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.	:	OSHRC DOCKET NO. 01-0163
	:	
RIVERDALE MILLS CORPORATION,	:	
	:	
Respondent.	:	

APPEARANCES:

Paul J. Katz, Esquire
Boston, Massachusetts
For the Complainant.

Warren G. Miller, Esquire
Boston, Massachusetts
For the Respondent.

BEFORE: G. Marvin Bober
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case is before the Occupational Safety and Health Review Commission ("the Commission"), pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review (1) citations issued by the Secretary of Labor ("the Secretary") and (2) proposed assessments of penalty therefor. The Occupational Safety and Health Administration ("OSHA") conducted an inspection of the facility of Respondent Riverdale Mills Corporation ("Respondent" or "Riverdale"), located in Northbridge, Massachusetts, from October 10, 2000 through December 11, 2000. As a result of the inspection, OSHA issued to Riverdale a ten-item serious citation and a two-item "other" citation, with total proposed penalties of $11,025.00. Riverdale filed a timely notice of contest, after which the Secretary filed her complaint and Riverdale filed its answer. Prior to trial, the Secretary withdrew Items 2 and 8 of the serious citation and both items of the "other" citation, leaving for resolution Items 1, 3 through 7, and 9 and 10 of the serious

citation.[1] The trial was held in Providence, Rhode Island, from October 29 through 31, 2001. Both parties have submitted post-trial briefs, and this matter is ready for disposition.

Jurisdiction

The parties agree that Riverdale is an employer within the meaning of section 3(5) of the Act and that the Commission has jurisdiction over this matter. *See* Joint Prehearing Statement and Stipulations, dated June 27, 2001.

Riverdale's Motion to Recuse

At the administrative trial, Riverdale made an oral motion that I recuse myself. One basis of the motion was the fact that I had heard another case involving this same Respondent and that, in November of 2000, I had issued a decision and order that was adverse to the company.[2] A further basis was the fact that, at the beginning of this proceeding, I advised Riverdale's counsel that if the company president, Respondent's representative at the trial, made comments and facial expressions during witness testimony as he had in the prior trial, I would ask the representative to leave because such behavior could intimidate the witnesses. (Tr. 5-7). I denied the motion to recuse, and, when the motion was renewed on the third day of trial, I again denied it. (Tr. 7; 603-04). Riverdale does not raise the issue of the motion in its post-trial brief. Regardless, in order to have a complete record, the reasons for my denial of the motion to recuse are set out below.

28 U.S.C. § 455(a) requires "[a]ny justice, judge, or magistrate of the United States [to] disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This statute seeks to balance two policy considerations. First, "courts must not only be, but must seem to be, free of bias or prejudice." *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998) (citation omitted). Second, recusal on demand would provide litigants with a veto against unwanted judges. *Id*. Courts have considered disqualification appropriate (1) when the charge is supported by a factual basis, and

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[1]As issued, Item 7 of the serious citation consisted of subitems 7(a) through 7(l); however, before the trial, the Secretary also withdrew subitem 7(i), leaving 11 subitems for resolution. *See* Joint Prehearing Statement and Stipulations, dated June 27, 2001.

[2]My decision in that case was due in part to my not crediting certain testimony of two company officials, one of whom was Riverdale's president, James Knott. *See Riverdale Mills Corp.*, 19 BNA OSHC 1329, 1333 (No. 99-1836, 2000). My decision was appealed to the First Circuit and was affirmed. *Riverdale Mills Corp. v. OSHRC*, No. 01-1060 (1st Cir. Feb. 21, 2002).

(2) when the asserted facts "provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." *In re Boston's Children First*, 244 F.3d 164, 166 (1st Cir. 2001); *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

The movant has the burden of convincing a reasonable person that personal bias exists. *Rhodes v. McDannel*, 945 F.2d 117, 120 (6th Cir. 1991); *United States v. Story*, 716 F.2d 1088, 1090 (6th Cir. 1983). Further, adverse rulings during the course of the proceeding are not, standing alone, sufficient to establish bias and prejudice. *Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir. 1956); *Joseph E. Bennett Co. v. Trio Indus.*, 306 F.2d 546, 549 (1st Cir. 1962). *See also United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966) (bias and prejudice are disqualifying only if they result in an opinion on the merits on some basis other than what the judge learned from his participation in the case). In addition, the Supreme Court has held that, in the absence of a statutory requirement, a judge is not disqualified from presiding over a retrial merely because he was reversed on earlier rulings. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236 (1947).

In view of the foregoing, the fact that I presided over an earlier trial involving Riverdale and issued a decision adverse to the company is no basis for my recusal in this matter. Moreover, I have thoroughly examined the transcript in this case, and, in my opinion, Riverdale was treated fairly and impartially and there is no evidence of bias or prejudice on my part against the company.[3] Finally, in writing this decision, I have based my determinations on what I learned from my participation in this trial. For these reasons, I conclude that my denial of the motion was appropriate.

The OSHA Inspection

The inspection of Riverdale's facility was a "general schedule" inspection resulting from the facility's being on a "site-specific targeting list."[4] OSHA compliance officers ("CO's") Nelson Barnes and Theresa Dann were assigned to conduct the inspection, and, upon arriving at the facility, and pursuant to OSHA procedure, they reviewed Riverdale's injury and illness records for 1997,

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[3]This is so despite the inappropriate behavior of Riverdale's counsel and the company president at various times during the trial. (Tr. 24-33; 199; 233-36; 369-71; 531; 549; 580-84; 588; 611-12; 618; 681; 693; 736; 747; 767; 769; 839).

[4]OSHA's national office had sent the list to the Springfield, Massachusetts OSHA office, which was the area office that performed the inspection. (Tr. 75).

1998 and 1999 to determine if a "wall-to-wall" inspection was required.[5] On the basis on that review, it was discovered that Riverdale's lost workday injury rate ("LWDI rate") for 1998 was 43, while the LWDI rate for manufacturing companies in general was 4.7 and the LWDI rate for companies in the same business as Respondent, that is, the fabrication of wire products, was 7.9.[6] The CO's accordingly conducted a wall-to-wall inspection of the facility, which resulted in the two citations noted above. (Tr. 75-78; 225; 435-38; 596-600; 605-06; 702-04).

The Secretary's Burden of Proof

Item 1 of the citation alleges a violation of the general duty clause, section 5(a)(1) of the Act, while the other items allege violations of specific standards promulgated under section 5(a)(2) of the Act. To prove a 5(a)(1) violation, the Secretary must show that (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *Well Solutions, Inc.*, 17 BNA OSHC 1211, 1213 (No. 91-340, 1995); *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). To prove a 5(a)(2) violation, the Secretary must show that (1) the standard applies to the cited condition, (2) the terms of the standard were violated, (3) employees had access to the condition, and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the condition. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1386 (No. 92-262, 1995); *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074 (No. 87-1359, 1991).

Serious Citation 1 - Item 1

Item 1 alleges a violation of section 5(a)(1) as follows:

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[5]CO's Barnes and Dann previously inspected the facility in April 1999, which culminated in the decision I issued in November 2000. (Tr. 435-38; 703-04).

[6]Ronald Morin, the Springfield OSHA office area director, testified about the 43 LWDI rate. (Tr. 76-78). In support of his testimony, the Secretary presented C-18, OSHA's "1998 Establishment Profile" for Riverdale; according to CO Dann, the information shown in C-18 was based on data provided by the company itself. (598-600; 605-06). The Secretary also presented Riverdale's OSHA 200 logs, showing the reportable injuries and illnesses for 1994 through 2000, as well as the supporting documents for those events. *See* C-1, C-2. James Knott, Riverdale's president, disputed the LWDI rate, but no evidence was presented to rebut the Secretary's evidence. (Tr. 923-24).

> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazards of falling down the hoist way shaft when the elevator car was not in the landing zone, being struck by the elevator car when the car was entering or leaving the landing zone, or having part of their body caught between the moving elevator and the hoist way:
>
> Vertical materials handling conveyor located between the maintenance dept. and the wire drawing dept. on the first level and in the storage area on the second level -- the gates could be opened without the vertical conveyor car at the desired landing zone; employee(s) were not prevented from walking into the hoist way while the vertical conveyor was in operation.

The record shows that the cited conveyor is a "vertical reciprocating conveyor" ("VRC") that travels between the first and second floors at the facility; the VRC is used to move items between the two floors, and it does not have an operator or carry passengers. The record further shows that the VRC's steel floor is about 14 feet wide and 8 feet deep, that the sides are steel wire mesh, and that the top, front and back are open. The first floor landing has a steel mesh door that opens onto the back of the VRC, while the second floor landing has a wooden door that opens onto the front of the VRC; the first floor door raises open vertically, and the second floor door, which has a small glass window in it, slides open horizontally. Both landings have "send/call" buttons and a red light that goes on when the car is not present at that level. (Tr. 226-28; 265-69; 277-78; 283; C-13; C-19).

In support of this item, the Secretary presented CO Barnes. He testified that on October 24, 2000, when he, CO Dann and representatives of Riverdale were on the second floor, he asked an employee, Mr. Manstram, to show him how the VRC worked.[7] The CO tested the VRC by trying to open the door, and he found he could do so when the car was not at the landing; he went to the first floor landing and found he could open that door when the car was not there.[8] CO Barnes concluded the VRC was not interlocked with the doors to prevent them from being opened when the car was

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[7]CO Barnes testified that during the inspection, he and CO Dann were accompanied by three Riverdale representatives, Messrs. Benoit, Christian and Nelson; as Barnes recalled, one of these individuals was an engineer and the other two were managers. (Tr. 225-26).

[8]CO Dann testified she saw CO Barnes open the doors on the first and second floors and that in both cases the car was not there. She identified C-33 as a photo of the second floor landing with the door ajar that showed that the car was not at that landing. (Tr. 932-43).

not there or when the car was moving. CO Barnes also concluded the condition was a serious hazard. On the first floor landing, an employee might open the door to see where the car was, and, if it was descending, the employee could be caught between the car and the hoist way floor; on the second floor landing, an employee could open the door and be struck by the ascending car, or an employee could open the door and walk in, and, if the car was on the first floor, fall 12 feet, 10 inches to the floor of the car. The CO said these hazards could have caused amputation or crushing injuries and could have been abated by an interlock device. He also said there was no OSHA standard addressing this situation but that ANSI B20.1-1993, a safety standard for conveyers, requires doors to VRC's to be interlocked.[9] (Tr. 228-31; 237-42; 247-59; 264-69; 574-75; 578-83; C-13; C-19).

The Secretary also presented Edward Perchaluk, president of Robert G. Warner Company ("Warner") since 1987. Mr. Perchaluk testified that Warner is a distributor and manufacturer's representative in the material handling industry, that one of its specialty areas is VRC's, and that he has dealt with VRC's since he began working for Warner in 1971. He further testified that operating a VRC without interlocking landing doors has been a recognized hazard in the manufacturing industry "since the beginning," and he discussed three documents in that regard. C-9, ANSI B20.1-1993, requires doors to VRC's to be "interlocked so that they can be opened only when the carrier has stopped at that level and the carrier cannot be moved until they are closed." *See* C-9, § 6.21.2(b). C-10, the 2001 edition of the "Application Guidelines for Vertical Reciprocating Conveyors," is published by the Material Handling Industry of America. C-10 requires gates and enclosures "in accordance with ASME/ANSI B20.1." It also requires gates to have "an interlock system to prevent carrier ... movement if the gate is open and to lock the gate when the carrier ... is not present at that landing." *See* C-10, §§ 5.6.2, 5.6.3, 10.5. C-11, a document published by a VRC manufacturer that dates from the 1970's, sets out the requirement for interlocks on VRC's in language essentially the same as that in C-9 and C-10. Mr. Perchaluk said that warning signs and lights do not obviate the requirement for interlocking landing doors to VRC's. He also said that, other than a unique type of

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[9]ASME/ANSI B20.1-1993 was admitted as C-9. As indicated in C-9, the initial 1947 standard was sponsored by ASME, the American Society of Mechanical Engineers, and approved by ANSI, the American National Standards Institute. C-9 is the eighth edition of the standard. *See* C-9, p. iii. *See also* C-9, p. 15, § 6.21.2(b), for the interlocking requirement CO Barnes noted.

VRC that is "totally conveyorized" such that it prevents access by people, he had never seen a VRC operated without interlocking landing doors. (Tr. 291-306; 322).

In defense of this item, Riverdale presented James Knott, the company president. Mr. Knott testified that the doors to the VRC were interlocked, such that if either door were opened, the car would come to an "instant stop." He said it was "absolutely not" true that a landing door could be opened without the car being present and that it was "absolutely impossible" that an employee could walk into the hoist way while the car was in operation. He also stated his belief that the OSHA CO's were not being truthful about this or any of the other alleged violations. (Tr. 840-41; 921-27).

Riverdale does not really dispute the Secretary's evidence regarding the "recognized hazard" element, and, based on the record, I find that the Secretary has met her burden of showing that it is a recognized hazard for a VRC to be operated without interlocking landing doors. Riverdale does, however, dispute the Secretary's evidence that the VRC was not interlocked with the landing doors. With respect to the allegation that the landing doors could be opened when the car was not present, the testimony of CO Barnes, set out above, was that he was able to open the doors on both landings without the car being there. His testimony was supported by that of CO Dann and C-33, the photo depicting the second floor door ajar. The only evidence Riverdale presented on this point was the testimony of Mr. Knott, who stated that the VRC was interlocked and that it was "absolutely not" true that a landing door could be opened without the car being present. Contrary to this testimony, C-5, a memo that Mr. Knott gave his counsel before the trial, reads in relevant part as follows:

> The vertical conveyor needs a sliding, un-interlocked door so an operator can slide the door open to see where the platform is. The door is properly marked with warning signs, but if the door couldn't be slid open to observe its location, the vertical conveyor would not be operational.[10]

In addition, I observed the respective demeanors of CO Barnes, CO Dann and Mr. Knott on the witness stand. I found the testimony of the CO's to be sincere and credible, while that of Mr. Knott was less than candid. Based on this finding, and in light of C-5, the testimony of the CO's is credited over that of Mr. Knott. The Secretary has therefore established that the landing doors to the VRC could be opened without the car being present.

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[10]The above statement is an October 28, 2001 revision to Mr. Knott's original memo of February 22, 2001, to his counsel. C-5 was received in evidence on the first day of trial. (Tr. 24-33).

As to the allegation that employees could walk into the hoist way when the car was moving, CO Barnes testified he had seen the VRC in operation but had not actually seen the car moving when a door was open. (Tr. 228-31; 248; 257-59; 264; 285; 580). CO Dann testified that she had seen "with her own eyes" that "[w]hen the door was open at the second level ... [the car] could move." (Tr. 941-42). Although Riverdale points to the foregoing as proof that the CO's were not truthful, CO Dann's testimony, as I read it, was only that she saw that the car "could" move with the door open, not that she saw that the car "did" move with the door open. This testimony is in accord with that of CO Barnes. He said that the way to determine whether the VRC was interlocked was to try to open a landing door when the car was not there; when he found he could do so, he was convinced that the VRC was not interlocked with the doors, which meant, based on his experience, that the car could move when a door was open, even though he did not see this occur. He also said that there could have been an interlock device on the VRC, although he did not recall seeing one, but that if there was it was not functional; further, when he told company officials that the VRC was not interlocked, they basically had nothing to say. (Tr. 264-65; 574-75; 578-83).

Riverdale presented no evidence in this regard except the testimony of Mr. Knott, who said that if either door were opened the car would come to an "instant stop." (Tr. 840-41). However, Mr. Knott has been found to be an unreliable witness, for the reasons given *supra*, while CO Barnes has been found to be a sincere and believable witness. Moreover, I note that CO Barnes has been with OSHA since 1976 and that he has conducted around 1,000 inspections, about 800 of which have involved manufacturing businesses; he has also had extensive training in safety matters, and his current position with OSHA is that of assistant area director in the Springfield office. (Tr. 222-24; C-16). For all of these reasons, I am persuaded that, as CO Barnes testified, the car could move when the landing doors were open. This conclusion is supported by the fact that Riverdale officials had essentially no response when CO Barnes brought to their attention the fact that the VRC was not interlocked. (Tr. 264; 574-75). I find, accordingly, that the Secretary has met her burden of proving that an employee could walk into the hoist way of the VRC when it was operating.

In view of the foregoing, the Secretary has demonstrated all of the elements required to prove that the VRC was in violation of the general duty clause. This item is consequently affirmed as a

section 5(a)(1) violation.[11] The Secretary has proposed a penalty of $1,125.00 for this item. CO Barnes testified that this was a high-gravity violation, as it could have caused serious injury or death, but that there was a lesser probability of an accident occurring because the VRC was not used frequently. He also testified that reductions were applied to the base penalty for this item for the employer's size, history and good faith.[12] CO Barnes said that the proposed penalty was appropriate and that it was "more than fair." (Tr. 165-66; 244-46). In light of the CO's testimony, I find that the proposed penalty is appropriate. A penalty of $1,125.00 is therefore assessed.[13]

Serious Citation 1 - Item 3

This item alleges two instances of violation of 29 C.F.R. 1910.132(a), which requires in pertinent part as follows:

> Protective equipment ... shall be provided, used and maintained ... whenever 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.

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[11]In affirming this item, I have noted that the conveyor was cited in 1997, pursuant to 29 C.F.R. 1910.212(a)(1), because the "safety gates" were not high enough to prevent access to the car. (Tr. 95-98; C-7). Riverdale asserts that "[i]t defies credibility to believe that the 1997 OSHA inspector would not have observed the alleged failure to interlock the landing doors." (R. Brief, p. 9). However, the record shows that only one gate to the VRC was evaluated then, that it was not tested, and that the CO's report that the gate was interlocked was based on what the employer said. (Tr. 95-100; 135-43; 152-53). Further, even if the gates to the VRC were interlocked in 1997, that would provide no basis for concluding they were interlocked in 2000, in light of record in this case. Finally, the language of the 1997 citation, together with Mr. Knott's statements in the first version of C-5, the memo he wrote his counsel, indicate that the landing gates were modified, such that their condition in 1997 was different from their condition in 2000. *See* C-5, C-7. Riverdale's suggestion that the citation of the VRC in this case was improper, in view of the 1997 citation, is rejected.

[12]These reductions, of 20, 10 and 25 percent, respectively, were applied to all of the proposed penalties in this case. The 20 percent reduction for size was due to the fact that Riverdale has about 120 employees. (Tr. 470-71).

[13]In her post-hearing brief, the Secretary requests that I assess penalties higher than those she proposed for this and three other items. (C. Brief, pp. 46-51). The Secretary's request is denied. *See R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070, 1075 (Nos. 91-1873 & 91-2027, 1995); *Valdak Corp.*, 17 BNA OSHC 1135, 1137 n.5 (No. 93-0239, 1995).

Item 3(a) alleges that employees who worked in the vicinity of an open galvanizing kettle that contained molten zinc were not required to wear leggings and spats to protect their legs and feet, exposing them to possible severe burns. The record shows that the galvanizing kettle is part of Riverdale's strand galvanizing line ("SGL"), which is the means used to coat steel wire. The record also shows that the kettle is about 3 feet deep and that the wire enters the kettle and goes through it about 1.5 feet below the surface so that the molten zinc can coat the wire. (Tr. 34-35; 69-70; 78-81; 609-10; 714-15). CO Dann testified she spoke to employee Phetsamone Khounsavath, who told her he worked on a grate platform near the kettle and that when he did so he wore safety glasses, a face shield, gloves and an apron to protect himself from the molten zinc. She further testified that when she asked him if he were provided leggings and spats to protect his legs and feet, he said he was not. CO Dann noted that a sign on the kettle stated that an explosion could occur if wet materials entered the molten metal and that hand, eye and face protection, as well as a non-flammable apron, leggings and spats, were to be worn at all times; she also noted that a manual she had seen at the facility for the SGL contained the same statement. The CO said that water could have entered the kettle if the sprinkler above it had been activated or if the water pipe and valve over it had failed, which could have caused molten zinc to splatter on the employee. (Tr. 608-14; 712-17; 783-88; 799-801; C-31).

As both parties indicate in their briefs, CO Dann based this item on her determination that water could enter the kettle, and she agreed that the chance of this occurring when an employee was working near the kettle was remote. (Tr. 814; 799-801). Regardless, I find that Riverdale violated the cited standard. First, Mr. Knott himself testified that water "often" dripped down onto the kettle, indicating the existence of the hazard the CO described.[14] (Tr. 845). Second, Mr. Khounsavath testified that he skimmed the top of the kettle about once a shift and that he wore protective clothing to do so. (Tr. 61-62; 70-71). Mr. Knott agreed it was occasionally necessary to skim zinc oxide from the top of the kettle. He testified that the employee was required to wear a face shield, goggles, gloves and an apron when doing this work but that there was "absolutely no reason" for spats and leggings, although they were also provided. (Tr. 848-49). CO Dann testified, however, that Mr. Khounsavath told her that spats and leggings were not provided, and the protective clothing he

[14]On page 1 of C-5, Mr. Knott's statement to his counsel was that "[w]ater regularly spills into the kettle and turns into steam instantly, without any problems."

mentioned did not include these items. (Tr. 61-62; 70; 612-13). In view of the evidence of record and my credibility findings above, I conclude that leggings and spats were required when employees worked near the kettle and that Riverdale did not provide them. Item 3(a) is therefore affirmed.

Item 3(b) alleges that an employee was "wearing jewelry on his neck and wrist while working in near proximity to the operation of the PVC coating machine," in violation of the cited standard. Based on the testimony of CO Dann and Mr. Khounsavath, I find that the cited instance occurred and that Riverdale had a rule prohibiting the wearing of jewelry around operating machinery. (Tr. 62-63; 614-15; 788-89; 798; C-3, p. 38; C-20). Regardless, I agree with Respondent that the cited standard does not apply to this situation. As Respondent notes, the standard refers to the requirement for protective equipment and nowhere mentions the wearing of jewelry. CO Dann testified there was no specific standard in this regard and that the cited standard was the one most applicable to the situation. (Tr. 789-90). However, that no specific standard exists to fit a particular situation is no basis for citing a standard that, in my view, clearly does not apply; in such a case, OSHA may issue a citation pursuant to the general duty clause, as it did in Item 1, *supra*. Item 3(b) is vacated.

The Secretary has proposed a total penalty of $1,100.00 for Item 3. CO Dann testified that she considered both instances to be of low gravity and that both had a low probability of an accident occurring. She also testified about the reductions applied for size, history and good faith, which were the same as those CO Barnes discussed, *supra*. (Tr. 616-17). In view of the fact that Item 3(b) has been vacated, I conclude that a penalty of $550.00 is appropriate for Item 3(a). A penalty of $550.00 is accordingly assessed for Item 3(a).

Serious Citation 1 - Item 4

Item 4 alleges a violation of 29 C.F.R. 1910.146(c)(4), which states as follows:

> If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with this section. The written program shall be available for inspection by employees and their authorized representatives.

This item alleges that on the SGL, a written permit space program was not developed and implemented for employee(s) who entered a chamber to restring wire, exposing them to possible asphyxiation. As noted above, the SGL is the means used to coat steel wire. The record shows that the wire strands the facility makes pass first through a cleaning chamber and then through coils that

heat them to 1,265 degrees. The wire next goes through a "cooling chamber" that has water coils that cool the wire to about 860 degrees; the chamber also has an atmosphere of 95 to 97 percent nitrogen and 3 to 5 percent hydrogen to prevent oxidization of the wire. The wire subsequently goes through the galvanizing kettle described *supra*, after which it goes through a cooling tube and then on to welding machines and other equipment for further processing. (Tr. 34; 78-81; 843-45; 851; 865).

The record further shows that the cooling chamber, which sits on a steel grid platform, is 42 feet long, 3 feet deep and 4.75 feet wide.[15] In the middle of the chamber is an enclosed "tower" that is about 8 feet high and 5 feet wide, and on top of the chamber, to either side of the tower, are four openings; the two on the north side are 3.5 by 5 feet, and the two on the south side are 3.5 by 6.67 feet.[16] About 12 wire strands go through the cooling chamber at a time, and the strands, which come off of a spool, fit through quarter-inch holes on the north side of the chamber. An employee then "threads" the strands into devices at the bottom of the chamber that hold them in place, and a "take-up" device on the south side pulls the strands through the chamber. The openings on the chamber are covered when wire is going through it, but if the wires break an employee must remove the covers and enter the chamber to rethread the wires. (Tr. 34-51; 80-82; 89; 108; 856-65; C-6; R-13).

Mr. Khounsavath testified that one of his jobs on the SGL was to rethread the wires if they broke, which could happen once or twice a shift, and he explained the procedure he followed. He first turned off the gas going into the chamber and then removed the covers on the openings with a crane, after which he waited 15 to 20 minutes so the gas and heat could dissipate; he then summoned another employee to monitor him, and, armed with a meter that detected for oxygen deficiency, he climbed into the chamber through one of the openings.[17] Once inside, he would begin rethreading

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[15]While Mr. Knott testified the chamber was 134 feet long, AD Morin testified that CO Dann had measured it to be 42 feet long. (Tr. 80-82; 108; 856; 859). In addition, R-6, a diagram of the chamber, indicates that its length is about the same as the CO's measurement. Based on this evidence, it would appear that Mr. Knott may have been referring to the length of the entire SGL.

[16]The chamber has no partitions, such that it is possible to crawl through the entire length of the chamber. (Tr. 41; 81; 154; 861-62).

[17]Mr. Khounsavath said that Nick Franklin, an engineer, was his "boss" on the SGL and the one who had told him to wait 15 to 20 minutes before going in the chamber; Mr. Franklin also gave

(continued...)

the broken wires on his hands and knees, which could take up to 30 minutes and could require him to crawl from one side to the other of the tower. Mr. Khounsavath said the meter's alarm had gone off several times in the chamber and that when it did he exited through the nearest opening; it took him 4 to 5 seconds at most to exit, and he had never been unable to breathe. Mr. Khounsavath also said that he did not know the percentage of hydrogen and nitrogen used in the chamber and that no one had ever told him what the effects of these gases were on the body. (Tr. 49-60; 64-69).

Ronald Morin, the area director ("AD") of the Springfield OSHA office, testified he viewed the chamber on June 20, 2001, with Mr. Knott, Mr. Miller and CO's Barnes and Dann. He discussed the chamber and how it worked, and he stated it was "definitely" a permit-required confined space; it had restricted entry and exit, employees entered it to work, it was not intended for continuous occupancy, and it had the potential to have a hazardous atmosphere. The AD said OSHA requires oxygen content to be at least 19.5 percent, that the chamber had no oxygen when wire was going through it, and that although air entered the chamber when the openings were uncovered there would still be oxygen-deficient "pockets" after 15 to 20 minutes due to the length of the chamber, the size of the openings, and the fact that no ventilation was used.[18] The AD also said the chamber was a permit-required confined space, even with the conditions Mr. Khounsavath had described, because a person with inadequate oxygen can quickly become disoriented and lose consciousness. AD Morin noted that the standard required a written plan, evaluating the chamber's hazards before any entry took place, and putting the necessary safeguards in place.[19] (Tr. 73; 78-94; 143-52).

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[17](...continued)
him the meter to use and told him to have a monitor when in the chamber. (Tr. 47-48; 55-56; 67).

[18]The AD said the employee had to go through the entire chamber to rethread the wire, and that the meter went off showed there could be oxygen-deficient areas; he also said the ceiling fan in the room would not ventilate the chamber due to the ceiling's height. (Tr. 85-93; 132; 146-48; 157).

[19]The AD noted that if prior testing had been done to show that employees could safely enter the chamber while it was being ventilated, and if continuous ventilation and periodic testing took place during entry and employees were properly trained, then nothing more was required; otherwise, there were further requirements, including monitoring, more in-depth training, and continuous testing of the chamber during entry. (Tr. 85-88; 145-52).

Riverdale contends the chamber was neither a confined space nor a permit-required confined space, in view of the testimony of Mr. Knott, and that AD Morin did not have the expertise to conclude that it was. Riverdale further contends that the testing it had done of the chamber prior to trial shows that the hydrogen and nitrogen are almost immediately replaced with oxygen when the covers are removed, such that entering the chamber does not present a hazard. I disagree.

First, I found AD Morin's credentials more than adequate. He has a B.S. in chemistry and is an industrial hygienist, he has been with OSHA for over 25 years and has been an AD for the last 16 years, and he has conducted many inspections of manufacturing facilities and is familiar with the type of process used at Riverdale. (Tr. 73-75; 101-05). Second, AD Morin's definition of a permit-required confined space was identical to the one in the standard. (Tr. 81-82; 85-87). *See also* 29 C.F.R. 1910.146(b). Third, I observed AD Morin's demeanor on the stand, and I found his testimony credible and convincing. Fourth, Mr. Knott has been found to be an unreliable witness, and portions of his testimony as to the chamber were contrary to other evidence. For example, despite Mr. Khounsavath's testimony, which I found believable, Mr. Knott denied the employee used a meter or a monitor when in the chamber; he also denied the employee had to crawl through the chamber to rethread the wire and indicated the work could be done by simply reaching into the openings or kneeling inside them. (Tr. 862; 920-21; 928). His explanation that Mr. Khounsavath was "mistaken" was not credible, based on the questions that his own counsel asked the employee.[20] (Tr. 65-68). Mr. Knott's testimony that gases were not trapped in the chamber and that oxygen replaced them "instantly" was likewise not credible in light of Mr. Khounsavath's unrebutted testimony that the oxygen meter's alarm had gone off several times when he was inside the chamber. (Tr. 59; 67-68; 862-66).

Finally, the testimony of Michael Matilainen, the certified industrial hygienist who tested the chamber at Respondent's request, does not persuade me the chamber was not a hazard. Based on his testimony and R-3, his report, Mr. Matilainen tested the chamber on August 28, 2001, from 11:32 to 11:49 a.m., using a Gastech GT-2400, an MSA Flowlite Pump and tubing that he put into the

[20]Riverdale's counsel even showed Mr. Khounsavath an oxygen meter at the hearing, and the employee identified it as the one that he used in the chamber. (Tr. 67-68).

chamber.[21] His first test of the chamber, which took place after the gas was turned off but with the covers still on, measured the oxygen level to be zero.[22] His next test was of the southernmost opening after its cover was removed, which showed the oxygen level to be 14 percent as soon as the cover was off and 19.6 percent after two minutes. His tests of the other openings, going from south to north, showed the oxygen levels to be 20.5, 20.9 and 20.9 percent, respectively, once their covers were removed; these tests were done four, seven and 14 minutes, respectively, after the first cover was taken off. Due to his tests and what company officials told him, Mr. Matilainen concluded that the chamber was not a permit-required confined space. (Tr. 325-41; 349-51; 354-55; R-3).

Despite the foregoing, I find that the chamber had the potential to have a hazardous atmosphere. Mr. Matilainen said his testing was limited to 30 minutes because that was what Mr. Knott wanted and that he would normally do more extensive testing that would take place over a longer period and in more areas. (Tr. 364-65). Mr. Matilainen also said he did not test in the area of the tower because it was his understanding employees did not need to go there. (Tr. 361). In addition, it is clear from his testimony and R-3 that the only areas Mr. Matilainen tested were the openings, and all of these factors, in my view, invalidate his opinion that the chamber was not a permit-required confined space and that the covered areas were not oxygen deficient.[23] (Tr. 339-40; 354-55; 360-63; 377). The record shows that Mr. Khounsavath had to crawl through the entire chamber, including the area beneath the tower, to rethread the wire.[24] (Tr. 57; 89; 146-48). The record also shows that the meter's alarm had gone off when Mr. Khounsavath was in the chamber. (Tr. 57-59; 67-68). AD Morin opined that this had occurred in covered areas and most likely under the tower. He explained that while the areas directly below the openings would probably have enough oxygen once the covers were removed, there would still be oxygen-deficient "pockets" in covered areas because of the length of

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[21] According to what Riverdale officials told him, the SGL had been operating since 6:00 a.m. that day and the gas was turned off about a minute before the first cover was removed. *See* R-3.

[22] Mr. Matilainen took this reading by inserting tubing into a "port" on the chamber. (Tr. 336).

[23] Mr. Matilainen's testing consisted of inserting the tubing he used first 1 foot and then 2 feet down into each opening. (Tr. 338-39; 363; 371-73; R-3).

[24] Based on the testimony of AD Morin and CO Barnes, the distance between the two openings closest to the tower was 12 to 15 feet. (Tr. 147; 575-76).

the chamber, the size of the openings and the fact that ventilation was not used. He further explained that to ensure it was safe for entry, the employer would have had to use ventilation and test the entire chamber over a period of time. (Tr. 85; 88-89; 92-93; 143-52).

In finding that Riverdale violated the standard, I have noted Mr. Khounsavath's testimony that it took him 4 to 5 seconds at most to exit the chamber. (Tr.57-60; 68-69). Mr. Khounsavath also testified, however, that the purpose of the monitor was to ensure his safety, in case something went wrong and he could not get out of the chamber. (Tr. 60). Moreover, AD Morin testified about the disorienting effects of oxygen deficiency on the body in relatively short time periods and how they can lead to unconsciousness and death. (Tr. 84-85; 93-94). Finally, Mr. Matilainen himself testified that precautions should be taken in atmospheres with under 19.5 percent oxygen due to the effects of low oxygen, including disorientation and muscular movement difficulty, and that these effects increase as oxygen levels decrease. (Tr. 358-60). Based on the record, the Secretary has met her burden of demonstrating a violation of the cited standard and this item is affirmed as a serious violation. The proposed penalty of $1,375.00 is appropriate and is accordingly assessed.

Serious Citation 1 - Item 5

This item alleges two instances of violation of 29 C.F.R.1910.147(d)(2), a provision of the lockout/tagout ("LOTO") standard, which states that:

> The machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment.

Items 5(a) and 5(b) allege that operators making adjustments to the cutters on an EVG welding machine and a Jaeger welding machine, respectively, were inadequately protected from inadvertent activation of the machines, in that the equipment was not shut down and de-energized properly.[25]

As to Item 5(a), CO Barnes testified that he saw an operator, Scott Ellis, making adjustments to the unguarded cutters on EVG welding machine LGR-72 without its being locked out or tagged out, and that George Riddle, a supervisor, was in the area with Mr. Ellis. The CO said that Mr. Ellis had turned off the cutters by opening a gate along one side of the machine and then turning off the switch to the cutters. He also said that although either opening the gate or turning off the switch stopped the machine, these actions were inadequate. The CO noted that someone could have closed

[25]The machines welded wire and then cut it to the desired length. (Tr. 463; 467).

the gate or switched the cutters back on inadvertently, or that a short or malfunction in the equipment could have occurred; he further noted that if any of these things had happened while Mr. Ellis was at the cutters making adjustments his fingers could have been amputated. CO Barnes stated that the proper way to deactivate the machine was to open the main disconnect switch that was on a panel 8 to 10 feet away and to put a lock or tag on it, which would have positively stopped the flow of current and kept the machine from coming on. (Tr. 462-66; 471-77; 488-90).

The purpose of the LOTO standard is to prevent the unexpected energization of machinery that could cause injury to an employee. *See* 29 C.F.R. 1910.147(a)(1). Based on the testimony of CO Barnes, and Riverdale's failure to rebut that evidence, I find that the Secretary has shown a violation of the cited standard. Riverdale contends, however, that the work that Mr. Ellis was doing met the exception to the standard set out following 29 C.F.R. 1910.147(a)(2)(ii)(B), as follows:

> NOTE: *Exception to paragraph (a)(2)(ii)*: Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection (See subpart O of this part).

Mr. Knott testified that the adjustments being made to the cited machinery fell within the exception, such that the machinery did not need to be locked out or tagged out. (Tr. 867-70). CO Barnes agreed the adjustments could have been part of the normal production work, but he disagreed that lockout or tagout was not required. He said that if the equipment had been effectively guarded, so that the employee would have been protected if the machine had come on, either through inadvertent activation or malfunction, then lockout or tagout would not have been necessary; however, since this was not the case, lockout or tagout was required. (Tr. 477-83; 491-92). I agree with the CO's opinion. It is clear from the record that the cutters were not effectively guarded. Moreover, it is clear from its language that the exception comes into play only if the work being done falls within its terms and alternative measures providing effective protection are used, such as the machine guarding requirements contained in Subpart O. Respondent has not demonstrated that the adjustment work met the exception, and Item 5(a) is affirmed as a serious violation.[26]

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[26]In affirming this item, I have noted the testimony of CO Dann, as to Item 7(j), that the gate

(continued...)

As to Item 5(b), CO Barnes testified that he saw another operator, Chris Schauer, making adjustments to the unguarded cutters on Jaeger welding machine #4578. The CO said that Mr. Schauer had turned off the machine by pushing its "on/off" button and by opening its disconnect switch but that the equipment should have been positively deactivated by also putting a lock or a tag on the disconnect switch. CO Barnes noted that someone could have closed the disconnect switch inadvertently, and if the "on/off" button had also been pushed inadvertently, or if there had been a short or malfunction in the equipment, the cutters could have come on while Mr. Schauer was still in the process of making adjustments to them; the CO stated that if this had happened, the employee's fingers could have been amputated. (Tr. 466-70; 483-85; 555).

As in Item 5(a), the testimony of CO Barnes has established the violation alleged in Item 5(b). The only argument Respondent makes with respect to this item is that the adjustment work fell within the exception noted above. This argument has already been considered and rejected, and Item 5(b) is affirmed as a serious violation. The Secretary has proposed a total penalty of $1,100.00 for Items 5(a) and (b). (Tr. 469-71). I find the proposed penalty appropriate, and it is therefore assessed.

Serious Citation 1 - Item 6

Item 6(a) alleges a violation of 29 C.F.R. 1910.178(a)(4), which applies to powered industrial trucks and provides as follows:

> Modifications and additions which affect capacity and safe operation shall not be performed by the customer or user without manufacturers prior written approval. Capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly.

The record shows that a Clark forklift truck at the facility with a capacity of 5500 pounds was being used with 10-foot steel fork extensions that had been made at the facility; the original forks were 4 feet long, and the extensions, which fit over the original forks and were removable, were used

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[26](...continued)
to the EVG welder was not interlocked with the equipment, as CO Barnes said. (Tr. 686-89; 694-95). The testimony of CO Dann is credited due to what Mr. Ellis told her, as set out in 7(j). However, this does not change the disposition of this item. CO Barnes testified that the cutters on the EVG welder could have been activated inadvertently by someone turning on the switch to the cutters or through a short or malfunction in the equipment. (Tr. 464-65; 488-89). Thus, even though the gate was not interlocked, Mr. Ellis was nonetheless exposed to the hazard of the cutters being activated.

to move pallets with items on them. (Tr. 161-67; 494-96; 506-09; 871-72). The record further shows, and Riverdale admits, that it did not obtain the manufacturer's approval to use the extensions. (Tr. 495-96; 923). CO Barnes testified that Patrick Malley, the operator, showed him the pallets and foam panels he had recently moved with the extensions; the pallets were 10 feet long and weighed 921 pounds, and the panels were 14 feet long and 8 feet, 4 inches wide. CO Barnes said the load center of the original forks was 2 feet, while the load center of the extensions was 5 feet, or 1 foot beyond the original forks. He also said this change decreased the truck's capacity and made it a hazard because it would not handle the way it was designed to handle; more of the weight of the foam panels would have been distributed beyond the 2-foot load center, creating the potential for the truck to tip over or lose its load, either of which could have caused serious injury. (Tr. 494-99; 508-09).

The Secretary also presented Robert Weigold, a manager with Summit Handling Systems ("Summit"), in regard to this item. Mr. Weigold testified that Summit sells, repairs and rents forklifts, that he has worked for Summit for five years, and that in his first two years with Summit he was a service representative; before Summit, he was with another forklift dealership for eight years, first as a shop foreman and then as a service representative, and he was familiar with the type of Clark forklift truck that is the subject of this item. Mr. Weigold said this truck normally has 42 or 48-inch forks, that its load center is 24 inches, and that it usually lifts 48-inch pallets. He also said putting 10-foot extensions on a truck with 48-inch forks is prohibited. First, extensions have no capacity beyond the forks, and extensions that are too long result in tremendous stress on the forks, which can actually break during the lift.[27] Second, putting 10-foot extensions on the truck in question would make the load center 60 inches, which would reduce the truck's capacity to around 2500 pounds. Third, the extensions would cause the center of gravity to be "way off" and the truck would be unstable. Mr. Weigold stated that a truck trying to lift over its capacity simply might not be able to, or the back wheels might just raise up a little. However, the truck might be able to lift the load but could lose it if the truck attempted to lift it higher or went over uneven ground, and the load could fall on someone;

[27]Mr. Weigold said that extensions cannot be more than 1.5 times the fork length, and he quoted this prohibition from three manufacturers' catalogs. He also said the better option would have been to obtain 10-foot forks, as well as a new capacity plate, from the manufacturer, because actual forks are much stronger than extensions. (Tr. 179-82; 188-90; 196; 200-02).

the truck could also tip over, causing injury to the driver. He further stated that changing the capacity without changing the information plate was also a hazard, as an operator unfamiliar with the truck would not know its true capacity. (Tr. 174-207; 212-14; C-8).

Based on the foregoing, Riverdale violated the cited standard. It is clear the company did not obtain the manufacturer's approval before using the extensions and that the truck's capacity plate was not changed. (Tr. 494-96; 872; 923). It is also clear that the extensions and the failure to change the plate represented a hazard. This conclusion is supported by the testimony of Mr. Weigold, which was credible and convincing. It is also supported by the testimony of Patrick Malley, the operator, who believed the truck's capacity to be 5500 pounds when the extensions were used. (Tr. 167). A conclusion that the extensions were a hazard is even supported by Mr. Knott. Although the CO testified about the extensions and pallets being used to move foam panels, Mr. Knott testified they were also used to move wire. (Tr. 871). The pallets weigh 921 pounds, and, if loaded with wire, they could easily weigh over 2500 pounds. (Tr. 509). Mr. Knott's other testimony, that the extensions were not a hazard and did not change the truck's capacity, is simply not credible, in view of the other evidence of record. (Tr. 872-75). Item 6(a) is affirmed as a serious violation.

Item 6(b) alleges a violation of 29 C.F.R. 1910.178(l)(3)(i)(G), which requires truck operators to receive initial training in fork and attachment adaptation, operation, and use limitations.[28] CO Barnes testified that when he asked if he had been trained in using the truck with the extensions, Mr. Malley said he had not been. The CO also testified that when he asked if he knew how the extensions affected the lifting capacity, Mr. Malley said he had "no idea." (Tr. 499-500). The CO's testimony is supported by that of Mr. Malley, who, as noted above, believed the truck's capacity was 5500 pounds even with the extensions. (Tr. 167). Mr. Malley did testify he had been trained and tested in using the truck. (Tr. 161-62; 168-69). However, based on what he told the CO and what he believed to be the truck's capacity, he was not trained as required. Item 6(b) is affirmed as a serious violation.

The Secretary has proposed a total penalty of $825.00 for Item 6. Having affirmed Items 6(a) and (b), and having considered the CO's testimony in this regard, I find the penalty as proposed to be appropriate. (Tr. 500-01; 517-18). A penalty of $825.00 is accordingly assessed for Item 6.

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[28]While the citation alleges a violation of 29 C.F.R. 1910.178(l)(3)(g), it is apparent that the intent was to allege a violation of 29 C.F.R. 1910.178(l)(3)(i)(G). Item 6(b) is amended accordingly.

Serious Citation 1 - Item 7

Item 7, as amended, alleges 11 instances of failure to guard machinery as required, in violation of 29 C.F.R. 1910.212(a)(1). The standard states, in relevant part, that:

> One of more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks.

Item 7(a) alleges that on wire drawing machine #2, the operator was exposed to possible injury from an in-running nip point created by wire moving onto a capstan. CO Dann testified that C-21 showed the condition, which she described. The wire went first through the piece of machinery indicated with an "X" on C-21, went next onto the capstan circled on C-21, and then went through the tube on the right side of C-21; the capstan rotated counterclockwise and helped guide the wire, and, as the wire was being pulled or drawn under a great deal of tension, the area where it went onto the capstan (marked with an arrow on C-21) was an ingoing nip point that could severely lacerate or amputate an operator's finger. CO Dann said that Ronald Morin, the operator, was walking up and down the line in the area of the capstan to observe the wire and make sure it was going to the take-up end.[29] She also said that he was anywhere from 6 to 12 inches from the nip point when she saw him, that the capstan should have been guarded by enclosing it, and that other capstans at the facility were guarded; she noted that Riverdale itself could have fabricated a guard for the capstan. (Tr. 620-27).

Mr. Knott testified that the capstan was guarded, that it was not a hazard, and that, in any case, the operator did not have to be in the area of the capstan when it was rotating. (Tr. 875-79). CO Dann agreed there was a guard on the top of the capstan. However, she was emphatic that the nip point where the wire went onto the capstan was not guarded and that the condition presented a laceration or amputation hazard. She also considered the operator to be exposed to the cited condition due to the fact that he got as close as 6 to 12 inches from the capstan when she saw him. (Tr. 620-21; 626; 724-27). The testimony of CO Dann is credited over that of Mr. Knott, and I find that the Secretary has established the alleged violation. Item 7(a) is therefore affirmed as a serious violation.[30]

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[29]The CO said that the operator was no relation to AD Morin. (Tr. 620).

[30]In affirming Item 7(a) and the other subitems that follow, I conclude that Riverdale knew

(continued...)

Item 7(b) alleges that on Jaeger welding machine #4578, employees were exposed to in-running nip points on capstan guide rolls. CO Dann testified that wire was fed into the machine and welded, after which it came out in sheets onto the bed of the machine, and that the guide rolls helped to guide the wire into the machine. She further testified that the guide rolls were circled in C-23 and C-24, that the one on the left side of the photos was similar to the one cited in Item 7(a), only smaller, and that the ones on the right side of the photos were seven much smaller guide rolls. The CO said the nip points were where the wire went through the rolls, that she had measured the nip points to be 5 feet high, and that Chris Schauer, the operator, told her he had to be in those areas once or twice a shift to ensure the wire was going into the machine properly; he also told her he sometimes had to actually reach up to those areas to make an adjustment.[31] The CO also said the nip points could have been easily guarded with either mesh or plastic guards. (Tr. 628-35; 729-33; 790-91).

Mr. Knott testified there were no nip points in photos C-23 and C-34 that presented a danger to employees. He said the nip points were over 6 feet high and that anyone simply observing the guide rolls would not be exposed to a hazard; he also said that if an adjustment were made the machine would be shut off. (Tr. 879-81). CO Dann agreed that just observing would not be a hazard and that adjustments should be made when the equipment is off. However, she was emphatic that she had measured the nip points to be 5 feet high and that the hazard was the same as the one indicated in Item 7(a) due to the operator's proximity to the nip points when he was in the area. She also testified at length about how an operator's finger could be caught in a guide roll. (Tr. 631-34; 730-34; 739-40; 790-91; 822-25; 828-29). Finally, it is clear from the CO's testimony that she had seen guards on other guide rolls in the facility. (Tr. 626-27; 635-36). The CO's testimony is credited over that of Mr. Knott, and the Secretary has shown the alleged violation. Item 7(b) is affirmed as a serious violation.[32]

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[30](...continued)
or should have known of the violative conditions.

[31]The CO said that the person in C-23 was not the operator but Peter Christian, Riverdale's process engineer, who went to look at the condition after she saw it. (Tr. 729-31).

[32]In affirming this item, I have noted Mr. Knott's testimony that the smaller guide rolls, which are clearly different from the larger guide rolls, based on C-23-24, were actually "wire
(continued...)

Items 7(c) and (d) allege that EVG welding machines LGR-72 and LGR-102, respectively, exposed employees to in-running nip points on capstan guide rolls. CO Dann testified that these guide rolls were similar to the small ones in C-23 and C-24 and that they presented the same type of hazard, that is, an operator's finger being caught between the wire being pulled and the guide rolls.[33] As to Item 7(c), the CO said that the guide rolls were 41 and 44 inches from floor, that Scott Ellis, the operator, had to be in that area frequently, and that she saw him as close as 6 to 12 inches from the guide rolls. As to Item 7(d), the CO stated that the operator had to be in the area to observe the wire, to make sure it was going into the machinery properly, and that the operator would be 6 to 12 inches from the nip points to do so. She indicated that both conditions could have been abated with removable guards made of plastic or plexiglass. (Tr. 635-40). Riverdale no assertion as to these items other than those that have been considered and rejected *supra*. I conclude that the Secretary has demonstrated the alleged violations, and Items 7(c) and (d) are affirmed as serious violations.

Item 7(e) alleges that at the end of the coating line, the operator was exposed to an in-running nip point between two rolls. CO Dann testified that at the end of the line, she observed a series of rolls where the coated wire was pulled through; there was a nip point between the main drive roll, which went clockwise, and the take-up roll, which went counterclockwise. She interviewed Mike Martel, the lead operator on the line, who told her that he had to go up on the platform next to the rolls to make sure the wire was going through properly; if it was not, he had to turn a handle to separate the rolls to adjust or align the wire while the rolls were turning. CO Dann identified C-25 as a photo of the cited area, and she drew an arrow to indicate the nip point and a circle to indicate the handle; she also identified R-12 as a photo of the employee standing on the platform with his arm resting on the grate guard around the cited area. She said the operator would have to lean over the guard to get to

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[32](...continued)
straighteners" that presented no hazard. (Tr. 880-81). The CO agreed that the smaller guide rolls also straightened the wire and that they were not really "capstans." She testified, however, that they were cited as "capstan guide rolls" because that was what an operator called them. (Tr. 736-39; 791-93). Regardless, Mr. Knott's testimony that the smaller guide rolls were not a hazard is not credited.

[33]C-32 shows the condition cited in Item 7(c), and the CO's testimony indicated that the condition in Item 7(d) was similar. In addition, as noted above, the CO testified at length about how it was possible to get a finger caught in an unguarded guide roll. (Tr. 820-25; 828-31).

the handle, which was about a foot from the nip point, and that if he fell as he leaned over his hand could get into the nip point. She also said the handle's location could be changed or a guard could be put over the rolls to keep the employee from getting into the nip point. (Tr. 640-49; 743-57).

Mr. Knott testified that the handle raised and lowered the rolls and that it was used only on setup to thread the wire into the machine. He further testified that it was "absolutely not true" that the handle was also used to align the wire while the machine was running and that there was "no way" the operator could reach over the guard and get his hand into the pinch point. (Tr. 883-85). CO Dann, however, testified specifically that the operator went up on the platform with her to explain what he did and that he told her he had to use the handle to adjust the wire while the machine was operating; she was also emphatic that the handle was about a foot from the nip point. (Tr. 645-47; 752; 756). The CO's testimony is credited over that of Mr. Knott, and this item is affirmed as a serious violation.

Item 7(f) alleges that on the roll take-up mechanism of EVG welding machine LGR-72, employees were exposed to being caught on the wire and/or to in-running nip points as the wire moved onto the roll take-up. CO Dann testified that after wire was welded and cut on the EVG line it went onto a spindle where it was wound up, and she identified C-26 and C-29 as photos of the take-up area. She said Scott Ellis, the operator, would approach the take-up area from the top platform in front of it, which was 7 feet long, and that he would step down to another platform, which was 9.5 inches lower than the top platform and right in front of the take-up; she also said she saw Mr. Ellis on the lower platform within 6 inches of the take-up and that if he had tripped, fallen or leaned against it his hands or fingers could have been caught on the wire itself, which was 1.5-inch square mesh, or in the nip point, which was caused by the wire winding counterclockwise onto the spindle.[32] CO Dann stated that a trip wire could be put in front of the take-up, so that if the operator tripped or fell into it it would stop; further, the platforms could be made the same level, so the operator would not have

[32]CO Dann drew an arrow on C-26 to show the nip point. She indicated that the normal duties of Mr. Ellis would require him to be at the operator's station, shown on the far right side of C-29, as well as on the lower platform in front of the take-up roll. (Tr. 658-63; 762-63; 803-04).

to be so close to the take-up, and this would also prevent trips or falls that could result from stepping down to the lower platform.[33] (Tr. 649-53; 656-69; 697-98; 796-97; 760-67; 805-06; 815-16).

Mr. Knott testified there was no hazard from the take-up. He disputed that an employee could even get caught in it, but that if he did, all he would have to do is stamp on the yellow trip bar. He also disputed that the platforms were at different levels, noting that R-15, a photo of another EVG machine with a similar platform and bar, showed that that platform was "perfectly flat." Finally, Mr. Knott disputed there was a need to be in front of the take-up when it was turning, stating that the operator performed his duties from the operator's station. (Tr. 886-92). However, CO Dann testified that she saw Mr. Ellis in front of the take-up and exposed to the cited hazard; she also testified how he could have been caught in it, either while standing on the lower platform or by falling from the upper platform, and why the yellow trip bar would not protect him from the cited hazard. (Tr. 660-67; 761-67; 796-97; 805-06). As to the levels of the platforms, the CO specifically testified that she had measured the top platform to be 9.5 inches above the lower platform, and she said she had seen the platform depicted in R-15 and had noted that it was essentially flat while the platform in front of the cited machine was not. (Tr. 812-13; 826-28). The CO's testimony is credited over that of Mr. Knott. The Secretary has shown the alleged violation, and this item is affirmed.

Item 7(g) alleges that on wire drawing machine #2, an interlock on an access panel was inoperative, exposing employees to being struck by wire in the event of a wire break. CO Dann testified that on one section of the cited machine, wire was pulled through a series of capstans. She further testified that the section had access panels to the wire and that Ronald Morin, the operator, had one of the panel doors open because he was making some adjustments to the wire. He told her that the panel doors were interlocked such that the machine would not operate if one was open. However, the CO observed that the machine was operational with the panel door open, and, when she asked him about it, Mr. Morin told her that a powder that coated the wire sometimes got "gunked up" in that area, causing the interlock to get stuck and not work. (Tr. 670-71).

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[33] The CO said the yellow trip bar between the two platforms would stop the machine if it was depressed; however, an employee could fall when stepping down to the lower platform without hitting the bar and get caught in the take-up roll, and the bar would likewise not protect an employee who was on the lower platform and facing the roll. (Tr. 664-67; 797-98; 762-65; 796-97; 804-05).

Based on the foregoing, the record shows that the interlock was not working. Regardless, the Secretary has failed to prove the alleged violation. As set out above, the citation alleges that the hazard was that of an employee being struck by wire. When the Secretary's counsel asked the CO about the hazard, however, his questions referred to the nip point created by the capstans, and he at no time addressed the cited hazard of an employee being struck by wire.[34] (Tr. 671). Moreover, when Riverdale's counsel questioned the CO in this regard, she agreed that this item had not been characterized as a nip point violation. (Tr. 768). Finally, while Mr. Knott's testimony about this item was unclear, it appeared to address the cited hazard, rather than a nip point hazard, such that an amendment to conform to the evidence is not appropriate. (Tr. 893-97). *See also* Fed. R. Civ. P. 15(b). The record does not demonstrate the alleged violation. This item is accordingly vacated.

Item 7(h) alleges that EVG welder LGR-126 presented a crushing hazard between the stripper plate and the end stand for the drive roll on the roll take-up mechanism. CO Dann identified C-28 as a photo of the cited welder. She testified that the red area on C-28 was the stripper plate, that the area marked with a "Y" was the end stand, and that between these two areas, which was about 6 inches at the top and 4 inches at the bottom, was where the crushing hazard existed. She explained that when a roll was completed, the stripper plate moved left and "stripped" the roll off so it would go to another area for packaging; she further explained that the stripper plate then moved back to the right, such that if an employee had fingers, a hand or other body part in the area, a crushing injury could result. The CO said that to make the stripper plate move, an employee had to stand at the operator's station to the right of the main end stand and push a button. She also said that she had seen an employee at the operator's station about a foot from the hazard. To abate the hazard, CO Dann recommended installing a pressure-sensitive button, which would require the employee to hold the button down until the stripper plate completed its operation. (Tr. 672-84; 768-74).

Mr. Knott did not testify as to this item because, according to his counsel, the same hazard was covered in Item 7(e); specifically, Riverdale asserts that the "brake" or "stamp bar" on the floor in front of the machine eliminated any danger. (Tr. 898-900). CO Dann agreed that the EVG LGR-72 cited in Item 7(e) and the EVG LGR-126 were similarly configured and that the EVG LGR-126 also

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[34]The Secretary's counsel also failed to elicit testimony from the CO that would establish how the employee could have been injured by this particular nip point hazard. (Tr. 671).

had a trip bar which, when depressed, would stop the operation of the machine. She also agreed that R-15 showed the trip bar on the EVG LGR-126. (Tr. 774–76; 826-28). However, she pointed out that the trip bar did not address the cited hazard because it was back away from the machine. (Tr. 774-76). Upon viewing the photos showing the LGR-72 and the LGR-126, that is, C-26, C-28, C-29 and R-15, I am persuaded by the CO's testimony that the trip bar in front of the LGR-126 did not protect against the cited hazard. In particular, I note that if an employee were standing at the operator's station or in front of the stripper plate and the end stand, the trip bar would be behind him; I further note that if the employee had his hand in the cited area and the stripper plate was returning to the right, he might lack the ability or presence of mind to step back onto the trip bar before a crushing injury occurred. I find that the Secretary has established the alleged violation, and this item is affirmed.

Item 7(j) alleges that the gate on the back side of EVG welding machine LGR-72 was open while the machine was operating, exposing the operator to possible injury from the wire and/or the cutters. CO Dann testified that she saw the operator, Scott Ellis, on the bed of the machine making adjustments to the cutters; the gate on the back side of the machine was open, and when she asked about it, Mr. Ellis told her could open the gate and walk into the area with the machine was running. CO Dann further testified that although the machine was not operating then, there was a potential for exposure anytime Mr. Ellis opened the gate and walked in when the machine was running; she explained that after the wire was welded it went onto the bed of the machine, where it was cut, and that being in the area created exposure to being caught on the wire or the operation of the cutters. The CO identified C-30 as a photo of the gate, and she noted that the hazard could be abated by putting an interlock on the gate, so that opening it would stop the machine. (Tr. 685-98; 778-82).

Riverdale contends there was no violation because the CO never saw anyone exposed to a hazard while the machine was running. However, as the CO stated, there was the potential for exposure to injuries from the wire and/or the cutters anytime anyone opened the gate and walked into the area. Riverdale also contends there was no hazard because there was a platform with a metal plate in front of the machine; according to Mr. Knott, anyone walking into the area would step on the metal plate, which would stop the machine. (Tr. 900-02). Mr. Knott's testimony is not credited. First, the CO did not mention the metal plate, and Riverdale's counsel never asked her about it. Second, while the EVG LGR-72 does, in fact, have a trip bar in the roll take-up area, as set out in Item 7(h) and

shown in C-29, there was no evidence of a similar device in the area of the cutters. Third, Mr. Knott has been found to be an unreliable witness. This item is affirmed as a serious violation.

Item 7(k) alleges that on Jaeger welding machine #4578, unguarded cutters exposed employees to possible lacerations. CO Barnes testified he saw Chris Schauer, the operator, observing the cutters on the machine. The CO identified C-27 as a photo of the cutters, and he noted that the wire went from left to right to the cutters at the top of the machine; he marked the top of the machine with an "X," he circled the cutters Mr. Schauer had been observing, and he marked the panel that served as a guard below the cutters with a "Y." The CO said Mr. Schauer was watching the cutters while they were operating, with the guard on, with his hands 2 to 6 inches from them; further, Mr. Schauer told him he also watched the cutters while they were running with the guard off.[35] The CO also said that while Mr. Schauer was just looking at them to see if they needed adjustment, and did not try to adjust them as they were running, the cutters still presented a laceration and/or amputation hazard due to the proximity of the operator's hands. CO Barnes stated that the hazard could have been abated by putting a see-through plastic guard over the cutters themselves. (Tr. 541-49; 554-65).

Mr. Knott testified that the cutters only required adjustment during setup and that there was no reason to adjust them otherwise. He also testified that the cutters could not cause lacerations unless the operator touched them and that there was no reason to touch them while they were operating. (Tr. 902-06). However, in light of what the CO saw and what the operator told him, I find that, contrary to Mr. Knott's testimony, the cutters required adjustment at times other than setup. Moreover, based on C-27, which clearly shows the cutters' location above the guard, and the CO's testimony, I find that the cutters exposed the operator to a laceration and/or amputation hazard. The Secretary has established the alleged violation, and this item is affirmed as a serious violation.

Item 7(l) alleges that an overhead door between the maintenance department and the machine shop did not retract and/or stop upon contact when it was descending. CO Barnes testified that the metal door was powered with an electric motor and was like an overhead door in a home garage. He further testified that he had an employee test the door by pushing the "down" button and that the door

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[35]The CO indicated that Mr. Schauer was slightly bent over in the area of the cutters when he saw him; he also indicated that his own height was 5 feet, 8 inches and that his chin reached the top of the machine. (Tr. 559-60).

did not stop or retract when the button was released. The CO said that the door did not have a sensor device to stop it if something was underneath it and that the door could strike and injure someone who happened to be going through it when it was descending; he also said that employees went through the door to move parts and equipment from one area to the other. (Tr. 550-53; 565-72).

Mr. Knott testified that the door was not a hazard because the "down" button had to be depressed for the door to descend and that releasing the button stopped the door. He also testified that a person under the door could stop it and hold it up and that he himself had done so. (Tr. 907-09). Mr. Knott's testimony is not credited, in light of the testimony of CO Barnes. The Secretary has shown the alleged violation, and this item is affirmed as a serious violation.

The Secretary has proposed a total penalty of $1,100.00 for Item 7. Having affirmed the subitems set out above, except for 7(i), which was withdrawn, and 7(g), and after considering the testimony of CO Barnes about the proposed penalty, I conclude that a penalty of $1,100.00 is appropriate. (Tr. 549). The proposed penalty is therefore assessed.

Serious Citation 1 - Item 9

This item alleges a violation of 29 C.F.R. 1910.305(g)(2)(iii), which states as follows:

> Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

CO Barnes testified that in the wire drawing department, a welding machine called the "Buck Welder #9" had a loose strain relief device around the flexible cord going into its back side, as shown in photo C-15. The CO said the purpose of the device was to prevent stress or tension on the terminal screws inside the machine and that too much tension could cause the cord's wires to pull loose from the screws; if this happened when the wires were energized and they touched the machine's outer casing, the entire machine could become energized and an employee contacting it could be shocked, burned or electrocuted. The CO also said the machine was plugged into an outlet and being used when he was there and that even if the outlet was wired to a circuit breaker, which he assumed it was, the circuit breaker would not protect against a shock. He explained that an employee could be shocked before the circuit breaker tripped, in the event of a short, and that the circuit breaker might not even trip if a short occurred. He further explained that circuit breakers protect machinery, while ground fault circuit interrupters protect people. (Tr. 530-40).

Mr. Knott testified that by the time he looked at the welding machine, the strain relief device had already been tightened up. He opined, however, that the cord could not have come out of the machine unless a great deal of force was put on it and that even if it had, the circuit breaker would have prevented any injury to an employee. He also opined that no one could have been shocked due to the facility's concrete floor and the fact that employees wore shoes. (Tr. 909-11).

I find the Secretary has shown a violation of the standard. The CO's testimony was clear and concise about why the condition was a hazard and the injuries that could have occurred. In addition, Mr. Knott did not see the strain relief device until it had been repaired, and, in any case, he has been found to be an unreliable witness. This item is affirmed as a serious violation. The proposed penalty of $825.00 is appropriate, based on the CO's testimony, and it is therefore assessed. (Tr. 434-34).

Serious Citation 1 - Item 10

Item 10 alleges a violation of 29 C.F.R. 1910.307(b), which requires that:

> Equipment, wiring methods, and installations of equipment in hazardous (classified) locations shall be intrinsically safe, approved for the hazardous (classified) location, or safe for the hazardous (classified) location.

CO Barnes testified that the mixing unit on the SGL had general purpose electrical wiring that went from the back of the unit to the control panel for payoffs 1 through 6. He further testified that pure hydrogen was pumped into the back of the unit at a pressure of 100 psi, that the distance from the back of the unit to the panel was 52 inches, and that both the wiring and the panel were hazards. The CO said that hydrogen is extremely flammable and that an accidental release could have occurred due to a leak or malfunction in the system, especially in view of the hydrogen's high pressure. He also said that a release could have contacted an ignition source and that the wiring and panel were both potential ignition sources; either could have generated a spark, and if this had occurred at the same time that a release took place, the hydrogen contacting the spark could have caused an explosion and fire. The CO explained that the wiring could have had an internal spark, which could have entered the panel through the wiring's fittings, that the electrical contacts in the panel could also have sparked, and that hydrogen could have entered the panel through the wiring fittings or the door on the panel. He further explained that using wiring and a panel approved for Class 1, Division 2 would have

kept sparks and hydrogen gas from entering the panel. CO Barnes identified R-8 as a photo of the mixing unit, the wiring and the panel.[36] (Tr. 423-33).

In support of its contention that it did not violate the cited standard, Riverdale presented J. Herve Guertin, an electrical inspector for Northbridge, who testified that he had inspected and approved the electrical wiring on the SGL, including the mixing unit, when it was installed in the late 1990's; he further testified that he went to the plant to do general inspections about six times a year, that he had last seen the mixing unit in September 2001, and that he was familiar with the cited wiring. Mr. Guertin stated that general purpose wiring was acceptable for that location and that Class 1, Division 2 wiring was not required. (Tr. 383-87; 395-400; 406; 420). However, it is clear from his testimony that his conclusion about the wiring was based on his estimating the distance from the back of the mixing unit to the control panel to be 10 to 15 feet, and he conceded that he had not measured the distance and that an explosion was much more likely to occur if the distance was only 52 inches. (Tr. 403-04; 421). He also conceded that he did not know the concentration of the hydrogen or if it was under pressure, and he indicated that, if the hydrogen going into the mixer was pure and was pumped in at a pressure of 100 psi, the hazard was much greater. (Tr. 400-03).

In view of the foregoing, the CO's testimony with respect to the cited condition is credited over that of Mr. Guertin. The Secretary has met her burden of demonstrating the alleged violation, and this item is affirmed as a serious violation.[37] The Secretary has proposed a penalty of $1,375.00 for this item, which, as the CO testified, had a low gravity and a lesser probability of an accident occurring. (Tr. 433-44; 457). The proposed penalty is appropriate and is accordingly assessed.

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[36]The CO marked the wire in R-8 with "X" and the panel with "Y." He said that although it looked closer in R-8, he had measured the distance from the back of the unit to the panel to be 52 inches; he also said it makes a difference how far a flammable substance is from an ignition source and that if the distance had been 10 feet he would not have cited the condition. (Tr. 424-27).

[37]In finding a violation, I have noted the testimony of Mr. Guertin and Mr. Knott that other wiring on the mixer was general purpose and not Class 1, Division 2. (Tr. 394-95; 912-13). The CO, however, indicated he did not see this wiring and that, in any case, the citation did not include it. (Tr. 440-45). I have also noted Mr. Knott's testimony that he could "put a match" to a leak without consequence, and the contrary testimony of Mr.Guertin. (Tr. 400; 913-14). Mr. Knott's testimony in this regard is not credited, and I find that he had the requisite knowledge of the cited condition.

ORDER

Based upon the foregoing decision, the disposition of the citation items, and the penalties assessed therefor, is as follows:

Citation 1	**Standard**	**Disposition**	**Classification**	**Civil Penalty**
Item 1	§ 5(a)(1)	Affirmed	Serious	$1,125.00
Item 2	1910.38(a)(1)	Vacated		
Item 3(a)	1910.132(a)	Affirmed	Serious	$ 550.00
Item 3(b)	1910.132(a)	Vacated		
Item 4	1910.146(c)(4)	Affirmed	Serious	$1,375.00
Item 5	1910.147(d)(2)	Affirmed	Serious	$1,100.00
Item 6(a)	1910.178(a)(4)	Affirmed	Serious	$ 825.00
Item 6(b)	1910.178(l)(3)(i)(G)	Affirmed	Serious	
Item 7(a)	1910.212(a)(1)	Affirmed	Serious	$1,100.00
Item 7(b)	1910.212(a)(1)	Affirmed	Serious	
Item 7(c)	1910.212(a)(1)	Affirmed	Serious	
Item 7(e)	1910.212(a)(1)	Affirmed	Serious	
Item 7(f)	1910.212(a)(1)	Affirmed	Serious	
Item 7(g)	1910.212(a)(1)	Vacated		
Item 7(h)	1910.212(a)(1)	Affirmed	Serious	
Item 7(i)	1910.212(a)(1)	Vacated		
Item 7(j)	1910.212(a)(1)	Affirmed	Serious	
Item 7(k)	1910.212(a)(1)	Affirmed	Serious	
Item 7(l)	1910.212(a)(1)	Affirmed	Serious	
Item 8	1910.219(c)(2)(i)	Vacated		
Item 9	1910.305(g)(2)(iii)	Affirmed	Serious	$ 825.00
Item 10	1910.307(b)	Affirmed	Serious	$1,375.00

Citation 2	Standard	Disposition	Classification	Civil Penalty
Item 1	1910.134(e)(4)	Vacated		
Item 2	1910.305(a)(1)(i)	Vacated		

Total Penalty Assessed: **$ 8,275.00**

/s/

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Dated: 10 JUNE 2002
Washington, D.C.