



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.

LORETTO-OSWEGO RESIDENTIAL
HEALTH CARE FACILITY,

Respondent.

OSHRC Docket Nos. 02-1164 & 02-1174

APPEARANCES:

Mark Lerner, Attorney; Jordana W. Wilson, Senior Trial Attorney; Ann Rosenthal, Counsel for Appellate Litigation; Daniel J. Mick, Counsel for Regional Trial Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Paul M. Sansoucy, Esq.; Paul Limmiatis, Esq.; Bond, Schoeneck & King, PLLC, Syracuse, NY
For the Respondent

DECISION

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

At issue before the Commission is whether the judge properly affirmed, as repeat, two citations issued to Loretto-Oswego Residential Health Care Facility (“Loretto Oswego”) under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. The judge based the repeat characterizations on his finding that Loretto Oswego operated as a “single employer” with two affiliated health care facilities against which there were Commission final orders for violations substantially similar to the ones cited in these cases.¹

¹ Under section 17(a), 29 U.S.C. § 666(a), a violation may be characterized as repeat where there is a “Commission final order against the same employer for a substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979).

Loretto Oswego operates a nursing home in Oswego, New York. The two affiliated facilities at issue here, Loretto-Rest Residential Health Care Facility (“Loretto Rest”) and Loretto-Utica Residential Health Care Facility (“Loretto Utica”), operate nursing homes in Syracuse and Utica, New York, respectively. All three Loretto facilities are affiliates of Loretto Management Corporation (“LMC”), which is located in Syracuse at the same address as Loretto Rest.

On June 24, 2002, following two inspections of the Loretto Oswego facility, the Occupational Safety and Health Administration (“OSHA”) issued five citations to Loretto Oswego alleging violations of various general industry standards. All five citations were timely contested and were docketed by the Commission as two separate cases. The parties subsequently resolved all of the issues in both cases, except for the repeat characterization of one citation in each case, which the Secretary based on prior Commission final orders against Loretto Rest and Loretto Utica.² The parties agreed with regard to these two citations that Loretto Oswego would pay a total penalty of \$56,250 if the repeat characterizations were affirmed, and if they were not, that the citations would be characterized as serious and Loretto Oswego would pay a total penalty of \$11,250.

Before the judge, Loretto Oswego did not dispute that the citations issued to the two other affiliates were final orders of the Commission and included violations substantially similar to the ones at issue here. Rather, Loretto Oswego argued that because LMC and the other Loretto affiliates are separate and legitimate non-profit corporations, a fact that the Secretary does not dispute, the final orders against Loretto Rest and Loretto Utica could not serve as a basis for characterizing the violations committed by Loretto Oswego as repeat. After a hearing on this matter, the judge issued a decision in which he concluded that LMC and its three affiliates constituted a single employer. Based on this conclusion, he affirmed the items in the two outstanding citations as repeat and assessed the agreed-upon penalty of \$56,250. For the

² The violations at issue under those citations involve Loretto Oswego’s failure to (1) ensure use of eye protection while applying certain cleaning products and provide facilities for flushing eyes, (2) provide timely hepatitis B vaccination shots for employees with occupational exposure to potentially infectious material, (3) make a medical evaluation immediately available following a reported exposure incident, (4) provide annual training on bloodborne pathogens to employees, (5) secure an oxygen cylinder, (6) develop lockout/tagout procedures, and (7) guard live parts of electrical equipment.

following reasons, we reverse the judge, affirm the items in these two citations as serious, and assess the \$11,250 agreed-upon penalty.³

ANALYSIS

In finding that LMC and its three affiliates constituted a single employer, which the Secretary alleged as the sole basis for the repeat characterizations, the judge evaluated the record evidence under Commission precedent holding that “related employers are regarded as a single entity where . . . they share a common worksite, have interrelated and integrated operations, and share a common president, management, supervision, or ownership.” *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1991-93 CCH OSHD ¶ 29,775, p. 40,496 (No. 88-1745, 1992); *accord C.T. Taylor Co.*, 20 BNA OSHC 1083, 1086-88, 2002-04 CCH OSHD ¶ 32,659, pp. 51,340-41 (No. 94-3241, 2003) (consolidated); *Trinity Indus., Inc.*, 9 BNA OSHC 1515, 1518-19, 1981 CCH OSHD ¶ 25,297, pp. 31,322-23 (No. 77-3909, 1981).⁴ But applying this precedent here, we conclude the Secretary has failed to establish that a single-employer relationship existed between Loretto Oswego and LMC or the previously cited affiliates.

In finding a single-employer relationship in *Vergona Crane* and *C.T. Taylor*, the Commission relied on strong evidence of close identity between the two companies involved in each case. In *Vergona Crane*, the two companies were owned by the same family, had the same

³ The penalty amount assessed for each citation item at issue here represents ten percent of the amount the Secretary had proposed based on the alleged repeat characterizations. With respect to the other citations in each case that were affirmed by the judge and not alleged as repeat by the Secretary, the judge assessed a total penalty of \$6,750. None of those citations are at issue on review.

⁴ In *Trinity Industries, Inc.*, the Commission held that where the Secretary alleges a single-employer relationship, the employer has the burden of persuasion because it can “readily produce” relevant facts that are peculiarly within its knowledge. 9 BNA OSHC at 1519, 1981 CCH OSHD at p. 31,322. But as the Commission has often stated, the Secretary bears the burden of showing that a cited entity is an employer. *E.g., Lake County Sewer Co.*, 22 BNA OSHC 1522, 1523, 2004-09 CCH OSHD ¶ 33,002, p. 54,217 (No. 07-1786, 2009); *Don Davis*, 19 BNA OSHC 1477, 1481, 2001 CCH OSHD ¶ 32,402, p. 49,897 (No. 96-1378, 2001); *Timothy Victory*, 18 BNA OSHC 1023, 1027, 1995-97 CCH OSHD ¶ 31,431, p. 44,450 (No. 93-3359, 1997). It thus stands to reason that the Secretary carries this same burden when it comes to determining whether the cited entity is part of a single-employer relationship. *See Don Davis*, 19 BNA OSHC at 1481, 2001 CCH OSHD at p. 49,897. Accordingly, we overrule *Trinity Industries, Inc.* to the extent that the holding in that case is inconsistent with this well-settled principle of law.

president, and operated out of the same office, and the leases for the crane at issue in that case appeared to use the names of those companies interchangeably. 15 BNA OSHC at 1783, 1991-93 CCH OSHD at p. 40,495. In *C.T. Taylor*, the two companies were owned and controlled by the same individual and operated out of the same office; one of the companies, on behalf of the other, essentially performed all administrative functions and, as to the job at issue, controlled and directed employee work and maintained responsibility for employee safety. 20 BNA OSHC at 1085-87, 2002-04 CCH OSHD at pp. 51,339-40. In this case, there are some areas of commonality, but in contrast with *Vergona Crane* and *C.T. Taylor*, we find that the evidence here falls short of showing that Loretto Oswego and the other Loretto corporations constituted a single employer.

We look first at the president and other upper management officials of the Loretto corporations. At the time of the violations, LMC and the three affiliates shared the same president, chief executive officer, and chief financial officer. This outward appearance of a common identity gives way, however, when we consider the extent to which LMC and its affiliates had “interrelated and integrated operations.” In terms of general administrative matters, the record shows little to no interaction among the affiliates themselves, but some involvement on LMC’s part with Loretto Oswego’s operations. For instance, LMC provided support to Loretto Oswego on financial matters. Budgets prepared by Karen Jeffreys, Loretto Oswego’s administrator, were submitted to and approved by LMC’s Board of Trustees.⁵ Jeffreys also discussed budget issues on a monthly basis with her supervisor, Mitchell Marsh, LMC’s vice-president of nursing home services. Financial matters at Loretto Oswego were reviewed once or twice a year by LMC’s corporate controller, who communicated regularly with Loretto Oswego’s financial director. And monthly financial reports were submitted by Loretto Oswego to LMC.

But the record shows that on a day-to-day basis, administrative personnel at Loretto Oswego operated independently of LMC. For instance, Jeffreys and her nursing director determined who to accept as residents at the facility. And even though the president and CEO of

⁵ Under its by-laws, LMC reserved the authority to approve its affiliates’ “annual operating and capital budgets,” and to maintain “access to all information regarding the operation of the affiliate including financial statements, minutes of board meetings and committee meetings, and any other relevant data.”

Loretto Oswego, who also held these same positions at LMC and each affiliate, had the authority to hire, discipline, or fire any Loretto Oswego employee, he delegated these responsibilities to Jeffreys, who was also directly accountable to the New York State Department of Health as a licensed nursing home administrator. All management employees at Loretto Oswego reported to Jeffreys, not any of her superiors, and although Jeffreys' monthly meetings with Marsh included some discussion of staffing issues, personnel issues were regularly handled in-house by a Loretto Oswego employee, with LMC being consulted only if a complicated issue arose. Finally, although Loretto Oswego and the other affiliates engaged in union contract negotiations at the same time, each one entered into a separate contract with the union.

In terms of safety matters, the evidence in the record is particularly weak as to whether LMC and its affiliates were so integrated that they acted as one employer. Although each affiliate had an exposure control plan for containment of infectious diseases that was revised by a Loretto infection control practitioner apparently on LMC's behalf, and some LMC personnel were present during OSHA's February 2002 inspection of the Loretto Oswego facility, this evidence—whether considered separately or in the context of the record as a whole—fails to establish that the affiliates and LMC “handled safety matters as one company.” *See C.T. Taylor*, 20 BNA OSHC at 1087, 2002-04 CCH OSHD at p. 51,340. The infection control practitioner provided copies of the revised exposure control plan to the affiliates and discussed her revisions at meetings attended by representatives of LMC and the affiliates. She also provided bloodborne pathogen training to Loretto Oswego employees on one occasion and to employees of the other affiliates as well. These specific measures undoubtedly served an important safety purpose, but addressed only a single aspect of employee safety at the affiliate facilities, and may represent nothing more than resource sharing rather than the level of integration necessary to show a single-employer relationship.

Nor do we view LMC's participation in the OSHA inspection here as indicative of a broader involvement in safety matters at Loretto Oswego. The record shows that Jeffreys requested that the compliance officers (“COs”) wait until LMC's safety manager and director of facilities could arrive from Syracuse before inspecting the Loretto Oswego facility. During the inspection, the LMC personnel facilitated immediate abatement of the violations and LMC's newly-hired corporate safety manager provided the COs with abatement dates for violations that could not be corrected immediately. The corporate safety manager was also present at the

settlement conference with Jeffreys and LMC's vice-president of support services, who the judge found had the authority to enter into a settlement on behalf of Loretto Oswego. It is not surprising, however, that LMC became more involved in Loretto Oswego's operations concerning the handling of a regulatory enforcement action—that action could have resulted in a monetary fine against Loretto Oswego and, as noted, LMC had some responsibility for overseeing the affiliate's financial matters.

Indeed, other evidence in the record shows that it was Loretto Oswego personnel, not employees of LMC, who were primarily responsible for safety matters at the facility. Like all of the affiliates, Loretto Oswego had its own safety committee comprised of only its employees, and it was Loretto Oswego, not LMC, that handled safety orientations for new employees. In fact, LMC had no employee dedicated to safety issues until the hire of its first corporate safety manager just three months prior to OSHA's inspection of the Loretto Oswego facility, and the record sheds little light on his role with respect to the affiliates during the period prior to the inspection. Most of the newly-hired safety manager's interactions with Loretto Oswego and the other affiliates, including any training or safety education requested by the affiliates, did not occur until after his first appearance at the Loretto Oswego facility on February 14, 2002, the day that OSHA commenced its inspection. And a new corporate-wide safety policy that the safety manager had drafted was not completed until the end of that month, and was not due to be "rolled out" in the Loretto facilities until March 1, 2002.

Further, other interactions regarding safety and health matters that occurred before OSHA's inspection were infrequent and, for the most part, focused on the safety and health of the Loretto Oswego facility's residents, not its employees. Indeed, on the two occasions over an eight-year period that Marsh organized mock inspections for Loretto Oswego and the other affiliates, the sole purpose was to prepare them for state regulatory surveys that were focused exclusively on safety and health conditions for residents, not employees. And despite Marsh's presence at the facility during one of these surveys, the Department of Health issued its Statement of Deficiencies specifically to Jeffreys as the licensed administrator, who then prepared a plan of correction for the facility with assistance from her own staff. Moreover, on at least one occasion Jeffreys herself hired an outside consultant to inspect the Loretto Oswego facility in preparation for a state survey.

With respect to Loretto Oswego's premises, its own building manager was responsible for maintaining the facility, and the two LMC managers who visited the facility four or five times a year limited their evaluation to "environmental and maintenance" issues, and provided some training to certain Loretto Oswego personnel on just these issues. And there is no evidence in the record that employee safety and health was the subject of Marsh's monthly meetings with Jeffreys and the affiliate's nursing director, during which Marsh reviewed "quality indicators" and performed "an environmental round."

Finally, the record shows that Loretto Oswego does not "share a common worksite" with either Loretto affiliate or LMC. The facilities of the three affiliates are located in different cities, and although LMC's offices are located at the same address as Loretto Rest, LMC has no physical presence at either Loretto Oswego or Loretto Utica. Given these circumstances and the record evidence discussed above regarding the lack of integration among Loretto Oswego and the other Loretto corporations concerning administrative matters and employee safety, we conclude that the Secretary has failed to demonstrate the existence of a single-employer relationship. As this was the Secretary's only basis for the repeat characterizations, we find that the record does not support characterizing any of the violations at issue as repeat.

ORDER

With respect to Docket Number 02-1164, we affirm as serious Items 1 through 4 of Citation 2, and assess penalties totaling \$8,250. With respect to Docket Number 02-1174, we affirm as serious Items 1 through 3 of Citation 2, and assess penalties totaling \$3,000.

SO ORDERED.

/s/ _____
Thomasina V. Rogers
Chairman

/s/ _____
Horace A. Thompson III
Commissioner

/s/ _____
Cynthia L. Attwood
Commissioner

Dated: January 7, 2011

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
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Complainant,	:	
	:	
v.	:	DOCKET NOS. 02-1164 & 02-1174
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LORETTO-OSWEGO RESIDENTAL	:	
HEALTH CARE FACILITY,	:	
	:	
Respondent.	:	
	:	

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Paul Limmiatis, Esquire
Bond, Schoeneck & King, PLLC
Syracuse, New York
For the Respondent.

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Procedural History

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”). The Occupational Safety and Health Administration (“OSHA”) inspected Respondent, Loretto-Oswego Residential Health Care Facility (“Loretto-Oswego”), a 120-bed skilled nursing home located in Oswego, New York, during February and March of 2002.¹ As a result, OSHA issued two Citations and Notifications of Penalty to Respondent on June 24, 2002. The citation relating to Docket No. 02-1164 alleges serious and “repeat” violations of various subparts of 29 C.F.R. § 1910.1030 and “repeat” violations of 29 C.F.R. §§ 1910.133(a)(1) and

¹The Secretary notes that although the citations refer to Respondent as Loretto Oswego RHCF, the facility’s legal name according to the records of the New York Secretary of State is the one set out supra.

1910.151(c). The citation relating to Docket No. 02-1174 alleges a serious violation of 29 C.F.R. § 1910.303(f), “repeat” violations of 29 C.F.R. §§ 1910.101(b), 1910.147(c)(4)(i) and 1910.303(g)(2)(i), and an “other” violation of 29 C.F.R. § 1910.305(g)(1)(iii). Respondent contested the citations, bringing this matter before the Commission, and the two cases were consolidated.

Prior to the hearing in this matter, Loretto-Oswego filed a motion for partial summary judgment, asserting that the Secretary’s classification of various of the citation items as repeat was improper because the previous violations related to two other employers which, while sharing the “Loretto” name and having a common corporate parent, were nonetheless separately incorporated and distinct legal entities.² The Secretary filed a cross-motion for partial summary judgment, asserting that where, as in this case, separate but affiliated corporations share a common business purpose, it is appropriate to disregard the corporate form and to consider the entities to be a single employer for purposes of the Act. The motions were denied in an order dated May 1, 2003, based on my conclusion that there were material facts that were undetermined and in dispute with respect to the interrelationship of the various legal entities under the Loretto “umbrella.” Following my order, the parties on May 9, 2003, reached a stipulation resolving all issues other than the repeat classification. Specifically, Loretto-Oswego agreed to the affirmance of the underlying violations in this matter.³ The parties also agreed that if the repeat classification was upheld, Loretto-Oswego would pay one-half of the proposed penalties; if, on the other hand, the repeat classification was not upheld, Loretto-Oswego would pay one-half of the penalties proposed for the serious items and one-half of the penalties that would have been proposed for the repeat items had they been classified as serious rather than repeat violations.⁴ The hearing in this case took place in Oswego, New York. Both parties have filed post-hearing briefs.

The OSHA Inspection

²The two previously-cited Loretto entities that are the basis of the repeat classifications are Loretto Rest Residential Health Care Facility and Loretto-Utica Residential Health Care Facility.

³The stipulations are attached hereto and incorporated by reference.

⁴Loretto-Oswego notes that in No. 02-1164, the penalty will be either \$47,000.00 or \$14,000.00, while in No. 02-1174, the penalty will be either \$16,000.00 or \$4,000.00

OSHA compliance officers (“CO’s”) Charlene Schmidt and Dwayne Gary went to the Loretto-Oswego facility on February 14, 2002, in order to perform a comprehensive safety and health inspection of the facility. According to their testimony, they met with Karen Jeffreys, the administrator of Loretto-Oswego, presented their credentials, and explained why they were there. In response to specific questions, Jeffreys told the CO’s that Loretto-Oswego had 176 employees, that Loretto Management Corporation (“LMC”), located in Syracuse, New York, was the controlling corporation, and that LMC controlled 1500 employees. The CO’s then asked for various documents, such as the OSHA 200 logs, the exposure control plan and the lockout/tagout (“LOTO”) plan. As the CO’s were reviewing the documents, Jeffreys said that she had contacted Loretto in Syracuse and that two people were being sent to accompany the CO’s during the inspection; Jeffreys asked if the CO’s could wait, and the CO’s agreed. When the individuals arrived, they introduced themselves as Arthur Coughlin, corporate safety manager, and Antonio Tullio, corporate director of maintenance.⁵ The CO’s began their inspection in the company of Jeffreys, Coughlin, Tullio and Darlene Nesbitt, Loretto-Oswego’s director of facilities. The CO’s were unable to complete the inspection and made plans to return another day. (Tr. 269-79; 304-11).

The CO’s resumed the inspection on February 20, 2002, accompanied by the same persons as before. When violations were observed, Coughlin and/or Tullio attempted to have them corrected immediately by calling on facility employees. CO Schmidt testified she spoke primarily to Coughlin because Jeffreys had to excuse herself at times to attend to other matters; Jeffreys also referred CO Schmidt to Coughlin or Tullio for anything she was unsure about.⁶ CO Schmidt held a preliminary closing conference on February 20, 2002; present were Jeffreys, Coughlin, Tullio, Nesbitt and Diane Harrington, Loretto-Oswego’s director of nursing. Schmidt discussed the violations, many of which had been remedied, and Coughlin provided abatement dates for items that had not been corrected.

⁵The business card Coughlin gave to CO Schmidt identifies him as the corporate safety manager, and both his card and that of Jeffreys have the name “Loretto” printed in the left-hand corner; the right side of Jeffreys’ card also has the name “Loretto Heights” on it, which is the name under which Loretto-Oswego operates. (Tr. 20; 274; 308; C-1).

⁶Schmidt testified, for example, that when unsecured compressed air cylinders were observed, Coughlin stated that they should have been secured; he also stated, when extension cords were observed in use, that permanent wiring should have been installed. (Tr. 281).

The CO's returned to the facility on March 7 and 13, 2002, to interview employees and to hold a final closing conference; in addition, Coughlin wanted to show Schmidt further items that had been corrected. On March 7, Scott LaRue, LMC's vice-president for support services, was at the facility.⁷ He told Schmidt that LMC had 13 facilities, including Loretto-Oswego, that LMC approved the budgets for the facilities, and that James Introne, LMC's president, had the authority to hire, fire and discipline the administrator of Loretto-Oswego. He said that the corporate safety manager was responsible for going to all the facilities to ensure that safety issues were taken care of; he also said that mock inspections were done at some sites, which consisted of LMC officials and facility administrators inspecting sites to make sure things were being done properly. LaRue was also present for the closing conference on March 13, at which time Schmidt discussed the violations that had been observed; as to the unsecured compressed air cylinders, LaRue indicated that this was fairly common in the facilities and that the nursing staff did not secure them. (Tr. 279-84; 309).

The CO's reviewed a number of documents during the course of the inspection. CO Schmidt identified C-11 as the corporate safety policy that Coughlin provided during the inspection; she testified that he told her that he had developed the policy, that it was supposed to be "rolled out" in all the facilities by March 1, 2003, and that he was to go to all of the facilities to provide training in the policy. CO Schmidt also identified C-12 as the LOTO program that Jeffreys gave her, and she testified that upon reviewing it, she noted that it was from Loretto's Nottingham facility, that the written procedures were from the Loretto Rest facility, and that it nowhere referenced Loretto-Oswego; when she asked Jeffreys if C-12 was in use at Loretto-Oswego, Jeffreys told her it was. CO Gary identified C-14 as a hazard communication policy that was given to them during the inspection; he testified that he did not believe that the policy was created at Loretto-Oswego because the cover had the name and address of Loretto Rest on it.⁸ (Tr. 275-77; 286; 299; 314).

The CO's also interviewed a number of employees during the course of the inspection, and CO Gary interviewed employees during March and April of 2002 about the relationship between LMC and Loretto-Oswego. According to his testimony, Jeffreys told him that Mitchell Marsh was

⁷LaRue told CO Schmidt that he was at the facility because she had told Coughlin that some of the observed conditions might be cited as repeat violations. (Tr. 299-300).

⁸Loretto Rest's address is 700 East Brighton Avenue, Syracuse, New York. (Tr. 314).

the corporate vice-president of residential health care facilities (“RHCF’s”) and that he was in charge of Loretto-Oswego, Loretto Rest RHCF (“Loretto Rest”), Loretto-Utica RHCF (“Loretto-Utica”) and Nottingham RHCF (“Nottingham”); Jeffreys also told him that Marsh was at the facility essentially monthly to review quality control, staffing and budget issues.⁹ Diane Harrington, the director of nursing, and Sharon Lamore, the assistant director of nursing, also told Gary that Marsh was the vice-president of RHCF’s. Harrington said Marsh was affiliated with the corporate office and stated that he could fire her if she did not follow corporate guidelines.¹⁰ Harrington further stated that, just prior to the OSHA inspection, Marsh had spent three consecutive half days at the facility for a New York State regulatory survey. CO Gary also interviewed Melva Neff, who Harrington referred to as the corporate infection control practitioner. Neff told CO Gary that she had written C-9 and C-10, the Loretto exposure control plans for 1997 and 1999, and that she revised the plan annually and provided it to the Loretto facilities. (Tr. 300-01; 309-13).

CO Gary went to LMC’s offices on May 20, 2002, to better understand LMC’s corporate structure and its relationship with Loretto-Oswego; he met with LaRue, Marsh and Coughlin, and also with Kathy Collins, the corporate comptroller, and Gregg Lawson, the corporate human resource manager.¹¹ LaRue told him that LMC’s Board of Trustees could influence the staff of Loretto-Oswego to make sure its wishes were carried out, that either he or Marsh would exercise that influence, depending on the area, and that the areas of influence included finance, human resources and information technology. Marsh told him that if there were budget issues at Loretto-Oswego he would talk to the facility’s administrator and that if the administrator did not make corrections to keep within the guidelines he would report the matter to the Board of Trustees, who would hold the administrator accountable. Gary testified that at the meeting, he was given C-3, a Price Waterhouse Coopers (“PWC”) financial statement for Loretto-Oswego for 1999 and 2000, and C-6 and C-7, organizational charts for LMC and Loretto-Oswego, respectively. (Tr. 314-19).

⁹Loretto-Rest is also referred to as the Cunningham facility or the Cunningham-Fahey facility. (Tr. 20; C-16, p. 5; C-27, p. 6).

¹⁰Lamore was present when Harrington made this statement and indicated her agreement with it. (Tr. 311).

¹¹LMC’s offices are at the same address as Loretto Rest. (Tr. 313-15).

The “Single Employer” Doctrine

In their post-hearing briefs, the parties make essentially the same arguments they made in their respective pre-hearing motions for partial summary judgment. The Secretary contends that where, as here, separate but affiliated corporations have a common business purpose, it is appropriate to disregard the corporate form and to consider the companies to be a single employer under the Act. Respondent contends that the classification of various of the citation items as repeat was improper since the previous violations upon which the repeat classifications were based related to two other companies which, while sharing the “Loretto” name and having a common corporate parent, were separately incorporated and are distinct legal entities. Respondent notes that the Commission has never held that separately incorporated employers may be treated as one for repeat violation purposes, but that, even if the single employer doctrine is found to apply here, the Secretary has not shown that Loretto-Oswego constitutes the same employer as Loretto Rest and/or Loretto-Utica.

To establish a repeat violation, the Secretary must show that, at the time of the alleged repeat violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlach Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). It is undisputed that, at the time the repeat citation items in this case were issued, there were final orders against Loretto Rest and Loretto-Utica for violations of the same standards; it is likewise undisputed that Loretto-Oswego was in violation of the standards cited in this case, including those that were classified as repeat.¹² The question to resolve is whether LMC and its affiliates may be considered a single employer under the Act in order to find that Loretto-Oswego was in repeat violation of the cited standards.

The Secretary points out that section 3(5) of the Act defines “employer” as “a person engaged in a business affecting commerce....” and that section 3(4) of the Act defines “person” as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” (Emphasis added). Thus, as the Secretary notes, the Act itself recognizes that an employer can be more than one corporation. The Secretary also points out that in a recent decision, the Commission reaffirmed its long-standing precedent essentially adopting the single employer concept as applied by the National Labor Relations Board

¹²See the parties’ above-noted stipulations, which are attached hereto.

(“NLRB”). C.T. Taylor Co., 20 BNA OSHC 1083 (Nos. 94-3241 & 94-3327). In that case, the Commission utilized the single employer doctrine to conclude that C.T. Taylor Company (“Taylor”) and Esprit Construction, Inc. (“Esprit”) were a single entity at the work site, even though Esprit was separately incorporated, because both companies were owned and controlled by Taylor; in so concluding, the Commission relied upon the relationship and interconnections between the two entities and particularly noted the fact that Taylor and Esprit handled safety matters as one company. *Id.* at 1086-87.

The single employer concept was first articulated in *Advance Specialty Co.*, 3 BNA OSHC 2072, 2075-76 (No. 2279, 1976). There, Commissioner Cleary stated that “the [NLRB] has consistently held that when two business entities have a combination of most or all of the following factors: a common worksite, a common president or management, a close interrelation and integration of operations and a common labor policy, it will treat the two as one for the purposes of the National Labor Relations Act.” *Id.* at 2075-76. Commissioner Cleary then went on to state that “when ... two companies share a common worksite such that employees of both have access to the same hazardous conditions, have interrelated and integrated operations, and share a common president, management, supervision or ownership, the purposes of the Act are best effectuated by the two being treated as one.” *Id.* at 2076. The Commission adopted the single employer concept in a later case, *Trinity Indus., Inc.*, 9 BNA OSHC 1515, 1518-19 (No. 77-39, 1981), and, in *C.T. Taylor*, it reiterated the statements that Commissioner Cleary made in *Advance Specialty*. *C.T. Taylor Co.*, 20 BNA OSHC at 1083. The Commission also used the single employer doctrine in *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992).

I have considered Respondent’s arguments as to why the single employer doctrine should not be found applicable to this matter. (R. Brief, pp. 8-10). I have also considered Respondent’s assertion, set out in a supplemental filing, that the Commission’s recent decision in *Eric K. Ho*, 20 BNA OSHC 1361 (Nos. 98-1645 & 98-1646, 2003), wherein the Commission reversed the judge’s decision that related corporations were properly cited for violations of an individual employer under the “alter ego” doctrine, bears directly on this case. After reviewing that decision, however, I agree with the Secretary that the holding in *Eric K. Ho* does not apply to the circumstances of this case. Moreover, while Respondent is correct that the Commission itself has not held that separately

incorporated employers may be treated as one for repeat violation purposes, a Commission judge has so held. *Southern Scrap Materials Co., Inc.*, No. 94-3393, 1997 OSAHRC LEXIS 162.¹³ Finally, the Commission clearly used the single employer concept in *C.T. Taylor* to find separate but related employers responsible for the same condition. *C.T. Taylor Co.*, 20 BNA OSHC at 1087-88. In any case, I conclude that the Secretary, in her discretion, may cite an employer for an alleged repeat violation that is based on a previous violation of the same or a substantially similar standard committed by a different but related employer. I further conclude that the single employer doctrine is the appropriate means of determining the issue to be resolved in this matter, as follows.

A Common Work Site

As the Secretary points out, while this case does not involve the common work site that is typical of construction cases, LMC's offices, as indicated above, have the same address on Brighton Avenue in Syracuse as Loretto Rest.¹⁴ Respondent makes much of the fact that the Commission's single employer test requires "a common worksite such that employees of both have access to the same hazardous conditions." As Loretto's various facilities are in and around Syracuse, as well as in Oswego and Utica, New York, it is apparent that, other than LMC, Loretto Rest and the other programs on the Brighton campus, they do not share a "common worksite." (C-27, p. 6). However, due to the nature of Loretto's business, most of the facilities would clearly present the same or similar hazards to employees; that this is so is illustrated by C-27, pp. 42-55, information from Loretto's web site, and by the alleged repeat violations in this case. Further, the Commission's test must have some flexibility to be utilized in the many types of cases that come before it. Based on

¹³As the Secretary notes, the facts in *Southern Scrap* are similar to those here. The safety director of the parent company provided safety advice and training to the subsidiary on a regular basis. He also regularly visited and inspected the subsidiary, developed its safety programs, was its representative during the OSHA inspection, and permitted the OSHA inspection to proceed. The judge found the two corporations operated as one for purposes of a repeat classification. A judge's decision, of course, is not binding on the Commission. *Leone Constr. Co.*, 3 BNA OSHC 1979 (No. 4090, 1976).

¹⁴Loretto Rest, Loretto's largest nursing home, has 520 beds, while Loretto-Utica and Nottingham have about 200 and 40 beds, respectively; as noted above, Loretto-Oswego has 120 beds. (Tr. 13; 20; 72; 98-99; 101; 105; 249-50; 385). The Brighton "campus," as it is called in a newsletter on Loretto's web site, includes not only LMC and Loretto Rest but also apartments, a rehabilitation center and a health center. (C-27, p. 6).

the record, I find that, among the Loretto entities that provide skilled nursing and other health care, employees are exposed to the same or similar types of hazards as those in this case. I conclude, therefore, that the Secretary has shown the first element of the Commission's single employer test.

A Common President, Management, Supervision or Ownership

A press release on Loretto's web site describes Loretto as follows:

Loretto is Central New York's largest elder care provider, with 1,600 employees serving 3,000 men and women at 15 different sites. As a not-for-profit, Loretto offers a broad spectrum of services from independent living and outpatient rehabilitation to assisted living and skilled nursing home care. Loretto's mission is to improve the quality of life for the frail elderly in Central New York, with a strong emphasis on advancing the dignity, independence, choices and safety of older adults.

See C-16, p. 7.

Loretto's web site also discusses Loretto's Board of Trustees, as follows:

Loretto is a voluntary, not-for-profit agency led by a Board of Trustees whose purpose is to assure that the organization operates in a manner that is consistent with its charitable mission of service to the elderly.

See C-27, p. 56.

The by-laws of LMC specifically state, under the section entitled "Purposes and Relationships," that "[t]he Corporation will control, oversee, coordinate, represent and support the interests of all present and future Loretto Corporations." (C-4, p. 2). The by-laws then set out the names of the various affiliates, and, after that listing, provide on pages 2 and 3 that:

The Corporation reserves to itself the following powers for each affiliate:

- (a) Approval of annual operating and capital budgets.
- (b) Approval of the employment of the chief executive officer.
- (c) Access to all information regarding the operation of the affiliate including financial statements, minutes of board meetings and committee meetings, and any other relevant data.
- (d) Participation and cooperation by each affiliate with the Corporation and the other affiliates in all matters of common interest.

The by-laws state, with respect to the chairperson of LMC's Board of Trustees, that:

The Chairperson of the Board shall be the chief elected officer of the Corporation and shall exercise, in behalf of the Board, general supervision of the affairs of the Corporation with respect to the goals and policies and the planning and financing of facilities and services as established by the Board.

(C-4, p. 6).

The by-laws further state, in regard to the president of LMC, that:

The President shall be an employee of and the chief executive officer of the Corporation and shall have and exercise charge and supervision of the implementation of the goals and policies of the Corporation through operation of its facilities and personnel. He shall perform such other duties as may be assigned to him by the Board of Trustees, but shall not be a Trustee of the Corporation.

(C-4, p. 7).

Finally, C-3, the PWC financial statements for Loretto-Oswego for 1999 and 2000 that CO Gary was provided during the inspection, gives the following information on page 10 about Loretto-Oswego's transactions with other affiliates:

In its efforts to provide a complete range of services to its residents and program participants, Loretto-Oswego is affiliated with a number of other Loretto entities. [LMC] is the sole member of all affiliated Loretto entities and the overall operations of all entities are under the administrative control of the President of the Corporations. Because of this controlled group relationship, generally advances and other balances due from/to affiliated entities arising in the normal course of business are recorded on an interest free basis. Amounts due to/from affiliates are collected/paid based on availability of funds from operations and on expected payment terms.

The record shows that James Introne, the president and CEO of LMC, is also the president and CEO of the Loretto affiliates, including Loretto-Oswego, Loretto Rest, Loretto-Utica and Nottingham. (Tr. 15; 85-86; 160; C-5-6). The record also shows that Introne is responsible to LMC's Board of Trustees ("the Board") for the affiliates' operations, and that the Board, through Introne, exercises oversight over the affiliates. (Tr. 21; 76; 160-63; C-5, No. 5). Introne has the authority to hire, fire and discipline the administrators and other personnel of the affiliates. (Tr. 86; 184; 283). Introne specifically hires the administrators of the facilities, and he also gives the administrators general direction; the administrators, in turn, are responsible to Introne and to the Board. (Tr. 76-77; 86-87; 163). Based on this evidence, I find that LMC and the Loretto affiliates share a common president and CEO. Moreover, this evidence, together with the information set out above from Loretto's web site, LMC's by-laws and the PWC financial statements for Loretto-Oswego, strongly suggests common management and supervision among LMC and the Loretto affiliates. There is also considerable relevant employee testimony, as follows.

The Secretary's Exhibit C-6, the LMC organizational chart given to CO Gary, shows that there are four vice-presidents, two of whom are senior vice-presidents, and one chief financial officer ("CFO") directly under Introne.¹⁵ Michael Sullivan testified that he was LMC's CFO from 1995 until 2002 and that, since the fall of 2002, he has been LMC's chief operating officer ("COO"). As CFO, Sullivan had general oversight of all accounting functions, including the budgets for LMC and all the affiliates, as well as operational cost effectiveness and strategic planning. As COO, Sullivan is responsible for the day-to-day oversight of the Loretto affiliates' operations, although not their budgets, and he has direct oversight of support services, human resources and information technology. Sullivan claimed that Loretto has become more decentralized since about 1997, such that the affiliates are running as separate entities as if there were no Loretto. He also said that this has resulted in fewer persons on LMC's payroll, more persons on the affiliates' payrolls, and the administrators, while able to consult as needed with corporate employees, having ultimate responsibility for their respective facilities; the areas that still have corporate functions are finance and those he directly oversees. (Tr. 202-17).

Mitchell Marsh, another individual directly under Introne on C-6, testified that he is the vice-president for the RHCF's and that he is also the administrator for Loretto Rest and for Nottingham; he was the administrator at Loretto-Utica until March 1998, when he became the administrator for Loretto Rest, and he became the vice-president for the RHCF's in January 1999.¹⁶ Marsh said that his primary responsibility is that of administrator of Loretto Rest, that his second is that of administrator of Nottingham, and that his third is that of vice-president for the RHCF's, in which he serves as a liaison for Introne to Loretto-Oswego and Loretto-Utica and a resource or consultant to those sites to make sure Introne's directions are being carried out; his duties in this regard include site visits to ensure the facilities have balanced budgets and are complying with state and federal regulatory requirements. Marsh visits each site essentially monthly and reviews financial and clinical records and then walks through the facility to ensure that environment and quality of care standards

¹⁵The two senior vice-presidents and the CFO are corporate officers. See C-6.

¹⁶All four of the RHCF's, including Loretto-Oswego, are directly below Marsh on C-6. Also below Marsh on C-6 are the adult day health care, nursing education and McAuliffe centers; these are on the Brighton campus, and their directors report to Marsh. (Tr. 168-71; C-27, p. 6).

are being met. Marsh has also organized mock inspections of sites, in which he and employees of other facilities inspect a particular site; the intent of these inspections is to have “fresh eyes” at the site to point out problems that might have been overlooked, but it is up to the facility staff to decide what items are problems that require correction.¹⁷ (Tr. 158-63; 169-79; 187-88; 382-86; 397-98).

Marsh further testified that in his consultant role he provides support and counsel to Loretto-Oswego and Loretto-Utica, due to his experience in working in nursing homes, and that he tries to be there for their New York State Department of Health (“DOH”) surveys. He noted the importance of the DOH surveys and the fact that if deficiencies are found, the administrator, who has a state-issued license and is legally responsible for the deficiencies, has to answer to Introne and the Board and must also prepare and sign off on a plan of correction to DOH.¹⁸ He also noted that facilities must comply with OSHA requirements, that he is advised when OSHA issues a citation to one of the RHCF’s, and that he in turn advises Introne; Marsh was also informed of the OSHA inspection in this case. Marsh said that Arthur Coughlin is responsible for making sure that the RHCF’s have the information and assistance they need to have an effective safety and health program.¹⁹ He noted that Coughlin had written a safety and health program for Loretto Rest and had disseminated it to the other facilities so that they could modify it and tailor it to their specific needs. He further noted that if a Loretto RHCF had a safety program that did not follow OSHA regulations, and if Coughlin was aware of that fact, Coughlin would notify him.²⁰ Marsh would then discuss the matter with the facility’s administrator and would also report the matter to Introne, who would take whatever action he deemed appropriate.²¹ (Tr. 163; 169; 174; 177; 180-84; 187-200; 385; 389-90).

¹⁷Marsh said he had not organized any mock inspections in the last two years. (Tr. 178).

¹⁸Marsh said each facility’s administrator is so licensed; he also said an administrator with a poor record can be sanctioned by the DOH, that the ultimate sanction would be for the license to be “pulled,” and that no one in LMC is subject to DOH sanctions. (Tr. 191-92).

¹⁹Marsh indicated his belief that Coughlin is an employee of Loretto Rest, although he said that he does not supervise Coughlin. (Tr. 180; 200).

²⁰Marsh stated that he is responsible for carrying out the program in Loretto Rest but not in the other RHCF’s. (Tr. 193-96)

²¹Similarly, Marsh testified that if a facility was not staying within its budget, he would help the administrator come up with a plan of action; if the facility still failed to keep within its budget,

Marsh said he is an employee of Loretto Rest and not of LMC, despite his position on C-6 under Introne with the other vice-presidents and the fact that Introne is his immediate supervisor; his belief was that of the three other vice-presidents shown at the same level on C-6, only Sally Berry, the senior vice-president for policy and development, is an LMC employee.²² He also said he does not supervise Jeffreys, that she does not report to him, and that C-7, the organizational chart for Loretto-Oswego, is inaccurate in that it shows an executive vice-president over the administrator instead of Introne. Marsh assumed Jeffreys had made C-7, and he noted that it would not surprise him if Jeffreys believed he was her supervisor because of the interactions they have and because he does her evaluation.²³ Marsh stated that neither he nor Introne supervises or manages Loretto-Oswego's operations on a day-to-day basis and that Jeffreys does so. He further stated that he does not have the authority to hire, fire or discipline Loretto-Oswego employees and that while Introne has such authority he delegates it to Jeffreys. (Tr. 164-65; 170-72; 378-82; 395-97).

Scott LaRue testified that he is employed by LMC and that he is the vice-president of support services; he manages the housekeeping, maintenance, food service and human resources operations at Loretto Rest, and he oversees the other Loretto entities in those areas and gives them advice and counsel as requested and as needed.²⁴ He explained that about 95 percent of his job

then the Board could suggest to Introne that the administrator be terminated or Introne could suggest to the Board that he wanted to terminate the administrator. (Tr. 175-76; 185-86).

²²Marsh also indicated that Steve Volza, the senior vice-president for housing, is not an employee of LMC, in spite of his being a corporate officer, and that he is the executive director and an employee of Nottingham Retirement Community. Marsh said other LMC employees, to his knowledge, are Introne, LaRue, Collins and Sullivan, as well as Cheryl Coolican, corporate director of admissions, and Christine Reilly, corporate treasurer. (Tr. 165-68).

²³Marsh said that he does Jeffreys' annual performance evaluation, and that of the administrator of Loretto-Utica, because Introne had asked him to due to his knowledge of nursing home operations. He also said he did not agree with Loretto-Oswego's answer to an interrogatory that Jeffreys reports to him, and he noted that the interrogatory answers in C-26 were prepared by Jeffreys and Respondent's counsel without his input. (Tr. 379-80; 393-99).

²⁴LaRue has had the same job title and duties since 1999, except for the area of human resources, which was added in August or September of 2002; his prior position was director of dining services at Loretto Rest. LaRue's immediate supervisor is Sullivan, and the box showing his position is just below that of Sullivan on C-6. LaRue testified that he and Jeffreys were the party

involves Loretto Rest, due to the size of that facility, and that the rest of his time is spent on matters in other facilities. He further explained that some entities have their own human resource and facilities functions, such that he provides less help to those sites, while other entities do not; Loretto-Oswego, for example, had a facilities director at the time of the inspection with whom he spoke four to six times a year.²⁵ LaRue indicated that while he works for LMC, the persons who work at Loretto Rest in the areas he oversees, such as human resources and maintenance, are employed by Loretto Rest but supervised by him; Antonio Tullio, for example, the Loretto Rest director of facilities, is an employee of Loretto Rest and reports to LaRue, although Tullio is ultimately responsible to Marsh.²⁶ LaRue also indicated that the LMC support services function is to ensure that Loretto Rest is following state and federal regulations and to assist the other facilities. (Tr. 71; 77-82; 90-91; 360).

LaRue further testified that he is the only LMC official who makes regular visits to Loretto facilities.²⁷ He offers his expertise but does not inspect the sites, and while he provides advice and counsel the site administrator decides whether to follow his advice; for example, when he and Tullio had gone to Loretto-Oswego to address maintenance issues they had offered suggestions to the facilities director and had informed Jeffreys but it was up to her to implement the suggestions.²⁸ LaRue said that, as to an OSHA inspection or a DOH survey at Loretto Rest, he would be involved

representatives during the subject litigation. (Tr. 71-73; 78-79; 83-85; 342; 370).

²⁵LaRue said Loretto-Oswego now has a support services director instead of a facilities director; he also said that he gives the least human resource assistance to Loretto-Oswego and Loretto-Utica. (Tr. 80-82).

²⁶LaRue noted that because of its size, Loretto Rest is able to have more people on staff with expertise in specific areas who can share their expertise with the smaller facilities; he also noted that Loretto Rest operates a central commissary and provides food to all but one of the Loretto facilities as well as to five non-Loretto facilities in the area. (Tr. 105-06; 112-13).

²⁷LaRue said Marsh also visits other Loretto sites on a regular basis; he first described Marsh as an LMC official but then stated that Marsh is an employee of Loretto Rest. LaRue indicated he agreed with Marsh that LMC has very few actual employees. (Tr. 93-94; 360).

²⁸As to site inspections, LaRue agreed with Marsh that mock inspections had taken place at Loretto RHCF's; he stated, however, that "cross-inspections" had been performed only twice in eight years, to his knowledge, and that the RHCF's now inspect themselves. (Tr. 92-93).

in the support service areas noted above and that Marsh, as administrator, would be responsible for any OSHA violations or DOH deficiencies found; as to an OSHA inspection or DOH survey at another facility, LaRue would only be involved if asked, his involvement would be limited to advice, and, if the facility did not follow his advice, he would voice his concern to the administrator but would not advise Sullivan.²⁹ LaRue also said that he got involved in the subject inspection only after learning the violations could be repeat and that he was at the post-citation settlement conference to try to change OSHA's position. LaRue stated that Jeffreys, as administrator, is responsible for whatever happens in her facility, including OSHA matters, and that that responsibility cannot be delegated to anyone else.³⁰ (Tr. 93-96; 103-04; 344-45; 349-51; 368-69).

LaRue said he hired Coughlin to manage the health and safety and worker compensation programs at Loretto Rest and that he directed Coughlin to write a safety program for Loretto Rest that could be modified and used by other Loretto facilities if they so chose.³¹ He also said he did not instruct Coughlin to write a corporate-wide program that would apply to all the facilities; he agreed, however, that the safety charter portion of the program states that the "failure to adhere to written corporate safety policies and rules will be considered serious infractions and will result in disciplinary actions, up to and including termination." LaRue explained that he had not reviewed the program before it went out, other than a few of the policies it contained, and that Coughlin had been "overzealous" in writing the charter; he also explained that while the program could be enforced at Loretto Rest, it could not be enforced at other facilities. LaRue did not recall telling CO Schmidt Coughlin is expected to visit all of the RHCF's and address their safety concerns; rather,

²⁹In the case of a DOH deficiency, LaRue noted that the Board would receive a copy of the statement of deficiency and it would then be up to Introne to decide what to do. (Tr. 95-96).

³⁰LaRue said Coughlin did not have the authority to correct the cited conditions on his own, that Jeffreys had that authority, and that Coughlin likewise did not have the authority to settle the subject citations. (Tr. 351).

³¹LaRue said that he was Greg Lawson's boss, that Lawson was Coughlin's boss, and that he was unsure whether Coughlin's title was "safety manager" or "corporate safety manager." He indicated that the word "corporate" in the title of persons working at Loretto Rest meant that their main duties were in that facility and that they provided advice and counsel to other sites when requested. (Tr. 96-97; 112-13; 354-55).

he provides advice and counsel and goes to other sites if it is requested. (Tr. 97; 355-57; 363-65; C-11, p. 2).

Antonio Tullio testified that he is employed by Loretto Rest, that his title is director of support service, and that his duties involve inspecting the building and supervising employees.³² He further testified that his duties also include giving support and advice to other Loretto facilities as needed, although he has no authority over them. Tullio said he visits other facilities when they ask him to and that he visits Loretto-Oswego four to five times a year to consult with that facility's maintenance director. Tullio also said that he was present during the OSHA inspection at Loretto-Oswego, at the request of that facility's maintenance director. He stated that when problems were noted by the OSHA CO's, he advised Loretto-Oswego's maintenance director how to correct them; however, it was up to the facility to decide how to actually correct the problems. (Tr. 225-34).

Gregg Lawson testified that he is the corporate human resource manager, that he is employed by LMC, and that his job involves the day-to-day management of the human resource function, which includes benefits, payroll and labor relations.³³ He said he is responsible for making sure that all Loretto facilities are in compliance with human resource policies and that although he spends 90 to 95 percent of his time on issues in Loretto Rest he consults with the other facilities as needed. He also said that he supervises Coughlin, the safety manager, and that he directs his work and gives him assignments; he mostly works with Coughlin, however, in the areas of disability leave and worker compensation. Lawson stated that in the past two years he has given advice to Loretto-Utica three to four times and to Loretto-Oswego twice; he further stated that while he gives the facilities advice he has no authority to direct them. (Tr. 236-42; 245-46).

³²Tullio first said that his title was "facility director environmental" but then said that his title was "probably" director of support service. He agreed, however, upon viewing C-6, that his name appeared in the box captioned "Facilities Management." He did not remember introducing himself as the corporate director of maintenance during the OSHA inspection. (Tr. 225-28; 232).

³³Lawson first testified that he is employed by Loretto Rest, but he later testified that he is in fact employed by LMC and that Scott LaRue is his immediate supervisor. (Tr. 241-24).

Arthur Coughlin testified he is the corporate safety manager, that he is employed by Loretto Rest, and that he has held this position since November 2001.³⁴ He said his job is to create safety policy, to conduct safety training, and to oversee the worker compensation and disability programs. He also said that he assists the various Loretto affiliates by providing the information they need to comply with OSHA and other regulations and that he conducts training for any affiliate that requests it. Coughlin described his job in this regard as consultative, and he noted that the affiliates may use or disregard what he provides and that he does not have authority to do anything, other than advise them they are not in compliance, if they do not. Coughlin has held safety training at Loretto facilities other than Loretto Rest four to five times, and two of these were LOTO training he gave at Loretto-Oswego and Loretto-Utica in the spring of 2002.³⁵ (Tr. 117-28; 131-34; 152).

Coughlin further testified that he wrote C-11, the Loretto Corporate Safety Program, and that he sent a copy to the administrator or program director of each affiliate around March 1, 2002; the facilities were told to make it site specific and that it would help them to be in compliance and to have a safer work place. He agreed that the Loretto Safety Charter set out in C-11 states that the corporate safety manager is responsible for ensuring overall compliance with policies, statutes and regulations, for monitoring the effectiveness of the safety programs, and for providing central health and safety services to all areas of Loretto. He said, however, that he does not really monitor the effectiveness of the safety programs, and he conceded that his lack of authority to enforce safety rules, such as the requirement to use syringes with engineered sharps, was inconsistent with the safety charter. He also said that although LaRue looked at a few of the policies in C-11, no one actually edited, reviewed or approved the program before it went out. (Tr. 126-34; 147-48; 154-56).

Coughlin's first visit to Loretto-Oswego was the day the inspection began, and he was asked to go to the facility because it had no one who was familiar with OSHA. He assisted in the walk-around of the facility, he answered questions the CO's asked, and both he and Tullio suggested ways to abate the violations the CO's observed; Jeffreys, however, was the individual responsible for

³⁴Coughlin said that Lawson is his immediate supervisor, that he also reports to LaRue, and that he does not report to Marsh. (Tr. 139-40).

³⁵Coughlin has also met with the safety committees of the various affiliates to educate them in safety and in how to conduct safety inspections. (Tr. 119; 127; 148-49).

abating the violations. He, LaRue and Marsh met to discuss the inspection after it had begun, and he also attended a post-citation conference on May 20, 2002; LaRue, Tullio and Jeffreys were there, as well as an OSHA official and Respondent's counsel. Coughlin stated that he himself did not have the authority to settle the citations. (Tr. 127; 134-39; 146; 152-54).

Melva Neff testified that she is employed by Loretto Rest as an infection control nurse, that Marsh is her boss, and that she is responsible for infection control at Loretto Rest and for providing advice in that regard to other Loretto facilities when they request it or when Marsh directs her to do so.³⁶ She said she is the person who made the revisions to C-9 and C-10, the Loretto Rest exposure control plans for 1997 and 1999, and that she makes such revisions every year. She also said she had trained Loretto-Oswego personnel in blood-borne pathogens in preparation for the DOH survey one year and that she had given similar training at two or three other sites. (Tr. 251-64).

Karen Jeffreys, the administrator of Loretto-Oswego, testified she reports to Marsh and that he visits her facility every two months; they discuss DOH, budget and financial matters, sometimes do an "environmental round," and at times discuss staffing. She said LaRue visits her facility about four times a year, usually to address environmental or maintenance issues and at times staffing, and that Collins visits her facility once or twice a year to go over financial matters. She also said Tullio is generally with LaRue on his visits and that Tullio also visits the facility on his own to train the maintenance or housekeeping staff. Jeffreys identified Marsh, LaRue, Collins and Tullio as LMC personnel, and she said her belief in this regard was based on C-6; she also said that the person represented by the "Loretto Exec. V.P." box on C-7 is Marsh. Jeffreys identified Coughlin as the safety director; it was her belief he was employed by Loretto Rest. (Tr. 13-25; 29-30; 46-47).

Jeffreys further testified that, while she reports to Marsh and he does her evaluation and can discipline her, and while he and Introne would be responsible for hiring her replacement, she herself is the "be all and end all" as far as Loretto-Oswego is concerned. She explained that as administrator, she is responsible for whatever happens at the facility, whether it relates to residents,

³⁶Neff agreed she had testified during her deposition that she was an employee of LMC. She explained, however, that after the deposition, Marsh had told her that she was actually an employee of Loretto Rest. She further explained that her belief that she was employed by LMC was based on her infection control dealings with the various facilities. Neff said that her only connection with LMC is Marsh, and she indicated that he works for LMC. (Tr. 252; 256).

employees, DOH issues or OSHA issues. She noted that a statement of deficiencies resulting from a DOH survey would be addressed to her individually and that it would be her responsibility, with the help of her directors, to reply with a plan of correction.³⁷ She also noted that the OSHA citations in this case were addressed to her in her capacity as administrator, and it was her belief, based upon her state-issued license, that she was ultimately responsible for the citations. Jeffreys did not remember if she had been at any settlement discussions when OSHA officials were present, but she had discussed settlement of the citations with LaRue.³⁸ (Tr. 15-16; 25-26; 36-38; 40-45; 50; 340-41).

Diane Harrington, Loretto-Oswego's director of nursing, testified that she did not know his official title but that Marsh oversees the RHCF's and is an employee of Loretto Rest. She further testified she sees Marsh about once a month, primarily to review quality indicators, and that he offers suggestions to the facility but has no guidelines for it to follow. Harrington said she does not report to Marsh and he does not supervise her. She did not recall telling CO Gary that Marsh could fire her if she did not follow staffing guidelines or that Marsh could "push" Jeffreys to fire her. (Tr. 54-58).

Sharon Lamore, Loretto-Oswego's assistant director of nursing, testified that Marsh is the corporate vice-president in charge of the RHCF's. She further testified that Marsh does not supervise her and that she has very little to do with him, but she indicated that he does supervise Harrington. Lamore did not agree that if Marsh wanted to, he could have her fired. (Tr. 65-69).

It is apparent from the foregoing that several employee witnesses gave testimony that was contrary to prior statements they made to the CO's. For example, LaRue's statement to CO Gary, that he and Marsh could influence the staff of Loretto-Oswego to make sure the wishes of LMC's Board were carried out, contradicts his hearing testimony that he only gives "advice and counsel" to the affiliates that the administrators can follow or not. (Tr. 94; 315-16; 350; 368-69). LaRue also

³⁷Jeffreys said that mock inspections were done at facilities in preparation for DOH surveys and that she had participated in a mock inspection of Loretto-Utica about two years before that Marsh had organized; Jeffreys also said that, since then, people were too busy to inspect other sites and that she had hired a consultant to inspect her facility. (Tr. 26-28; 47).

³⁸Jeffreys testified that she did not know who had the authority to settle the citations in this case and that she did not know if Coughlin had such authority. She agreed she had stated at her deposition that he had such authority, but she explained at the hearing that her statement in that regard was an "assumption" on her part. (Tr. 30-31; 37).

told CO Schmidt that the corporate safety manager was responsible for going to all the facilities to ensure that safety issues were taken care of, which conflicts with his testimony that Coughlin gives “advice and counsel” to the sites and only goes to a site if it is requested. (Tr. 97; 284). Coughlin’s statement to CO Schmidt, that the safety program he had written was to be “rolled out” in all the facilities by March 1, 2003, and that he was to go to all the facilities to train them in the program, is at odds with his testimony that his job as to safety is consultative, that the affiliates may use or disregard what he provides, and that he gives training only if a site requests it. (Tr. 119-28; 131-34; 286). Harrington and Lamore both indicated to CO Gary that Marsh could have them fired, but, at the hearing, they denied this was the case. (Tr. 58; 69; 310-11).

I observed the respective demeanors of the CO’s on the witness stand, and I find their testimony credible, consistent and sincere. Further, the CO’s were disinterested witnesses, unlike the employee witnesses, all of whom hold significant positions with Loretto. In particular, I find the earlier factual statements that employees made describing corporate relationships more credible than the statements they made after the formulation of Respondent’s legal defense; in this regard, I note that several employees who testified at the hearing used the term “advise and counsel” or similar verbiage and that this language never came up when the CO’s spoke to the employees.³⁹ I therefore credit the testimony of the CO’s over that of the employees to the extent that employee testimony is inconsistent with prior statements made by them to the CO’s.

Similarly, I do not credit employee testimony to the effect that Loretto facilities operate as separate, independent entities and that administrators at individual facilities are free to disregard Loretto policies and the “advice and counsel” of Loretto management because it is unpersuasive in view of the record as a whole. While such instances abound, the best example of such testimony is that of LaRue and Coughlin, set out supra, having to do with C-11, Loretto’s corporate safety program. Their testimony indicating that C-11 was written for Loretto Rest and that the other facilities could use it if they chose plainly conflicts with the safety charter, which states that the “failure to adhere to written corporate safety policies and rules will be considered serious infractions

³⁹I also note that, in at least one instance, the testimony of an employee witness was directly contrary to Respondent’s responses to interrogatories. See footnote 23, supra.

and will result in disciplinary actions, up to and including termination.”⁴⁰ (C-11, p. 2). Respondent’s position that Coughlin’s drafting of the above statement was a mere fanfaronade is rejected. LaRue’s claim that Coughlin was “overzealous” in writing the charter and that he himself had not really reviewed the program before it went out was not believable since the manual was an important document within his province. (Tr. 355-57; 363-65). Moreover, Coughlin conceded that his lack of authority to enforce safety rules was inconsistent with the safety charter’s statement that the corporate safety manager is responsible for ensuring overall corporate compliance with “policies, regulations and statutes.” (Tr. 134; C-11, p. 3).

Finally, for the same reasons, I do not credit certain testimony about the employing entity of particular individuals. Marsh testified he is employed by Loretto Rest, despite his position under Introne on C-6 with the other vice-presidents. (Tr. 164-65; 170-71). Jeffreys and Neff, on the other hand, both indicated that Marsh is an employee of LMC, and LaRue first identified Marsh as an employee of LMC but then said he works for Loretto Rest. (Tr. 17; 93-94; 256). In addition, LMC’s by-laws state that vice-presidents “shall be employees of the Corporation,” and Marsh was present for the meeting CO Gary had in LMC’s offices.⁴¹ (Tr. 315; C-4, p. 7). Neff also testified that she is an employee of Loretto Rest, but she agreed she had stated at her deposition that she worked for LMC; she also noted that Marsh told her after her deposition that she was an employee of Loretto Rest.⁴² (Tr. 252). Coughlin and Tullio testified they are employed by Loretto Rest.⁴³ (Tr. 117; 225). LaRue agreed and indicated that, while both report to him, they are ultimately responsible to Marsh.

⁴⁰When Marsh was asked about the statement, he interpreted it to mean that if employees willfully ignored safety practices they would be putting their jobs in jeopardy and that Introne’s position about having a safe and healthful work environment had been very clear. (Tr. 197).

⁴¹A conclusion that vice-presidents are LMC employees has further support in the record. Steve Volza, who is shown on C-6 as the vice-president for housing, was identified by Jeffreys and LaRue as an employee of LMC and an officer of LMC, respectively. (Tr. 28; 35-36; 110).

⁴²As noted above, CO Gary testified that Harrington identified Neff as the corporate infection control practitioner. (Tr. 313).

⁴³The CO’s testified that Coughlin and Tullio introduced themselves as the corporate safety manager and the corporate director of maintenance, respectively; in addition, Coughlin was at the meeting that CO Gary attended in LMC’s offices. (Tr. 274; 308; 315).

(Tr. 81; 90-91; 97; 355). Marsh, however, testified that Tullio reports to LaRue and said nothing about Tullio reporting to him; he also said Coughlin does not report to him, despite his stated belief Coughlin is employed by Loretto Rest. (Tr. 180; 200; 387-88). Further, Coughlin testified he reports to Lawson and LaRue and not to Marsh, and C-6 shows Tullio and Lawson in LaRue's chain of command. (Tr. 139-40).

Based on the reliable and probative evidence of record, I find that Marsh, Neff, Coughlin and Tullio are employees of LMC. Moreover, even if they are not, their positions are clearly "corporate" in nature, in that their job duties include ensuring that all of the Loretto facilities,⁴⁴ and not just Loretto Rest, follow regulatory and other requirements falling within their areas of responsibility.⁴⁵ In this regard, I specifically reject the testimony of these and other Loretto employees indicating that they give only "advice and counsel" to the Loretto affiliates and that, other than Loretto Rest, they have no authority to tell the affiliates what to do; stated another way, I find that Marsh, Neff, Coughlin and Tullio, as well as admitted LMC employees such as Sullivan, LaRue and Lawson, in fact had the authority to direct the affiliates. I also specifically reject the testimony of Marsh that he does not supervise Jeffreys and that she does not report to him. (Tr. 379; 395). Jeffreys testified that she reports to Marsh, she told CO Gary that Marsh is in charge of all the RHCF's, and her statements are supported by C-6, which shows all of the RHCF's directly below Marsh. (Tr. 14-15; 309). In view of the record, and for all of the reasons set out in this discussion, I conclude that LMC and the Loretto affiliates share common management and supervision.

Interrelated and Integrated Operations

COO Sullivan testified he is responsible for the day-to-day oversight of the Loretto affiliates' operations and that he has direct oversight of support services, human resources and information technology operations. (Tr. 206-07). C-6 shows the areas under Sullivan to be support services,

⁴⁴Marsh, of course, is responsible only for the RHCF's.

⁴⁵Even assuming arguendo that these four individuals are employees of Loretto Rest, it matters little to my determination that the Loretto affiliates do not in fact operate as separate and independent entities, as Respondent contends, but, instead, as a single employer with common management and supervision. This conclusion is supported by Neff, who agreed that most of the employees she knew and had dealt with over the years had a sense that they worked for "Loretto" regardless of the entity that actually employed them. (Tr. 267-68).

which includes facilities management, nutrition and dining services and human resources, as well as information technology and the positions of corporate controller and corporate treasurer; further, Sullivan said that the areas that have corporate functions are finance and those he directly oversees.⁴⁶ (Tr. 211). Based on his testimony, C-6 and the record as a whole, I find specifically that LMC and the affiliates have interrelated and integrated operations with respect to finance, support services and information technology. Further evidence of the interrelation of Loretto operations follows.

As to the RHCF's, the record establishes that Marsh oversees them and supervises their administrators, that he tries to be there for their DOH surveys, and that he visits each site essentially monthly. During his visits, he and the administrator discuss budget, financial and staffing issues; he also reviews clinical records and walks through the facility to ensure that environment and quality of care standards are being met. (Tr. 15-16; 22-23; 174-77; 187-88). Marsh has conducted mock inspections, in which he goes to an RHCF with personnel of other RHCF's; the findings of such an inspection are provided to the site administrator.⁴⁷ (Tr. 26-28; 47; 92-93; 178-79; 382-84; 397-98). Marsh is informed when an OSHA inspection occurs at a site, and he in turn advises Introne; Marsh would also advise Introne if an RHCF was not following OSHA regulations or keeping within its budget. (Tr. 178; 183-86). LaRue visits the RHCF's about four times a year, usually to address environmental or maintenance issues; Tullio is generally with LaRue on such visits, and Tullio also visits the sites on his own to train the maintenance or housekeeping staff. (Tr. 16-17; 23-24; 93-94; 230-31). Neff has visited the RHCF's to provide blood-borne pathogen training. (Tr. 259-60).

As to employee safety and health, the record shows that this function is part of human resources and that Coughlin, the corporate safety manager, is responsible for going to all the Loretto sites to address safety issues and to provide safety training as needed. (Tr. 119-21; 152; 284-86).

⁴⁶Sullivan, who became the COO in the fall of 2002, testified that his predecessor had essentially the same duties that he has. (Tr. 208). C-6, which was given to CO Gary in May of 2002, does not show a COO but does show Sullivan as the CFO; it also shows all the areas he stated that he oversees now, as well as the corporate controller and treasurer positions, as being under his responsibility at that time. Sullivan never said whether he is responsible currently for financial matters, but he did say that he does not oversee budgets now. (Tr. 207). These issues, however, have no effect on my finding that Loretto has interrelated and integrated operations.

⁴⁷As set out supra, no cross-inspections have taken place for the last two years, and the RHCF's now hire contractors to inspect their facilities. (Tr. 27; 47; 92-93; 178-79; 397-98).

The record also shows that Coughlin wrote C-11, Loretto's corporate safety program, that he provided it to all the Loretto sites in March of 2002, and that his duties include ensuring that the sites comply with it.⁴⁸ (Tr. 126; 154-56; 286). As the safety charter expresses it, on page 6 of C-11:

The Corporate Safety Manager is responsible for recommending corporate-wide health and safety policies; ensuring overall corporate compliance with policies, statutes, and regulations; monitoring the effectiveness of the safety programs; and providing central health and safety services to all areas of Loretto.

In regard to the subject OSHA inspection, the record shows that Coughlin and Tullio went to Loretto-Oswego pursuant to Jeffreys' call, that they were with the CO's during the walk-around inspection, and that Coughlin and/or Tullio attempted to correct any observed violations immediately by calling on facility employees; the record also shows that the CO's spoke to Coughlin most of the time, because Jeffreys had to excuse herself to attend to other matters at times, and that Jeffreys also referred the CO's to Coughlin or Tullio for anything she was unsure about. Coughlin and Tullio attended the preliminary closing conference, Coughlin provided abatement dates for items that had not been corrected, and, during the CO's later visits, he showed them items that had been abated. (Tr. 274-75; 278-84; 307-09). The contemporaneous actions of Coughlin and Tullio that the CO's described were far more reliable than their later, carefully-thought-out testimony in this regard. Thus, contrary to the testimony of LaRue, Coughlin and Tullio, claiming that only Jeffreys had the authority to abate the violations, I find that Coughlin and Tullio, in light of their actions during the inspection, exercised their authority to abate the violations.

Besides the above, the record shows that LaRue spoke to CO Schmidt at the site on March 7, that he participated in the final closing conference at the facility on March 13, and that he attended the settlement meeting held with OSHA on May 20, 2002; also present were Jeffreys, Coughlin, Tullio and Respondent's counsel. (Tr. 138-39; 282-84; 351). Coughlin testified, and LaRue agreed, that Coughlin did not have the authority to settle the citations. (Tr. 138; 351). Moreover, although Jeffreys testified that she was ultimately responsible for the citations, she did not know who had the authority to settle them. (Tr. 30; 36-37; 340-41). Finally, while LaRue also

⁴⁸In addition to C-11, Loretto has other corporate policies; these include the LOTO and the exposure control plans and the hazard communication policy that the CO's reviewed during the inspection, as well as a pre-employment drug testing program. (Tr. 31-34; 143-44; 179-80; 198-99; 256-59; 275-77; 299; 312-14; 361; C-9-10; C-12; C-14).

testified that Jeffrey was ultimately responsible for the citations, he never said she had the authority to settle them or that he did not have such authority.⁴⁹ (Tr. 103-04; 351). Based on the record, and especially on the fact he was at the settlement meeting, I conclude LaRue had the authority to settle the citations.⁵⁰

There is still further evidence of the interrelation and integration of Loretto's operations. First, monthly systems meetings are held at Loretto Rest; the heads of the various Loretto sites and programs are present, and the purpose of the meetings is to share information.⁵¹ (Tr. 28-29; 88-90; 141-43; 264-65). Second, as noted supra, Loretto Rest operates a central food commissary and provides food to all but one of its facilities and also to five non-Loretto facilities. (Tr. 105-06). Third, while Loretto facilities hire their own employees and have their own employee orientations, Loretto's web site sets out job opportunities for the various facilities as well as benefits for "Loretto" employees. (Tr. 44; 260-61; 331-34; 104; 151; C-27, pp. 28-35). Fourth, all Loretto service and maintenance employees belong to the same union, and, while each facility has its own contract, all of the contracts were negotiated at the same time and all of the contracts were all signed by Introne.⁵² (Tr. 107-11; 114; 243-45). Fifth, and finally, the same insurance agency handles all Loretto worker compensation claims. (Tr. 370-71).

⁴⁹LaRue did testify, however, that he did not have the authority to settle the citations issued to Loretto Rest in 1999, but he indicated that an officer of LMC designated by Introne could have settled those citations. (Tr. 343-44).

⁵⁰LaRue's involvement in OSHA matters is also shown by CO Schmidt's testimony that she had conducted the 1999 inspection of Loretto Rest and that LaRue had been at the opening conference, had been with her during the walk-around, and had been at the closing conference. She also testified that LaRue had told her then that the corporate risk manager, Barry Hess, was not able to be there for the inspection; further, Coughlin told her that Donald Reeve, who also had the title of corporate risk manager, was his immediate predecessor. (Tr. 284-86; C-28). LaRue apparently had no involvement in the 2001 inspection of Loretto-Utica. (Tr. 349).

⁵¹Jeffreys and LaRue indicated that safety and OSHA matters are not discussed at systems meetings; Coughlin, however, testified that they were, and Neff testified that she had attended the meetings to speak about exposure control and to disseminate copies of the exposure control plan after she had revised it. (Tr. 29; 89-90; 142-43; 264-65).

⁵²Lawson testified that while some facility heads were present during the negotiations for the current contracts, the Loretto bargaining team was Sullivan, LaRue and himself. (Tr. 243-45).

Based on the foregoing, I conclude that LMC and the Loretto affiliates have interrelated and integrated relations. I further conclude that, as the Secretary has demonstrated all of the elements of the Commission's "single employer" test, LMC and the Loretto affiliates operate as a single entity. Therefore, for the reasons articulated in the "single employer doctrine" portion of this decision, I conclude that the Secretary's issuance of the subject citations items as repeat was appropriate, and, accordingly, those items are affirmed as repeat violations.⁵³

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

1. Respondent, Loretto-Oswego RHCF, was, at all times pertinent hereto, an employer with the meaning of the Act.
2. The Commission has jurisdiction over the parties and the subject matter of this case.
3. Respondent was in serious violation of 29 C.F.R. §§ 1910.1030(c)(1)(iv), 1910.1030(c)(1)(v), 1910.1030(f)(2)(iv), 1910.1030(f)(5) and 1910.1030(h)(5)(i), as alleged in Items 1 through 5, respectively, of Citation 1 (Docket No. 02-1164).
4. Respondent was in repeat violation of 29 C.F.R. §§ 1910.133(a)(1), 1910.151(c), 1910.1030(f)(2)(i) and 1910.1030(f)(3), as alleged in Items 1a, 1b, 2 and 3, respectively, of Citation 2 (Docket No. 02-1164).
5. Respondent was in serious violation of 29 C.F.R. § 1910.303(f), as alleged in Item 1 of Citation 1 (Docket No. 02-1174).

⁵³In so finding, I have considered Respondent's argument, based on the testimony of LaRue, that a deficiency at one site resulting from a DOH survey would not result in a repeat deficiency due to a prior similar deficiency at another site, although there is a mechanism for repeat deficiencies within the same facility, because the DOH treats each facility as a separate legal entity. (Tr. 345-47). I agree with the Secretary that repeat deficiencies in health law are irrelevant to repeat citations in OSHA law, and Respondent's argument is rejected. (Tr. 347).

2. Respondent was in repeat violation of 29 C.F.R. § 1910.101(b), 1910.147(c)(4)(i), and 1910.303(g)(2)(i), as alleged in Items 1 through 3 of Citation 2 (Docket No. 02-1174).

3. Respondent was in “other” violation of 29 C.F.R. § 1910.305(g)(1)(iii), as alleged in Item 1 of Citation 3 (Docket No. 02-1174).

ORDER

1. Items 1 through 5 of Citation 1 (Docket No. 02-1164) are AFFIRMED, and a total penalty of \$5,750.00 is assessed for these items.

2. Items 1 through 3 of Citation 2 (Docket No. 02-1164) are AFFIRMED, and a total penalty of \$41,250.00 is assessed for these items.

3. Item 1 of Citation 1 (Docket No. 02-1174) is AFFIRMED, and a penalty of \$1,000.00 is assessed for this item.

4. Items 1 through 3 of Citation 2 (Docket No. 02-1174) are AFFIRMED, and a total penalty of \$15,000.00 is assessed for these items.

5. Item 1 of Citation 3 (Docket No. 02-1174) is AFFIRMED, and no penalty is assessed for this item.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated: December 29, 2003

Washington, D.C.