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. TREE OF LIFE, INC., d/b/a GOURMET AWARD FOODS, N.E. DIVISION, Respondent.	OSHRC Docket No. 00-0433

DECISION

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

Tree of Life, Inc., d/b/a Gourmet Award Foods, N.E. Division ("Tree of Life"), a wholesale distributor of gourmet foods, operates a warehouse distribution center in Albany, New York. Pursuant to a complaint, Michele Schuhman, a compliance officer ("CO") with the Occupational Safety and Health Administration ("OSHA"), inspected the facility. As a result, OSHA issued three citations alleging serious, repeat, and nonserious violations of standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (the "Act"). The parties settled all but two of the items. After a hearing on the remaining items, Administrative Law Judge Covette Rooney vacated one item and affirmed as *de minimis* an alleged serious item involving emergency exits. The only issue on review is the *de minimis* classification; the merits are not on review. For the following reasons, we find that the violation was not *de minimis*, affirm it as serious, and assess a penalty of $1500.

I. Whether the Judge Erred in Reclassifying the Violation of 29 C.F.R. § 1910.36(b)(4)

as *De Minimis.*

Tree of Life's facility consisted of two large warehouse buildings stocked with packaged food items ready for shipment. Citation 1, Item 3 alleges that in Warehouse Building 4294, "Exit door near the battery charging area was locked," and that the "South/West exit door was stuck in such a way that it could not be opened without a lot of force," in violation of 29 C.F.R. § 1910.36(b)(4).[1]

CO Schuhman testified that the door near the battery charging station would not open even when she "[u]sed the weight of [her] body"[2] when pushing the panic bar handle with her hand and putting her shoulder against the door. She added that she informed management that it would not open, "[a]nd then at that . . . point they opened it. . . . with a key." Safety and sanitation supervisor Theresa Boening, who accompanied CO Schuhman during the inspection, admitted that the CO was unable to open the door, but testified that management opened the door after the inspection, without the CO present. Boening stated that she examined the door after the CO left the facility and that she was able to open it by throwing her "hip into the door . . . . [o]nto the crash bar." Boening added that the door is

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[1]The cited standard provides:

> **§ 1910.36 Means of Egress**
> . . .
> (b) *Fundamental requirements.*
> . . .
> (4) In every building or structure exits shall be so arranged and maintained as to provide free and unobstructed egress from all parts of the building or structure at all times when it is occupied. No lock or fastening to prevent free escape from the inside of any building shall be installed except in mental, penal, or corrective institutions where supervisory personnel is continually on duty and effective provisions are made to remove occupants in case of fire or other emergency.

[2]CO Schuhman testified that at the time of the inspection, she weighed approximately 243 pounds.

not equipped with a lock and that the key was used merely to "reset the crash bar."[3] Joseph Sevrie, the lead maintenance porter, did not accompany the CO during the inspection, but corroborated Boening's testimony that the door was not equipped with a lock and that a key could only be used to reset the panic bar mechanism.

In regard to the southwest exit door, the CO testified that she pressed on the handle and then threw her body weight into the door three times "simulating someone trying . . . to . . . anxiously get out of the building," but the door would not open. She added that a management official subsequently tried the door twice before it opened. Her testimony was corroborated by Raymond Moye, the union shop steward who accompanied her during the inspection. In contrast, however, Boening, who testified that the southwest exit door "was a little more difficult to get open," stated that the CO "put a little weight into the door but it did open." Boening added that she opened the door after the inspection without any trouble, but she admitted that the door was no longer "stuck" after the CO opened it.

The judge affirmed a violation based on the fact that the doors were not easily opened. She found that "while the first door was not in fact locked[,] it nonetheless was not easily opened," and that the "second door did not open easily and that force was required to open it." She held that "the doors did not provide 'free and unobstructed egress' as required by the standard," but noted that they "did in fact open at the time of the inspection." As a result, she concluded that "the violation was technical in nature and that it had a negligible relationship to employee safety and health," and she thus classified it as *de minimis.*

We disagree. Section 9(a) of the Act indicates that violations are *de minimis* when they "have no direct or immediate relationship to safety or health." 29 U.S.C. § 658(a). "A violation should be classified as *de minimis* when there is technical noncompliance with a standard but the violation has such a negligible relationship to the safety or health of

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[3]Boening stated that after opening an emergency exit, a key must be used to reset the crash bar or the door "will not stay closed." She stated that if the panic bar is not reset with the key, the door can be opened. She admitted that it was possible for the key device to malfunction.

employees that it is not appropriate to order abatement or assess a penalty." *See Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2156, 1987-90 CCH OSHD ¶ 28,501, p. 37,771 (No. 87-1238, 1989). This violation does not have a negligible relationship to the health and safety of employees. The standard cited here requires that exits provide free and unobstructed egress. The failure of these emergency exit doors to open immediately when reasonable pressure was applied could have prevented free and unobstructed egress from the warehouse in the event of a fire or other emergency necessitating prompt evacuation. Such a hazard is not "so trifling that an abatement order would not significantly promote the objectives of the Act." *Hackney/Brighton Corp.*, 15 BNA OSHC 1884, 1887, 1991-93 CCH OSHD ¶ 29,815, p. 40,617 (No. 88-610, 1992). We therefore find that the judge erred in classifying the violation as *de minimis.*[4]

Furthermore, we find that the violation was serious as alleged. Under Commission precedent, a violation is serious if, in the event of an accident, there is a "substantial probability that the result would be death or serious physical harm." *Id.* at 1886, 1991-93 CCH OSHD at p. 40,617. A serious violation only requires proof that the harm "could have occurred." *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2077, 1991-93 CCH OSHD ¶ 29,942, p. 40,918 (No. 88-523, 1993); *see Hackney/Brighton,* 15 BNA OSHC at 1886, 1991-93 CCH OSHD at p. 40,617. Here, the CO testified that "the result[ant] injury could be a serious one which could be smoke inhalation, which could result in damage[d] organs due to deprivation of oxygen or to death." Clearly, burns, smoke inhalation, and other potential injuries caused by delays in exiting the workplace during an emergency fall within the meaning of "serious

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[4]Tree of Life cites an unreviewed judge's decision affirming a violation under the cited standard as *de minimis*. Unreviewed judges' decisions do not constitute precedent binding upon the Commission. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981, 1975-76 CCH OSHD ¶ 20,387, p. 24,322 (No. 4090, 1976). Moreover, we note that the exit item there was subsequently settled as "other than serious" with no penalty as part of a partial settlement agreement. *Oberdorfer Indus.*, No. 97-0469 (consolidated) (Feb. 12, 1999) (and documents discussed therein). A number of other items in that case are still pending on review before the Commission.

physical harm." *See Jeanette M. Gould d/b/a Gould Publications*, 16 BNA OSHC 1923, 1925, 1993-95 CCH OSHD ¶ 30,502, p. 42,153 (No. 89- 2033, 1994) (affirming a serious violation of section 1910.36(b)(4)).

II. Penalty

Section 17(j) of the Act mandates that the Commission 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). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). "The gravity of a particular violation depends on 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." *Id.*

CO Schuhman testified that she proposed a "gravity-based" penalty of $1500 for this item. She "assigned a low probability and a low severity taking into consideration the fact that they had other exit doors throughout the whole facility that did not have problems." She declined to make any adjustments for size, good faith, or history. Because the judge found the violation to be *de minimis*, she did not assess a penalty.

In our view, the evidence shows that the gravity of the violation is moderately low. The record showed that the doors could be opened, albeit with the use of force, and as the compliance officer testified, there were other exit doors in the facility. Tree of Life is a large employer with approximately 3500 employees at 19 distribution centers. In regard to history, the record shows that in 1998, OSHA issued citations to Tree of Life's Albany facility.[5] The record does not contain specific evidence regarding good faith. On balance, therefore, we find that the proposed penalty of $1500 is appropriate.

[5]One item was withdrawn, and three others were settled.

III. Order

For the reasons set forth above, we affirm the violation of 29 C.F.R. § 1910.36(b)(4) as serious and assess a penalty of $1500.

/s/

Thomasina V. Rogers
Chairman

/s/

Ross Eisenbrey
Commissioner

Date: September 28, 2001

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SECRETARY OF LABOR, Complainant, v. TREE OF LIFE, INC., d/b/a GOURMET AWARD FOODS, NE DIVISION, Respondent.	OSHRC DOCKET NO.00-0433

Appearances:

Marc G. Sheris, Esquire
Office of the Solicitor
U.S. Department of Labor
New York, New York

Mary W. Jarrett, Esquire
Coffman, Coleman, Andrews & Grogan
Jacksonville, Florida

Before: Administrative Law Judge Covette Rooney

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. § 651 *et seq.* ("the Act"). Respondent, Tree of Life, Inc., d/b/a Gourmet Award Foods, NE Division, is a wholesale distributor of specialty foods. (Tr. 144). Respondent admits that it is an employer engaged in a business affecting commerce and that it is subject to the requirements of the Act. At all times relevant to this action, Respondent maintained a work site at 4294 Albany Street, Albany, New York.

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's work site from December 21, 1999 to January 21, 2000, and, as a result, issued citations alleging serious, repeat and "other" violations. Specifically, Citation

1 alleged 11 serious violation, Citation 2 alleged two repeat violations, and Citation 3 alleged five "other" violations. The total proposed penalty for the citations was $34,200.00.

Respondent timely contested the citations and proposed penalties, and a hearing was held in Albany, New York on January 31, 2001. At the start of the hearing, counsel for the parties informed the court that a settlement had been reached resolving all of the items except for Items 3 and 4 of Serious Citation 1.[6] (Tr. 6). The hearing thus involved only these two items, which allege violations relating to exit doors and protective footwear, respectively. The parties have briefed the issues in this regard, and this matter is ready for disposition.

Background

Respondent's facility consisted of two large warehouse buildings.[7] The buildings had numerous aisles with racks 25 to 30 feet high stocked with canned, jarred and packaged goods. Like goods were usually either boxed or "shrink wrapped" together in "cases." Most cases held six to 12 items, but some held up to 48 items, and while the average weight of an item was 4 pounds, some items, such as bagged rice, could weigh 50 to 100 pounds.[8] Filling an order involved selecting goods from the racks and placing them on a pallet, and an order could include only a few items from a case or up to a half or a full case.[9] To fill an order, an

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[6]On February 2, 2001, counsel for the parties submitted to the court a signed Partial Stipulated Settlement and Order. The terms of the settlement were approved in a separate order.

[7]When OSHA conducted its inspection, Respondent had approximately 180 employees who worked in three shifts; the largest, the day shift, had 75 to 80 employees. In March of 2000, Respondent moved into a larger space, which has allowed it to operate with less equipment and fewer employees and to more evenly distribute the work among the three shifts; as a result, there is now less congestion in the facility. However, the procedures for loading and unloading goods, described below, have remained essentially the same. (Tr. 140-44, 152-53).

[8]The weight of the items in about 85 percent of orders filled was 20 pounds or less, about 5 percent was over 30 pounds, and 1 to 2 percent was 50 pounds or more. (Tr. 134, 145-46).

[9]A pallet is a flat wooden piece designed for holding stock. The types of pallets used at the facility weighed anywhere from 20 to 35 pounds. (Tr. 43, 104, 151; C-3).

employee would manually take from the racks goods that were located up to the shoulder or chin level.[10] The employee would then place the items on a pallet that was thereafter moved by an industrial truck. The facility had a number of these trucks, consisting of forklifts, "high-low" trucks and "pallet jack" trucks; the forklifts and pallet jack trucks were used to move goods through the facility, while the high-low trucks were used for placing goods on or removing them from the upper levels of the racks. After an order was complete, it would be taken to the loading area where warehouse workers would load it onto a tractor-trailer for delivery. Upon delivery, either the customer or Respondent's employees would unload the order. (Tr. 14-16, 51-52, 103-04, 111, 114-15, 136-37, 142-55).

The Secretary's Burden of Proof

To establish a violation of a standard, the Secretary must show (a) the applicability of the standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994). The Secretary bears the burden of proof on each of these elements by a preponderance of the evidence. *See Olin Constr. Co. v. OSHRC*, 525 F.2d 464 (2d Cir. 1975); *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 131 (No. 78-6247, 1981).

Citation 1, Item 4

This item alleges a violation of 29 C.F.R. 1910.136(a), which provides as follows:

> General requirements. The employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, and where such employee's feet are exposed to electrical hazards.

The citation alleges a violation of the standard as follows:

> a) Warehouses - Employees who were subjected to stock falling on their feet and industrial trucks rolling over their feet or running into their feet were not required to wear safety shoes.

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[10]The goods removed were replaced by means of an industrial truck taking reserve goods from the upper levels of the racks and putting them on the lower levels. (Tr. 142-43).

OSHA compliance officer ("CO") Michele Schuhmann testified that this citation item was issued because, during her inspection, she observed numerous industrial trucks and stock being moved around in aisles and employees were wearing various types of non-safety shoes, including sneakers. She determined this condition was a hazard, in that stock could fall on the employees' feet or the moving equipment could hit or roll into their feet, and she photographed an employee who was wearing sneakers and manually moving a pallet over his feet. It was CO Schuhmann's opinion that a safety shoe meeting the ANSI standard for protective footwear would protect the toe area of an employee's foot because of the amount of impact and compression the toe box area is designed to handle.[11] (Tr. 17-19, 107, Ex. C-3).

CO Schuhmann obtained documentation from management that revealed that since 1998, employees had been injured by objects falling or rolling onto their feet. Exhibit C-4, a report dated December 6, 1999, indicated the right foot of an employee was injured when the truck he was driving ran into a steel post; when he jumped off, the truck ran over his right foot. Exhibit C-5, a report dated November 11, 1999, indicated that the fork of a truck struck an employee's foot as he was coming out of one of the stock aisles, causing pain and swelling to the employee's left toes. Exhibit C-7, a report dated October 16, 1998, showed that an employee was putting a block of dry ice into a cooler when it fell on his right big toe, resulting in a contusion. Exhibit C-8, a report dated November 17, 1999, showed that an employee was injured when an industrial truck driven by another employee accidentally bumped into his left ankle, causing it to bruise. The CO said she had been in a pallet-making company that had had industrial trucks going up and down the aisles and that the employees in that facility had worn steel-toed shoes.(Tr. 19-23, 28-34, 43, 68).

The standard's terms specifically require foot protection when employees are working in areas where their feet are exposed to injury from falling or rolling objects. The CO's testimony and Exhibits C-3-5 and C-7-8 show the presence of falling and rolling objects in

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[11]The ANSI standard, ANSI Z41-1991, requires safety shoes to meet certain performance requirements for resistance to compressive and impact forces. Safety shoes that meet the ANSI standard are designed to withstand from 1,000 to 2,500 compressive pounds and from 30 to 100 foot pounds. The shoe demonstrated at the hearing had a compressive resistance of 2,500 pounds and an impact resistance of 75 foot pounds. (Tr. 47-48; Ex. C-9).

the facility, that employees were not wearing safety shoes, and that employees had been injured from objects falling or rolling onto their feet. In addition, Raymond Moye, a tractor-trailer driver and the chief shop steward at the facility, testified that he was not aware of any restrictions on the types of shoes that could be worn; he also testified that he usually wore a work-type boot, but he acknowledged he had worn sneakers. (Tr. 110-14). Accordingly, I find that the standard applies in this case, that Respondent did not comply with the terms of the standard, and that employees were exposed to the violative condition.

In regard to whether Respondent had knowledge of the violative condition, the OSHA standards for personal protective equipment ("PPE") are found in Subpart I of 29 C.F.R. 1910. Subpart I is performance oriented and contains guidance for the selection and use of PPE.[12] It also contains non-mandatory Appendices A and B that provide guidance as to PPE for eye, face, head, foot and hand hazards. *See* 59 Fed. Reg. 16,362, April 6, 1994, and 59 Fed. Reg 33,911, July 1, 1994. The standard requires that employers ensure that protective equipment be provided, used, and maintained in sanitary and reliable condition, as necessary, to protect employees from workplace hazards. It also requires employers to ensure compliance with the individual requirements for particular types of PPE where articulated hazards are present. *See* 29 C.F.R. 1910.133 through 138. The employer must perform a hazard assessment in order to determine what PPE is needed. *See* 29 C.F.R. 1910.132(d). The hazard assessment will disclose the information needed to select the appropriate PPE for any hazards present or likely to be present at a particular workplace.

Since Subpart I is performance oriented, employers must act in a reasonably prudent manner in determining when and how employees who are exposed to foot injury hazards are to be protected. In *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38 (2d Cir. 1978), the Court had to determine whether the airline had violated 29 C.F.R. 1910.132 by failing to require that all cargo handlers wear steel-toed safety shoes. In so doing, the Court stated that

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[12]A performance-oriented standard sets out the criteria to be met through safe workplace performance-oriented goals. As such, specific requirements are not always addressed; rather, the goals of what is meant to be accomplished are addressed. A performance-oriented standard gives employers the flexibility to adapt the rule to the needs of the workplace situation, instead of having to follow specific rigid requirements.

one must consider "whether a reasonable person familiar with conditions in the industry would have instituted measures more elaborate than the precautions taken by the airline." *Id.* at 41. The Court noted that such an objective standard, proscribing conduct unacceptable in light of the common understanding and experience of those in the industry, provides the affected industry with sufficient notice of its responsibilities under what would otherwise be an extremely vague regulation.[13] The Court also noted that "[a]t the same time, ... OSHA is not precluded from promulgating, after notice and comment, new and specific regulations requiring safety precautions beyond those considered reasonable in the industry." *Id.*

In applying this test, the Commission has held that although industry custom and practice will aid in determining whether a reasonable person familiar with the circumstances and with any facts unique to the industry would perceive a hazard, they are not necessarily dispositive. *See Allegheny Airlines, Inc.*, 9 BNA OSHC 1623, 1631 (No. 14291 and 14345, 1981), and cases cited therein. Thus, industry practice cannot be the sole determinant as to whether a reasonable employer in the industry would regard a given set of facts as a hazardous condition requiring personal protective equipment, and it is proper to also consider such factors as the employer's history of prior injuries (including incidence and severity thereof) and the weight and number of articles being handled.

Additionally, Courts have recognized that actual knowledge of a hazard makes industry custom and practice irrelevant in terms of establishing notice of a hazard and the concomitant responsibility to afford protection from that hazard. Where an employer is shown to have actual knowledge that a practice is hazardous, the problem of fair notice does not exist. *Cotter & Co. v. OSHRC* , 598 F.2d 911, 914 (5th Cir. 1979) (specific, confirmed knowledge regarding a hazard warranting a steel-toed shoe requirement); *Cape & Vineyard Div. v. OSHRC* , 512 F.2d 1148, 1152 (1st Cir. 1975).

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[13]The instant case arose in the Second Circuit. *See also Ryder Truck Lines v. Brennan*, 497 F.2d 230 (5th Cir. 1974) (cargo movers in trucking industry); *McClean Trucking Co. v. OSHRC*, 503 F.2d 8 (4th Cir. 1974) (cargo movers in trucking industry); *Arkansas-Best Freight Systems v. OSHRC*, 529 F.2d 649 (8th Cir. 1976) (cargo handlers at trucking company freight dock and workers who maintained and serviced trucks and trailers). In addition, *see Voegele Co. v. OSHRC*, 625 F.2d 1075 (3d Cir. 1980) (safety belts).

The Secretary, citing to *American* Airlines, argues CO Schuhmann is a "reasonable person," noting that she had conducted 317 inspections since 1990, that the majority of the facilities had some type of warehouse or storage facility attached, and that one of her inspections involved a pallet-making facility where steel-toed shoes were worn. (Secretary's Brief, pp. 17-18). The Secretary's argument is unpersuasive. I find that CO Schuhmann's testimony regarding her previous inspections does not establish the depth of knowledge that would be required to show what a reasonable person familiar with the conditions in this industry would have implemented in terms of protective footwear. I also find that the one specific industry she mentioned -- pallet-making -- was far from similar to Respondent's facility, and the Secretary presented no evidence to establish any similarities. (Tr. 44). The CO's testimony that she had observed employees at other warehouses or storage facilities wearing steel-toed shoes is likewise not probative. When asked at how many of these facilities she had seen steel-toed shoes, she could only recall that there had been more than one, and she could not recall if there had been more than ten. (Tr. 108-09). This testimony negates any support for the Secretary's position that the CO's 317 previous inspections establish her knowledge of what is reasonable within this industry.

The Respondent, on the other hand, adduced testimony from Michael Novak, the company's vice-president of operations, in support of its position that no reasonably prudent person in the industry would have instituted a program of greater protection than was currently required based on the conditions at the facility. Novak testified that he had been in the distribution industry, either directly operating or supervising on both the national and the international level, for 30 years. These facilities were similar in nature to Respondent with respect to the operations involved and the types of products. None of his other employers, including Wal-Mart and other like companies, required employees to wear steel-toed safety shoes in their distribution operations. Furthermore, none of the companies Respondent had acquired had required its employees to wear such shoes. Additionally, Novak had toured or inspected various similar facilities as part of the "Best Practices" meetings he had attended,

which included safety practices.[14] He testified he had visited over 30 companies and at least 100 distribution warehouses all over the United States, including the area of the subject work site, and that none of these required safety shoes. As a result of his extensive visits to other companies and facilities, Novak concluded that there was no industry-wide requirement for employees of warehouse distributors to wear safety-toed shoes. (Tr. 128-34).

As previously stated, the Commission has held that industry custom and practice are not the sole factors in determining whether a reasonable person familiar with the facts and circumstances of the industry would perceive a hazard. It is the Secretary's position that the evidence of Respondent's accident history as well as a previous OSHA inspection provide notice of the cited hazard. However, I find that the evidence adduced does not prove such knowledge by a preponderance of the evidence. The three foot accidents noted above represent an extremely low incidence of non-severe injuries, and although they do show that a hazard existed, they do not provide objective or reasonable notice that safety shoes should have been worn in Respondent's facility.[15] In view of the record and my findings in this matter, I conclude that the Secretary has not met her burden of proof with respect to establishing knowledge of the hazard. Item 4 of Citation 1 is therefore vacated.

Citation 1, Item 3

This item alleges a violation of 29 C.F.R. 1910.36(b)(4), which provides as follows:

> In every building or structure exits shall be so arranged and maintained as to provide free and unobstructed egress from all parts of the building or structure at all times when it is occupied. No lock or fastening to prevent free escape from the inside of any building shall be installed except in mental, penal, or corrective institutions where supervisory personnel is continually on duty and effective provisions are made to remove occupants in case of fire or other emergency.

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[14]In 1993, Novak attended a "Best Practices" meeting at the Hanaford distribution center that is located just outside of Albany. At that time, Hanaford was considered a "world class" distribution center, and it did not require safety shoes for warehouse employees. (Tr. 133-34).

[15]Although C-4-5 and C-7-8 set out four incidents, the accident reported in C-8 involved an employee's ankle. The standard addresses the hazard of foot injuries; thus, there are only three injuries relevant to this discussion.

CO Schuhmann testified that this item was issued because there were two exit doors in the facility that could not be opened; one door was locked and could not be opened until a key was obtained, and the other door was stuck. The first door was located by the battery charging station, and when she pushed on the handle the door did not open; she then tried the handle three more times, and, as she did so, pushed on the door with all the weight of her body, but it still would not open.[16] The CO said that a management official had to use a key to open the door. She also said that she watched this person put the key in the keyhole before pushing the handle, after which the door opened freely. (Tr. 58-65, 73-80; Ex. C-10).

CO Schuhmann further testified that the second door was in close proximity to the first door and that she first tried to open it by pressing on the handle and pushing against the door with the weight of her body; she tried to open the door twice more in this same way, but it still would not open. The CO said a management official tried the door about two times before it finally opened. She also said that this door was the next exit down from the first door and that both were on the same side of the building. (Tr. 60-63, 81-82, 87; Ex. C-11).

Raymond Moye, the chief shop steward, testified that he saw the CO try to open the doors, and he corroborated her account of her efforts to open the second door. Specifically, he recalled that she threw herself into the door three times and that a maintenance man then threw himself into the door and it opened. He could not recall if the maintenance man had to do this more than once, but he recalled it opening for the maintenance man. (Tr. 112-13).

Respondent presented evidence that the emergency doors at the facility were not ever locked. Joseph Sevrie, the lead porter who regularly maintained such doors, testified it was impossible for the first door to have been locked so as to prevent it from being opened and that the lock mechanism shown in Exhibit C-10 was used to reset the emergency door handle after it was opened. (Tr. 156-59; Ex. R-1(a)-(b)). Theresa Boening, an employee who participated in the inspection, testified that there were no locks on the emergency doors and that the lock mechanisms ensured the doors were closed, not locked. She said she saw the CO attempt to open the first door and that the door did not open; however, she did not recall the

[16]The CO indicated that her weight at the time was 247 pounds. (Tr. 63).

CO stating to anyone that the door was locked. She also said that after the CO left the area, she herself went over to the door and opened it by throwing her hip into it, and she noted that after the door was opened it had to be reset with a key. As Boening recalled, the CO opened the second door but it was "difficult" for her to do so. Boening herself later went over to the door and had no trouble opening it. (Tr. 162-65, 173-75).

As to the second door, it is clear from the foregoing that the testimony of the CO and Moye was largely in agreement. It is also clear that, although Boening's testimony about the second door differed from that of the CO and Moye, the testimony of these three witnesses establishes that the second door did not open easily and that force was required to open it. As to the first door, there was a significant difference between the testimony of the CO and that of Boening. However, Boening's testimony about the lock mechanisms on the exit doors agreed with that of Sevrie, and, in my opinion, the Secretary did not rebut their testimony in this regard. On the other hand, Boening's testimony about the first door establishes that the CO was not able to open it. On balance, I find that the record demonstrates that while the first door was not in fact locked it nonetheless was not easily opened.

Under Commission precedent and the language of the standard, to prove that a door violates section 1910.36(b)(4), the Secretary must show that the door (1) is an "exit" and (2) that it deprives employees of "free and unobstructed egress" from the areas in which they work. *See Gould Publications*, 16 BNA OSHC 1923, 1924 (No. 89-2033, 1994); *Spot-Bilt, Inc*., 11 BNA OSHC 1998, 2000-01 (No. 79-5328, 1984). It is clear from the record that the cited doors were exit doors. It is also clear, based on my findings above, that neither door was easily opened. The fact that the doors would not open without the use of force persuades me that the doors did not provide "free and unobstructed egress" as required by the standard. I find, therefore, that the standard applies, that its terms were violated, and that employees were exposed to the violative condition. I further find that Respondent should have known of the condition, since it was one that the lead porter should have detected during the course of his maintenance and inspections of the doors. Accordingly, the Secretary has met her burden of proof with respect to this citation item.

This item has been classified as serious. However, I find that the violation was technical in nature and that it had a negligible relationship to employee safety and health, in that the doors did in fact open at the time of the inspection. I also find that the imposition of a penalty or the entry of an abatement order would be inappropriate. This item is therefore affirmed as a *de minimis* violation.

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 found specially and appear in the decision above. (See Rule 52(a) of the Federal Rules of Civil Procedure.)

ORDER

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

1. Citation 1, Item 3, alleging a serious violation 29 C.F.R. 1910.36(b)(4), is AFFIRMED as a *de minimis* violation.

2. Citation 1, Item 4, alleging a serious violation of 29 C.F.R. 1910.136(a), is VACATED.

/s/

Covette Rooney

Judge, OSHRC

Dated: May 21, 2001

Washington, D.C.