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

SECRETARY OF LABOR, Complainant, v. ARCTIC GLACIER U.S.A., INC., Respondent.	OSHRC DOCKET No. 16-0450

Appearances: Suzanne Demitrio Campbell, Esq.
U.S. Department of Labor, Office of the Solicitor
New York, New York
For the Complainant

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Washington, D.C.
For the Respondent

Before: William S. Coleman
Administrative Law Judge

DECISION and ORDER

On September 11, 2015, the Occupational Safety and Health Administration (OSHA) commenced an inspection of an ice manufacturing facility located in Hicksville, New York, that is owned and operated by the Respondent, Arctic Glacier U.S.A., Inc. (Arctic Glacier). That inspection resulted in OSHA issuing to Arctic Glacier on March 10, 2016, a seven-item serious citation and a one-item repeat citation, which together proposed penalties totaling $67,000. Arctic Glacier timely contested the citations and proposed penalties, and the Executive Secretary of the Occupational Health and Safety Review Commission (Commission) docketed the matter on April

4, 2016. The Commission's Chief Judge thereafter assigned the matter to the undersigned for hearing and decision.

Before the date of the scheduled hearing, the parties informed the undersigned that they had reached a full settlement of the matter, so the matter was taken off the hearing calendar and the parties were directed to file a fully executed settlement agreement.

In the process of attempting to formalize the settlement agreement, it became apparent that the parties had *not* in fact reached agreement on all essential terms of the settlement. Subsequent efforts to come to a complete settlement were unsuccessful, but the parties did succeed in agreeing to enter into a partial settlement. So, on October 5, 2017, the parties entered into a Partial Stipulated Settlement (PSS) in which the Secretary agreed to vacate five of the seven "serious" citation items, and the Respondent agreed to accept the lone "repeat" citation item as well as two of the originally issued "serious" citation items, but with one of those two items being reclassified from "serious" to "other than serious."

The PSS dated October 5, 2017, was posted on October 9, 2017, in the manner prescribed by Commission Rule 7(g), 29 C.F.R. § 2200.7(g), and no objection to the partial settlement was filed.

The PSS left unresolved only the penalty amounts for (1) an "other than serious" violation of 29 C.F.R. § 1910.305(c)(5) (Citation 1, item 5) for failing to have a faceplate to cover the opening of an electrical enclosure for the "snap switch" to some ice packaging machinery, and (2) a "repeat" violation of 29 C.F.R. § 1910.37(b)(2) (Citation 2, item 1) for failing to have two exit route doors, both of which served the same room, marked with an "Exit" sign.

After executing the PSS, the parties sought to have the two unresolved penalty amounts adjudicated based on a Joint Stipulation of Facts pursuant to Commission Rule of Procedure 61,

"Submission without hearing." 29 C.F.R. § 2200.61.[1] The parties duly filed a Joint Stipulation of Facts that consisted almost entirely to simply stipulating to the authenticity of seventeen numbered documentary exhibits that were filed with the stipulation. The parties thereafter filed simultaneous closing briefs. Arctic Glacier opted to file a closing reply brief on November 27, 2017, at which time the record on the matter was deemed complete.

As set forth below, the PSS is approved and its terms are incorporated by reference. The penalty amount assessed for the other than serious violation of 29 C.F.R. § 1910.305(c)(5) (Citation 1, item 5) is $1100, and the penalty amount assessed for repeat violation of 29 C.F.R. § 1910.37(b)(2) (Citation 2, item 1) is $20,000.

FINDINGS OF FACT

The following facts were established by at least a preponderance of the evidence on the stipulated record filed in accordance with Commission Rule of Procedure 61:

1. Arctic Glacier U.S.A, Inc. (Arctic Glacier) is a corporation that is in the business of producing, marketing, and distributing packaged ice. (Answer, ¶3). Arctic Glacier owns and operates 42 ice-production and 50 ice-distribution facilities, and its products are distributed to more than 75,000 retail customers located in nineteen states and six Canadian provinces. (Ex. 2). Arctic Glacier has approximately 1600 employees nationally, and has an average annual revenue exceeding $100 million. (Ex. 2).

[1] Commission Rule of Procedure 61, "Submission without hearing," provides:

> A case may be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof. Motions for summary judgment are covered by Federal Rule of Civil Procedure 56.

2. In May 2015, Arctic Glacier opened a 33,000 square-foot ice manufacturing and packaging facility located in Hicksville, New York (Hicksville Facility). Arctic Glacier maintains approximately 37 employees at the Hicksville Facility. Another company, Nuzzolese Brothers Ice Corp., is co-located with Arctic Glacier at the Hicksville Facility and is involved in the distribution and delivery of ice products manufactured at the Hicksville Facility to retail outlets in the Greater New York Metropolitan Area. The stipulated record does not indicate the number of Nuzzolese Bros. employees whose designated work location is at the Hicksville Facility. (Exs. 1, 2 & 3).

3. About four months after the Hicksville Facility became operational, OSHA received a complaint that reported hazardous conditions at the facility. In response to that complaint, on September 11, 2015, a compliance safety and health officer (CO) from the OSHA area office located in Westbury, New York, opened a partial safety inspection of the Hicksville Facility. That inspection was assigned inspection number 1090928. (Ex. 1).

4. The Hicksville Facility utilizes a closed-circuit anhydrous ammonia refrigeration system to manufacture most of the ice products. Because anhydrous ammonia is classified as a highly hazardous chemical and the Hicksville Facility's system was charged with over 10,000 pounds of it, Arctic Glacier was required to comply with OSHA's Process Safety Management (PSM) standard, which is codified at 29 C.F.R. § 1910.119. (Ex. 2). The citations issued to Arctic Glacier on March 10, 2016, originally alleged four violations of the PSM standard, but the Secretary agreed to vacate three of them in the PSS, and Arctic Glacier agreed to accept one of them.

Violation of § 1910.305(c)(4) and Proposed Penalty
(Citation 1, Item 5)

5. In the PSS, the Secretary agreed to reclassify "serious" Citation 1, item 5, to an "other than serious" violation, and Arctic Glacier agreed to accept that reclassified citation item. The

approval of the PSS herein establishes that Arctic Glacier violated 29 C.F.R. § 1910.305(c)(4)[2] on or about September 11, 2015, in that the electrical enclosure that housed the on/off snap switch for the Hamar automated packaging system for packaging line number six, located in the packaging room, did not have a faceplate cover. The automated packaging system runs at 120 volts alternating current, single phase, and is energized by being connected to the main cabinet with a screw-on cannon plug. When in operation, the automated packaging system forms bags, fills them with ice cubes, seals the bags, and then places the filled bags on a conveyor. (Exs. 11 & 13). After the packaging system is turned on and operating, the packaging line is fully automated and requires no further employee intervention or manipulation unless some malfunction occurs. (Exs. 5 & 13).

6. Altogether there were six packaging lines in the packaging room, but ordinarily the only time that all six lines are in operation at the same time is during the peak demand period between Memorial Day and Labor Day. During non-peak demand periods, ordinarily only two to four of the six lines are in operation on any given day. (Exs. 8 & 11). Arctic Glacier employees are present in the packaging room when packaging lines are in operation. (Exs. 5, and Ex. A to Ex. 11). An employee with the job title of "Machine Tender" is positioned at one end of the packaging lines. (The diagram at Exhibit A to Exhibit 11 indicates that a single employee is capable of tending to more than one packaging line at the same time.)

7. An employee whose job title is "Stacker" is positioned at the end of each packaging line's conveyor, which is about 20 feet from the location of the machine's on/off snap switch. (Ex. A to Ex. 11, & Ex. 8). (The diagram at Exhibit A to Exhibit 11 indicates that each packaging line

[2] Section 1910.305(c)(4) provides:

> *Faceplates for flush-mounted snap switches.* Snap switches mounted in boxes shall have faceplates installed so as to completely cover the opening and seat against the finished surface.

in operation is staffed by a "Stacker" employee who is dedicated to serving only that packaging line.)

8. A worker must make direct contact with the on/off snap switch in order to turn the packaging line machinery on and off during normal operations and when the machine malfunctions. Any employee who switched the machine on or off at a time when the enclosure for the snap switch lacked a faceplate risked sustaining an electrical shock. (Ex. 5).

9. The plant manager for the Hicksville Facility was present with the CO when the CO observed that the enclosure that housed the on-off snap switch for packaging line six lacked a faceplate. The plant manager indicated to the CO that he believed the absence of a faceplate created a hazard of electrical shock. (Ex. 5). The plant manager informed the CO that the automated packaging system for line six had been previously installed at Arctic Glacier's facility in Brooklyn, and he surmised that the faceplate might not have been re-installed when the equipment had been re-wired during its installation at the Hicksville Facility. (Ex. 5).

10. Arctic Glacier fully abated the violation during the OSHA inspection by installing a faceplate on or near September 11, 2015. (Ex. 5).

11. The original citation proposed the then maximum penalty of $7000 for the alleged serious violation. This proposal was the result of OSHA's conclusion that the severity of the violation was "high" and that the probability of injury resulting from the violation was "greater," so that the overall gravity of the violation was "high." (Ex. 5).

12. The re-classification of the violation to an "other than serious" violation establishes that the violation bears a "direct and immediate relationship to the safety and health of employees," but that the most serious injury or illness that could reasonably be expected to result from an employee's exposure to the violative condition is "minimal" (i.e., such exposure would not cause

death or serious physical harm). (*See* the OSHA "Field Operations Manual" (FOM) that was in effect at the time the citation was issued, OSHA Directive No. CPL 02-00-150, ch. 6, § III.A.1.b. [eff. Oct. 1, 2015].)[3]

13. If OSHA had originally classified the violation of § 1910.305(c)(4) as an "other than serious" violation rather than a "serious" violation, then by applying the protocol set forth in the FOM that was in effect at the time the citation was issued, OSHA would have proposed a penalty that was less than the maximum allowable penalty of $7,000, but not less than $1000. The stipulated record contains no evidence as to what penalty OSHA actually would have proposed for the violation if OSHA had originally classified it as "other than serious."

Violation of § 1910.37(b)(2) and Proposed Penalty
(Citation 2, Item 1)

14. In the PSS, Arctic Glacier agreed to accept Citation 2, item 1, which had alleged two instances of a repeated violation of 29 C.F.R. § 1910.37(b)(2).[4] The two instances involved two different doors that were part of two different exit routes[5] for evacuating the facility's ice making

[3] The FOM was not included in the Joint Stipulation of Facts, but both parties refer to it in their written arguments. The undersigned regards these arguments to entail an implied joint request to take judicial notice of the FOM pursuant to Fed. R. Evid. 201.

[4]Section 1910.37(b)(2) provides: "Each exit must be clearly visible and marked by a sign reading 'Exit.'"

[5]When used in this decision, the terms "exit," "exit access," "exit discharge," and "exit route" bear the meanings set forth in 29 C.F.R. § 1910.34(c), as follows:

> *Exit* means that portion of an exit route that is generally separated from other areas to provide a protected way of travel to the exit discharge. An example of an exit is a two-hour fire resistance-rated enclosed stairway that leads from the fifth floor of an office building to the outside of the building.
>
> *Exit access* means that portion of an exit route that leads to an exit. An example of an exit access is a corridor on the fifth floor of an office building that leads to a two-hour fire resistance-rated enclosed stairway (the Exit).

room.[6]

15. The rectangular shaped ice making room is 57.5 feet long and 32 feet wide. (Ex. 2). The ice making room has five doors along its four walls. When the CO opened the inspection on September 11, 2015, none of the five doors bore any "Exit" signage on the ice making room side of the doors. The evacuation diagram for the ice making room designated only two of its five doors as exit route doors, and neither of those doors was marked with "Exit" signage. (Ex. 6, Bates pagination "Arctic-H 000140"). One of the unmarked exit route doors was on the east wall and the other unmarked exit route door was on the opposite west wall.[7] The distance between these two exit route doors was approximately 57.5 feet. (Ex. 10).

16. The unmarked exit route door on the east wall was a double-hung, side-hinged, left

> *Exit discharge* means the part of the exit route that leads directly outside or to a street, walkway, refuge area, public way, or open space with access to the outside. An example of an exit discharge is a door at the bottom of a two-hour fire resistance-rated enclosed stairway that discharges to a place of safety outside the building.
>
> *Exit route* means a continuous and unobstructed path of exit travel from any point within a workplace to a place of safety (including refuge areas). An exit route consists of three parts: The exit access; the exit; and, the exit discharge. (An exit route includes all vertical and horizontal areas along the route.)

[6] The "ice making room" is confusingly identified in the declarations of Andy Gravener (Ex. 11) and Brent Hill (Ex. 13) as the "Ice Bagging Room," even though both declarants describe there being "several ice making machines" in that room, and neither declarant refers to any ice bagging activity actually occurring in the room. Nevertheless, it is apparent from the context of those declarations that both declarants are referring to the room with the two unmarked exits that the citation and other documents in the stipulated record identify as the "ice making room." (Ex. 5).

[7] In the evacuation diagram that is part of Exhibit 6 (Bates pagination "Arctic-H 000140"), the exit route door on the east wall is the one for which the evacuation route provides egress in the upward direction, and the exit route door on the west wall is the one the evacuation route provides egress in the downward direction.

and right-hand outward-swinging, fire-rated steel door, that was 60 inches wide and 90 inches high, and that swung outward left and right with interior panic-type hardware. This exit route door opened to a corridor, with the exit route continuing to the exit discharge to the outside of the building in the loading dock area. (Exs. 6 & 10).

17. The unmarked exit route door on the opposite (west) wall was an inward swinging side-hinged, single-hung, fire-rated steel door, measuring 36 inches wide and 84 inches high. This exit route door opened to a corridor that led to the exit discharge to the outside of the building. (Exs. 6 & 10).

18. The ice making room was bordered on its south side by the "ice rake bin" room.[8] There are two doors on the north wall of the ice rake bin room that connect it to the adjoining ice making room—one door was near the ice rake bin room's east wall and the other was near the room's west wall. Both doors were marked with an "Exit" sign on the ice rake bin room side of the doors. The specified exit routes for anyone occupying the ice rake bin room was through either of the two exit route doors on the room's north wall that provided ingress to the adjoining ice making room, with the exit routes continuing through either of the two exit route doors in the ice making room. (Exs. 6 & 10).

19. The ice making room was bordered on its north side by a slightly larger adjoining room. The stipulated record does not identify the name or function of this adjoining room, but reference to Exhibit 2 and to paragraph 4(a) of the PSS suggests that this adjoining room is the "anhydrous ammonia machinery room" (machinery room), and that access to the machinery room from the ice making room is restricted. There is a side-hinged double left and right inward

[8] In the evacuation diagram that is part of Exhibit 6 (Bates pagination "Arctic-H 000140"), the ice rake bin room is the room to the left of the ice-making room.

swinging door on the north wall of the ice making room that connects it to the machinery room. (Exs. 6, 10, & 16-b). This double door is a part of the exit route for a person positioned in the machinery room near that double door. (Ex. 16-b). A person utilizing that double door to egress from the machinery room to ice making room would then have to use one of the two exit route doors in the ice making room to continue along the designated exit route to the exit discharge. (Ex. 16-b).

20. Arctic Glacier's failure to mark the two exit route doors in the ice-making room with "Exit" signage caused those two exit route doors to be indistinguishable from the other three doors in the room that were not part of any exit route for egress from the ice making room. The absence of "Exit" signs on each of the two exit route doors as required by § 1910.37(b)(2) could have caused a delay in the emergency evacuation of an employee who was situated in the ice making room, the ice rake bin room, or the machinery room. (Ex. 6). There is a substantial probability that such a delay in an employee being able to discern which of the five doors in the ice making room led to an exit discharge, could have resulted in an employee sustaining serious or even fatal injury. (Exs. 6, 10, & 16-b).

21. Arctic Glacier employees, and employees of outside contractors, accessed the ice making room from time to time to perform inspections, maintenance activities, and repairs on process equipment. (Ex. 6). The stipulated record contains no evidence regarding the number of employees who typically occupy either the ice rake bin room or the machinery room, or the frequency of such occupancy. (As previously described, the exit routes from these two adjoining rooms pass through the ice making room and its two exit route doors.)

22. Arctic Glacier completed abatement of the violation by placing appropriate "Exit" signage for the previously unmarked exit route doors within one or two days after the CO identified

the violation. (Ex. 11).

23. The prior violation that supported the classification of "repeated" was a violation of the same standard at Arctic Glacier's facility in Mamaroneck, New York, that had been identified during OSHA inspection number 623559. That inspection had been opened on August 20, 2012, and that violation became a final order on September 24, 2013. (Ex. 18).

24. OSHA proposed a $22,000 penalty for the repeat violation of § 1910.37(b)(2), arriving at this figure by applying the protocol set forth in chapter six of the OSHA FOM that was in effect at the time the citation was issued. (*See* footnote 3, *supra*). In applying that protocol, OSHA classified the severity of the violation to be "medium" (as opposed to "high," "low," or "minimal" severity) and the probability of injury occurring as a result of the violative condition to be relatively low (that is, a "lesser" probability of injury, rather than a "greater" probability). According to the FOM's penalty matrix, a violation with "medium" severity and "lesser" probability is assigned an overall gravity characterization of "moderate" (in contrast to gravity characterization of either "high" or "low"). Such a "moderate" violation (with "medium" severity and "lesser" probability) is assigned a threshold gravity-based penalty of $4000 under the FOM's penalty matrix. OSHA increased this baseline amount about by 10% to $4400 based on Arctic Glacier's "history," in that Arctic Glacier had been established to have violated other health or safety standards within the preceding five years. Further following the protocol set forth in the FOM, OSHA applied a multiplier of five to the $4400 figure because the violation was a first repeated violation by an employer who had more than 250 employees nationwide and thus was regarded to be a "large" employer for purposes of the penalty calculation. (If Arctic Glacier had 250 or fewer employees nationwide, the $4400 figure would have been multiplied by a factor of two instead of five.) Application of the multiplier of five resulted in a proposed gravity-based

penalty of $22,000 for the first repeat violation. (Ex. 6).

Discussion

The Commission obtained jurisdiction of this matter under section 10(c) of the Occupational Safety and Health Act (Act) upon Arctic Glacier's timely contest of the citations and proposed penalties. 29 U.S.C. § 659(c). At all relevant times, Arctic Glacier was an employer covered by the Act because it met the Act's definition of "employer." 29 U.S.C. § 652(5). (Answer, ¶ 4).

The Commission and its judges make *de novo* penalty determinations and have the authority to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) *aff'd* 73 F.3d 1466 (8th Cir. 1996); *Allied Structural Steel,* 2 BNA OSHC 1457, 1458 (No. 1681, 1975).

With the two violations here having occurred before November 2, 2015, the statutory penalty for the repeat violation ranges from no penalty to $70,000. The statutory penalty for the "other than serious" violation ranges from no penalty to $7000. 29 U.S.C. § 666. *Cf.* Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015); Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 Fed. Reg. 43430 (July 1, 2016) (authorizing increased penalty amounts for OSHA violations occurring after November 2, 2015).

Section 17(j) of the Act requires that in assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc.,* 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011).

Gravity is typically the primary consideration among these four statutory criteria, and is determined by "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." *J.A. Jones Constr. Co.,* 15 BNA OSHC 2200, 2214 (No. 87-2059, 1993). In assessing the probability that a violative condition may result in injury, appropriate factors to consider include the number of employees exposed, the frequency and duration of employee exposure, employee proximity to the hazard, the use of appropriate personal protective equipment, and any other pertinent working conditions. *See* FOM in effect at the time the citation was issued, OSHA Directive No. CPL 02-00-150, ch. 6, sec. III.A.2.b. (eff. Oct. 1, 2015).

"Other Than Serious" Violation of § 1910.305(c)(4)
(Citation 1, Item 5)

Citation 1, item 5, involves the absence of the faceplate for the electrical enclosure that housed the on/off snap switch for the automated packaging system on packaging line six. The violation was originally alleged to have been a "serious" violation, and OSHA proposed the maximum penalty of $7000 that was then available for a serious violation. OSHA sought the maximum penalty after having determined that the severity of potential injury was "high" and the probability of an injury occurring was "greater," so that the overall gravity of the violation was determined to have been "high." However, the alleged violation as finally resolved by the PSS is classified as an "other than serious" violation. A violation is considered "other than serious" when "there is a direct and immediate relationship between the violative condition and occupational safety and health, but not of such relationship that a resultant injury or illness is death or serious physical harm." *Crescent Wharf and Warehouse Co.*, 1 BNA OSHC 1219, 1222 (No. 1, 1973). OSHA policy describes the "severity" of an "other than serious" violation to be "minimal," meaning that "the most serious injury or illness that could reasonably be expected to result from an employee's exposure … would not cause death or serious physical harm." OSHA FOM, CPL 02-00-159, eff. Oct. 1, 2015, ch. 6, § III.A.1.b.

The FOM provides that where the probability of an injury occurring as a result of an "other than serious" violation is "lesser," then ordinarily no penalty is proposed. *Id.* at § III.A.5.b. If the probability of an injury occurring as a result of an "other than serious" violation is "greater," then the range for a gravity-based penalty for that violation is between $1000 and $7000. *Id.* The FOM states that the maximum penalty of $7000 may be proposed where the OSHA area director determines that such a penalty "is appropriate to achieve the necessary deterrent effect." *Id.*

With the violation having been established by the PSS to have been "other than serious," it must be deemed to have been of "minimal" severity, so any electrical shock that resulted from the violation would not be reasonably expected to cause serious injury or death.

The evidence in the stipulated record establishes that the probability of an employee sustaining an electrical shock as a result of the violation is "greater," because the on-off switch had to be manipulated every time the machinery was turned on or off.

The Declarations of Brent Hill, Andy Gravener, and Steve Rostkowski are not sufficiently weighty to support a finding that at the time of the inspection the equipment was being repaired, or that the power to the equipment had been turned off and the equipment had been unplugged, so that no electricity was present in the uncovered enclosure that housed the on/off snap switch.

Brent Hill was the manager of the inspected facility at the time the inspection was opened on September 11, 2015, but he has since left Arctic Glacier's employ. In his declaration dated November 7, 2017, he stated that the equipment that lacked the faceplate was not in use at the time of the inspection. (Ex. 13). He stated further that he did "not recall the specific reason for the face plate having been removed, but my best recollection is that, at that time, repairs … were in progress and the electricity had been turned off while those repairs had been conducted."

Mr. Hill's "best recollection" of events that occurred more than two years prior to his making the declaration is insufficiently weighty to establish that there was no electricity present to the electrical enclosure that housed the on/off snap switch that lacked a face plate. There is no indication in the violation report that the CO who conducted the inspection prepared (Ex. 5) that electricity was not present in the equipment. To the contrary, the contemporaneous documentation in the stipulated record supports a finding that electrical power *was* present in the exposed electrical enclosure at the time of the inspection—the CO who conducted the inspection wrote that the "electrical hazard was observed in plain view by [the CO] and was *clearly seen* to be exposing the Production Associate *who was operating the machine* to an electrical hazard." (Ex. 5, Bates pagination Arctic-H 000117, ¶23) (emphasis added). Moreover, the CO's violation report indicates that during the inspection Mr. Hill himself had "identified electrical shock as a potential hazard that could result from not having a faceplate cover installed on the enclosure." *Id.* The CO's record of his observations while conducting the inspection, and his record of what Hill said to the CO during the inspection, are more reliable than Hill's "best recollection" of what occurred during a small part of an inspection that he participated in more than two years earlier.

Andy Gravener is the Director of Arctic Glacier's eastern U.S. operating division and he was involved in the construction and start up of the Hicksville Facility. He states in his declaration that Arctic Glacier's "standard practice is to turn off and then unplug the [machinery] before we perform any maintenance on them," and that "[g]iven our standard practice and the training our employees get on the electrical system and lockout/tagout requirements, *I think* that at the time that the compliance officer conducting the inspection noted the missing face plate on September 11, 2015, the [machinery] on line 6 was not in use and was unplugged." (Ex. 11, p. 2) (emphasis added). Mr. Gravener's supposition, grounded in his understanding of Arctic Glacier's standard

practices, that the equipment had been unplugged at the time of the inspection is not sufficiently weighty to prove that the machinery was unplugged. As with the Hill declaration, the CO's contemporaneous record of the conditions that he observed at the time of the inspection are far more reliable, decisive, and weighty than Gravener's supposition.

Steve Rostkowski is the president of a company named Industrial Refrigeration, Inc. Employees of that company were working on process equipment at the Hicksville Facility at the time of the inspection. (Ex. 15). Exhibit 15 of the Joint Stipulation of Facts is Rostkowski's *unsigned* declaration that states "the equipment in the Ice Bagging Room was not in use and was unplugged at the time Industrial Refrigeration, Inc.'s employees were performing their work." Rostkowski's declaration is given no weight because Rostkowski did not sign the declaration that was filed with the Joint Stipulation of Facts. And there may be good reason that Roskowski did not sign the prepared declaration, because there is no indication in the stipulated record that the averments in numbered paragraph 3 of that declaration are based on his personal knowledge or that he would have been competent to testify on the matters stated in that paragraph.[9]

The weight of the evidence on the stipulated record establishes that electricity was present in the exposed electrical enclosure and presented a "greater" probability that an employee could sustain an electrical shock, albeit of "minimal" severity, as a result of the violative condition. This is so even though the nearest employee to the enclosure was ordinarily twenty feet away and, according to evidentiary material that Arctic Glacier caused to be prepared for inclusion in the stipulated record, such an employee had no job-related reason to get any closer to the enclosure.

[9] Paragraph 3 of the Rostkowski declaration states in full: "Given the seasonal nature of Arctic Glacier's business, and the fact that Arctic Glacier's busy season had already concluded, the equipment in the Ice Bagging Room was not in use and was unplugged at the time Industrial Refrigeration, Inc.'s employees were performing their work." (Ex. 15).

Be this as it may, the evidence of record establishes that some employee had to manipulate the on/off switch to turn the machinery on and off, and in doing so would necessarily have direct contact with the switch that was housed in the enclosure that lacked a faceplate.[10]

According to the FOM's penalty methodology, the range of penalties for an "other than serious" violation for which there is a "greater" probability of injury is between $1,000 and $7,000. There is no evidence in the stipulated record to support establishing the threshold gravity based penalty amount at more than the minimum of $1000. That $1000 figure is reasonable for such a violation and is accepted as a threshold amount. Applying the protocol in the FOM, no reductions in the threshold amount of $1000 would be in order under the FOM's methodology to account for either "good faith" or Arctic Glacier's size, because Arctic Glacier has a recent history of other violations and it is regarded to be a "large" employer and thus not eligible for penalty reduction

[10]Arctic Glacier argues that the stipulated record establishes that the then manager of the facility, Brent Hill, started the packaging line systems each day, and not any other Arctic Glacier employee. (Reply Br. 2). Even if this were accepted as being an accurate statement of fact, this would establish that Mr. Hill had direct contact with the exposed on-off snap switch and was at risk to receiving an electrical shock as a result of the violative condition.

The stipulated record, however, lacks sufficient evidence to establish that Hill was the person who switched on the machinery every day. Arctic Glacier relies on the declaration of Larry Aleksandrich as supporting a finding that Hill is the employee who switches on the machinery for the packaging lines. (Ex. 14). Aleksandrich is a consultant and is not an employee of Arctic Glacier. In his declaration, Aleksandrich states that he has played a "key role in designing and implementing" Arctic Glacier's process safety program. In paragraph 4 of his declaration, he states: "It is my understanding that … [e]ach day Brent Hill would start the equipment and conduct daily rounds in the Ice Bagging Room and Machinery Room." This averment is insufficient to establish that it is based on Aleksandrich's personal knowledge or that he would be competent to testify on the matter stated.

Notably, nothing in Hill's declaration supports the claim that he was the person who switched on the machinery every day. Hill's declaration simply does not address the matter of whether he is involved in switching on the machinery for the packaging lines.

Contrary to Arctic Glacier's argument, the evidence in the stipulated record is insufficient to support the finding that Brent Hill was the only employee of Arctic Glacier who switched on the packaging machinery for line six in the facility's packaging room.

that is allowed for smaller employers. Further applying the protocol in the FOM, the $1000 threshold amount would be increased by 10% to reflect Arctic Glacier's prior history of recent violations. (Ex. 5, Bates pagination "Arctic-H 000118"; Ex. 18).

The FOM's treatment of the factors of gravity, history, good faith, and employer size are reasonable when applied to the facts of this matter and are adopted for purposes of assessing the penalty for the other than serious violation. The record supports the conclusion that if OSHA had originally classified the violation as "other than serious," the proposed penalty would have been at least $1100. The remainder of the stipulated record lacks sufficient information to support increasing that sum to achieve any additional deterrent effect. Accordingly, a penalty of $1100 will be assessed for the "other than serious" violation of § 1910.305(c)(4).

"Repeat" Violation of 1910.37(b)(2)
(Citation 2, Item 1)

The citation proposed a penalty of $22,000 for the repeated violation of § 1910.37(b)(2), pursuant to the FOM's methodology described in the Finding of Fact ¶ 24.

The stipulated record supports OSHA's determination that the severity of the violation was "medium." While there is evidence that the ice making room with the two unmarked exit route doors was occupied only intermittently and by very few workers, there remains evidence that Artic Glacier employees and the employees of third-party contractors had occasion to occupy the ice making room and thus become exposed to the hazard of the two unmarked exit route doors. Moreover, the ice making room, and the two unmarked exit route doors in that room, were part of the exit routes for workers in the adjoining ice rake bin room and the machinery room. The stipulated record is devoid of evidence as to the number of persons who occupy those rooms and the frequency of that occupancy, but the record nonetheless supports the reasonable inference that both rooms are intended to be occupied from time to time and could have been occupied had there

been an emergency that required evacuation of those rooms. Thus, persons occupying those adjoining rooms would also be exposed to the hazard of the unmarked exit route doors in the ice making room. The absence of the signage on the doors would likely only delay the ultimate evacuation of persons in these rooms during an emergency, not prevent their evacuation, but even the slightest delay could conceivably result in serious injury or death. Thus, assignment of a severity of "medium" for the violation, rather than either "high" or "low," is reasonable, is supported by the stipulated record, and is adopted.

Arctic Glacier challenges OSHA's severity classification of "medium" in part on the argument that the stipulated record shows that there were *three* exit route doors in the ice making room, and that one of them was appropriately marked with "Exit" signage. This argument is rejected, and the findings of fact set forth above that the ice making room had only two doors that were part of designated exit routes, and that neither was marked with "Exit" signage, is confirmed. Arctic Glacier bases its argument on an unsworn assertion contained in an undated letter addressed to the attorney for Arctic Glacier on the letterhead of a consulting firm named Industrial Consulting & Education, LLC, that was signed by the firm's president, Mr. Paul Gadomski. (Ex. 12). There is no indication that Mr. Gadomski had ever visited the Hicksville Facility, and his letter suggests that the opinions he states in his letter are based on written information and material that he had reviewed, including a "provided sketch" of the ice making room. The "provided sketch" could conceivably have been the sketch that the CO prepared and that is part of the stipulated record at Exhibit 10, or it could have been some other sketch that is not a part of the stipulated record. Gadomski's letter indulges in the unsupported belief that three of the doors to the ice making room were part of designated exit routes, and that one of those three doors was marked with "Exit" signage. There is simply no evidence in the stipulated record to support the finding that any of the

five doors in the ice making room were marked with "Exit" signage or that any doors other than the two exit route doors previously described were a part of any designated exit route from the ice making room. Gadomski's apparent mistaken understanding to the contrary does not make it so.

The determination that the probability of any injury resulting from the violation to be "lesser" is also reasonable and is supported by the stipulated record, including the significant quantity of evidence proffered in declarations and documentation that Arctic Glacier caused to be developed for inclusion in the stipulated record, and further supports the conclusion that the likelihood of either a fire or the release of anhydrous ammonia is remote. (Exs. 11, 12, 13, & 14). The undersigned concurs in assigning a "lesser" probability of injury resulting from the violative condition.

Included in OSHA's penalty methodology was a 10% increase in the threshold penalty amount of $4000 because of Arctic Glacier's prior history of violations. (Ex. 18). To enhance a repeat penalty amount for a prior history of violations, when the "repeat" classification itself results in applying a multiplier to that penalty amount, essentially results in enhancing the penalty twice based on the employer's prior history. The undersigned declines to increase the threshold sum of $4000 for the violation by 10% to account for prior history of violations, and instead applies only the multiplier of five to the $4000 figure, which is the amount specified by the FOM for an other than serious violation with a "lesser" probability of injury, and which is reasonable formula for calculating the penalty for the repeat violation here. This results in an assessed penalty of $20,000 for the repeated violation of § 1910.37(b)(2).

ORDER

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a). If any finding is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the

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

1. The Partial Stipulated Settlement agreement dated October 5, 2017, having been posted on October 9, 2017 in the manner prescribed by Commission Rule 7(g), 29 C.F.R. § 2200.7(g), and no objection to the agreement having been filed, is approved under 5 U.S.C. § 554(c)(1) and Commission Rule 100, and its terms are incorporated in their entirety by reference in this order.

2. A penalty of $1100 is assessed for the other than serious violation of 29 C.F.R. § 1910.305(c)(4) that is described in Citation 1, item 5, issued on March 10, 2016 in connection with inspection number 1090928 (except for the original "serious" classification, which is not the correct classification of the established violation).

3. A penalty of $20,000 is assessed for the repeated violation of 29 C.F.R. § 1910.37(b)(2) that is described in Citation 2, item 1, issued on March 10, 2016 in connection with inspection number 1090928.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: January 30, 2018