



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

ANGELICA TEXTILE SERVICES, INC.,

Respondent.

OSHRC Docket No. 08-1774

ON BRIEFS:

Kimberly A. Robinson, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, D.C.

For the Complainant

Mark A. Lies, II, Esq.; Stephanie C. LaRocco, Esq.; Seyfarth Shaw, LLP, Chicago, IL

For the Respondent

**DECISION**

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

Angelica Textile Services, Inc. operates a commercial laundry facility in Ballston Spa, New York. On September 30, 2008, following an inspection of the facility, the Occupational Safety and Health Administration issued Angelica a citation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, that as amended, alleged violations under ten serious and four repeat items.<sup>1</sup> Former Administrative Law Judge John H. Schumacher issued a decision affirming two of the serious items (Citation 1, Items 3 and 11) and vacating the remaining twelve items.<sup>2</sup> The judge assessed a total penalty of \$3,825 for the two affirmed items.

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<sup>1</sup> A fifth repeat item, as well as a second citation alleging an other-than-serious violation, were withdrawn by the Secretary.

<sup>2</sup> Pursuant to Commission Rule 61, the parties stipulated to the record and agreed to have the judge decide the case without a hearing. 29 C.F.R. § 2200.61 (“[a] case may be fully stipulated by the parties and submitted to the . . . [j]udge for a decision . . .”).

On review are two of the vacated citation items: Instances (b) and (c) of Item 2b, which allege repeat violations under 29 C.F.R. § 1910.146(d)(3) concerning the adequacy of isolation and verification procedures for a permit required confined space (PRCS); and Item 8, which alleges a repeat violation under 29 C.F.R. § 1910.147(c)(4)(ii) concerning the specificity of lockout/tagout (LOTO) procedures. For the reasons that follow, we affirm both citation items, characterize them as serious, and assess a single grouped penalty of \$7,000.

## **I. Background**

Angelica employees clean linens by operating a series of interconnected machines in an area of the Ballston Spa facility called the “wash alley.” The largest of these machines, the combined batch washer (CBW), consists of a long, cylindrical tunnel with eight washer modules. There are two CBWs at the facility. One of the CBWs discharges washed linens into a “press.” The press squeezes water out of the wet linens and forms them into a compressed clump known as a “cake.” These linen cakes are then sent by conveyor to the “cake shuttle,” which travels along a track to deliver the cakes to one of five dryers in the wash alley.

The other CBW discharges washed linens into the “co-bucket,” which is a large hopper mounted on a shuttle that also travels back and forth along a track. The co-bucket then deposits wet linens into an “extractor,” which expels water from the linens and dumps them onto a conveyor. The conveyor moves the linens onto the “loose goods shuttle,” which travels along another track. These linens are either loaded directly into one of two dryers in the wash alley or deposited into a cart and loaded manually into other dryers.

## **II. Citation 1, Item 8 — LOTO Procedures**

The LOTO standard “covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.”<sup>3</sup> 29 C.F.R. § 1910.147(a)(1)(i) (emphasis in original). Section 1910.147(c)(4)(i) requires that “[p]rocedures . . . be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.” The provision cited in Item 8, § 1910.147(c)(4)(ii), requires that LOTO procedures “*clearly and specifically* outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy and the means to enforce compliance”;

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<sup>3</sup> Angelica does not dispute that its employees engage in servicing and/or maintenance activities on the machines at its facility.

as relevant here, this includes procedures for locking out a machine and verifying the effectiveness of that lockout. (Emphasis added.)

To be compliant with this provision, the procedures must “inform the employee of the specific procedural steps to shut down and lock out a machine.” *Gen. Motors Corp.* (“GM”), 22 BNA OSHC 1019, 1027 (No. 91-2834E, 2007) (consolidated); *Dayton Tire*, 23 BNA OSHC 1247, 1257-58 (No. 94-1374, 2010) (reviewing preamble’s discussion of “specific”), *aff’d in relevant part*, 671 F.3d 1249 (D.C. Cir. 2012). The purpose of these procedures “is to guide an employee through the lockout process . . .” *Drexel Chem. Co.*, 17 BNA OSHC 1908, 1913 (No. 94-1460, 1997). Determining whether a LOTO procedure is sufficient is a fact-specific inquiry that focuses on “ ‘the complexity of the equipment and the control measures to be utilized.’ ” *GM*, 22 BNA OSHC at 1026 (citing Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36,644, 36,670 (Sept. 1, 1989) (final rule)); *see* 29 C.F.R. § 1910.147, App. A—Typical Minimal Lockout Procedure (“For more complex systems, more comprehensive procedures may need to be developed, documented and utilized.”).

The parties here have stipulated that Angelica’s written LOTO procedures for the machines at the Ballston Spa facility consist of several documents, including a section in its general safety manual, a general LOTO program, and machine-specific “surveys.” According to the Secretary, Angelica violated § 1910.147(c)(4)(ii) because these procedures “fail[] to clearly identify all of the specific steps to be followed by employees . . . to control hazardous energy.” The judge disagreed, concluding that the record does not show that the complexity of the machines at issue—both CBWs, seven dryers, the press, and three types of shuttles—require anything more detailed than what is already included in the company’s procedures.

On review, the Secretary argues that Angelica’s LOTO procedures for the cited machines are deficient in two respects: (1) they do not clearly identify all of the specific steps to be followed by employees to control hazardous energy, including the operation and location of lockout controls, and thus fail to guide the employees through the lockout process; and (2) they lack specific procedures for verifying deenergization.<sup>4</sup> In response, Angelica argues that the Secretary

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<sup>4</sup> The Secretary does not dispute that the LOTO surveys for the machines at issue are the type of machine-specific documents that, when used with general LOTO procedures, could satisfy the specificity requirements of § 1910.147(c)(4)(ii). OSHA Interpretation Letter, from Edwin G. Foulke, Jr. to E.C. Palmer, Jr. (July 12, 2006, corrected Oct. 17, 2007) (stating that “supplemental

failed to put forth any evidence that its procedures are not sufficient under § 1910.147(c)(4)(ii). We affirm the violation but on narrower grounds than argued by the Secretary.

### **Specificity of Lockout Procedures**

An employer's LOTO procedures must include, among other things, "[s]pecific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy," and "for the placement . . . of lockout devices." 29 C.F.R. § 1910.147(c)(4)(ii)(B), (C). Angelica's general safety manual states that "[a]ll energy control devices that are needed to control energy to the machine or equipment will be physically located and operated in such a manner as to isolate the machine or equipment from the energy source." Although the manual provides some general information on how to operate controls and locks, none of this information is machine-specific and the location of controls on the machines at issue is not specifically identified. The manual does require, however, that a machine-specific "lockout-tagout survey" be conducted "to locate and identify all energy sources to verify which switches or valves supply energy to machinery and equipment." Angelica conducted surveys for all the machines at issue.

The question, therefore, is whether these machine-specific surveys, when read in tandem with the other documents that make up Angelica's LOTO procedures, inform the employee of the "[s]pecific procedural steps" necessary to perform the lockout process for a cited machine. *Drexel Chem. Co.*, 17 BNA OSHC at 1913. The Secretary maintains that Angelica's procedures are not specific enough because they neither list "the location of the energy sources" nor explain "the steps the employee is required to take" to lock them out. We agree, but only with respect to certain aspects of the LOTO procedures as they relate to the CBWs and dryers.

As to the CBWs, each machine's cylindrical tunnel has an auger-like device that turns during the laundering process, spinning water and linens through the CBW's eight washer modules. The tunnel itself is turned by a chain and sprocket driven by an electric motor, and "delivered steam" is controlled by compressed air-operated (pneumatic) valves. To protect against a release of thermal energy, Angelica's procedures require employees to "lock out all valves . . . including steam [and] water." The LOTO surveys (one for each CBW) include certain descriptive information about the CBWs' valves—the valve size for "steam and water" lockout

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means" such as "checklists, placards, a work order system, or work authorization permit system" may be "used in conjunction with a generic energy control procedure").

and the pipe size for the pneumatic lockout. The number of valves and their location on the CBWs, however, are not specified in the surveys or in any other document that is part of Angelica's LOTO procedures. Indeed, although the "pneumatic energy" part of each CBW survey has a line for "Location" (such a line is not included for any other valve type), this line was left blank on both surveys.

Whether the absence of this information renders the LOTO procedures deficient depends on the complexity of the CBWs. *GM*, 22 BNA OSHC at 1026. We find that the record establishes such complexity. Feeding the CBWs are a main steam line, four steam sublines, and a hot water line. There are also numerous valves—a manually-actuated main steam valve, a pneumatically-actuated main steam valve, valves for each steam subline, a hot water valve, and valves for dispensing chemical wash during the laundering process. The environmental safety and health manager ("safety manager") for the Ballston Spa facility conceded that none of the valves on the CBWs were labeled. In short, each machine—which is large enough to allow a person, depending on stature, to stand upright inside each of the eight modules—has numerous unlabeled valves incorporated into its extensive piping system with varied energy sources. Given these circumstances, we find that Angelica's LOTO procedures for the CBWs are deficient based on the procedures' failure to specify the number and locations of the valves that employees are required to lock out. *See id.* at 1027 (noting inadequacy of LOTO procedures for "the plant's more complex equipment").

As to the dryers, each one is equipped with a rotating drum, which poses a mechanical hazard if the electricity energizing the drum's motor is not locked out. The air surrounding the dryer drum is heated by gas-fired flames. The safety manager testified that both electrical energy and natural gas are involved in creating a dryer's thermal hazard; this means that both energy sources must be locked out. The LOTO survey for each dryer requires lockout or tagout of an electrical disconnect switch and pneumatic and gas valves. For the natural gas used to heat the dryers, the safety manager testified that the gas valve is located on the back of each dryer and that it is locked out by engaging a "keyway," closing the valve, and then applying a chain. Each dryer LOTO survey identifies the size of the gas valve but not its location on the dryer. Based on the relatively small size of the dryers—the drum for each measures about four feet in diameter—and the few valves located on these machines, we conclude that the Secretary has not shown that

employees would be unable to locate these valves using the information provided in the procedures.

The same cannot be said, however, for the LOTO procedures concerning operation of the gas valve's keyway. The surveys for four of the cited dryers state that use of a 9-inch chain is required for lockout, but these surveys (and all other LOTO documents) fail to specify which energy sources' lockout devices require use of a chain. In addition, the LOTO procedures do not explain how to use the keyway and apply the chain. Under these circumstances, including the apparent complexity of the keyway used on the gas valves, we find that the procedures concerning operation of these devices are insufficient under the cited standard.

Finally, as to other controls on the CBWs and the dryers, as well as the various controls on the press and the three types of shuttles, the procedures in several instances do not specify the location of the valves and electrical disconnect switches or the operation of the locking devices used to isolate the machines' various energy sources. We find that in these instances, however, the record does not show that the circumstances require inclusion of additional details in the procedures. The electrical disconnect switches on some of the machines, for example, are conspicuous—large, red buttons—and labeled. Additionally, the evidence does not show that employees would have difficulty locating the machines' different valves (in contrast to the valves on the CBWs) or need further instruction, beyond that provided in the LOTO procedures, to operate the various locking devices (in contrast to the keyway for the dryers' gas valves).

### **Specificity of Verification Procedures**

An employer's LOTO procedures must also include "[s]pecific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures." 29 C.F.R. § 1910.147(c)(4)(ii)(D). Before "starting work on machines or equipment that have been locked or tagged out," authorized employees use these procedures to "verify that isolation and deenergization of the machine or equipment have been accomplished."<sup>5</sup> 29 C.F.R. § 1910.147(d)(6).

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<sup>5</sup> Also, "[i]f there is a possibility of reaccumulation of stored energy to a hazardous level," there would have to be procedures that allow for the continuing "verification of isolation . . . until the servicing or maintenance is completed, or until the possibility of such accumulation no longer exists." 29 C.F.R. § 1910.147(c)(4)(ii)(D), (d)(5)(ii). It is not clear whether such a possibility exists as to any of the machines at issue. Accordingly, the Secretary has not established a violation on this basis.

Angelica's general LOTO program directs employees to "attempt[] to reenergize the machine or equipment with all potential energy sources to verify that [it] is free from all potentially hazardous energy sources." Similarly, in its general safety manual, Angelica instructs that after locking or tagging out machinery or equipment, employees must "verify that isolation or de-energization of the machine or equipment has been accomplished . . . by following the normal start up procedures (depress 'Start' button, etc.)." In addition to Angelica's general verification procedures, the company's PRCS procedures specific to the CBW apply prior to entry "to either clear a jam (rope) or conduct maintenance," and require that entrants "verify that the power to all related equipment has been successfully locked out."

While the safety manager testified that specific instructions for a restart attempt on the CBW are relayed through job training, § 1910.147(c)(4) requires that LOTO procedures be "documented."<sup>6</sup> There are no documented instructions, however, specifying how such an attempt should be made to verify electrical lockout for the CBW. Indeed, the general safety manual instruction does not explain how to operate what the safety manager described as "the start series control buttons at the [CBW] control panel" or identify the codes that, according to the record, must be entered to verify that the machine will not start back up. We find, therefore, that Angelica's LOTO procedures are lacking the necessary specificity to enable an employee to verify that the CBW has been successfully locked out.<sup>7</sup>

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<sup>6</sup> The LOTO standard mandates that procedures be documented (except in narrow circumstances not present here) and include "[s]pecific procedural steps." 29 C.F.R. § 1910.147(c)(4)(i) ("Note"), (ii)(B), (ii)(C).

<sup>7</sup> Commissioners Attwood and Sullivan also find that the verification procedure for ensuring that thermal energy within the CBW's washer modules is no longer at hazardous levels is lacking. Angelica's Confined Space Permit Entry Procedures require that employees check the temperature before entry into a module: "No one will be allowed to enter into a chamber that is over 120 degrees F. (Note, temperature does not need to be checked if entry is only made into the chute.)" According to the safety manager, the employee would use a thermometer with an infrared beam to measure the temperature of each module's interior before entry—if, for example, the second module required maintenance, thermal energy in the first module would be measured before entry and, once in the first module, thermal energy in the second one would be measured before entry. There is no written LOTO instruction, however, that identifies or details this (or any other) procedure for measuring a module's temperature before entry. Additionally, even though the Confined Space Permit Entry Procedures instruct employees to verify that all valves feeding the CBWs have been successfully locked out, no method of verification is identified. Chairman MacDougall departs with her colleagues on this determination, as she would find that the

For the three types of shuttles at issue, both the general LOTO program and the shuttle safety procedures direct employees to attempt a restart after turning the power off and applying a “lock and/or tag.” These procedures contain no specific information on what controls to activate when attempting to reenergize the shuttles. The safety manager testified, however, that located on the co-bucket shuttle is a “series of switches” that include a large, red electrical disconnect switch and the control switch for energizing the equipment. There is nothing in the record to show that this “series” includes anything more than just these two switches on each shuttle.<sup>8</sup> Absent evidence that the electrical disconnect switch is inconspicuous or unlabeled, the Secretary has failed to show that the purpose of the other switch—to reenergize the shuttle—was not obvious to the employees attempting to utilize the verification procedure. Furthermore, in contrast to the CBWs, there is no evidence to show that attempting to reenergize each shuttle requires more than merely flipping a switch. The evidence also fails to show if this same series of switches is on the other two shuttles. Given these gaps in the record, we find that the Secretary has not established that the verification procedures are deficient as to the shuttles’ electrical energy sources.<sup>9</sup>

With respect to the remaining machines, each dryer’s LOTO survey requires lockout of valves for “main air” and natural gas and of an electrical disconnect switch; the press’ LOTO survey requires lockout of “main air” valves, use of mechanical blocks to prevent a “bell” (a heavy component) from falling, and lockout of an electrical disconnect switch. These surveys, like those for the CBWs, do not address verification. The Secretary, however, has presented no evidence to show that locating and engaging the start button on each machine, to attempt a restart for

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verification procedure for the CBW is sufficiently specific, seeing that commonsense dictates that an employee would understand the written instruction—“No one will be allowed to enter into a chamber that is over 120 degrees F”—applies to *each* chamber’s interior and a thermometer is needed to verify temperature.

<sup>8</sup> There is a directional switch that allows each shuttle to move from manual to automatic mode, and vice versa, but it is not clear whether this is a third switch on the shuttle or simply the aforementioned control switch that energizes the shuttle.

<sup>9</sup> The Secretary has also failed to prove that the verification procedure as to the loose goods shuttle’s mechanical energy source is deficient. The mechanical energy is, according to this shuttle’s LOTO survey, blocked using safety pins, but the Secretary has not identified what specifically is being blocked and how the apparatus creating the mechanical energy is powered during normal operations. Consequently, the Secretary has not shown that Angelica’s general instruction to attempt a restart is insufficient to verify that both mechanical and electrical energy sources on the loose goods shuttle are adequately isolated.



verification purposes, requires more specific instruction than that found in Angelica's general LOTO program and its general safety manual.

While engaging the start button might be sufficient to verify that the electrical energy is locked out, it is not sufficient to verify that other sources of energy for the dryer and press are also locked out. With respect to each dryer, during normal operations when the dryer is idle—in other words, when the electrical components of the dryer are not energized—the natural gas valve is not closed and gas continues to feed the dryer's pilot light. During lockout, therefore, pushing the start button for verification purposes would not verify that the flow of gas to the dryers has been adequately blocked. Further, with respect to the press, the page of the operating manual attached to the press' LOTO survey specifically states that the bell, which poses a crushing hazard, could descend even if the power is off. Here, too, attempting to restart the machine would not verify that the bell on the press has been properly blocked. Accordingly, we find that the procedures for verifying lockout of energy sources associated with each dryer's natural gas valve and the press' bell are deficient.

Based on these deficiencies in the specificity of Angelica's LOTO procedures for lockout and verification of lockout, we conclude that the company's procedures do not comply with § 1910.147(c)(4)(ii). We therefore affirm Item 8.

### **III. Citation 1, Item 2b — PRCS Procedures**

There is no dispute that the CBWs' washer modules are PRCSs that employees sometimes enter. In recognition of this fact, Angelica developed and implemented a written permit space program, as required by 29 C.F.R. § 1910.146(c)(4). Such programs must comply with the PRCS standard's requirements, which as relevant here, mandate that the employer develop and implement "the means, procedures, and practices necessary for safe permit space entry operations," including those for "[v]erifying that conditions in the permit space are acceptable for entry throughout the duration of an authorized entry," and for "[i]solating the permit space." 29 C.F.R. § 1910.146(c)(4), (d)(3)(iii), (d)(3)(vi). The Secretary's allegations in Instances (b) (Verification) and (c) (Isolation) of Item 2b concern the sufficiency of Angelica's procedures for the CBWs.<sup>10</sup>

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<sup>10</sup> Only Instances (b) and (c) of Item 2b are before us on review. Instances (a), (d), and (e) were either vacated by the judge and not pursued on review or withdrawn by the Secretary.

### **Instance (b) (electrical energy verification)**

The Secretary alleges that Angelica violated § 1910.146(d)(3)(vi) because the company's PRCs procedures do not include step-by-step, written instructions on how to verify that electrical energy sources to the CBW have been shut off. The judge vacated this instance, rejecting the Secretary's argument that the PRCs standard requires such detailed procedures. On review, the Secretary asserts that the cited PRCs provision requires instructions to be clear and specific and to provide as much specificity as the procedures required by the LOTO standard.<sup>11</sup> He argues that his reading of the cited provision “ ‘sensibly conforms to the purpose and wording’ of § 1910.146(d)(3),” because “the LOTO standard prescribes the minimum level of protection . . . against the energization hazard” and the PRCs program, when implemented cannot “effectively ‘isolate the space’ ” unless it provides at least the same level of protection. The Secretary claims, therefore, that the cited standard's meaning is plain, but, “[t]o the extent . . . the complexity of the PRCs standard renders some terms and requirements ambiguous,” his interpretation is reasonable and should be given deference.

We conclude that the PRCs standard is ambiguous with regard to the degree of specificity the required verification instructions must include. Although the standard has criteria that specify the type of information that must be included in the “means, procedures, and practices necessary for safe permit space entry operations”—“verifying that conditions in the permit space are acceptable for entry,” among other categories of information—it is ambiguous as to the degree of specificity required. 29 C.F.R. § 1910.146(d)(3)(i)-(vi); see *Martin v. OSHRC* (“*CF&I*”), 499 U.S. 144, 150-51 (1991) (“[i]n situations in which the meaning of regulatory language is not free from doubt,” provision is considered ambiguous (internal quotation marks and brackets omitted)); *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997) (finding the term “verification” to be “latently ambiguous” and applying deference under *Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). We must therefore consider the reasonableness of

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<sup>11</sup> Section 1910.147(c)(4)(ii), as discussed above, requires that LOTO procedures “clearly and specifically outline . . . [s]pecific requirements for testing a machine . . . to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.” The Secretary does not dispute that it is permissible for an employer's confined space and LOTO programs to reference the same written LOTO procedures, as long as the LOTO procedures comply with the LOTO standard. Angelica's PRCs procedures incorporate by reference its LOTO procedures.

the Secretary's interpretation that the standard requires the PRCS verification instructions to have the same degree of specificity required by the LOTO standard.<sup>12</sup>

In the PRCS standard's preamble, OSHA addresses the standard's requirement to isolate the permit space before entry, stating: "The permit space must be isolated from serious hazards. For example, . . . [m]echanical equipment posing a hazard within the space must be locked out or tagged *in accordance with § 1910.147, . . .*" Permit-Required Confined Spaces, 58 Fed. Reg. 4462, 4497 (Jan. 14, 1993) (final rule) (emphasis added). In addition, in discussing what information must be included in a PRCS permit, OSHA explains that it is sufficient for such permits to simply refer to the § 1910.146(d)(3) procedures, rather than to include the procedures' details in the permit itself, because OSHA contemplated that "*detailed* procedures for making the permit space safe for entry"—which some commenters referred to as "*highly specific* in nature"—"are required to be established[] under paragraph (d)(3)." *Id.* at 4508 (emphasis added; internal citations omitted). In light of these statements, we find that the PRCS standard's history supports the Secretary's position that the procedures mandated by § 1910.146(d)(3), including those for verification, must contain the type of step-by-step details that the Secretary asserts are required here. *See Am. Sterilizer Co.*, 15 BNA OSHC 1476, 1478 (No. 86-1179, 1992) (standard's preamble can be " 'best and most authoritative statement of the Secretary's legislative intent' " (citation omitted)); *see also Tops Markets Inc.*, 17 BNA OSHC 1935, 1936 (No. 94-2527) (relying on LOTO preamble to interpret ambiguous provision), *aff'd*, 132 F.3d 1482 (D.C. Cir. 1997) (unpublished table case).

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<sup>12</sup> Before the judge, the Secretary did not argue that the cited provision in Instance (b) was ambiguous, and he did not expressly invoke the deference principle. Angelica argues that this principle is therefore not before us here. Although the Commission will not normally consider issues that a party failed to raise below, we have discretion to reach such issues. 29 C.F.R. § 2200.92(c); *see, e.g., S. Pan Serv. Co.*, 25 BNA OSHC 1081, 1088 n.10 (No. 08-0866, 2014) (considering respondent's preemption argument though not raised below); *Westvaco Corp.*, 16 BNA OSHC 1374, 1380 n. 14 (No. 90-1341, 1993) (addressing infeasibility issue though not raised in answer below). We exercise that discretion here because the ambiguity and deference issues are "intertwined" with an issue raised before the judge—what an employer's obligations are under § 1910.146(d)(3)(vi)—that cannot be resolved without first determining the cited provision's meaning. *See, e.g., Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) ("On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered fairly subsumed by the actual questions presented." (internal citation and quotation marks omitted)).

Angelica emphasizes that the PRCS standard’s text neither references nor incorporates the LOTO standard, and it instead “contains its own express requirements for a written program”; it argues that, under the Secretary’s position, these requirements would be “nullif[ied] and render[ed] . . . superfluous.” This argument is unavailing. The PRCS standard requires procedures to be applied at different times and in different circumstances than the LOTO standard. Specifically, the PRCS standard generally requires that procedures be utilized before an employee enters a confined space, irrespective of that entry’s purpose, whereas the LOTO standard requires that procedures be utilized before a servicing or maintenance activity begins, regardless of whether an employee must enter a confined space. *Compare* 29 C.F.R. § 1910.146(c)(5)(ii)(C), (c)(5)(ii)(H), (d)(2), (d)(5)(i), (e)(1), (f)(8) (detailing measures that must be completed before entry into PRCS), *with* 29 C.F.R. § 1910.147(c)(1) (stating that purpose of energy control program is “to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, start up or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source, and rendered inoperative”).

Additionally, the PRCS procedures are intended to “protect[] against the release of energy *and material* into the [confined] space,” 29 C.F.R. § 1910.146(b) (definition of “[i]solation”), (d)(3)(iii); they are also directed at other safety concerns unique to a confined space, such as close proximity and restricted means of egress, 29 C.F.R. § 1910.146(b) (definition of “[c]onfined space”). In contrast, LOTO procedures are focused on protecting employees from injuries that could result from “the *unexpected* energization or start up of the machines or equipment, or release of stored energy,” 29 C.F.R. § 1910.147(a)(1)(i) (emphasis in original). Given these differences, compliance with LOTO requirements is not sufficient to comply with the PRCS standard—such LOTO procedures must be incorporated into the written confined space program so that employees will implement them as part of the confined space entry protocol and in the correct sequence.

Accordingly, we conclude that the Secretary’s interpretation of the PRCS standard’s requirement for verification procedures is reasonable and, thus, entitled to deference.<sup>13</sup> *See CF&I*,

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<sup>13</sup> Angelica argues that the Secretary’s reading of § 1910.146(d)(3)(vi) conflicts with the standard’s language and is tantamount to rulemaking. Given our conclusion that the Secretary’s interpretation of the cited provision is reasonable, rulemaking is not required. *See Nooter Constr. Co.*, 16 BNA OSHC 1572, 1574 (No. 91-237, 1994) (Commission determined provision requiring “suitable

499 U.S. at 150-51. As we have already found, Angelica’s LOTO procedures for verifying the lockout of the CBWs’ electrical energy sources lack the specificity required under § 1910.147(c)(4)(ii). Thus, we find that Angelica’s PRCS procedures, which incorporate its LOTO procedures, are similarly deficient.<sup>14</sup>

**Instance (c) (isolation of water, steam, liquid chemicals, and compressed air)**

The Secretary alleges that Angelica violated § 1910.146(d)(3)(iii) by failing to “[d]evelop and implement the means, procedures, and practices” for “[i]solating the [CBW as a] permit space” from water, steam, liquid chemicals, and compressed air. According to the Secretary, Angelica’s procedures are deficient because they require *only* that the CBWs’ valves be closed and locked out and that this fails to constitute “isolation” from materials. The judge vacated this instance, rejecting the Secretary’s argument that LOTO alone is insufficient here; the judge noted that LOTO is explicitly included as a means of “isolation” in the PRCS standard’s definition of the term.

On review, the Secretary argues that LOTO may only be used as a means of isolation from a release of *energy*, while other means—such as blanking or blinding—must be used when (as here) it is necessary to protect against a release of *material*. We conclude that the Secretary’s reading of the PRCS standard is supported by its plain language. *Joel Yandell*, 18 BNA OSHC 1623, 1626 (No. 94-3080, 1999) (noting that plainness or ambiguity of statutory language is determined by reference to “ ‘the language itself, the specific context in which that language is

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cylinder truck, chain or other steadying device” was ambiguous and found Secretary’s interpretation that cylinder truck must have chain or strap across truck’s open end to be “suitable” was not unreasonable and did not require rulemaking).

<sup>14</sup> As with its LOTO procedures, Angelica suggests that experience or training may compensate for a lack of written specificity under the PRCS standard. Like the LOTO standard, the PRCS standard requires procedures to be written—specifically, an employer’s “*written . . . permit space program*” must include certain “means, procedures, and practices . . .” 29 C.F.R. § 1910.146(c)(4), (d) (emphasis added). To the extent Angelica’s employees may have understood these means, procedures, and practices through on-the-job training, the PRCS standard’s regulatory history shows that training was not intended to serve as a substitute for written procedures; the proposed rule had training requirements but no requirement for a written program, whereas in the final rule, OSHA retained the training requirements and added the requirement that the program be written. Permit-Required Confined Spaces, 58 Fed. Reg. at 4479, 4484, 4510-15; Permit-Required Confined Spaces, 54 Fed. Reg. 24,080, 24, 086, 24,091-94 (June 5, 1989) (notice of proposed rulemaking).

used, and the broader context of the statute as a whole’ ” (cited case omitted)). As the judge pointed out, “lockout or tagout” is indeed included in the standard’s definition of “isolation”:

[T]he process by which a permit space is removed from service and completely protected against the release of energy and material into the space by such means as: blanking or blinding; misaligning or removing sections of lines, pipes, or ducts; a double block and bleed system; lockout or tagout of all sources of energy; or blocking or disconnecting all mechanical linkages.

29 C.F.R. § 1910.146(b). According to Angelica, this shows that LOTO, alone, may be used as an isolation procedure to comply with § 1910.146(d)(3)(iii). The definition, however, ties LOTO only to “all sources of *energy*,” while the space as a whole must be “completely protected against the release of energy *and material*.” 29 C.F.R. § 1910.146(b) (emphasis added). None of the other means of isolation included as examples in the definition are modified by the phrase “sources of energy”; it is, therefore, these other means—not “lockout or tagout”—that may be used for protecting against “the release . . . of material.” 29 C.F.R. § 1910.146(b).<sup>15</sup> The standard’s text thus plainly shows that LOTO is appropriate only for isolating *energy*. *Field & Assocs., Inc.*, 19 BNA OSHC 1379, 1380 (No. 97-1585, 2001) (applying principle *expressio unius est exclusio alterius* to find that Secretary did not intend to limit scope of cited fall protection standard to employees engaged in roofing work where such limitation was not included in standard).

Angelica concedes that it does not use any method other than LOTO to isolate the valves that feed chemicals, compressed air, hot water, and steam into the CBWs’ washer modules—spaces Angelica has designated as PRCs. Given that the plain language of the PRC standard lists “lockout or tagout” as a means for isolating only energy, we conclude that Angelica’s procedures are deficient in that they provide no other means for protecting “against the release

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<sup>15</sup> We note that this distinction between the means required to isolate *energy* and those required to isolate *materials* is echoed in the PRC standard’s preamble:

The permit space must be isolated from serious hazards. For example, if energized parts of electric equipment are exposed, the circuit parts must be deenergized and locked out . . . . Chemical or gas lines that are open within the permit space must be isolated by such means as blanking or blinding, misaligning or removing sections of lines, pipes, or ducts, or a double block and bleed system.

Permit-Required Confined Spaces, 58 Fed Reg. at 4497.

of . . . material” into the CBWs’ modules.<sup>16</sup> We therefore affirm both Instances (b) and (c) of Item 2b.

#### IV. Characterization

The Secretary alleges that the violations at issue under Items 2b and 8 should be characterized as repeat. A violation is properly characterized as repeat under section 17(a) of the Act, 29 U.S.C. § 666(a), “if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979); *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005). The Secretary establishes “a prima facie case of [substantial] similarity by showing that the prior and present violations are for failure to comply with the same standard.” *Potlatch Corp.*, 7 BNA OSHC at 1063. Here, the prior citations on which the Secretary bases his repeat characterization became final orders of the Commission in 2005, just over three years before the instant citation was issued.<sup>17</sup> There is no dispute that two of Angelica’s prior violations were

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<sup>16</sup> Angelica argues that even if the Secretary’s reading of the standard is valid, he must still show that Angelica’s LOTO procedure is “*in fact* ineffective in this case to prove a violative condition . . .,” and the only evidence addressing this shows that its procedures are effective. It is well-established, however, that where a standard requires a specific means of compliance, the employer is not permitted to choose a different means of addressing the hazard, unless the employer can demonstrate either a greater hazard or infeasibility. See *Quinlan Enters.*, 17 BNA OSHC 1194, 1195-96 (No. 92-0756, 1995) (affirming violation where Secretary established prima facie case of noncompliance and employer failed to establish elements of either affirmative defense). Angelica has raised neither affirmative defense.

<sup>17</sup> Angelica argues that the Secretary improperly relied on these prior citations because they fell outside of OSHA’s look-back policy for alleging a repeat characterization, which was limited to three years at the time the current citation was issued. See Field Inspection Reference Manual (FIRM), CPL 02-00-103 ¶ III.c.2.f (Sept. 26, 1994; revised July 13, 1999). The Commission, however, has held that the “ ‘time between violations does not bear on whether a violation is repeated,’ ” concluding that the FIRM’s instructions “are only a guide for OSHA personnel to promote efficiency and uniformity, are not binding on OSHA or the Commission, and do not create any substantive rights for employers.” *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003) (citing *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1168 (No. 90-1307, 1993), *aff’d without published opinion*, 19 F.3d 643 (3d Cir. 1994)); *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1296 n.18 (No. 00-1402, 2010) (rejecting argument that Secretary must follow FIRM’s look-back policy, and citing to *Hackensack*); *Triumph Constr. Corp. v. Sec’y of Labor*, 885 F.3d 95, 98-100 (2d Cir. 2018) (rejecting employer’s argument—based on OSHA’s look-back policy in effect at the time citation was issued—that Commission should not have relied on previous violations more than three years old to affirm violation as repeat; recognizing that “[n]either the Act nor OSHA’s implementing regulations prescribe any temporal limits for

cited under the same standards as the violations presently at issue.<sup>18</sup> This prima facie showing of substantial similarity may be rebutted “by evidence of the disparate conditions and hazards associated with these violations of the same standard.” *Id.* Although the “principle factor” in assessing repeat liability “is whether the two violations resulted in substantially similar *hazards*,” *Lake Erie Constr. Co.*, 21 BNA OSHC at 1289 (emphasis added), this assessment may also take into consideration other factors that bear on the similarity of the two violations.

The Commission is the ultimate fact-finder, and as such, Chairman MacDougall and Commissioner Sullivan find that the violations at Angelica’s Ballston Spa facility were not “substantially similar” to those at Angelica’s Edison facility.<sup>19</sup> In thoroughly examining the issue

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determining whether a violation is repeated,” and citing to *Hackensack* for proposition that OSHA’s Field Operation Manual, including its look-back policy, is not binding on Commission and creates no substantive rights for employers). Furthermore, the FIRM in effect at the time the current citation was issued stated that “[a] citation will be issued as a repeated violation if: . . . [t]he citation is issued within three years of the final order of the previous citation, or . . . [t]he citation is issued within three years of the final abatement date of that citation, *whichever is later*.” FIRM at ¶ III.c.2.f(3) (emphasis added). The current citation was issued on September 30, 2008. The final abatement date of the prior citation referenced in Item 2b was September 14, 2006—thus, using the “later abatement date, Item 2b was issued less than three years after the final abatement of the earlier citation. The prior citation referenced in Item 8, however, was abated at the time of the prior inspection and, thus, Item 8 was neither “issued within three years of the final order of the previous citation” nor “within three years of the final abatement date.”

<sup>18</sup> The prior violations occurred at an Angelica facility located in Edison, New Jersey and involved CBWs. The prior violation serving as the basis for Item 2b’s repeat characterization was initially alleged as a single willful violation (Citation 2, Item 1, Inspection No. 306739475) cited under § 1910.146(c)(4). In the settlement agreement that followed, this citation was broken down into six separate renumbered items, the second of which was a violation of § 1910.146(d)(3). The prior violation serving as the basis for Item 8’s repeat characterization was cited under § 1910.147(c)(4)(ii) (Citation 1, Item 1, Inspection No. 306739459), and that violation was unaltered by the settlement agreement.

<sup>19</sup> Our dissenting colleague submits that under *Chevron*, 467 U.S. at 842-45, and *CF&I*, 499 U.S. at 154-57, the Secretary is entitled to deference in his interpretation of section 17(a)’s term “repeatedly,” a term she finds ambiguous. 29 U.S.C. § 666(a). While she attempts to bootstrap her dissenting opinion into the safe harbor of *Chevron* deference, she concedes that it rests on her own findings of fact as set forth in her dissent: “I find that the current violations are substantially similar to the previous violations”; “I also find that Angelica has failed to rebut the Secretary’s prima facie case.” Section 10(a) of the Act states that “[t]he Commission shall . . . issue an order, *based on findings of fact*, affirming, modifying, or vacating the Secretary’s citation or proposed penalty . . .”; and section 11(a) of the Act states that “[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a



of whether these are repeat violations on the record before us, we decline a mechanical application of the test for establishing a repeat characterization. *See George Hyman Constr. Co., v. OSHRC*, 582 F.2d 834, 841 (4th Cir. 1978) (“deliberately avoid[ing] setting forth an all-inclusive and rigid definition of ‘repeatedly’ under the Act” and noting that “overall policy of providing employers with incentive to comply with the safety requirements of the Act”).

Taking into account here the factors regarding similarity, there is sufficient evidence of disparity to rebut the Secretary’s *prima facie* showing. The prior violations serving as the basis for the repeat characterization of the current violations alleged deficiencies in Angelica’s PRCS and LOTO procedures that were significant enough to render those procedures substantially ineffective. Specifically, in the prior PRCS citation, the Secretary identified the following “critical deficiencies” in Angelica’s PRCS program regarding entry into the Edison CBWs’ confined spaces:

- 1) failure to test the atmosphere of the space(s) for air contaminant and specify acceptable entry conditions,
- 2) failure to isolate the space(s) from thermal and mechanical energy sources,
- 3) failure to control entry through use of written authorization permits,
- 4) failure to provide training to all employee(s) who enter confined spaces, or act as attendants, and
- 5) failure to provide for means of rescue/retrieval in event of emergency.

Absent these key elements, the company lacked the means necessary to address confined space hazards in the CBWs and protect employees entering these spaces.<sup>20</sup>

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whole, shall be conclusive.” 29 U.S.C. §§ 659(a), 660(a) (emphases added). A factual finding that the violations are not the same or “substantially similar” (and thus not repeated) does not conflict with the Secretary’s interpretation of section 17(a)—he too uses the “substantially similar” test. As such, the principles of *Chevron* deference do not apply here, and the finding as to lack of substantial similarity, which is supported by the record, is conclusive. In sum, Congress has specifically authorized the Commission, through the exercise of its adjudicatory powers, to conclude that the violations at issue here are not substantially similar.

<sup>20</sup> The breadth of the PRCS violations at the Edison facility is shown by the wide-ranging deficiencies noted by the renumbered items in the settlement agreement. *See* footnote 19, *supra*. In addition to a general failure to comply with paragraph (d)(3) of the PRCS standard, these items address failures to (1) implement the measures necessary to prevent unauthorized entry, § 1910.146(d)(3); (2) evaluate permit space conditions when entry operations are conducted, § 1910.146(d)(5); (3) develop and implement certain rescues and emergency services procedures, § 1910.146(d)(9); (4) review the permit space program, § 1910.146(d)(14); (4) document, before

In response to the prior citation, Angelica actively sought out and eliminated similar hazards, including developing a PRCS program specific to its CBWs “to eliminate or control hazards in [its] permit-required confined spaces.” *See* Permit-Required Confined Spaces, 58 Fed. Reg. at 4486. As the record establishes, the program included a comprehensive procedure for employee entry into the washer modules. Not surprisingly, given Angelica’s compliance efforts, the number of deficiencies in its PRCS program affirmed here—a failure to include sufficiently specific procedures for verifying lockout of electrical energy sources on the CBW and procedures that include LOTO but need to go further to constitute “isolation”—have been meaningfully reduced.

Likewise, the deficiencies previously found and cited at Angelica’s Edison facility demonstrated a comprehensive failure to comply with its LOTO responsibilities. The prior citation stated:

- a) Production area. Written procedures for lockout/tagout were not site specific. Procedures shall include at a minimum:

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entry is authorized, the completion of measures required by paragraph (d)(3), § 1910.146(e)(1); and (5) provide PRCS training to affected employees, § 1910.146(g)(1).

Angelica’s abatement notification indicates the qualitative and quantitative measures Angelica had to implement to demonstrate compliance. Specifically, the Edison facility:

- (1) Purchased a gas monitor to test the atmosphere of the CBWs; developed standard operating procedures that explained how to use the gas monitor; trained employees on use of the gas monitor; added monitoring results to the PRCS entry form; prohibited entries unless levels are in acceptable ranges; and required retention of cancelled permits.
- (2) Developed and implemented LOTO procedures relating to the CBWs, which identify all energy sources—electrical, mechanical, pneumatic, gravitational, thermal and chemical; and trained all employees on using these procedures.
- (3) Developed a customized entry permit, specific to the types of CBW entries, and required retention of cancelled permits for at least one year.
- (4) Trained all employees involved in confined space entry in LOTO and confined space, and provided training specific to the employees’ roles (as an entrant, attendant, or supervisor, for example).
- (5) Modified the entry permit to require verification that the Edison Fire Department has been notified before each confined space entry.

By comparison, the only violations being affirmed at Angelica’s Ballston Spa facility pertain to discrete deficiencies in verification and isolation procedures under § 1910.146(d)(3)(iii) and (d)(3)(vi), respectively.

Types of machines requiring maintenance/service  
Types of energy sources for those machines  
Location of those energy sources  
Means for isolating specific energy sources

Employees are exposed while performing maintenance/servicing including clearing jams on machinery such as but not limited to tunnel washers.

Thus, the prior citation involved a failure to have machine-specific and site-specific LOTO procedures.<sup>21</sup> In the present case, however, there is no dispute Angelica has established procedures specific to the machines in its Ballston Spa facility. The Secretary, in fact, concedes that by the time of the inspection leading to the current citation, a separate LOTO survey was completed for every machine at issue. Again, rather than lacking comprehensive procedures, the LOTO violation affirmed here establishes only two types of discrete deficiencies in the company's machine-specific procedures.

Both cited provisions are performance-oriented, which means that employers have flexibility in meeting their requirements. Permit-Required Confined Spaces, 58 Fed. Reg. at 4486, 4496-97 ("The basic performance-oriented nature of OSHA's permit space standard forces employers to develop whatever procedures are necessary to eliminate or control hazards in permit-required confined spaces"; noting that paragraph (d)(3) includes performance-oriented requirements); Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,656

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<sup>21</sup> The record shows that Angelica abated the prior LOTO citation at the time of the earlier inspection. Given the Secretary's acceptance of the abatement method, there is no basis here to conclude that Angelica knew its safety precautions and corrective actions were inadequate and that Angelica, therefore, "require[d] a greater than normal incentive to comply with the Act." *George Hyman Constr.*, 582 F.2d at 841; *see also id.* at 840 ("We believe the most reasonable inference to be drawn from the subsequent addition of 'repeatedly' is that Congress intended to provide for enhanced penalties when an employer committed recurrent violations that did not necessarily rise to the level of willfulness." (citing H.R. 16785, 91st Cong., 2d Sess. 67-68 (1970), *reprinted in* Legislative History at 959-60, and comparing it with Legislative History at 1103)); *Todd Shipyards Corp. v. Sec'y of Labor*, 586 F.2d 683, 685 (9th Cir. 1978) (discussing that in establishing the greater penalties of section 17(a), Congress indicated that the repetition of a violation after a citation and small sanction demonstrated that greater penalties were necessary to gain that employer's compliance with OSHA standards (citing S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), *reprinted in* Legislative History at 141, and Conf. Rep. No. 91-1765, 91st Cong., 2d Sess. 41-42 (1970), *reprinted in* Legislative History at 1194-95)); *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 857 n.8 (3rd Cir. 1996) ("The *Potlatch* test, for the most part, is derived from *George Hyman* and *Todd Shipyards*.").

(“The standard is written in performance-oriented language, providing considerable flexibility for employers to tailor their energy control programs and procedures to their particular circumstances and working conditions.”). In these circumstances, the record does not show that Angelica’s prior violations, which reflect what had been a nearly complete failure to comply, are substantially similar to the current violations; rather, the evidence shows that the violations took place under disparate conditions. Indeed, the Secretary established only minimal deficiencies here, reflecting that after those prior violations, Angelica took affirmative steps to achieve compliance and avoid similar violations in the future.<sup>22</sup> Simply put, these facts do not “indicate a failure to learn from experience.” *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998) (explaining that “substantially similar” distinguishes between circumstances that do, and do not, “indicate a failure to learn from experience,” and noting that phrase “must be defined sufficiently narrowly that the citation for the first violation placed the employer on notice of the need to take steps to prevent the second violation”); see *Wal-Mart Stores, Inc. v. Sec’y of Labor*, 406 F.3d 731, 737 (D.C. Cir. 2005) (relying on *Caterpillar*’s explanation of “substantially similar” to address repeat liability). In sum, materially different circumstances are present that do not warrant a finding of repeat violations by Angelica here, a finding that is plainly consistent with Commission precedent.<sup>23</sup>

While providing a treatise-worthy review of the Commission’s precedent dealing with repeat violations, including *Potlatch* and its progeny, it is much ado about nothing since this decision is not overruling *Potlatch sub silentio* or creating new precedent, and our dissenting colleague’s disagreement with this ruling—based on differing factual findings on whether there is substantial similarity between violations—does nothing to undermine the result of Commission

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<sup>22</sup> Our dissenting colleague mischaracterizes this sentence as requiring a heightened state of mind, or scienter, appropriate only to a determination of willfulness. The “affirmative steps to achieve compliance and avoid similar violations in the future” is a summary description of why the Ballston Spa facility violations are not “substantially similar” to those at the Edison facility. Further, notwithstanding our dissenting colleague’s intent to characterize the majority’s decision as based on finding “good faith” and a failure to find “actual knowledge,” neither of these terms are used by the majority in the context of the characterization of the violations affirmed here.

<sup>23</sup> Our dissenting colleague simply misreads our case law to the extent she is suggesting that a repeated violation under section 17(a) of the Act automatically occurs whenever there is a final order against the same employer for a failure to comply with the same standard. If that was our case law, the words “substantially similar” would never be relevant in a case involving a violation of the same standard.

fact-finding.<sup>24</sup> See *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975) (Commission is ultimate fact-finder), *cert. denied*, 425 U.S. 903 (1976); see also *Potlatch Corp.*,

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<sup>24</sup> Despite our dissenting colleague's obvious attempt to set a basis for reversal of this decision, our conclusion accords with the mandate that agency decision-making be reasoned; we are compelled to take into consideration the differing circumstances that, in our view, require a determination that these violations are not repeated. See 5 U.S.C. § 706 ("The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (agency action is arbitrary and capricious "[w]here the agency has failed to provide a reasoned explanation"); *NTEU v. Horner*, 854 F.2d 490, 498 (D.C. Cir. 1988) ("Stated most simply, [a reviewing court's task under the arbitrary and capricious standard] is to determine whether the agency's decisionmaking was 'reasoned.' " (internal quotation marks omitted)). Here, as the Commission has done in the past, the majority has applied *Potlatch* in the specific context of the facts of this case. See, e.g., *Suttles Truck Leasing, Inc.*, 20 BNA OSHC 1953, 1970 (No. 97-0545, 2004) (consolidated) (no repeated violation where, "[b]ecause the facts alleged in [previous] citation were very different from the allegation here, we find that the hazards posed by the violations were not substantially similar"); see also *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009) (FCC "used the evidence before it to make" reasonable judgment); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 234-35 (D.C. Cir. 2008) (in finding that level of interference with mobile communications caused by new broadcasting technology was not "harmful"—because interference would occur only over short distances and affected devices are mobile—FCC did not "abrogate its precedent" on definition of "harmful interference," as it was only applying "its longstanding definition" to "a new context"); *Sacramento Mun. Util. Dist. v. FERC*, 474 F.3d 797, 803 (D.C. Cir. 2007) (FERC did not depart from precedent but distinguished it); *Nuvio Corp. v. FCC*, 473 F.3d 302, 308 (D.C. Cir. 2006) ("[The reviewing court] may not disturb its determination where . . . the [FCC] has considered relevant factors and has articulated a reasoned basis for its conclusion."); *West Coast Media, Inc., v. FCC*, 695 F.2d 617, 621 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 816 (1983) (FCC engaged in "eminently reasonable" decisionmaking when it distinguished an asserted precedent by merely reciting the factual differences between the prior case and the one before it).

In *Hall v. McLaughlin*, the D.C. Circuit explained that "[r]easoned decisionmaking requires treating like cases alike," and that "[d]ivergence from agency precedent demands an explanation." 864 F.2d 868, 872 (D.C. Cir. 1989). The court went on to explain, however, that "[w]here the reviewing court can ascertain that the agency has not in fact diverged from past decisions, the need for a comprehensive and explicit statement of its current rationale is less pressing." *Id.* Further, where "the circumstances of the prior cases were sufficiently different from those of the [present] case . . . the [agency] was justified in declining to follow them," and the court could accept even a "laconic explanation as an 'ample' articulation of its reasoning." *Id.* at 873 (citing *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 211 (D.C. Cir. 1984)). Here, the evidence shows that

7 BNA OSHC at 1063 (“prima facie showing of similarity would be rebutted by evidence of the disparate conditions and hazards associated with . . . violations of the same standard”); *id.* at 1067 (Barnako, Commissioner, concurring and dissenting in part) (agreeing that for violation to be repeated, it must be substantially similar to prior violation but noting that “[i]f the *facts* surrounding the subsequent violation are so different from those giving rise to the abatement order that it cannot be said that the employer had actual notice its safety precautions with respect to the subsequent violations were inadequate[,] then a repeated violation should not be found” (emphasis added)). Given the stark differences between the current and prior violations, the Secretary’s repeat characterization of Items 2b and 8 is rejected and the violations under these items are affirmed as serious.

## **V. Penalty**

In assessing a penalty, the Act requires the Commission to give “due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.” 29 U.S.C. § 666(j). Here, given their alleged repeat characterization, the Secretary proposes a penalty of \$12,500 for Item 2b and \$10,000 for Item 8.

The violations, however, are not affirmed as repeated, though the record does support affirming them as serious. Moreover, in light of the overlapping factual circumstances of these violations, particularly as to the specificity required for Angelica’s LOTO and PRCS procedures, it is appropriate to group them for penalty purposes and assess a single penalty. *L. E. Myers Co.*, 16 BNA OSHC 1037, 1048 (No. 90-945, 1993) (“The Commission has wide discretion in the assessment of penalties for distinct but overlapping violations and we have held that it is appropriate to assess a single penalty for such related violations.”). Therefore, having considered

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Angelica’s current violations took place under disparate conditions from its previous ones, which render them not “substantially similar” and thus not repeated.

the pertinent penalty factors, including the high-gravity nature of LOTO and PRCs violations, Items 2b and 8 are grouped for penalty purposes, and a single penalty of \$7,000 is assessed.  
SO ORDERED.

/s/  
Heather L. MacDougall  
Chairman

/s/  
James J. Sullivan, Jr.  
Commissioner

Dated: June 24, 2018

ATTWOOD, Commissioner, concurring and dissenting in part:

I concur with my colleagues' reasoning and conclusions in Parts II and III of their opinion. However, I conclude that, under the Commission's well-established legal test for assessing whether a violation should be characterized as repeated, the Secretary has established that the affirmed violations are, in fact, repeat violations. Therefore, I dissent from Parts IV and V.

At the outset, I strongly disagree with my colleagues' attempt to frame this issue as a purely factual question so that they can avoid binding Supreme Court precedent. My disagreement in this case has nothing to do with my colleagues' factual findings but instead concerns the *types of facts* they rely upon to conclude that the employer did not “*repeatedly* violate[,]” under section 17(a) of the Act, the cited provisions in this case. 29 U.S.C. § 666(a) (emphasis added).

Thus, in determining that the violations are not repeated, my colleagues commit two significant legal errors. First, they silently reject the Commission's long-settled and straightforward test set forth in our seminal case for determining whether a violation is properly characterized as repeated—*Potlatch Corp.*, 7 BNA OSHC 1061, 1062 (No. 16183, 1979)—and put forth a new test that relies on the types of facts the Commission and the circuit courts have long held are only relevant to a willful characterization. Second, in rewriting the repeat characterization test, they defy *Chevron* principles by failing to accord *any* deference to the Secretary's interpretation of the statutory term “repeatedly”—an interpretation that, of course, must be reasonable given that until today it was in perfect accord with the Commission's own longstanding precedent, as well as that of every court of appeals to consider the issue. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984); *see also Martin v. OSHRC (CF&I)*, 499 U.S. 144, 154-57 (1991).

#### **A. Commission Precedent and the Distinction Between Willful and Repeat**

Prior to 1979, no two Commissioners were able to agree on the meaning of “repeatedly,” as used in section 17(a) of the Act, so the Commission did not enunciate a binding interpretation of that term.<sup>1</sup> *See Potlatch*, 7 BNA OSHC at 1062 (“Although several plausible suggestions [as

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<sup>1</sup> Section 17(a) originally provided:

Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than \$10,000 for each violation.



to what constitutes a repeated violation] have been made by individual Commissioners and the courts, no consistent and authoritative answer has emerged.”); *George Hyman Constr. Co., v. OSHRC*, 582 F.2d 834, 838 (4th Cir. 1978) (“There appears to be little agreement regarding the efficacy and acceptability of any one of the approaches.”). That changed with the *Potlatch* decision—the Commission (with Commissioner Barnako concurring and dissenting in part) set forth the test to be used in determining whether a violation is repeated. *Potlatch* has since been cited with approval by several circuit courts and consistently affirmed and applied by the Commission. See, e.g., *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 860 (3rd Cir. 1996) (adopting *Potlatch* test); *Bunge Corp. v. Sec’y of Labor*, 638 F.2d 831, 837-38 (5th Cir. 1981) (favorably citing *Potlatch*, but disagreeing on allocation of burden of proof); *J.L. Foti Constr. Co. v. OSHRC*, 687 F.2d 853, 857 (6th Cir. 1982) (*Potlatch*, both generally and in application to facts of case, represents reasonable interpretation of section 17(a)); *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982) (*Potlatch* in accord with literal wording and structure of Act); *D & S Grading Co. v. Sec’y of Labor*, 899 F.2d 1145, 1147 (11th Cir. 1990) (citing “[t]his Court[’s]” holding in *Bunge*); *Manganas Painting Co.*, 273 F.3d 1131, 1135 (D.C. Cir. 2001); *FMC Corp.*, 7 BNA OSHC 1419, 1421-22 (No. 12311, 1979); *Automatic Sprinkler Corp. of Am.*, 8 BNA OSHC 1384, 1389 (No. 76-5089, 1980); *Edward Joy Co.*, 15 BNA OSHC 2091, 2092 (No. 91-1710, 1993); *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167-68 (No. 90-1307, 1993), *aff’d*, 19 F.3d 643 (3d Cir. 1994) (Table); *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994); *Midwest Masonry, Inc.*, 19 BNA OSHC 1540, 1542-44 (No. 00-0322, 2001); *Deep South Crane & Rigging Co.*, 23 BNA OSHC 2099, 2105 (No. 09-0240, 2012), *aff’d*, 535 Fed. App’x 386 (5th Cir. 2013). The *Potlatch* test is also in complete accord with the Secretary’s interpretation of section 17(a) of the Act. See, e.g., *D.M. Sabia Co.*, 90 F.3d at 860 n.12 (“[S]ince *Bethlehem*, the Commission has acceded to the Secretary’s interpretation of the term

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Occupational Safety and Health Act of 1970, 84 Stat. 1590, 1606 (1970). In 1990, this provision was amended to read:

Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$5,000 for each willful violation.

Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

‘repeatedly’ as used in section 666(a). Since *Potlatch*, the Commission and the Secretary have been in full accord as to the definition of the term ‘repeatedly.’ ”).

The overarching principle of the *Potlatch* test is that “[a] violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” *Potlatch*, 7 BNA OSHC at 1063. Furthermore, “[i]n cases arising under section 5(a)(2) of the Act, . . . the Secretary may establish a prima facie case of similarity by showing that the prior and present violations are for failure to comply with the same standard.” *Id.* And, in cases such as this,

where the Secretary shows that the prior and present violations are for an employer’s failure to comply with the same specific standard, it may be difficult for an employer to rebut the Secretary’s prima facie showing of similarity. This is true simply because in many instances *the two violations must be substantially similar in nature* in order to be violations of the same standard.

*Id.* (emphasis added).

Although my colleagues pay lip service to the *Potlatch* test, they reformulate it and rely on two additional elements, i.e., types of facts, that are only relevant to a willful characterization. First, by explicitly requiring that the Secretary prove that “Angelica knew its safety precautions and corrective actions were inadequate” (see majority opinion at fn. 21), my colleagues insert an actual knowledge element into the inquiry—an element that has previously been limited to a willfulness characterization determination. See, e.g., *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1111 (No. 11-2559, 2016). In doing so, they rely on a pre-*Potlatch* decision, *George Hyman*, 582 F.2d 834,<sup>2</sup> and Commissioner Barnako’s dissenting opinion in *Potlatch*, in which—citing *George*

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<sup>2</sup> *George Hyman* is a Fourth Circuit decision—a circuit court to which neither party could appeal in this case. See 29 U.S.C. § 660(a); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (where it is probable that decision will be appealed to certain circuit, Commission generally applies law of that circuit). I therefore disagree with my colleagues’ reliance on this decision, to the exclusion of all else.

In any event, my colleagues place undue significance on this decision by relying on the court’s statement that “[w]e have deliberately avoided setting forth an all-inclusive and rigid definition of ‘repeatedly’ under the Act . . .” to support their rejection of “a mechanical application of the test for establishing a repeat characterization.” *George Hyman*, 582 F.2d at 841. However, the following sentences of the court’s opinion—which my colleagues fail to quote—explain *why* the court was so restrained in its holding: “We recognize the desirability of allowing the Commission flexibility in working out reasonable guidelines in enforcing the Act. We decide only that fundamental rules of common sense and fairness, applied in light of the enforcement scheme

*Hyman*—he argues that unless “the employer had *actual notice* its safety precautions with respect to the subsequent violation were inadequate, then a repeated violation should not be found.” *Potlatch*, 7 BNA OSHC at 1067 (emphasis added). But Commissioner Barnako’s dissent relies on a misreading of *George Hyman*<sup>3</sup>—that case holds nothing of the sort:

Intrinsic within the statutory scheme of enforcement is the overall policy of providing employers with incentive to comply with the safety requirements of the Act. The system of penalties contained in [section] 17 allows for increased fines when the need arises to provide an employer with added incentive. To effectuate this policy, before a repeated violation may be found *it is essential that the employer receive actual notice of the prior violation. For unless the employer has previously been made aware that his safety precautions are inadequate, there is no basis for concluding that a subsequent violation indicates the employer requires a greater than normal incentive to comply with the Act.* Similarly, a reasonable time should elapse from the receipt of the notice of the original citation in order that employers be enabled to take corrective action. The two criteria preclude a purely inadvertent recurrence of a violation from being the basis for a repeated violation citation and require a reasonable opportunity be provided to the employer to correct safety and health hazards.

582 F.2d at 841 (emphasis added). In a footnote, citing section 10 of the Act, the court added that “[i]n most cases the final order procedure for the initial violation is presumptively sufficient notice to the company’s management that an initial violation has occurred.” *Id.* at 841 n.13. Thus, it is apparent that, when the court refers to the employer previously being “made aware that his safety precautions are inadequate,” it is referring to the “final order procedure for the initial violation”

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contained in [section] 17, should control the meaning and enforcement of the Act.” *Id.* In a footnote, the court quoted with favor a passage from its earlier decision in *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1263-64 (4th Cir. 1974), which concluded: “ ‘We decline to freeze interpretation, for further enforcement experience may well demonstrate the wisdom of distinctions and exceptions, if not outright change.’ ” *George Hyman*, 582 F.2d at 841 n.12. The *Potlatch* decision’s test for determining whether a violation should be characterized as repeated constitutes that “further enforcement experience.” Thus, this portion of the *George Hyman* decision is largely irrelevant.

Moreover, as noted in Part B below, the Commission’s decision in *Potlatch* and the Fourth Circuit’s decisions in *Gilles & Cotting* and *George Hyman* were issued long before the Supreme Court’s decisions in *Chevron* and *CF&I*. Although the Fourth Circuit has yet to revisit the statutory deference question—the Commission decided *Potlatch* five months after *George Hyman*—neither the Commission’s nor the Secretary’s interpretation of “repeatedly” has varied since then.

<sup>3</sup> My colleagues similarly misread *George Hyman*, asserting that “[g]iven the Secretary’s acceptance of the abatement method [in the earlier LOTO citation], there is no basis here to conclude that Angelica knew its safety precautions and corrective actions were inadequate . . . .”

and not to the subsequent violation of the same standard. *Id.* at 841 & n.13. Moreover, the majority opinion in *Potlatch* clearly rejects Commissioner Barnako's (and by extension my colleagues') reading of *George Hyman*:

The Secretary, in order to prove any violation to be repeated, must demonstrate that the earlier citation upon which he relies became a final order of the Commission prior to the date of the alleged repeated violation. As the Fourth Circuit pointed out in its *Hyman* decision[,] "Before a repeated violation may be found it is essential that the employer receive *actual notice of the prior violation*."

*Potlatch*, 7 BNA OSHC at 1064 (emphasis added). Likewise, in *Dun-Par Engineered Form Co.*, the Tenth Circuit explained:

Once an employer has been cited for an infraction under a standard, this tends to apprise the employer of the requirements of the standard and to alert him that special attention may be required to prevent future violations of that standard. Defining a repeated violation as the second violation of a particular standard is therefore in line with the general enforcement scheme of the Act which imposes a burden on employers to discover and correct potential hazards prior to an OSHA inspection, *and an even greater obligation to do so once alerted by a citation and final order*. Under this scheme, "the greater penalties for 'repeat' violations should come into play whenever an employer fails adequately to respond to a citation."

676 F.2d at 1337 (citations omitted) (emphasis added).

Numerous courts of appeals have also explicitly rejected interpretations of section 17 of the Act that sought to require a showing of actual knowledge to establish repeat characterization. The Third Circuit, in the first appellate decision to interpret the meaning of "repeatedly," equated this term with "willfully" and required the Secretary to prove that the employer "repeatedly violated [the general or specific duty clauses of the Act] in such a way as to demonstrate a flaunting [sic] disregard of the requirements of the Act." *Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157, 162 (3d Cir. 1976). However, every court of appeals to subsequently rule on the issue rejected the "flaunting" standard of *Bethlehem Steel*. Thus, in *George Hyman*, the Fourth Circuit stated: "We believe the most reasonable inference to be drawn from the . . . addition of 'repeatedly' is that Congress intended to provide for enhanced penalties when an employer committed recurrent violations that did not necessarily rise to the level of willfulness." 582 F.2d at 840-41. The Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits similarly have declined to require a "flaunting disregard" to establish a repeated violation. *Bunge Corp.*, 638 F.2d at 837-38; *J.L. Foti Constr. Co.*, 687 F.2d at 856; *Todd Shipyards Corp. v. Sec'y of Labor*, 586 F.2d 683, 686 (9th Cir. 1978); *Kent Nowlin Constr. Co. v. OSHRC*, 648 F.2d 1278, 1282 (10th Cir. 1981); *D & S Grading Co.*,

899 F.2d at 1147-48. And in 1990, after the Act was amended to mandate a minimum penalty amount for willful, but not repeated, violations, the Third Circuit concluded that “the formula prescribed in *Bethlehem* for determining when a repeated violation occurs is no longer operative. A repeated violation requires no more than a second violation and does not require proof of ‘flaunting.’ ” *D.M. Sabia Co.*, 90 F.3d at 860.

Here, it is undisputed that Angelica had actual notice of the prior violations, which were affirmed in settlement agreements. Thus, the only actual notice or knowledge requirement applicable to a repeat characterization determination has been met.

Second, my colleagues argue that “the record does not show that Angelica’s prior violations, which reflect what had been a nearly complete failure to comply, are substantially similar to the current violations,” which reflect “affirmative steps to achieve compliance and avoid similar violations in the future.” This assertion, however, seeks to insert an element of good faith or state of mind into the determination of whether a violation is repeated and thus also blurs the statutory distinction between a willful and repeated violation. See 29 U.S.C. § 666(a) (differentiating between willful and repeated violations for purposes of minimum penalty that may be assessed); *Corley v. United States*, 556 U.S. 303, 314 (2009) (stating that “ ‘a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant’ ” (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004))). Moreover, this argument has been squarely rejected by the Commission. In *Potlatch*, Commissioner Barnako advanced the very same position as my colleagues in his concurring and dissenting opinion:

I would . . . permit an employer, by way of defense, to show that it took good faith steps after the entry of a final order to prevent the occurrence of substantially similar violations . . . .

. . . I believe a defense should be available where the employer can show that it took reasonable, good faith steps after receiving the initial citation to eliminate substantially similar violations from its work-places. Upon such a showing, the employer would be entitled to a reduction in the characterization of the repeated violation.

. . . .

The majority concludes that the steps taken by an employer to prevent repeated violations should be considered only in assessing the penalty. While I agree that such steps are relevant to any penalty assessment, I would not stop here but would consider them in determining whether the employer was properly charged with a repeated allegation instead of a lesser violation.

*Potlatch*, 7 BNA OSHC at 1065, 1068. In response, the *Potlatch* majority made clear that in the context of repeat violations, an employer’s good faith efforts or state of mind are only relevant in assessing an appropriate penalty:

Section 17(j) of the Act specifically provides that “the good faith of the employer” is to be given due consideration in determining an appropriate penalty. Accordingly, evidence as to aggravated conduct, disregard of the Act, or flouting is relevant *only* to the assessment of an appropriate penalty.

....

... As with evidence of respondent’s attitude, however, we believe that evidence regarding commonality of supervision and an employer’s internal distribution of safety responsibility may be indicative of its good faith. Thus, such evidence would be cognizable in assessing an appropriate penalty.

....

... [T]he geographic proximity of past and present violations is indicative of the employer’s good faith, and will be considered by the Commission in the assessment of a penalty.

....

[T]he length of time between the two violations is relevant only to the “good faith” criterion for penalty assessment.

*Id.* at 1064 (emphasis added). Subsequent Commission decisions have reaffirmed that holding. Thus, in *FMC Corp.*, decided shortly after *Potlatch*, the Commission’s two-member majority again rejected Commissioner Barnako’s assertion that good faith should be considered in determining if a violation is repeated:

FMC asserts that it made good faith efforts to comply with the cited standard but that numerous factors made strict compliance difficult if not impossible and, therefore, its noncompliance does not represent a ‘flaunting’ of the housekeeping requirement. In *Potlatch Corp.* . . . we rejected the contention that an employer’s attitude is relevant to whether a violation is repeated . . . . Following *Potlatch*, we reject FMC’s contention and conclude that FMC’s violation of 29 C.F.R. § 1916.51(a) is ‘repeated’ as alleged in the citation. FMC’s asserted good faith efforts to comply with the standard are entitled to consideration in assessing an appropriate penalty.

7 BNA OSHC at 1419 (citations and footnotes omitted).<sup>4</sup>

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<sup>4</sup> In his *FMC* dissent, Commissioner Barnako repeated his argument that good faith should be factored into a determination of whether a violation is repeated:

In my dissenting opinion in *Potlatch Corp.* . . . I stated that a “defense should be available where the employer can show that it took reasonable, good faith steps

More recently, in *Jersey Steel Erectors*, 16 BNA OSHC at 1168, the Commission unanimously concluded that “Jersey’s inadequate attempts to comply with the standard might be relevant to a finding of willfulness, if it were in issue, and may have a bearing on the ‘good faith’ component of the penalty assessment. However, once the violation is established, evidence of an employer’s inadequate efforts to comply are not relevant to whether the violation was repeated.” See *Midwest Masonry, Inc.*, 19 BNA OSHC at 1544 (citing *Jersey Steel*, and concluding, “[o]nce the underlying violation is established, the employer’s alleged good faith belief does not negate the classification of a violation as repeated”).

The only facts that the Secretary, the Commission, and the courts have ever held to be relevant to the repeat characterization analysis have related to whether an employer previously violated a particular standard, whether the employer knew (generally through the issuance of a final order) that it had committed that previous violation, and whether the employer then committed another substantially similar violation—most often a violation of the same standard. The fact that Angelica had previously committed many other violations in addition to those cited here does not alter the fact that, in this case, Angelica “repeatedly” violated two of the very same standards. That Angelica largely cleaned up its act following the first set of violations cannot negate the fact that its subsequent violations of two of the same provisions require characterizing those violations as repeated.<sup>5</sup> My colleagues’ attempt to shoehorn a good faith defense into the

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after receiving the initial citation to eliminate substantially similar violations from its workplaces.” *The majority only considers these good faith factors relevant in determining an appropriate penalty under [section] 17(j) of the Act.* Although I agree that these steps are also important for penalty assessment purposes, I would find them relevant to a consideration of whether a respondent was reasonably attempting to comply with its abatement responsibilities under the Act. I believe that good faith attempts at compliance justify a reduction in the characterization of the violation from repeated to serious or nonserious.

*FMC Corp.*, 7 BNA OSHC at 1423 (citation omitted) (emphasis added).

<sup>5</sup> Moreover, the majority’s singular reliance on “the breadth” of the previous violations, as compared to the two violations at issue here, as justification for finding the current violations are not repeated, leads to an absurd result. An employer who previously committed only the same two discrete violations could be charged with a repeated violation whereas an employer, such as Angelica here, who previously committed so many violations that the PRCS and LOTO procedures were rendered—in the words of my colleagues—“substantially ineffective,” could not. This stands the purpose of the repeat classification on its head. See *George Hyman*, 582 F.2d at 841 (section 17 “allows for increased fines when the need arises to provide an employer with added incentive” to comply with the Act).

test for assessing a repeat characterization—under the rubric “affirmative steps to achieve compliance and avoid similar violations in the future”—is, thus, contrary to well-established Commission precedent and nothing more than an attempt to resurrect Commissioner Barnako’s dissenting view in *Potlatch*.

### **B. Chevron Deference**

The Commission’s decision in *Potlatch* predates two significant changes in the legal landscape. In *Chevron*, 467 U.S. at 842-45, the Supreme Court established that a federal court must defer to a reasonable construction of a statute by the administrative agency charged with administering it. And, in *CF&I*, 499 U.S. at 154-57, a unanimous Supreme Court explicitly held that, under the OSH Act, the Secretary of Labor, not the Commission, is the administrative actor to whom such deference is owed. Today, however, in their abrupt departure from long-settled Commission precedent, my colleagues fail to give *any* consideration, let alone deference, to the Secretary’s reasonable interpretation of the ambiguous term “repeatedly” as used in section 17(a) of the Act. See *D.M. Sabia Co.*, 90 F.3d at 860 (acknowledging that “[b]y employing a plenary standard of review and failing to defer to the Secretary’s interpretation of section 666(a),” Third Circuit’s previous decision in *Bethlehem* “offended the [*CF&I*] standard”). This failure is all the more troublesome given that the Secretary and the Commission have long been in agreement on the test for repeat characterization. See, e.g., *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998) (OSHA’s “Field Operations Manual takes a position similar to that of *Potlatch*”); *D.M. Sabia Co.*, 90 F.3d at 860 n.12.

As recently as December of last year, the Court of Appeals for the Second Circuit, a circuit to which either party could appeal this decision, 29 U.S.C. § 660(a), reminded the Commission that principles of deference apply to the Secretary of Labor’s interpretation of ambiguous provisions of the OSH Act and the Mine Safety and Health Act. The court explained that where “the Secretary’s interpretation of the Mine and OSH Acts [is] embodied in a series of citations for safety violations, it is entitled to the deference described in *Chevron*.” *Sec’y of Labor v. Cranesville Aggregate Cos.*, 878 F.3d 25, 33 (2d Cir. 2017). The court then applied the “*Chevron* two-step framework,” and found the statutory provision at issue to be ambiguous, and therefore gave the Secretary’s reasonable interpretation of the provision “substantial deference.” *Id.* at 33-36. Significantly, the court found that “[i]n contravention of *Chevron*, the [judge] does not appear to have given the Secretary’s interpretation of the Mine Act any deference at all, instead imposing



his own view of what was reasonable. Because the Commission did not afford proper deference to the Secretary's reasonable determination, the Commission's ruling was not in accordance with the law."<sup>6</sup> *Id.* at 36.

Here, my colleagues commit the very same error. It is irrefutable that the term “repeatedly” in section 17(a) of the Act is ambiguous. That is, of course, what the years of litigation were all about. Thus, the *Chevron* analysis necessarily moves on to the second step: is the Secretary's interpretation of “repeatedly” reasonable? Since the Secretary's interpretation is embodied in a citation, identical to the test enunciated in *Potlatch* (which has been endorsed by every circuit court of appeals to rule on the issue), and based on decades of enforcement history applying that test, there can be no doubt the Secretary's interpretation is reasonable.<sup>7</sup> Moreover, the Secretary's argument on review hinges entirely on the *Potlatch* decision and its progeny. Yet, as discussed above, my colleagues take it upon themselves, without explanation or even acknowledgement that they are doing so, to reformulate the repeat characterization test by allowing evidence of Angelica's good faith attempts to comply with the lockout/tagout (LOTO) and permit required confined space (PRCS) standards to negate the proven repeat characterization of the affirmed violations, and by requiring that the employer have actual knowledge of the current violations.

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<sup>6</sup> My colleagues seek shelter from the inevitable consequences of *Chevron* deference in this case by arguing that their contrary conclusion is merely based upon findings of fact and is, therefore, conclusive. My colleagues completely ignore that the foundation of my dissent has nothing to do with their findings of fact—in fact, my colleagues and I have no difference of opinion as to the facts in this case. Rather, as discussed above, my dissent rests on my colleagues' erroneous legal determination that certain facts—principally those relating to an employer's good faith effort to abate any previous violation and the employer's lack of actual knowledge of the later violation—are cognizable in determining whether a violation is repeated. It is also, of course, this erroneous legal determination—not my colleagues' findings of fact—that radically shifts the legal test upon which the Secretary, the Commission, and the appellate courts have relied for almost 40 years. Put simply, the issue at hand is a legal one that turns entirely on the proper interpretation of the statutory term “repeatedly”—thus, *Chevron* is most certainly controlling. *Cranesville Aggregate Cos.*, 878 F.3d at 33 (applying *Chevron* deference to Secretary's interpretation of statute).

<sup>7</sup> The Secretary's consistent reliance on the *Potlatch* test for alleging repeated violations is also reflected in OSHA's current Field Operations Manual; it provides that “[a]n employer may be cited for a repeated violation if that employer has been cited previously for the same or a substantially similar condition or hazard and the citation has become a final order of the Occupational Safety and Health Review Commission . . . . Generally, similar workplace conditions or hazards can be demonstrated by showing that in both situations the identical standard was violated . . . .” CPL-02-00-160, ch. 4, ¶¶ VII.A, .B (Aug. 2, 2016).

Such departure “from established precedent without announcing a principled reason for such a reversal” is arbitrary and an abuse of discretion. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 807 (3rd Cir. 1985). And even if a “principled reason” had been provided, my colleagues’ decision in this case—given their treatment of *Potlatch* and its progeny—does not “afford proper deference to the Secretary’s reasonable determination” and, therefore, is “not in accordance with the law.” *Cranesville Aggregate Cos.*, 878 F.3d at 36.

### **C. The Violations are Properly Characterized as Repeat**

As noted above, a violation is properly characterized as repeated under section 17(a) of the Act if, when it is committed, there is a Commission final order against the employer for a substantially similar violation. *Potlatch*, 7 BNA OSHC at 1063. As to the similarity of the citations, “[t]he Secretary may establish a prima facie case of substantial similarity by showing that a citation against the employer for violating the same standard has become a final order, and the burden then shifts to the employer to rebut that showing.” *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005). “ ‘[T]he principle factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards.’ ” *Id.* (citation omitted); see *Potlatch*, 7 BNA OSHC at 1063 (explaining that it may be difficult for employer to rebut evidence of repeated violation where Secretary shows prior and present violations are for “same specific standard”). Here, the citation was issued to Angelica on September 30, 2008. Just over three years earlier, citations issued to Angelica in 2004 for violations discovered at its Edison, New Jersey facility became final orders.

Angelica claims that the instant violations are not substantially similar to those affirmed in the previous citations. The Secretary responds that the violations alleged in the citation items currently on review and the prior violations arise from the same underlying standards and resulted in substantially similar hazards. Applying the test for substantial similarity as reasonably interpreted by both the Secretary and the Commission in numerous previous cases, I find that the current violations are substantially similar to the previous violations and therefore are properly characterized as repeated.<sup>8</sup>

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<sup>8</sup> Notably, the majority opinion lacks any assessment as to whether the specific violations at issue resulted in substantially similar hazards, which is what *Potlatch* requires.

There is no dispute that both of the standards at issue here—29 C.F.R. § 1910.146(d)(3) and 29 C.F.R. § 1910.147(c)(4)(ii)—were also at issue in the 2004 citations.<sup>9</sup> The Secretary, therefore, has established a prima facie case of substantial similarity with respect to the prior violations for both Items 2b and 8. *Lake Erie Constr. Co.*, 21 BNA OSHC at 1289. Indeed, my colleagues concede that requirement has been met. I also find that Angelica has failed to rebut the Secretary’s prima facie case. As to Instance (c) of Item 2b, Angelica argues only that unlike Instance (b), the prior violation “did not concern an alleged deficiency with the verification of power shut down procedures.” Although the relevant allegations underlying the 2004 violation did not specifically address electrical energy or mention verification, the prior violation did involve the same type of equipment at issue here under Item 2b (the CBWs) and both violations addressed essentially the same hazards—i.e., those hazards that could exist within the confined spaces of the CBWs.<sup>10</sup> See, e.g., *Suttles Truck Leasing, Inc.*, 20 BNA OSHC 1953, 1967 (No. 97-0545, 2004) (identifying hazards as substantially similar where prior violation pertained to confined spaces not being tested for oxygen, flammable gases, and toxic air contaminants, and instant violations pertained to hazards in washed tanks not being evaluated and failing to test for toxic atmospheres before employees entered tanks); *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1189 (No. 00-0553, 2005) (in general duty clause case, identifying hazards as substantially similar where prior

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<sup>9</sup> The prior violation serving as the basis for Item 2b’s repeat characterization, as listed in the settlement agreement, alleged a violation of § 1910.146(d)(3), the same subsection of the LOTO standard as was cited in the current citation. The prior violation serving as the basis for Item 8’s repeat characterization was cited under § 1910.147(c)(4)(ii), and that violation was unaltered by Angelica’s subsequent settlement agreement.

<sup>10</sup> The allegations set forth in the relevant item from the 2004 citations were as follows:

The provisions of the employer’s written confined space entry program were not being implemented for protection of employee(s) who enter tunnel washers to remove jammed/clogged laundry. Among the critical deficiencies noted were;

- 1) failure to test the atmosphere of the space(s) for air contaminant and specify acceptable entry conditions,
- 2) failure to isolate the space(s) from thermal and mechanical energy sources,
- 3) failure to control entry through use of written authorization permits,
- 4) failure to provide training to all employee(s) who enter confined spaces, or act as attendants, and
- 5) failure to provide for means of rescue/retrieval in event of emergency

violation involved employees entering “underground fuel tank to clean it, exposing them to the hazards of inhaling a toxic substance, asphyxiation, and fire or explosion,” and instant violation involved employees entering PRCS “without those spaces having been evaluated and deemed safe for entry,” exposing employees to “the hazard of asphyxiation from lack of oxygen or chemical hazards”).

As to Item 8, Angelica argues that the current violation is not substantially similar to the prior violation because the procedures in question related to its Edison facility, which were different than the procedures at its Ballston Spa facility, so the proven deficiencies in the two sets of procedures were also likely different. However, “the fact that the violations occurred at different worksites is not relevant to a determination of a repeated characterization.” *Potlach*, 7 BNA OSHC at 1064. Moreover, as with some of the procedures and deficiencies identified with respect to Item 8, the 2004 citation item specifically states that the servicing activities at issue included “clearing jams on machinery such as but not limited to [CBWs],” and that to be compliant, the procedures must include, among other things, “[l]ocation of [the] energy sources” and “[m]eans for isolating specific energy sources.”<sup>11</sup> Thus, particularly with respect to Angelica’s failure to provide specific LOTO procedures for the CBWs at both the Edison and Ballston Spa facilities, the hazards associated with those deficiencies—the unexpected energization of a CBW (or other equipment) while attempting to unjam it—are “substantially similar,” if not exactly the same. *See, e.g., Amerisig Se., Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996) (prior and instant violations under guarding standard “presented substantially the same hazard of an employee’s hand being caught in unguarded rotating machinery”). And not only are these violations substantially similar to the 2008 citations at the Edison facility, according to my colleagues they are violations of a

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<sup>11</sup> The allegations set forth in the relevant item from the 2004 citations were as follows:

a) Production area. Written procedures for lockout/tagout were not site specific.  
Procedures shall include at a minimum:

Types of machines requiring maintenance/service

Types of energy sources for those machines

Location of those energy sources

Means for isolating specific energy sources

Employees are exposed while performing maintenance/servicing including clearing jams on machinery such as but not limited to tunnel washers.

“high-gravity nature.” Thus, the seriousness of the violations still present at an Angelica workplace belies the majority’s wishful conclusions that “the Secretary established only minimal deficiencies here” and that “these facts do not ‘indicate a failure to learn from experience.’ ” (Citation omitted.)

Accordingly, I find that the violations affirmed under Item 2b (Instances (b) and (c)) and Item 8 are properly characterized as repeated. However, as the Commission in *Potlatch* and its progeny has indicated, it would be appropriate to take Angelica’s assertions of good faith into account by determining an appropriate penalty reduction.

Dated: June 24, 2018

/s/ \_\_\_\_\_  
Cynthia L. Attwood  
Commissioner



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
U.S. Customs House, 721 19<sup>th</sup> Street, Room 407  
Denver, Colorado 80202

SECRETARY OF LABOR,

Complainant,

v.

ANGELICA TEXTILE SERVICES, INC.,

Respondent.

OSHRC Docket No. 08-1774

**APPEARANCES:**

Suzanne Demitrio, Esquire, New York, New York  
Heather Filemyr, Esquire, New York, New York  
For the Secretary

Mark Lies II, Esquire, Chicago, Illinois  
Elizabeth Leifel Ash, Esquire, Chicago, Illinois  
For the Respondent

BEFORE: John H. Schumacher  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (“the Act”). On June 5, 2008, the Occupational Safety and Health Administration (“OSHA”) began an inspection of a facility of Angelica Textile Services, Inc. (“Respondent” or “Angelica”), located in Ballston Spa, New York. OSHA cited Angelica for ten

serious and four repeat violations and proposed a total penalty of \$58, 525.<sup>36</sup> Angelica filed a timely notice of contest, bringing this matter before the Commission.<sup>37</sup>

### **Background**

The inspection was initiated on June 5, 2008, based on this facility appearing on a list of high-hazard industries.<sup>38</sup> (Rawson Dep. 33). Angelica has several facilities in addition to its Ballston Spa location. CO Rawson met with the following Angelica personnel on the first day of the inspection: Craig Andrews, Operations Manager; Ken Barnes, Maintenance Manager; and (via telephone) Tony Long, Corporate Safety Director. She later met with Kevin McDonough, who became the environmental safety and health manager for the facility on June 10, 2008. (McDonough Dep. 37).

### **Jurisdiction**

In its Answer, Respondent admits it was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. The court concludes the Commission has jurisdiction over the parties and subject matter in this case.

### **Rule 61**

By request and upon agreement of the parties, and with the approval of the undersigned, this case has been decided on the stipulated record pursuant to Commission Rule 61, 29 C.F.R.

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<sup>36</sup> The Citation and Notification of Penalty (“Citation”) issued September 30, 2008, alleged fifteen serious violations and one other-than-serious violation, with a total proposed penalty of \$23,250. In her Complaint dated December 23, 2008, the Secretary amended four items to allege repeat violations and increased the penalty accordingly. She also withdrew two of the items, *i.e.*, Citation 1, Item 2a and Citation 2, Item 1. Angelica argues that it was prejudiced by the amended Citation. However, the Commission has held that amendments made long before the hearing will generally not result in prejudice. *See United Cotton Goods, Inc.*, 10 BNA OSHC 1389, 1390 n.5 (No. 77-1894, 1982). Here, the Secretary amended the Citation in her Complaint and Angelica has not demonstrated how it was prejudiced. Angelica’s argument is rejected, and the Citation as amended is accepted.

<sup>37</sup> Angelica set forth the following defenses in its Answer: 1) the amendment to reclassify certain items as repeat deprives it of due process and 2) these items are time barred. Angelica has also alleged it is entitled to the legal fees and expenses it incurred in defending against the amended citation items. While most of the items in this case are being vacated, as set out below, I conclude Angelica is not entitled to an award for its fees and expenses.

<sup>38</sup> OSHA’s inspection began on June 5, 2008, and according to the Citation continued through September 19, 2008. CO Rawson’s testimony shows she visited Angelica’s facility on June 5, June 12, and July 8, 2008. (Rawson Dep. 68, 281-82).

2200.61 (“Rule 61”). The parties do not dispute the applicability of the cited standards. They do dispute whether Angelica violated the standards.

On September 23, 2011, the parties filed briefs for the disposition of this matter under Rule 61. Joint Exhibit 3 set out the contents of the stipulated record, as follows: (1) the depositions of Anthony Long, Margaret Rawson, Kevin McDonough, David Malter, and Edward Jerome; (2) Settlement Agreements for Docket Numbers 04-1318 and 04-1319; and (3) the revised expert report of David Malter, dated January 18, 2010. (See Joint Exh.1-4). On February 24, 2012, in accordance with Rule 61, the parties submitted a joint stipulation of the facts in this matter. Each party has submitted an initial brief and a reply brief.

I have reviewed the stipulated record and the parties’ arguments in this matter. Any argument not specifically addressed in this decision has been duly considered, found to be unpersuasive, and rejected.

### **Hearsay**

Angelica argues that the Secretary’s case relies on inadmissible hearsay evidence. The CO’s deposition testimony recounts information she gained from employee interviews and other third parties. Respondent asserts that this information should be disregarded as it is inadmissible hearsay. (R. Reply Br. 7).

The Commission has consistently held that statements by employees are not hearsay, under Rule 801(d)(2)(D) of the Federal Rules of Evidence (“FRE”). *E.g., Regina Constr. Co.*, 15 BNA OSHC 1044, 1047-48 (No. 87-1309, 1991) (citations omitted) (explaining that both foreman and employee statements are admissions of a party-opponent and not hearsay). The current version of FRE 801(d)(2)(D) states:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

....

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and: . . . (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.

In *Regina*, the Commission noted that admissibility must not be equated with reliability. It also noted that employee admissions are not “inherently reliable” and that the judge must thus



consider several factors when assessing the credibility of such statements.<sup>39</sup> *Id.* at 1048. As the Commission explained, a judge has no opportunity to assess the credibility of an employee's out-of-court statement.<sup>40</sup> *Id.* at 1049. This is especially relevant here, where the undersigned judge did not have the opportunity to assess the credibility of either the employee or the CO reporting the conversation. I conclude that all of the employee statements referred to by CO Rawson meet the exception provided for by FRE 801(d)(2)(D).

However, Respondent is correct that statements by non-employees to CO Rawson are hearsay and, as such, inadmissible. Any such evidence that was properly objected to as hearsay in this case will be found inadmissible and will not be considered.

### **Estoppel**

Angelica raises an estoppel defense based on its contention that OSHA accepted its confined space and lockout-tagout ("LOTO") programs as a part of a prior settlement agreement from 2005.<sup>41</sup> (R. Br. 7). This argument fails for two reasons. First, it is well established that OSHA may issue a citation for a condition that may have been previously observed but was not cited as a violation. "OSHA is not precluded from issuing a . . . citation for previously observed or uncited violations." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2183 n.13 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). Further, to establish an estoppel claim against the Government, the party must show that the Government "made a misrepresentation upon which the party reasonably and detrimentally relied and that the Government engaged in affirmative misconduct." *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994) (citations omitted). OSHA's mere receipt of Angelica's above-noted programs as part of a settlement

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<sup>39</sup> These factors are: "(1) the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted." *Regina* at 1048-49 (citation omitted).

<sup>40</sup> "The Commission stated in *Continental Electric Co.*, (citations omitted), '[a]s an out of court declaration, the employee's statement [to the Secretary's industrial hygienist] inherently has less probative value than would the employee's own testimony and is not necessarily entitled to dispositive weight.'" *Regina* at 1049.

<sup>41</sup> As noted above, the two prior settlement agreements were included in the stipulated record.

agreement is not an affirmative action. In addition, Angelica has not shown any misconduct by OSHA or its own detrimental reliance. Its argument is rejected.

### **Stipulated Facts**

Pursuant to Commission Rule 61, the parties submitted the following stipulated facts.

1. Angelica's Ballston Spa facility was engaged in the business of renting textiles to "hospitals, clinics, nursing homes" and other similar clients. McDonough Dep. at 9-10.
2. As part of this rental agreement, Angelica processed and laundered soiled linens before returning those linens to its clients. *Id.*
3. The hazards Respondent's employees encountered throughout the laundering process are the subject of the citation items in this case.
4. Company-wide, Respondent had more than 250 employees. Rawson Dep. at 340.
5. At the time of OSHA's inspection, Respondent used a series of interconnected machines to launder the soiled medical linens in a "wash alley" at Respondent's worksite. *See* McDonough Dep. at 13; McDonough Ex. 2 (hand-drawn diagram of wash alley).
6. This area was surrounded by a chain-link perimeter fence. Rawson Dep. at 37-38; Long Dep. at 40.
7. Soiled linens entered the wash alley for laundering via one of two "fixed conveyor[s] with moveable belt[s]," which deposited the material into either of two continuous batch washers "CBWs" aka "Tunnels"), large screw-shaped industrial washing machines containing 8 separate modules. McDonough Dep at 14, 27-30, 44; Malter Dep. at 146.
8. A diagram depicting the layout of the CBWs is contained in the manufacturer's literature at McDonough Ex. 10, Fig. 3 at Angelica - 00195.
9. Linens were divided between CBW # 1 or 2 depending upon the type of material being laundered. McDonough Dep. at 28-29.
10. Those linens entering CBW # 1 were sent through the machine's wash cycle while being transported through the 8 modules of the tunnel. *Id.* at 29-30. After washing, the clean linen was discharged into the co-bucket, "a big hopper mounted on a . . . traveling shuttle." *Id.* at 30. The co-bucket traveled east and west along approximately 20-foot-long tracks to feed one of the two extractors servicing CBW # 1. *Id.* at 30-31. Then, the co-bucket discharged wet laundry into the extractor, which used centrifugal force to expel water from the linens. *Id.* at 31.
11. Next, the extractor dumped the linens onto the loose goods conveyor, which loaded the laundry onto another shuttle, called the "loose goods shuttle." *Id.* at 31-32.
12. After the linens were loaded into the loose goods shuttle, a dryer operator, an employee located outside the wash alley, determined into which of the industrial dryers the laundry was sent. *Id.* at 32, 42-43.
13. All of the dryers in the wash alley were Milnor dryers, with laundry being deposited in the front and removed through the back. *Id.* at 42-43.

14. Linens would either be delivered into Milnor dryer six or seven, fed directly by the loose goods shuttle, or sent to the loose goods shuttle opening, where the textiles dumped into a cart and manually loaded into a dryer. *Id.* at 32.
15. The dry linens were removed from the wash alley through the back side of the dryers, which expelled the linens onto another conveyor. *Id.* at 32-33.
16. Those linens entering CBW # 2 were discharged from the CBW after washing into a press, which "literally presse[d] the water out of the linen." *Id.* at 33.
17. The pressed linen formed a "cake" "four-foot in diameter and maybe six-inches in height and all compressed together." *Id.* at 16, 33.
18. The linen cakes were then sent via the "cake conveyor" to the cake shuttle, which delivered them to one of dryers one through five. *Id.* at 33-34.
19. After drying, the laundry was discharged through the back of the dryers and out of the wash alley as with the linens entering CBW # 1. *Id.* at 34.
20. As shown in the manufacturer's literature at McDonough Ex. 10, each CBW was comprised of 8 large inter-connected modules. Fig. 3 at Angelica-00195; see also McDonough Dep. at 29-30.
21. Each CBW is a long tunnel with an "Archimedes screw," and the CBW turned during the laundering process, spinning water and linens through the 8 modules of the washer. McDonough Dep. at 29-30, 44.
22. As with the co-bucket, both the loose goods shuttle and the cake shuttle traveled along fixed tracks. McDonough Dep. at 16-18.
23. These tracks ran both above and below the shuttles, like a trolley. Malter Dep. at 152.
24. The CBW tunnel was turned by a chain-and-sprocket, driven by an electric motor, and delivered steam was controlled by compressed air-operated valves. McDonough Dep. at 45.
25. During the laundering process, wash chemicals such as detergent and an alkali were sent into the CBW to clean the linens. *Id.* at 46.
26. None of the valves feeding the CBWs were labeled. McDonough Dep. at 115, 119, 121-122.
27. Respondent's written Confined Space Entry Program, Procedure SFY-1100, identified the "Tunnels" (aka the CBWs) as "permit required" confined spaces. See Rawson Ex. 5, § 1.3, p.1.
28. The CBWs were only to be entered in the event of a jam or other maintenance procedure. See McDonough Ex. 10 at Angelica-00192.
29. Respondent's corporate-level written permit-required confined space plan identified the dryers in its facility as permit-required confined spaces. See Rawson Ex. 5, § 1.3.
30. The Milnor dryers had "fire eyes" through which their pilot lights could be seen. Malter Dep. at 139.

31. These devices controlled the temperature in the dryer, and when one of the fire eyes was extinguished, employees needed to enter the wash alley area to reignite it. Rawson Dep. at 236-37.
32. The shuttles were generally automatically operated by a computer control system that coordinated their movement based upon the needs of the dryers and washers. See Malter Dep. at 143.
33. Each of the shuttles had a "cow catcher" that would stop shuttle motion after contact with any obstruction, on either end. Rawson Dep. at 41-42; Malter Dep. at 153-54; McDonough Ex. 2.
34. The shuttle is also equipped with emergency stop buttons and emergency pull cables. McDonough Dep. at 223-25.
35. A control panel on the sides of the shuttles had a button that permitted the shuttles to be turned off. Malter Dep. at 153-55.
36. Respondent's written lockout/tagout plan originally called for all four gates providing access to the wash alley to be interlocked, de-energizing machinery before entry into the wash alley was permitted. Malter Ex. 6 § 1.1.3, p.1 (also McDonough Ex. 7).
37. Respondent later authorized deviation from this written plan, allowing gates one and two to be locked, but not interlocked. Long Dep. at 49-53; see McDonough Ex. 2 (showing the location of the gates to the wash alley).
38. The interlocked gates were designed to de-energize multiple machines in the wash alley nearest to the gate that was opened, but did not de-energize all machines in the wash alley. See Rawson Dep. at 47-48; McDonough Dep. at 168-69; Malter Dep. at 144.
39. At the time of the OSHA inspection, Respondent allowed all 6-8 of its non-managerial maintenance employees to enter the two gates (gates one and two on the diagram at McDonough Ex. 2), which were each locked with a single chain-and-lock padlock, and not interlocked. Long Dep. at 50, 54; Malter Dep. at 134-35; Rawson Dep. at 252.
40. Respondent's written policy governing entry into the wash alley, SFY-1060, Entering Shuttle Area Safely, did not require the shuttles to be de-energized or locked out if employees were servicing machinery in the wash alley and not working directly on the shuttle. McDonough Dep. at 178-80; McDonough Ex. 7.
41. This is because Respondent's policy distinguished between "Maintenance on the Shuttle" and "Work in the Shuttle Area on Non-Shuttle Equipment" and did not require lockout or de-energization of the moving shuttles for work in the wash alley other than maintenance on the shuttle itself. McDonough Dep. 178-80; McDonough Ex. 7 (also Malter Ex. 6).
42. Respondent's written procedures called for a "watch person" to be utilized for entry into the wash alley if interlocked gates were not used and employees were not performing tasks that Respondent designated "Maintenance on the Shuttle[s]" themselves. Malter Ex. 6, §§ 3.1-3.2 (also McDonough Ex. 7).
43. This policy required a dryer operator serving as a "watch person" to stand near the operator panel at the south end of the wash alley, and "observe and alert the person working on the inside

of any possible hazards. [The policy] does not specify that they have to keep eye contact on the individual. They have to be aware of any hazards that may occur." McDonough Dep. at 189; see McDonough Ex. 2.

44. The watch person was required to be in the "general area" of dryer operator control panel. McDonough Dep. at 190-91.

45. Once the shuttle was switched from manual mode back into automatic mode from this directional switch, the shuttle could be re-activated.

46. An alarm would sound, and there would be approximately a one-minute delay before shuttle reactivation. Malter Dep. at 155-56; Rawson Dep. at 54, 245-46.

47. Respondent's confined space program for all machines consisted of McDonough Ex. 3 and 4, in addition to its complete lockout/tagout program at McDonough Ex. 5-9 and the CBW manufacturer's documents contained at McDonough Ex. 10. See McDonough Dep. at 47-54.

48. The process of isolating the hazards to the CBW required all of the following: (1) lock out of the main Miltron (*sic*) control panel, which was located at the end of the conveyor to each CBW outside the wash alley and supplied electrical energy to the CBW; (2) lock out of an additional electrical switch to the CBW located outside of the wash alley fence; (3) lock out of the chain drive which provided mechanical energy to the CBW; (4) isolation of the valves, including those providing thermal energy and compressed air to the CBW; and (5) lock out of other machinery servicing the CBW. McDonough Dep. at 44-45, 93-102.

49. Rawson Ex. 5 is a true and accurate copy of Respondent's Confined Space Entry Program, SFY 1100, which applied to the CBWs at all times relevant to the alleged violations.

50. McDonough Ex. 9 is a true and accurate copy of Respondent's Lockout/Tagout Surveys for the CBWs, which applied to the CBWs at all times relevant to the alleged violations. See McDonough Ex. 9; Rawson Dep. at 141; McDonough Dep. at 108-11.

51. Mr. McDonough testified that verification of electrical lockout to the CBW could be achieved by pressing a "start series" of buttons on the machine's control panel. McDonough Dep. at 108; Rawson Dep. at 140.

52. The main steam valve feeding the CBWs was locked out.

53. Respondent did not use "blanking or blinding; misaligning or removing sections of the lines, pipes or ducts; or a double block and bleed system." Rawson Dep. at 153-54; Malter Dep. at 98, 100-102; McDonough Dep. at 117; Malter Ex. 10, App. B, §§ 5.15, 5.19 at Angelica-00243.

54. Instead, Respondent's procedures called for these valves to be "isolated" by "clos[ing] the valve . . . and then us[ing] some type of device to secure that handle in place so that it cannot be moved without a proper key or other device." Malter Dep. at 100; see also McDonough Ex. 3, App. B, p.13-14.

55. Respondent's written confined space program instructed: "The atmosphere within the space shall be periodically tested or continuously monitored as necessary to ensure that the continuous forced air ventilation is preventing the accumulation of a hazardous atmosphere." See Rawson Ex. 5, § 3.2.9, p. 4 and Appendix B § 5.23-5.25, p. 14 (also McDonough Ex. 3); Rawson Dep. at 161-62; Malter Dep. at 87.

56. Respondent used an atmospheric PHD monitor to test the CBW for hazardous atmosphere after lockout and ventilation of the space when entry was required. Rawson Dep. at 173; Malter Dep. at 120-21; McDonough Dep. at 85; see also Rawson Ex. 5, App. B, §§ 5.23- 5.25, p.14 (also McDonough Ex. 3).
57. The manufacturer of the meter used by Respondent recommended that the meter be calibrated no more than one month prior to use. Malter Dep. at 120-21.
58. To calibrate the meter, one would take the meter into a clear-air environment outside the facility where there was no known hazardous atmosphere and calibrate the meter using calibration gas (i.e. "a known quantity of gas contained in a cylinder that you introduce into the meter to determine the accuracy of the meter" used only for the purposes of calibration) as instructed by the manufacturer. McDonough Dep. at 85-86.
59. After calibration, the meter was used in the CBW to evaluate hazards of the space. *Id.* at 86.
60. The only calibration gas at Respondent's facility expired prior to 2007 (OSHA's inspection of the worksite occurred in 2008). See Rawson Dep. at 375-76 (day 2); Malter Dep. at 124.
61. Respondent created a single permit for all of its permit-required spaces, including the Milnor dryers, with the exception of the CBW. See Rawson Dep. at 182; McDonough Ex. 3, App. D, p. 19-21.
62. McDonough Ex. 3 contains a true and accurate copy of that permit as it existed at all times relevant to the alleged violations.
63. Respondent created a separate entry permit for the CBWs. Malter Ex. 9.
64. Malter Ex. 9 is a true and accurate copy of that permit as it existed at all times relevant to the alleged violations.
65. Respondent's written confined space program provided that, in the event a confined space rescue was required, rescue services would be obtained from the Local Volunteer Ballston Spa Fire Department, and that the fire department would be summoned by calling 911. Rawson Ex. 5, §§ 7.2-7.3, p. 10-11 (also McDonough Ex. 3); Rawson Dep. at 202; McDonough Dep. at 149-50, 159.
66. The Ballston Spa Fire Department is located approximately 100 yards from Respondent's facility. McDonough Dep. at 154-58.
67. This plan did not require Respondent to call the fire department prior to each confined space rescue to determine whether the fire department was presently available to perform a rescue. McDonough Dep. at 160-62.
68. None of Respondent's employees were expected to perform a confined space rescue. McDonough Dep. at 146-48.
69. None of Respondent's employees were trained to perform a confined space rescue. Rawson Dep. at 206; McDonough Dep. at 146-47.
70. Ms. Rawson testified that the fire department did not have a qualified confined space rescue team and could not make a confined space rescue to retrieve a downed entrant. Rather, the fire department would need to call Mutual Aid through Saratoga County to summon additional

assistance from the towns of either Colonie or Schuylerville, which each had a confined space rescue team. This additional assistance could take up to 30 minutes. Rawson Dep. at 208, 213. Mr. McDonough testified that the Ballston Spa Fire Department visited the Angelica facility in approximately 2001 to undertake an evaluation of confined space operations and conducted drills at least annually at the facility to ensure they were able to respond to various types of emergencies. McDonough Dep. at 154-163.

71. The press, which expelled water from linens laundered by the CBW, had three energy sources: hydraulic, electrical and gravitational. See Malter Dep. at 169-70; McDonough Dep. at 16.

72. McDonough Ex. 9, p. 22, is a true and accurate copy of Respondent's lockout survey for the press.

73. The cake, loose goods, and co-bucket shuttles possessed air, gravity and electrical power sources. Malter Dep. at 168-69.

74. Respondent's shuttle safety program instructed employees to lock out the shuttles and attempt to reenergize the shuttles to verify lockout. McDonough Ex. 7, §§ 2.1-2.3, p.2.

75. The shuttle survey for the "loose goods shuttle" instructed that mechanical blocks be applied by using the "safety pins supplied with machine." See McDonough Ex. 9.

76. McDonough Ex. 8 is a true and accurate copy of the machine surveys for the dryers, which applied at all times relevant to the alleged violations. See McDonough Ex. 8; McDonough Dep. at 51.

77. McDonough Ex. 5 is a true and accurate copy of Respondent's facility-wide lockout/tagout program, which applied to the CBWs at all times relevant to the alleged violations.

78. Respondent's confined space training program consisted of initial hire training, classroom training, on-the-job training, and a video training provided by Coastal, an outside company. Rawson Dep. at 168-69, 188-89, 195-99; Long Dep. at 32, 34-36.

79. Likewise, Respondent's lockout training consisted of initial hire and classroom training, in which employees were trained directly from Respondent's written lockout procedures, on-the-job training, and a video training provided by Coastal. Rawson Dep. at 151-53; Long Dep. at 18-19, 32, 34-36, 45.

80. Prior to OSHA's inspection, Respondent performed a PPE analysis for the 50% sodium hydroxide solution based upon a review of the sodium hydroxide MSDS. McDonough Dep. at 203-04.

81. This review concluded that PPE was necessary, including "chemically impervious gloves, safety glasses, a face shield, a rubber or vinyl apron and general work clothes, et cetera." *Id.* at 204.

82. There was a hose in the boiler room with a control valve located "approximately 20 feet" away from the location of the sodium hydroxide solution transfer point. McDonough Dep. at 207-08.

83. Mr. McDonough testified that there was also a sink in a room adjoining the boiler room. See McDonough Dep. at 207; McDonough Ex. 12.

84. The nature of Respondent's business exposed some of Respondent's employees to potential exposure to blood and other infectious materials because it involved the laundering of medical supplies. See McDonough Dep. at 216.
85. Respondent rented textiles, including washcloths, towels, sheets, pillow cases, gowns, scrubs and surgical towels, to hospitals and nursing homes. McDonough Dep. at 9-11.
86. After the linens were soiled by Respondent's clients, linen was packaged by the client in plastic bags and picked up by Respondent and taken to its worksite. *Id.* at 10-11.
87. At Respondent's facility, employees opened bags of linen, emptied the linens onto the conveyor, and sorted the linen according to type. *Id.* at 11.
88. Respondent offered the Hepatitis B vaccine series to "those [employees] that had exposure, which would've been soil sort, RSR's, supervisors, management, washroom, dryer [operators], housekeeping." McDonough Dep. at 216.
89. Prior to the start of their regular duties, Respondent offered the vaccination series to newly-hired employees through a video-based training, which "explained the OSHA Hepatitis B bloodborne pathogen standards. And of course within that training it provide [d] information regarding the HBV [Hepatitis B] vaccination." McDonough Dep. at 216-17.
90. Angelica paid employees for the time spent watching the video. McDonough Dep. at 217.
91. After the video training and classroom training, these employees were given the option to receive the Hepatitis B vaccination series or sign a waiver. *Id.* at 217.
92. The depositions of Mr. McDonough, Mr. Malter, Mr. Long, Ms. Rawson, and Mr. Jerome, along with their exhibits, constitute the entire record in this matter. The parties stipulate the admissibility of the transcripts of these depositions, along with their exhibits.
93. Mr. McDonough and Mr. Long were managerial employees of Respondent at the time of their depositions. Mr. Malter was an expert designated by Respondent at the time of his deposition. Ms. Rawson and Mr. Jerome were employees of the Occupational Safety and Health Administration at the time of their depositions.
94. The Parties have a dispute over any fact not stipulated herein.

### **The Secretary's Burden of Proof**

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (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. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1<sup>st</sup> Cir. 1982).

The parties do not dispute that the cited standards are applicable to Angelica's laundry facility. Angelica's internal safety procedures reflect the potential exposure of its employees to



hazards from confined spaces, unexpected energization (lockout), chemical handling, and bloodborne pathogens. (See Stip. Facts 80-81, 83; McDonough Exh. 3-10).

Angelica asserts that because there was no confined space entry in the six months before the Citation's issuance date, and thus no employee exposure to the hazards, these citation items must be vacated. (R. Br. 6-7). However, showing actual exposure to the hazard is not required. Rather, the Secretary must show that an employee could be exposed to the hazard either "in the course of their assigned working duties, their personal comfort while on the job, or their normal means of ingress and egress to their assigned workplaces." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, July 3, 2000) (citations omitted). The alleged violations will therefore be considered, where relevant, in terms of potential exposure of employees.

#### **Citation 1, Item 1**

Item 1 alleges a serious violation of 29 C.F.R. § 1910.132(a), which states:

(a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

This item was based on the weekly transfer of a 50% solution of sodium hydroxide from one drum to another. (Rawson Dep. 91-93) The Secretary alleges that an employee, Mr. Papke, needed to wear chemical resistant coveralls to provide adequate protection. (S. Br. 28). Angelica required an employee doing this work to wear chemical-resistant gloves, safety glasses, a face shield, a rubber or vinyl apron and a long-sleeved cotton uniform as personal protective equipment ("PPE"). (Stip. Facts 80-81; Rawson Dep. 93; McDonough Dep. 204).

The Secretary must provide evidence to show that Angelica's required PPE was inadequate to protect an employee from that particular hazard. See *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1265 (No. 98-0701, 2003) (vacating citation where the CO's opinion was the only evidence presented that a particular type of protective clothing was required). CO Rawson

interviewed the employee responsible for the transfer; she did not observe the activity.<sup>42</sup> (Rawson Dep. 91-93). The Secretary offered CO Rawson's opinion testimony as evidence that the chemical-resistant apron provided was not adequate protection and that, instead, chemical-resistant clothing (coveralls) was necessary. (S. Br. 25). However, the Secretary has not presented any other evidence that the PPE designated and provided by Angelica was not sufficient protection or that chemical-resistant coveralls were the necessary protection for this work activity.<sup>43</sup> To the contrary, the parties have stipulated that Angelica did a PPE analysis and provided PPE. Because the Secretary did not meet her burden of showing that the PPE Angelica required and provided was inadequate, this item is vacated.

**Citation 1, Item 2(b)**

This item alleges a serious violation of 29 C.F.R. § 1910.146(d)(3), which states that an employer must:

(3) Develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including, but not limited to, the following: (i) Specifying acceptable entry conditions; (ii) Providing each authorized entrant or that employee's authorized representative with the opportunity to observe any monitoring or testing of permit spaces; (iii) Isolating the permit space; (iv) Purging, inerting, flushing, or ventilating the permit space as necessary to eliminate or control atmospheric hazards; (v) Providing pedestrian, vehicle, or other barriers as necessary to protect entrants from external hazards; and (vi) Verifying that conditions in the permit space are acceptable for entry through the duration of an authorized entry.

Item 2(b) lists three instances that allegedly violate the standard's requirements.<sup>44</sup> They are as follows: (b) Angelica's confined spaces program ("program") (at § 5.13) did not specify a means to verify that the power had been successfully shut off within the continuous batch washer ("CBW"); (c) Angelica's program requirement (at § 5.19) to lock out valves is not a proper means of isolation; and (d) Angelica's program (at § 5.23) did not specify the frequency of periodic atmospheric testing of the CBW.

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<sup>42</sup> CO Rawson stated the employee, Mr. Papke, had safety glasses, a face shield, gloves, and cotton uniforms. She further stated that she saw the safety glasses, face shield, and chemical-resistant apron on the second day of her inspection. (Rawson Dep. 92-93, 308).

<sup>43</sup> For example, the Secretary did not offer as evidence the material safety data sheet ("MSDS") for the 50% sodium hydroxide solution, which might have included a PPE recommendation.

<sup>44</sup> The original Citation listed five instances. The Secretary has withdrawn Instances (a) and (e) of this item.

*Instance b*

The Secretary alleges that Angelica's written program must include a detailed description of its lockout verification process for entry into a CBW. (S. Br. 37). She acknowledges that Angelica included a step to verify that the power has been successfully shut off; however, it did not specify the "means." (S. Br. 36-38; McDonough Exh. 3). The Secretary refers to the preamble of the LOTO standard to support her assertion that the subject standard requires the employer to provide a written, detailed set of verification instructions.<sup>45</sup> The Secretary does not explain how the LOTO standard's preamble applies to the confined spaces standard cited here.

Additionally, the Secretary points to CO Rawson's testimony that Angelica's maintenance manager told her that energy verification was not part of the procedure.<sup>46</sup> However, this uncorroborated assertion is in direct conflict with Angelica's written program, which requires verification of power shut-off. Further, the parties have stipulated that lockout can be verified by "pressing a 'start series' of buttons." (Stip. Fact 51).

The Secretary has provided no persuasive evidence to support her position that the cited procedure is inadequate. This instance is vacated.

*Instance c*

The Secretary contends that Angelica's written program used an improper means to isolate the CBW's water, steam, chemical, and air lines. Angelica's program specifies that a lockout system will be used to isolate the lines feeding the CBW. The Secretary asserts the only acceptable means of isolation are "blanking or blinding; misaligning or removing sections of the lines, pipes or ducts; or a double block and bleed system." The Secretary refers to an August 6, 2007 OSHA letter of interpretation to support her position.<sup>47</sup> (S. Br. 37-39).

Commission precedent establishes that the plain meaning of a regulation is given controlling weight. *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043,

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<sup>45</sup> 54 Fed. Reg. 36,644, 36,770 (Sep. 1, 1989).

<sup>46</sup> There is no indication that CO Rawson referred to any inspection notes during her deposition testimony, and the record does not include any deposition testimony for Maintenance Manager Barnes.

<sup>47</sup> See

[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=25949](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25949)

2003) (citation omitted). The Secretary's interpretation is consulted only when the regulation is ambiguous or its meaning is unclear. *Id.* Here, the confined spaces standard defines "isolation." This definition includes the "lockout or tagout of all sources of energy" as one way to isolate a space. See 29 C.F.R. § 1910.146(b). I find the Secretary's position to be in direct conflict with the plain language of the standard, since lockout is explicitly included as a means of isolation.<sup>48</sup> This instance is vacated.<sup>49</sup>

*Instance d*

The Secretary asserts that Angelica's written procedures should have included guidance for an employee to determine how frequently or on what basis to conduct additional atmospheric testing during a confined space entry in the CBW. (S. Br. 42).

As discussed below, Angelica provides training, in addition to its written procedures, as a part of its confined spaces entry program. Angelica's safety and health manager testified that, during on-the-job training, information is provided as to how to determine the frequency of atmospheric testing. He further testified that each entry's conditions vary, so the testing frequency depends on the actual pre-entry readings and the conditions for that particular entry. (McDonough Dep. 88-92; R. Br. 13). Additionally, Angelica's expert witness, Mr. Malter, confirmed that the frequency of testing in a CBW will be determined by the circumstances of that particular entry. (Malter Dep. 87-89.)

To support her position that Angelica's program is inadequate, the Secretary relies on CO Rawson's testimony. (S. Br. 42-43). However, CO Rawson admitted that the standard does not require a particular testing frequency and that she did not know if the frequency used by Angelica was adequate for a confined space entry. She also acknowledged that this is a performance-based requirement and that an employer is expected to design a process that works for its particular circumstances. (Rawson Dep. 160-62). I find that the Secretary has not shown

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<sup>48</sup> The Secretary also notes that the valves feeding the CBW were not labeled and Angelica's written procedures did not tell an employee the location of each valve. (S. Br. 41). Mr. McDonough testified that employees knew the valves' locations based on training and experience. (McDonough Dep. 115-19). I find that the Secretary has not shown why Angelica's written instructions, when coupled with its on-the-job training, were insufficient.

<sup>49</sup> In view of my disposition of this instance, it is not necessary to address whether the interpretation letter, which deals with solenoid valves that cannot be locked out, would apply to this instance.

that Angelica's confined spaces program had an inadequate procedure for ongoing atmospheric testing. This instance is vacated.

Based on the foregoing, Item 2(b) of Citation 1 is vacated.

**Citation 1, Item 3**

Item 3 alleges a repeat violation of 29 C.F.R. § 1910.146(d)(4)(i), which states that an employer must:

(4) Provide the following equipment (specified in paragraphs (d)(4)(i) through (d)(4)(ix) of this section) at no cost to employees, maintain that equipment properly, and ensure that employees use that equipment properly: (i) Testing and monitoring equipment needed to comply with paragraph (d)(5) of this section.

The parties have stipulated that the CBW is a permit required confined space that could be entered to clear a jam or for other maintenance. (Stip. Facts 27-28). The Secretary alleges that Angelica did not properly maintain the PHD Plus Atmospheric Monitor ("PHD monitor" or "meter"). (S. Br. 43). The PHD monitor is used to test for a potentially hazardous atmosphere in a CBW confined space entry.<sup>50</sup> (Stip. Fact 56). The parties stipulated that the manufacturer recommends that the meter be calibrated no more than a month prior to its use. (Stip. Fact 57). The gas used to calibrate the meter at Angelica's facility expired prior to 2007 – more than 18 months before the inspection. (See Stip. Fact 60).

Angelica asserts this item should be vacated because there was no entry into the CBW, and therefore no exposure, in the six months before the citation. (R. Br. 14). However, as discussed above, the Secretary need only show that employees could be exposed to the hazard in the normal course of their duties. Here, employees could enter a CBW to clear a jam or for other maintenance. (Stip. Fact 28). The Secretary has shown potential employee exposure.

Angelica also argues that this item should be vacated because there is no proof the expired calibration gas was defective. (R. Br. 14). However, Angelica's own witness, Mr. Malter, testified that he would not recommend the use of expired calibration gas to his clients. He further testified that expired calibration gas could result in an inaccurate reading for certain atmospheric gases, while providing an accurate reading for other gases. (Malter Dep. 123-26). Angelica's argument that expired calibration gas was acceptable is rejected.

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<sup>50</sup> 29 C.F.R. § 1910.146(d)(5) requires, in pertinent part: "Evaluate permit space conditions as follows when entry operations are conducted: (i) Test conditions in the permit required space to determine if acceptable entry conditions exist . . . ."

This case is analogous to *Suttles Truck Leasing, Inc.*, 20 BNA OSHC 1953, 1970 (Nos. 97-0945 & 97-0546, 2004). In *Suttles*, the employer did not provide a calibration kit for its combustible gas meter. *Id.* The Commission stated that “[b]ecause it is clear from the standard that testing equipment must be properly calibrated, we find that Suttles violated the standard by not having the capability to calibrate its meter.” *Id.* Based on the record, I conclude that Angelica did not properly maintain its monitoring equipment for use in a confined space entry. This citation item is affirmed. The penalty for this item is addressed below.

**Citation 1, Item 4(a)**

This item alleges a serious violation of 29 C.F.R. § 1910.146(f)(6), which states:

(f) *Entry permit.* The entry permit that documents compliance with this section and authorizes entry to a permit space shall identify:

....

(6) The individual, by name, currently serving as entry supervisor,<sup>51</sup> with a space for the signature or initials of the entry supervisor who originally authorized entry;

The Secretary argues that an entry permit form must have two spaces -- one for the supervisor who authorizes the entry and another for the person currently serving as the entry supervisor. (S. Br. at 50-51.) The Secretary relies on the two sample permits at Appendix D of the confined spaces standard to support her position. *Id.* The note to 29 C.F.R. § 1910.146(e)(1) states that Appendix D includes “examples of permits whose elements are considered to comply with the requirements of this section.” 29 C.F.R. § 1910.146. The Secretary asserts that Angelica’s forms provided a space for the authorizing party’s signature, but did not provide a place to list the supervisor overseeing the entry. (S. Br. 51).

The parties have stipulated that Exhibit 9 to the Malter deposition and Exhibit 3 to the McDonough deposition were accurate representations of Angelica’s CBW and Non-CBW entry permit forms. (Stip. Fact 62, 64.) Both permit forms included an instruction that “[t]his permit

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<sup>51</sup> *Entry supervisor* means the person (such as the employer, foreman, or crew chief) responsible for determining if acceptable entry conditions are present at a permit space where entry is planned, for authorizing entry and overseeing entry operations, and for terminating entry as required by this section. NOTE: An entry supervisor also may serve as an attendant or as an authorized entrant, as long as that person is trained and equipped as required by this section for each role he or she fills. Also, the duties of entry supervisor may be passed from one individual to another during the course of an entry operation. 29 C.F.R. § 1910.146(b).

shall be issued by the Safety Coordinator or trained designee.” (McDonough Exh. 3 at Appendices C & D). Both of Angelica’s permits included a space for the following: “Entrant,” “Attendant,” “Entry Supervisor Signature,” “Permit Issuer Signature,” and “Safety Coordinator’s or Designee’s Signature.” *Id.*

I have reviewed Appendix D’s sample permits. Sample D-1 includes spaces for the “Job Supervisor,” the “Supervisor” preparing the permit, and the “Unit Supervisor” approving the permit. Sample D-2 includes spaces for the “Supervisor(s) in charge of crews” and “Supervisor Authorization.” Neither of the sample forms uses the title “entry supervisor” on the form. See Appendix D, 29 C.F.R. § 1910.146.

I have compared Angelica’s entry permit forms to Appendix D’s sample forms. I find that Angelica’s permit forms include a space to identify the entry supervisor – “Entry Supervisor Signature.” (McDonough Exh. 3; Malter Exh. 9). I further find that Angelica’s permit form is functionally similar to the sample forms. Appendix D’s sample forms demonstrate that a particular job title is not required on the permit form and that there is more than one way to design a compliant entry permit form. Therefore, contrary to the Secretary’s allegation, Angelica’s entry permit form does provide a space to identify the person currently serving as entry supervisor.<sup>52</sup> This citation item is vacated.

**Citation 1, Item 4(b)**

This item alleges a serious violation of 29 C.F.R. § 1910.146(f)(10), which states:

(f) *Entry permit.* The entry permit that documents compliance with this section and authorizes entry to a permit space shall identify:

\* \* \*

(10) The results of initial and periodic tests performed under paragraph (d)(5) of this section, accompanied by the names or initials of the testers and by an indication of when the tests were performed . . . .

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<sup>52</sup> It seems the Secretary may also be arguing that Angelica’s permit is not compliant because it only shows a space for a signature and not an additional space for a printed name. (S. Br. 50-51). However, this is not required by the plain language of the cited standard. It requires that the individual be identified – a signature could meet that requirement. Additionally, I note that Sample D-2 of Appendix D does not provide a separate space for the printed name and a signature, nor does it specify whether a name appear in printed form or as a signature.

The Secretary alleges that Angelica's permit form did not identify the names or initials of the person conducting atmospheric tests. The Secretary argues an additional space is required on the form. (S. Br. 51-52).

As discussed above, Angelica's permit form includes labeled spaces for the entrant, attendant, and entry supervisor. (McDonough Exh. 3). Mr. McDonough testified that testing could be done by either the entrant, attendant, or entry supervisor, because they were all trained to conduct atmospheric testing. (McDonough Dep. 87-88). CO Rawson confirmed that during her investigation she was told the entry supervisor conducted the testing. She also acknowledged that the entrant or attendant could be a tester. (Rawson Dep. 183-84). Angelica argues that since one of the three individuals identified on the form conducts the atmospheric testing, the form meets the requirements of the standard. (R. Br. 15).

The Secretary points to the standard's preamble as evidence that the tester must be separately identified on the permit form to provide the necessary accountability for testing.<sup>53</sup> (S. Br. 52). The preamble does highlight the need to identify the person conducting the testing to promote "individual responsibility." However, it does not state an additional space is necessary on the permit form.

As discussed above, the sample forms demonstrate there is more than one way to design an entry permit form. Here, the party that will conduct the testing (entrant, attendant, or entry supervisor) is identified on Angelica's entry permit form. While Angelica's form may not be the ideal, the terms of the standard are performance-based and allow an employer some latitude in structuring its permit form. I find that the Secretary has not shown by a preponderance of the evidence that Angelica did not comply with the standard's requirements. This item is vacated.

**Citation 1, Item 5**

Item 5 alleges a serious violation of 29 C.F.R. § 1910.146(g)(3), which states:

(3) The training shall establish employee proficiency in the duties required by this section and shall introduce new or revised procedures, as necessary, for compliance with this section.

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<sup>53</sup> "In issuing its final rule, OSHA determined that the identity of the person conducting the testing provides a vital accountability function of promoting 'individual responsibility' for testing functions." 58 Fed. Reg. 4,462, 4,506 (Jan. 14, 1993).



The Secretary alleges that Angelica's training was required to provide an employee with the information and understanding needed for the specific duties assigned (as entrant, attendant, or entry supervisor). (S. Br. 54). She sets out three instances to support a violation of the standard's requirements: a) the training for authorized entrants did not provide adequate information concerning the hazards of the CBWs or atmospheric testing procedures and equipment for the CBW; b) the training for attendants did not provide sufficient information to timely summon qualified rescue services; c) the training for entry supervisors did not establish proficiency in calibrating the atmospheric testing equipment or completing entry permits.

The Commission has held that if the employer shows "that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided." *Trinity Indus., Inc.*, 20 BNA OSHC 1051, 1063 (No. 95-1597, 2003), *petition for review denied*, 107 Fed. App'x 387, 2004 WL 1663604, (5<sup>th</sup> Cir. 2004) (citations omitted). The parties have stipulated that Angelica's confined space training program included training at the time of hire, classroom training, on-the-job training and video-based training. (Stip. Fact 78). Because Angelica does have a training program, the Secretary must provide evidence of its deficiencies.

The Secretary relies on CO Rawson's testimony to support the allegation of inadequate training. (S. Br. 56). CO Rawson testified that her conclusions were based on employee interviews, a review of Angelica's training documents, and completed entry permits. (Rawson Dep. 377-80). The Secretary asserts Angelica's video-based training was insufficient because it was not tailored to Angelica's facility. (S. Br. 56). The description for the training video notes that it includes training on confined space hazards, atmospheric testing and team responsibilities. (Rawson Exh. 15). Mr. McDonough testified that the training videos included information about atmospheric testing and the hazards in a confined space. He further testified that the videos were available for CO Rawson to view but she did not ask to watch them. (McDonough Dep. 299-32).

### Training for Authorized Entrants<sup>54</sup>

The Secretary alleges that Angelica did not train its authorized entrants about the hazards of the CBW and that the video training was not facility-specific.<sup>55</sup> (S. Br. 56). First, there is no requirement in the cited standard that Angelica's video-based training must be tailored to its own facility. Further, the video training is just one component of Angelica's training program. I find that the Secretary has not established that Angelica's video training was inadequate.

Next, the CO's testimony did not provide any information about which employees she interviewed, the questions she asked these employees, or their specific answers. Further, the following is included in Angelica's written training materials for authorized entrants:

During this training session, your duties as a permit-required confined space entrant are outlined as well as the hazards which you may encounter while working in the confined space. Also, you will learn about the entry permit, the communication system during an entry, and the rescue and emergency procedures.

(Rawson Exh. 16). This excerpt illustrates that Angelica's training plan covered the potential hazards for entrants.

Based on the record evidence, I conclude that Angelica's training program for authorized entrants was multi-faceted and appeared to cover the required subject matter. The Secretary has not presented adequate evidence to show that Angelica's overall training program for authorized entrants was inadequate. This instance is vacated.

### Training for Attendants

The standard requires an attendant to "[s]ummon rescue and other emergency services as soon as the attendant determines that authorized entrants may need assistance to escape from

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<sup>54</sup> "*Duties of authorized entrants*. The employer shall ensure that all authorized entrants: (1) Know the hazards that may be faced during entry, including information on the mode, signs or symptoms, and consequences of the exposure; (2) Properly use equipment as required by paragraph (d)(4) of this section . . . ." 29 C.F.R. § 1910.146(h).

<sup>55</sup> The Secretary also alleges that authorized entrants were not provided sufficient information about the requirements for atmospheric testing. (S. Br. 56). Because the Secretary is unclear about which requirements she is referring to, I will not address this allegation. Further, if the Secretary is referring to lack of training in the use of atmospheric testing equipment itself, no evidence was provided this was a normal duty for an authorized entrant. To the contrary, provisions in the confined spaces standard imply that a party other than the entrant could conduct the testing. See 29 C.F.R. §§ 1910.146(c)(5)(ii)(C) and 1910.146(d)(3)(ii).

permit space hazards.” 29 C.F.R. § 1910.146(i)(7). The Secretary alleges that Angelica’s training was inadequate because it did not train attendants to timely summon qualified rescue services.

The Secretary argues that because “Angelica had failed to develop the appropriate rescue procedures, Respondent clearly could not have trained its employees on these procedures.”<sup>56</sup> (S. Br. 58). As noted above, Angelica has a multi-faceted training program. Training of attendants is a part of that program. (McDonough Exh. 3-4). The record shows that Angelica trained its attendants to summon rescue by dialing 911, in accordance with its rescue plan. (McDonough Dep. 149-50). I find this meets the standard’s requirement to summon emergency services as soon as the attendant determines an entrant needs assistance. This instance is vacated.

#### Training for Entry Supervisors

The Secretary alleges that the training for entry supervisors was inadequate because it did not establish proficiency in calibrating the atmospheric testing equipment or in ensuring entry permits were completed.<sup>57</sup> (S. Br. 58; Rawson Dep. 378). To the contrary, the CO’s testimony shows that Mr. Barnes, the maintenance manager, did know how to calibrate the PHD monitor. (Rawson Dep. 378). The Secretary has provided no additional evidence to support her allegation that entry supervisors were not proficient in the calibration of atmospheric testing equipment, and what she has presented is not persuasive.<sup>58</sup>

To illustrate that permits were improperly completed, and to show a lack of proficiency in training, the Secretary points to several completed entry permits that she alleges lack information related to atmospheric testing or an entry supervisor’s signature. (S. Br. 59; Rawson

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<sup>56</sup> Citation 1, Items 6(a)-6(c), discussed below, address the content of Angelica’s rescue plan.

<sup>57</sup> The duties for an entry supervisor are set forth at 29 C.F.R. § 1910.146(j).

<sup>58</sup> Mr. McDonough testified that he believed employees had demonstrated proficiency because three employees successfully demonstrated use of the PHD monitor to him. (McDonough Dep. 145). The Secretary asserts that Mr. McDonough’s deposition testimony about these three employees is irrelevant because this demonstration was conducted after the inspection and after additional training had been provided to employees. (S. Br. 56). To support this contention, the Secretary notes that Mr. McDonough began his employment after the start of OSHA’s inspection. *Id.* However, the Citation lists this violation as occurring “on or about June 12, 2008.” (Rawson Exh. 14). Mr. McDonough began his employment with Angelica on June 10, 2008. (McDonough Dep. 37). Because this is the only evidence the Secretary presents to dispute the validity of McDonough’s testimony, I find the Secretary’s argument unpersuasive.

Ex. 12; Malter Ex. 9). Eight permits were completed in 2006, and one was completed in 2007. (Rawson Exh. 12; Malter Exh. 9).

I have reviewed these forms and find there is some variation in how each was filled out. However, the Secretary did not describe why a particular permit was incomplete for its related confined space entry. Further, the Secretary did not explain how the forms and training that were in place in 2006 and 2007 were applicable to the training and procedures in effect at the time of the inspection.<sup>59</sup> I conclude that the Secretary has not demonstrated that Angelica's training for entry supervisors was inadequate. This instance is vacated. As all three instances have been vacated, Item 5 is vacated.

**Citation 1, Items 6(a) through 6(c)**

These items allege deficiencies in Angelica's rescue and emergency services plan. The parties have stipulated that when a rescue is needed, Angelica's contacts the Ballston Spa Fire Department ("BSFD") by calling 911. Angelica relies on the BSFD for rescue services as none of its employees are expected to or trained to perform a confined space rescue. The BSFD is about 100 yards from the facility. The BSFD visited Angelica's facility in 2001 (approximately) to evaluate confined space operations. At least once a year, the BSFD conducted drills at Angelica's facility to ensure they were able to respond to an emergency. (Stip. Facts 65-70).

Additionally, the parties stipulated that the BSFD did not have a qualified confined space rescue team and could not make a rescue to retrieve a downed entrant. Rather, the BSFD would call for assistance from either Colonie or Schuylerville, which did have confined space rescue teams. (Stip. Fact 70.) To support this stipulation, the parties refer to CO Rawson's testimony. (Stip. Fact 70; Rawson Dep. 208, 213). I find this stipulation to be somewhat mischaracterized. The deposition shows that CO Rawson testified that the BSFD would not *enter* a confined space for rescue, but would instead cut into the CBW to retrieve the downed entrant. She also testified that if entry rescue was needed, the BSFD would call in either Colonie or Schuylerville. (Rawson Dep. 208-213). The following is from CO Rawson's deposition testimony.

Q. Is it your understanding that the [BSFD] is still -- well, strike that. Is it your understanding that at the present time that the [BSFD] is intending to provide rescue services, that was the import of your conversation with Chief Bowers?

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<sup>59</sup> Additionally, the Secretary relies on CO Rawson's conclusion, based on employee interviews, that training was insufficient for Angelica's entry supervisors. (S. Br. 59). The Secretary did not provide evidence to support CO Rawson's conclusion.

A. The [BSFD] cannot make an entry rescue into the CBW because it does not have people that are qualified for confined space entry.

Q. That's the not the question I asked. Let's try it again. Do you have, based upon your communication with Chief Bowers, it's your understanding that the [BSFD] is going to respond -- let's try it that way -- is going to respond in the event that they are told that it's necessary for a rescue to occur from a confined space?

A. Yes.

Q. And is it your understanding that *they are going to conduct that rescue by cutting through the side of the CBW and retrieving the employee that way?*

A. That was my last discussion with him, yes.

Q. So there's two ways that you can do the rescue. You can go into the CBW, the [BSFD] can go in and they can take the employee out, is that right? That's one way to do it?

A. Or you could have a retrieval system to pull the person out, to make a nonentry rescue.

Q. And it's your understanding that today, the [BSFD], if called at least as indicated to you, they will respond and they will do a retrieval from the outside, is that correct?

A. That's the only way they can retrieve somebody.

Q. That's your understanding about what they will do, is that correct?

A. Right. Can I answer that?

Q. If you're done with your answer, no. If you're not done with your answer, yes.

A. What I'd like to add to that is [BSFD] has indicated if they need additional support they would call Mutual Aid through Saratoga County, that Mutual Aid can take as long as 30 minutes to come because they would pull it from either the Town of Colony or Town of Schuylerville which has confined space rescue training teams.

[Emphasis added].

(Rawson Dep. 208-09, 212-13). The Secretary alleges that Angelica did not properly evaluate its designated rescue service's proficiency or its ability to respond in a timely manner. She also alleges Angelica did not provide the BSFD access to its facility. Her allegations are addressed below.

Citation 1, Item 6(a)

Item 6(a) alleges a serious violation of 29 C.F.R. § 1910.146(k)(1)(i), which states:

(k) *Rescue and emergency services.* (1) An employer who designates rescue and emergency services, pursuant to paragraph (d)(9) of this section, shall: (i) Evaluate a prospective rescuer's ability to respond to a rescue summons in a *timely manner*, considering the hazard(s) identified. [Emphasis added].

The Secretary alleges that Angelica did not evaluate the local fire department's ability to timely respond to a rescue summons. She asserts that rescue must be available in a very short period of time based on the hazards at Angelica's facility. (S. Br. 63-64). Nonetheless, the

Secretary did not cite Angelica for improper selection of a rescue team; instead, she alleges that Angelica did not conduct the required evaluation.<sup>60</sup>

CO Rawson admitted that an Angelica management employee told her that Angelica had contacted the BSFD to provide rescue services. (Rawson Dep. 215-16). Because the BSFD was located within 100 yards of Angelica's facility, I find that Angelica did not need to conduct a detailed study to determine that the BSFD's response would be timely.

The Secretary further alleges that Angelica's confined space program did not require contact with the BSFD to verify its availability before each confined space entry. (S. Br. 62-63). This is an inaccurate assessment by the Secretary. Angelica's plan required calling the fire department prior to each confined space entry, as illustrated by both its written procedure and the entry permit form. (McDonough Exh. 3, pp. 15, 18). Angelica's procedure states that "[t]he plant will utilize the local Fire Department as the confined space rescue team. The local Fire Department has been contacted and agrees to perform rescue in the event one is needed." (McDonough Exh. 3, p. 15). The permit form asks if the fire department has been made aware of the entry. If the answer is no, then entry is not allowed. (McDonough Exh. 3, p. 18). I find that Angelica's program does require contact with the BSFD prior to each entry.

The Secretary has not established that Angelica did not evaluate the designated rescue team's timeliness. Item 6(a) is vacated.

Citation 1, Item 6(b)

This item alleges a serious violation of 29 C.F.R. § 1910.146(k)(1)(ii), which states:

(k) *Rescue and emergency services.* (1) An employer who designates rescue and emergency services, pursuant to paragraph (d)(9) of this section, shall:

....

(ii) Evaluate a prospective rescue service's ability, in terms of *proficiency with rescue-related tasks* and equipment to function appropriately while rescuing entrants from the particular permit space or types of permit spaces identified; . . . .  
[Emphasis added].

The Secretary alleges that Angelica did not conduct a "meaningful evaluation" of the BSFD's proficiency with rescue-related tasks and equipment before its designation as Angelica's

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<sup>60</sup> 29 C.F.R. § 1910.146(k)(1)(iii) provides, in pertinent part: "(iii) Select a rescue team or service from those evaluated that: (A) Has the capability to reach the victim(s) within a time frame that is appropriate for the permit space hazard(s) identified; (B) Is equipped for and proficient in performing the needed rescue services . . . ."

rescue and emergency service.<sup>61</sup> She additionally alleges that because the BSFD would rescue an entrant by cutting into the CBW, instead of utilizing a retrieval system, Angelica did not conduct a proper evaluation. (S. Br. 65-67).

The Secretary is focused on what she believes is an inadequate method of rescue. She did not provide persuasive evidence that the BSFD's method of rescue was inadequate. Further, as noted above, Angelica had contacted the BSFD about using its rescue services, the BSFD had visited the facility, and the BSFD conducted drills prior to the OSHA inspection. The Secretary has not shown by a preponderance of the evidence that Angelica did not evaluate the designated rescue team's proficiency. Item 6(b) is vacated.

Citation 1, Item 6(c)

Item 6(c) alleges a serious violation of 29 C.F.R. § 1910.146(k)(1)(v), which states:

(k) *Rescue and emergency services.* (1) An employer who designates rescue and emergency services, pursuant to paragraph (d)(9) of this section, shall:

....

(v) Provide the rescue team or service selected with *access to all permit spaces* from which rescue service may be necessary so that the rescue service can develop appropriate rescue plans and practice rescue operations. [Emphasis added].

The Secretary alleges that Angelica did not provide the BSFD access to its permit spaces. However, the parties stipulated that the BSFD visited Angelica's facility in 2001 and conducted annual drills thereafter. (Stip. Fact. 70). Additionally, CO Rawson admitted that she had no evidence that Angelica did not provide access to the BSFD. (Rawson Dep. 222). I find that Angelica did provide access to the BSFD. Item 6(c) is vacated.

Citation 1, Item 7

This item alleges a serious violation of 29 C.F.R. § 1910.147(c)(4)(i), which states:

(4) *Energy control procedure.* (i) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

The Secretary alleges that Angelica did not enforce the procedures that protect employees from unexpected shuttle movement. (S. Br. 101). Angelica had a policy for employees entering

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<sup>61</sup> The CO's testimony as to what she learned about the BSFD's ability to retrieve an entrant is set out above.

the wash area to perform service and maintenance. (McDonough Exh. 5, 7 (SYF-1050, *Lockout/Tagout Program* and SYF-1060, *Shuttle Safety*)). This policy required lockout for work on shuttle equipment. It also required an employee to either lock out or use a watch person for work on non-shuttle equipment in the wash area. (McDonough Exh. 7). The Secretary offers three examples of how Angelica did not enforce these procedures: resetting the fire eyes on the dryers, clearing blockages in the press, and servicing the co-bucket shuttle. (S. Br. 86).

The parties have stipulated that an employee would enter the wash alley to reignite a fire eye. (Stip. Fact. 31). The Secretary alleges that an employee could be exposed to a moving shuttle when entering the wash area to reignite the dryers' fire eyes. (S. Br. 90). Evidence was not presented to show when or how often an employee needed to reignite a fire eye.<sup>62</sup> Evidence was also not presented to show the method an employee used to reignite a fire eye. Because the Secretary has not offered sufficient information about the process used by Angelica's employees to reignite the fire eyes, I am unable to determine whether Angelica enforced its procedures. The Secretary has not proven this first example.

The Secretary's second example is that Angelica did not enforce its procedures when employees were required to clear a blockage in the laundry press. (S. Br. 86). No evidence was presented to show when or how often this could occur, and no evidence was presented to show whether this had ever been done or was expected to be done at the facility.

The Secretary relies on Mr. Malter's testimony to support her position that an employee might need to clear a blockage in the laundry press. (S. Br. 94; Malter Dep. 140). However, a review of Mr. Malter's deposition testimony shows that he actually said:

I don't know specifically how they [Angelica] use it, but in hydraulic presses, sometimes materials being fed into it will need to be moved around. And that's – but again, I don't know specifically in this. That would be my assumption. If somebody told me there was a press block, I would say the material didn't properly feed either in or out of the press and had to be manually shifted.

(Malter Dep. 140). As the excerpt shows, Mr. Malter was speculating generally about a blockage in a press; he was not commenting about Angelica's actual practice. Insufficient

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<sup>62</sup> The Secretary offered a hand-drawn diagram of the fenced wash area to show exposure. (McDonough Exh. 2). However, she does not describe the path an employee would travel or his proximity to a moving shuttle. This diagram, therefore, was not helpful to resolve this citation item.



evidence was presented to establish that Angelica did not enforce its lockout procedures when an employee would clear a blockage in the press. The Secretary did not prove the second example.

As to the third example, CO Rawson testified that she saw an employee, Mr. Thomas, enter the fenced wash area to reset the co-bucket shuttle. The CO stated that Mr. Thomas entered the wash area through gate 2 (a padlocked gate) and then exited about 15 minutes later. (Rawson Dep. 238). The CO admitted that she lost sight of him after he walked through the gate and that she did not see whether he was near moving equipment. (Rawson Dep. 238-40).

To prove that a machine may become unexpectedly energized, “[t]he Secretary must show that there is some way in which the particular machine could energize, start up, or release stored energy without *sufficient advance warning* to the employee.” *General Motors Corp.*, 17 BNA OSHC 1217, 1220-21 (Nos. 91-2973, 91-3116 & 91-3117, 1995) (emphasis added), *aff’d*, 89 F.3d 313 (6<sup>th</sup> Cir. 1995) (“*GM I*”). In *GM I*, the employer used an eight to twelve-step series of commands to reactivate the equipment and, prior to the restart, alarm warnings would sound to provide an employee time to avoid hazardous movement of the equipment. *Id.* The Commission found that this was sufficient to demonstrate that there was no unexpected energization. *Id.*

Here, the Secretary provided evidence that an employee, Mr. Thomas, entered the wash area to restart the co-bucket shuttle.<sup>63</sup> The record shows that the shuttle was shut down and in manual mode when Mr. Thomas entered the wash area. (Rawson Dep. 243). It also shows that, before the shuttle could be activated by an operator outside the wash area, an employee had to push a directional switch on the co-bucket shuttle itself to return it to automatic mode. (McDonough Dep. 193-96). Then, the operator (outside the fenced wash area) had to answer several question on the control panel before the shuttle would reactivate. When the operator put the shuttle back into operation, an alarm sounded, with a one-minute delay prior to shuttle reactivation. *Id.* This is analogous to the process in *GM I*, where the Commission found an employee was given sufficient warning. However, the Secretary asserts that the one-minute delay between the sounding of the alarm and the restart of the machine was too brief and that the

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<sup>63</sup> The Secretary provided a hand-drawn diagram of the fenced wash area; the diagram, however, does not include the distance between machines and the employee’s path of travel to demonstrate exposure to moving equipment. (See McDonough Exh. 2).

re-energization process was less complex than the one found sufficient in the *GM I* decision. I disagree.

I find the Secretary has not shown by a preponderance of the evidence that resetting the co-bucket shuttle exposed Mr. Thomas to the unexpected energization of equipment in the wash area. Mr. Thomas had advance warning of the co-bucket shuttle's reactivation, and no evidence was presented to demonstrate that other equipment in the wash area presented an unexpected energization hazard to Mr. Thomas. The Secretary has not proven the third example.

Based on the foregoing, Item 7 is vacated.

**Citation 1, Item 8**

This item alleges a repeat violation of 29 C.F.R. § 1910.147(c)(4)(ii), which states:

(ii) The procedures shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance including, but not limited to, the following: (A) A specific statement of the intended use of the procedure; (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy; (C) Specific procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them; and (D) Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.

The Secretary alleges that Angelica's lockout procedures did not sufficiently detail all of the specific procedural steps needed to control hazardous energy during maintenance or servicing activities.<sup>64</sup> The Secretary relies on the Commission's *Drexel* decision to support her contention that Angelica's lockout procedure lacked the necessary detail. *Drexel Chem. Co.*, 17 BNA OSHC 1909 (No. 94-1460, 1997). In *Drexel*, the employer did not have a procedure customized to its own machines and processes; instead, its lockout procedure was based on, without modification, the standard's sample in Appendix A. *Id.* at 1913. The Commission found that these generic procedures did not provide the information an employee would need to lockout a machine. *Id.* Further, the Commission stated that the purpose of the lockout procedure is to

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<sup>64</sup> The Secretary points to CO Rawson's testimony that Angelica's procedures were too general. (S. Br. 111). In her testimony, the CO said she learned, through employee interviews, that the lockout methods varied from one employee to another. (Rawson Dep. 270). However, there was no evidence indicating the nature of the questions asked, the answers, or how the answers varied. Further, the CO admitted she did not ask the employees to perform a lockout using Angelica's written procedures. (Rawson Dep. 269-271). I find the CO's testimony unpersuasive.

“guide an employee” through the process. *Id.* However, the facts of *Drexel* are not analogous to those here. Angelica’s procedures included both a general lockout procedure which applied to all its equipment and supplemental machine-specific lockout surveys. (McDonough Exh. 5-10). I find that Angelica’s procedures do not resemble the short generic procedure in *Drexel*.

Commission precedent holds that the required specificity for lockout procedures is evaluated according to a machine’s complexity. *General Motors Corp.*, 22 BNA OSHC 1019, 1026-27 (Nos. 91-2834E & 91-2950, 2007) (“*GM I*”). In that case, the Commission noted that the lockout standard’s preamble indicates that a lockout procedure should outline the steps to follow and that the amount of detail is relative to the equipment’s complexity. *GM II* at 1025-27 (citing to the preamble).<sup>65</sup> The Commission also noted that the procedure should be a “guide” for an employee performing lockout. *Id.* at 1026 (citing to *Drexel* at 1913). The Commission found that the machinery in *GM II* was too complex for the company’s generic three-page lockout procedure. To illustrate the level of the machinery’s complexity, the Commission observed that one of the machines contained “15 or 16 automatics, 65 weld guns, probably 300 limit switches [and] over 150 disconnects.” *GM II* at 1027.

Angelica argues that its lockout procedures are sufficiently detailed and notes that OSHA issued an interpretive letter in 2006 that supports its position.<sup>66</sup> (R. Br. 21-22). The letter states

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<sup>65</sup> The preamble to the final rule for the LOTO standard sets out the following. “In this final standard, OSHA has retained the word “specific” when detailing the elements of the procedure. This was done to emphasize the need to have a detailed procedure, one which clearly and specifically outlines the steps to be followed. Overgeneralization can result in a document which has little or no utility to the employee who must follow the procedure. However, whereas the procedure is required to be written in detail, this does not mean that a separate procedure must be written for each and every machine or piece of equipment. . . . The written energy control procedure required by this standard need not be overly complicated or detailed, depending on the complexity of the equipment and the control measures to be utilized.” 54 Fed. Reg. 36,644, 36,670 (Sept. 1, 1989).

<sup>66</sup> The Secretary asserts that Mr. Malter, Angelica’s expert, found that Angelica’s lockout procedures for the press and shuttles were not sufficiently detailed. (S. Br. 104). However, a review of Mr. Malter’s testimony shows that he was referring only to the shuttles, not the press; in particular, he indicated he had not seen specific procedures for the shuttles in the information he reviewed. (Malter Dep. 175-78). I have reviewed the exhibits attached to Mr. Malter’s deposition and find that the lockout/tagout surveys specific to the shuttles were not included. I find, therefore, that the information Mr. Malter reviewed was incomplete and do not credit his opinion related to the lockout procedures for the shuttles.

that lockout procedure must have “sufficient information to provide employees with adequate direction such that employees effectively can follow the procedure and safely perform the servicing and maintenance activities.”<sup>67</sup> The letter also states that one way an employer can comply with the requirements of the standard is to have a general procedure that is supplemented by information for each machine. *Id.* This is consistent with Commission precedent, which holds that a lockout procedure is a guide that is evaluated according to a machine’s complexity.

I find that Angelica’s procedures include multiple steps which outline a general lockout procedure plus information specific to each machine.<sup>68</sup> This is quite different than *GM II*’s generic three-page procedure coupled with its highly complex machinery. The Secretary did not provide evidence to establish that Angelica’s machines were so complex that its procedures were an inadequate guide for its employees to use to perform a lockout. The Secretary thus has not met her burden of proving that Angelica’s lockout procedures were inadequate. Item 8 is vacated.

**Citation 1, Item 9**

Item 9 alleges a repeat violation of 29 C.F.R. § 1910.147(c)(7)(i), which states:

(c)(7) Training and communication. (i) The employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees. The training shall include the following: (A) Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control. (B) Each affected employee shall be instructed in the purpose and use of the energy control procedure. (C) All other employees whose work operations are or may be in an area where energy control procedures may be utilized, shall be instructed about the procedure, and about the prohibition relating to attempts to restart or reenergize machines or equipment which are locked out or tagged out.

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<sup>67</sup> See

[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=25576](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25576).

<sup>68</sup> Angelica’s program consists of: a ten-page general step-by-step lockout procedure; a three-page shuttle safety procedure, which includes lockout; an eight-page overview of the lockout program; a six-page document specific to the CBW; and, finally, the lockout surveys for each particular machine. (Stip. Fact 47; McDonough Exh. 5-10).

The basis for evaluating an alleged violation of a training standard was discussed above in Item 5. To reiterate, if the employer has demonstrated that it provides training, the Secretary must show that the training was deficient. The parties have stipulated that Angelica provides initial hire, classroom, on-the-job, and video-based training to its employees as a part of its lockout program. (Stip. Fact 79). Further, CO Rawson testified that all pertinent employees received lockout training. (Rawson Dep. 280-97, R. Br. 23).

The Secretary asserts that because Angelica's energy control program was inadequate, the training for employees must also be inadequate.<sup>69</sup> (S. Br. 114). This argument fails because, as stipulated, Angelica's training program was broader than its written procedures. (See Stip. Fact 79). She also asserts that lockout training was inadequate based on CO Rawson's conclusion that Angelica's employees used different lockout methods.<sup>70</sup> (S. Br. 114). However, CO Rawson admitted that she based her conclusion about inadequate training on employee interviews, and that she did not ask employees to demonstrate the lockout process.<sup>71</sup> (R. Br. 22; Rawson Dep. 289-90).

I find that the Secretary's evidence was insufficient to demonstrate that Angelica's lockout training program was inadequate. This citation item is vacated.

#### **Citation 1, Item 10**

Item 10 alleges a serious violation of 29 C.F.R. § 1910.151(c), which states:

(c) Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

Angelica asserts there was no employee exposure to the cited hazard of contact with sodium hydroxide solution because it required its employees to wear adequate PPE. (See Stip. Facts 80-81). As the Secretary points out, however, the purpose of having a drenching or flushing station for the body and eyes is in the event there is contact with the corrosive material; PPE is provided to prevent contact. (S. Br. 122). I find that the cited standard applies and that

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<sup>69</sup> Instance (b) for this item was withdrawn; it alleged a lack of training for employees cleaning in the wash area.

<sup>70</sup> Item 7, above, addressed whether Angelica's lockout procedures were enforced.

<sup>71</sup> There is no indication that CO Rawson consulted her interview notes during her deposition; she also did not identify the employees she interviewed, and there was no related documentation in the stipulated record.

Angelica's employee, when transferring the sodium hydroxide solution in the facility, was exposed to having the solution contact his skin or eyes.<sup>72</sup>

The Secretary alleges that Angelica's facilities were inadequate because an eyewash station and a safety shower were not provided for immediate emergency use. (S. Br. 122). The Secretary has the burden of showing the facilities Angelica provided were not suitable. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2168 (No. 90-1747, 1994). Commission precedent establishes that the "totality of the relevant circumstances" is evaluated to determine if an employer's drenching or flushing facilities are suitable. *Id.* at 2167-68 (citations omitted). The factors to consider are the nature, strength and amount of the corrosive material, the work area's configuration, and the distance from the facilities to where the corrosive material is used. *Id.* Further, the Commission has held that a "specific linear distance" is not required; rather, the particular circumstances dictate suitability. *Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1325 (Nos. 97-0469 & 97-0470, 2003) (citations omitted).

The record shows that the solution transfer occurred in the boiler room. It also shows that Angelica had an eyewash station that was about 100 feet away (and through a doorway) from the solution transfer point; further, there was a sink in a washroom adjacent to the boiler room and a "drench hose" in the boiler room that was about 20 feet from the transfer point. (Stip. Facts 82-83; S. Br. 125, R. Br. 24; Rawson Dep. 386-387; McDonough Dep. 205-207). The Secretary asserts these were all inadequate, noting that there was no emergency shower or eyewash station in the boiler room, where the transfer took place. (S. Br. 125).

The Secretary points to ANSI Z358.1, a consensus standard, in support of her position that the eyewash station Angelica had was too far away and that the drench hose was not a suitable replacement for an eyewash station or a safety shower. (S. Br. 127). However, the ANSI standard the Secretary refers to has not been incorporated into the cited standard, and, therefore, it cannot be considered to be a requirement of the standard.<sup>73</sup>

The facts in this case compare favorably to those in *Atlantic Battery*. There, the employer had a drench hose in its acid-mixing room which an employee accessed by reaching

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<sup>72</sup> This is the same work activity discussed in Item 1, above. The CO did not observe the solution transfer, instead she interviewed the employee who performed this work; further, Mr. McDonough confirmed that this transfer process occurred. (Rawson Dep. 91-99, 308; McDonough Dep. 203).

<sup>73</sup> I also note that the ANSI standard is not among the documents that are included in the record.

over a conveyor-type apparatus. *Atlantic Battery* at 2167-68. The Commission found that the drench hose was in the work area, and there was no evidence that the conveyor impeded access; there was also no evidence that an eyewash station was the only adequate means to protect an exposed employee. *Id.* at 2168. The Commission found that the Secretary did not prove that the drench hose in Atlantic Battery's acid-mixing room was unsuitable and accordingly vacated that citation item. *Id.* at 2167-68. Here, a drench hose was in the work area, and there was no evidence of an impediment to reach the hose.<sup>74</sup> Further, there was no persuasive evidence that the drench hose was not an adequate means for drenching or flushing. I find the Secretary's assertion, that Angelica's drench hose was inadequate, to be unpersuasive.

The Secretary also relies on *Oberdorfer*, to support her position. There, the employees were handling chlorine gas containers and the flushing station was 75 feet away from the work area. *Oberdorfer* at 1325. The Secretary asserts that since the chemical in Angelica's facility is similar to the one in *Oberdorfer* and the eyewash station is even farther away, this citation item must also be affirmed. (S. Br. 126). *Oberdorfer*, however, is not analogous to this case in several key ways. In that case, employees were required to wear full-face respirators and rubber gloves, the chlorine gas was a "strong acid," and it was the industry standard for a flushing station to be no farther away than 10 feet for a "strong acid." The Commission upheld the citation based on this evidence. *Id.* at 1324-25. Here, there was no evidence to show the sodium hydroxide solution was a "strong acid," such that an eyewash station had to be located within 10 feet of where employees were handling the sodium hydroxide solution. Also, in addition to the eyewash station, Angelica had a drench hose available that was 20 feet from the solution transfer point. I find the Secretary's reliance on *Oberdorfer* to be misplaced.

For all of the reasons above, I conclude that the Secretary has not met her burden of proving that Angelica's drenching and flushing facilities were unsuitable. This item is vacated.

#### **Citation 1, Item 11**

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<sup>74</sup> See *Bridgeport Brass Co.*, 11 BNA OSHC 2255 (No. 82-899, 1984). There, an employee transferring sulfuric acid outside the building had to walk 16 feet to the building's entrance, go through the entrance door, and then walk another 7 feet to the eyewash station. *Id.* at 2256. The Commission found the Secretary did not provide evidence to show that there was an "unreasonable impediment" to reach the location of the eyewash and shower. *Id.* at 2256.

Item 11 alleges a serious violation of 29 C.F.R. § 1910.1030(f)(1)(ii),<sup>75</sup> which states, in pertinent part:

(ii) The employer shall ensure that all medical evaluations and procedures including the hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including prophylaxis, are: (A) Made available at no cost to the employee; (B) Made available to the employee at a reasonable time and place . . . .

The parties have stipulated that some of Angelica's employees were exposed to blood or other potentially infectious materials when laundering textiles. (Stip. Facts 84-85). The two instances asserted as violations of the standard are: (a) Angelica did not compensate newly-hired employees for their time or travel expenses to get the Hepatitis B virus ("HBV") vaccination series; and (b) an employee with a needle-stick injury was required to schedule the final two HBV vaccinations in the series on non-work time without compensation.

The Commission has held that the Secretary's interpretation "requiring employees to be compensated [by the employer] for both the time required for treatment and the travel expenses incurred" is reasonable. *Beverly Healthcare-Hillview*, 21 BNA OSHC 1685, 1686 (Nos. 04-1091 & 04-1092, 2006), *rev'd on other grounds*, 541 F.3d 193 (3rd Cir. 2006). The Commission acknowledged that without such compensation, the "likelihood that an employee will obtain the necessary medical treatment declines." *Id.* at 1686 (citations omitted).

As to the first instance, the Secretary asserts that Angelica violated the standard because it did not compensate its newly-hired employees for time or travel expenses related to the getting the HBV vaccination. (S. Br. 13). The parties have stipulated that newly-hired employees receive training about the HBV vaccine and are given the option to receive the vaccination or sign a waiver. (Stip. Facts 88-91). CO Rawson testified that employees told her they were not compensated for the time spent to get the vaccination. (Rawson Dep. 314). However, the Secretary did not provide evidence of the names of the employees or the dates the vaccinations were received. Further, Mr. McDonough testified that when he was hired by Angelica, he had

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<sup>75</sup> The Citation stated that subparagraph (B) of 29 C.F.R. § 1910.1030(f)(1)(ii) had been violated. In her brief, the Secretary cites to 29 C.F.R. § 1910.1030(f)(1)(ii). (S. Br. 128). Angelica did not object, and the language in the original Citation is consistent with the allegation that a violation occurred because employees incurred expenses when getting the HBV vaccination series. Angelica has thus suffered no prejudice in its defense of this item.



the opportunity to receive his HBV vaccine very near Angelica's facility – as he put it, “right down on the corner.”<sup>76</sup> He also testified that over the years, Angelica had used different strategies to offer the vaccines. (McDonough Dep. 218-20). I find that the CO's testimony, standing alone, is insufficient to establish this instance. Without supporting evidence, *i.e.*, records showing that the employees the CO spoke to had received the HBV vaccination, when they received it, and if they were compensated for their time, the record is inadequate to determine whether newly-hired employees did in fact incur uncompensated expenses when they obtained the HBV vaccination. The Secretary has not met her burden of demonstrating a violation for the cited instance.

As to the second instance, the record establishes that an employee, Mr. W., suffered a needle-stick injury while sorting laundry.<sup>77</sup> (S. Br. 132, McDonough Dep. 212-14; Rawson Dep. 312-13, 316). Mr. McDonough confirmed that Angelica's records showed that on the day of the injury, Mr. W. was compensated for the time he spent to get the first shot in the HBV series. Mr. McDonough, however, could not determine from those records whether Mr. W had been compensated for his time when getting the second shot. Further, he stated that he found no information in the records that Mr. W. was reimbursed for the cost of mileage for either shot. (McDonough Dep. 212-14, 221).

Based on foregoing, I find that Mr. W. was not compensated as required for the expenses he incurred in obtaining his vaccination. The Secretary has demonstrated this instance is a violation and this citation item is affirmed.

### **Serious Characterization**

A violation is classified as serious under section 17(k) of the Act if “there is substantial probability that death or serious physical harm could result.” Commission precedent requires a finding that “a serious injury is the likely result should an accident occur.” *Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000).

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<sup>76</sup> Mr. McDonough began his employment as Angelica's environmental safety and health manager on June 10, 2008, which was five days after OSHA began its inspection. (McDonough Dep. 37, 166).

<sup>77</sup> The exact date of this injury was not provided. However, Mr. McDonough testified that Mr. W. received his second shot in the HBV series in mid-April, about a month after the incident. (McDonough Dep. 214-20).

Items 3 and 11 of Citation 1 have been affirmed, and they are affirmed as serious violations because a serious injury would have been the likely result if an accident had occurred. Regarding Item 3, the manufacturer of the CBW noted that the modules can contain toxic gases which can kill or injure an employee if inhaled. (S. Br. 73; McDonough Exh. 10 at 00193). As discussed above, the use of expired calibration gas could result in an inaccurate atmospheric reading, which could cause serious injury or death. Regarding Item 11, the Commission has acknowledged that the HBV vaccine “is one of the critical ways of preventing the harmful effects of exposure to bloodborne pathogens.” *Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1869 (No. 02-0865, 2007) (citations omitted). The Hepatitis B virus is a pathogen capable of causing serious illness and death. (S. Br. 136; Rawson Dep. 353). The vaccination can protect an employee from contracting HBV and, consequently, a serious or fatal illness.

#### **Repeat Characterization**

A violation may be characterized as repeat under section 17(a) of the Act, 29 U.S.C. § 666(A), if there is a Commission final order against the same employer for a substantially similar violation. *Cagle’s Inc.*, 21 BNA OSHC 1738, 1745 (No. 98-0485, 2006) (citing *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary can prove substantial similarity by showing the employer failed to comply with the same standard as in the prior citation. *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1866 (No. 93-1122, 1996. If the standards are not the same, the Secretary must show the violations are substantially similar or involve similar hazards. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994) (citing *Potlatch* at 1063). Further, the abatement does not have to be similar to uphold a repeat citation. *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005) (finding employer’s argument about different abatement methods lacked merit.)

The Secretary alleges that Item 3 should be characterized as a repeat violation based on a settlement agreement that became a Commission final order on August 15, 2005. The cited standard in the settlement agreement is not the same as the instant citation item. The Secretary relies on a violation of 29 C.F.R. § 1910.146(d)(5) from a prior settlement agreement to establish the repeat characterization of the present violation of 29 C.F.R. § 1910.146(d)(4)(i). (S. Br. 84). She argues that even though there is no description of the violative conduct in that agreement, the description from the originally-issued citation can be used because “it is clear that these [settlement] violations were meant to correspond to the descriptions contained in the original

willful citation item.”<sup>78</sup> (S. Br. 80-81). I cannot make this “leap,” however. The Secretary has the burden of demonstrating that the two violations are “substantially similar.” *See Monitor* at 1594. The settlement’s citation item is generally related to the instant citation item, in that both address the requirements for a confined space entry program.<sup>79</sup> Regardless, they are not the same standard. While the Secretary does not have to show that the facts of both violations are identical, she must provide enough information to convince the undersigned that the violations are substantially similar. *See Id.* Here, she has not done so, and I find that the violations are not substantially similar. This item is not, therefore, properly classified as a repeat violation.

### **Penalty Determination**

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer’s business, the gravity of the violation, the employer’s good faith, and its prior history of violations. In *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993), the Commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. [Citations omitted]. The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. [Citation omitted].

Angelica is a relatively large employer with 250 employees company-wide. Regarding Item 3, the Secretary assessed the gravity as high due to the potential for asphyxiation from the atmospheric hazard. The probability was found to be lesser due to the infrequency of entry into confined spaces. A good faith reduction was applied because of Angelica’s written safety program. (S. Br. 142-44). I find a penalty of \$2,125 to be appropriate for Item 3, upon giving due consideration to all the relevant factors.<sup>80</sup> Regarding Item 11, the Secretary assessed the

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<sup>78</sup> The originally-issued citation alleged a violation of 29 C.F.R. § 1910.146(c)(4); in the settlement agreement, this was changed to a six-item citation of the following: 29 C.F.R. §§ 1910.146(d)(5), 1910.146(d)(3), 1910.146(e)(1), 1910.146(g)(1), 1910.146(d)(9) and 1910.146(d)(14).

<sup>79</sup> It appears the prior violation was based on a lack of a written testing program; the current violation is related to expired gas in a meter. (S. Br. 84).

<sup>80</sup> As noted above, the Secretary amended Item 3 to repeat, but it has been affirmed as serious. The Secretary’s formula for the proposed serious violations in this case was applied to arrive at the penalty of \$2,125.

gravity as medium because the effects of the Hepatitis B virus are sometimes reversible. The probability was determined to be lower because needle-sticks were infrequent. A good faith reduction was also applied to this item, based on Angelica's safety program. (S. Br. 144). I find the proposed penalty of \$1,700 for Item 11 appropriate. Accordingly, a penalty of \$2,125 is assessed for Item 3, and a penalty of \$1,700 is assessed for Item 11.

**Findings of Fact and Conclusions of Law**

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

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1910.132(a), is VACATED.
2. Citation 1, Item 2b, alleging a repeat violations of 29 C.F.R. § 1910.146(d)(3), is VACATED
3. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1910.146(d)(4)(i), is AFFIRMED, and a penalty of \$2,125 is assessed.
4. Citation 1, Items 4a and 4b, alleging serious violations of 29 C.F.R. §§ 1910.146(f)(6) and (f)(10), are VACATED.
5. Citation 1, Item 5, alleging a serious violation of 29 C.F.R. § 1910.146(g)(3), is VACATED.
6. Citation 1, Items 6a, 6b, and 6c, alleging serious violations of 29 C.F.R. §§ 1910.146(k)(1)(i), (ii), and (v), are VACATED.
7. Citation 1, Item 7, alleging a serious violation of 29 C.F.R. § 1910.147(c)(4)(i), is VACATED.
8. Citation 1, Item 8, alleging a repeat violation of 29 C.F.R. § 1910.147(c)(4)(ii), is VACATED.
9. Citation 1, Item 9, alleging a repeat violation of 29 C.F.R. § 1910.147(c)(7)(i), is VACATED.
10. Citation 1, Item 10, alleging a serious violation of 29 C.F.R. § 1910.151(c), is VACATED.
11. Citation 1, Item 11, alleging a serious violation of 29 C.F.R. § 1910.1030(f)(1)(ii), is AFFIRMED, and a penalty of \$1,700 is assessed.

Dated Aug 27, 2012  
Denver, Colorado

/s/  
Hon. John H. Schumacher  
Judge, OSHRC