THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

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

SECRETARY OF LABOR, Complainant, v. ANGELICA TEXTILE SERVICES, INC., Respondent.	OSHRC Docket No. 08-1774

APPEARANCES:

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

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

BEFORE: John H. Schumacher
Administrative Law Judge

DECISION AND ORDER

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

serious and four repeat violations and proposed a total penalty of $58, 525.[1] Angelica filed a timely notice of contest, bringing this matter before the Commission.[2]

Background

The inspection was initiated on June 5, 2008, based on this facility appearing on a list of high-hazard industries.[3] (Rawson Dep. 33). Angelica has several facilities in addition to its Ballston Spa location. CO Rawson met with the following Angelica personnel on the first day of the inspection: Craig Andrews, Operations Manager; Ken Barnes, Maintenance Manager; and (via telephone) Tony Long, Corporate Safety Director. She later met with Kevin McDonough, who became the environmental safety and health manager for the facility on June 10, 2008. (McDonough Dep. 37).

Jurisdiction

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

Rule 61

By request and upon agreement of the parties, and with the approval of the undersigned, this case has been decided on the stipulated record pursuant to Commission Rule 61, 29 C.F.R. 2200.61 ("Rule 61"). The parties do not dispute the applicability of the cited standards. They do dispute whether Angelica violated the standards.

On September 23, 2011, the parties filed briefs for the disposition of this matter under Rule 61. Joint Exhibit 3 set out the contents of the stipulated record, as follows: (1) the depositions of Anthony Long, Margaret Rawson, Kevin McDonough, David Malter, and Edward

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

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

[3] OSHA's inspection began on June 5, 2008, and according to the Citation continued through September 19, 2008. CO Rawson's testimony shows she visited Angelica's facility on June 5, June 12, and July 8, 2008. (Rawson Dep. 68, 281-82).

Jerome; (2) Settlement Agreements for Docket Numbers 04-1318 and 04-1319; and (3) the revised expert report of David Malter, dated January 18, 2010. (*See* Joint Exh.1-4). On February 24, 2012, in accordance with Rule 61, the parties submitted a joint stipulation of the facts in this matter. Each party has submitted an initial brief and a reply brief.

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

Hearsay

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

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

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
> . . . .
> (2) An Opposing Party's Statement. The statement is offered against an opposing party and: . . . (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.

In *Regina*, the Commission noted that admissibility must not be equated with reliability. It also noted that employee admissions are not "inherently reliable" and that the judge must thus consider several factors when assessing the credibility of such statements.[4] *Id.* at 1048. As the Commission explained, a judge has no opportunity to assess the credibility of an employee's out-

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

of-court statement.[5] *Id*. at 1049. This is especially relevant here, where the undersigned judge did not have the opportunity to assess the credibility of either the employee or the CO reporting the conversation. I conclude that all of the employee statements referred to by CO Rawson meet the exception provided for by FRE 801(d)(2)(D).

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

Estoppel

Angelica raises an estoppel defense based on its contention that OSHA accepted its confined space and lockout-tagout ("LOTO") programs as a part of a prior settlement agreement from 2005.[6] (R. Br. 7). This argument fails for two reasons. First, it is well established that OSHA may issue a citation for a condition that may have been previously observed but was not cited as a violation. "OSHA is not precluded from issuing a . . . citation for previously observed or uncited violations." *Kaspar Wire Works, Inc*., 18 BNA OSHC 2178, 2183 n.13 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). Further, to establish an estoppel claim against the Government, the party must show that the Government "made a misrepresentation upon which the party reasonably and detrimentally relied and that the Government engaged in affirmative misconduct." *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994) (citations omitted). OSHA's mere receipt of Angelica's above-noted programs as part of a settlement agreement is not an affirmative action. In addition, Angelica has not shown any misconduct by OSHA or its own detrimental reliance. Its argument is rejected.

Stipulated Facts

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

1. Angelica's Ballston Spa facility was engaged in the business of renting textiles to "hospitals, clinics, nursing homes" and other similar clients. McDonough Dep. at 9-10.

2. As part of this rental agreement, Angelica processed and laundered soiled linens before returning those linens to its clients. *Id.*

3. The hazards Respondent's employees encountered throughout the laundering process are the subject of the citation items in this case.

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

[6] As noted above, the two prior settlement agreements were included in the stipulated record.

4. Company-wide, Respondent had more than 250 employees. Rawson Dep. at 340.

5. At the time of OSHA's inspection, Respondent used a series of interconnected machines to launder the soiled medical linens in a "wash alley" at Respondent's worksite. *See* McDonough Dep. at 13; McDonough Ex. 2 (hand-drawn diagram of wash alley).

6. This area was surrounded by a chain-link perimeter fence. Rawson Dep. at 37-38; Long Dep. at 40.

7. Soiled linens entered the wash alley for laundering via one of two "fixed conveyor[s] with moveable belt[s]," which deposited the material into either of two continuous batch washers "CBWs" aka "Tunnels"), large screw-shaped industrial washing machines containing 8 separate modules. McDonough Dep at 14, 27-30, 44; Malter Dep. at 146.

8. A diagram depicting the layout of the CBWs is contained in the manufacturer's literature at McDonough Ex. 10, Fig. 3 at Angelica - 00195.

9. Linens were divided between CBW # 1 or 2 depending upon the type of material being laundered. McDonough Dep. at 28-29.

10. Those linens entering CBW # 1 were sent through the machine's wash cycle while being transported through the 8 modules of the tunnel. *Id*. at 29-30. After washing, the clean linen was discharged into the co-bucket, "a big hopper mounted on a . . . traveling shuttle." *Id*. at 30. The co-bucket traveled east and west along approximately 20-foot-long tracks to feed one of the two extractors servicing CBW # 1. *Id*. at 30-31. Then, the co-bucket discharged wet laundry into the extractor, which used centrifugal force to expel water from the linens. *Id*. at 31.

11. Next, the extractor dumped the linens onto the loose goods conveyor, which loaded the laundry onto another shuttle, called the "loose goods shuttle." *Id*. at 31-32.

12. After the linens were loaded into the loose goods shuttle, a dryer operator, an employee located outside the wash alley, determined into which of the industrial dryers the laundry was sent. *Id*. at 32, 42-43.

13. All of the dryers in the wash alley were Milnor dryers, with laundry being deposited in the front and removed through the back. *Id*. at 42-43.

14. Linens would either be delivered into Milnor dryer six or seven, fed directly by the loose goods shuttle, or sent to the loose goods shuttle opening, where the textiles dumped into a cart and manually loaded into a dryer. *Id*. at 32.

15. The dry linens were removed from the wash alley through the back side of the dryers, which expelled the linens onto another conveyor. *Id*. at 32-33.

16. Those linens entering CBW # 2 were discharged from the CBW after washing into a press, which "literally presse[d] the water out of the linen." *Id*. at 33.

17. The pressed linen formed a "cake" "four-foot in diameter and maybe six-inches in height and all compressed together." *Id*. at 16, 33.

18. The linen cakes were then sent via the "cake conveyor" to the cake shuttle, which delivered them to one of dryers one through five. *Id*. at 33-34.

19. After drying, the laundry was discharged through the back of the dryers and out of the wash alley as with the linens entering CBW # 1. *Id.* at 34.

20. As shown in the manufacturer's literature at McDonough Ex. 10, each CBW was comprised of 8 large inter-connected modules. Fig. 3 at Angelica-00195; see also McDonough Dep. at 29-30.

21. Each CBW is a long tunnel with an "Archimedes screw," and the CBW turned during the laundering process, spinning water and linens through the 8 modules of the washer. McDonough Dep. at 29-30, 44.

22. As with the co-bucket, both the loose goods shuttle and the cake shuttle traveled along fixed tracks. McDonough Dep. at 16-18.

23. These tracks ran both above and below the shuttles, like a trolley. Malter Dep. at 152.

24. The CBW tunnel was turned by a chain-and-sprocket, driven by an electric motor, and delivered steam was controlled by compressed air-operated valves. McDonough Dep. at 45.

25. During the laundering process, wash chemicals such as detergent and an alkali were sent into the CBW to clean the linens. *Id*. at 46.

26. None of the valves feeding the CBWs were labeled. McDonough Dep. at 115, 119, 121-122.

27. Respondent's written Confined Space Entry Program, Procedure SFY-1100, identified the "Tunnels" (aka the CBWs) as "permit required" confined spaces. See Rawson Ex. 5, § 1.3, p.1.

28. The CBWs were only to be entered in the event of a jam or other maintenance procedure. See McDonough Ex. 10 at Angelica-00192.

29. Respondent's corporate-level written permit-required confined space plan identified the dryers in its facility as permit-required confined spaces. See Rawson Ex. 5, § 1.3.

30. The Milnor dryers had "fire eyes" through which their pilot lights could be seen. Malter Dep. at 139.

31. These devices controlled the temperature in the dryer, and when one of the fire eyes was extinguished, employees needed to enter the wash alley area to reignite it. Rawson Dep. at 236-37.

32. The shuttles were generally automatically operated by a computer control system that coordinated their movement based upon the needs of the dryers and washers. See Malter Dep. at 143.

33. Each of the shuttles had a "cow catcher" that would stop shuttle motion after contact with any obstruction, on either end. Rawson Dep. at 41-42; Malter Dep. at 153-54; McDonough Ex. 2.

34. The shuttle is also equipped with emergency stop buttons and emergency pull cables. McDonough Dep. at 223-25.

35. A control panel on the sides of the shuttles had a button that permitted the shuttles to be turned off. Malter Dep. at 153-55.

36. Respondent's written lockout/tagout plan originally called for all four gates providing access to the wash alley to be interlocked, de-energizing machinery before entry into the wash alley was permitted. Malter Ex. 6 § 1.1.3, p.1 (also McDonough Ex. 7).

37. Respondent later authorized deviation from this written plan, allowing gates one and two to be locked, but not interlocked. Long Dep. at 49-53; see McDonough Ex. 2 (showing the location of the gates to the wash alley).

38. The interlocked gates were designed to de-energize multiple machines in the wash alley nearest to the gate that was opened, but did not de-energize all machines in the wash alley. See Rawson Dep. at 47-48; McDonough Dep. at 168-69; Malter Dep. at 144.

39. At the time of the OSHA inspection, Respondent allowed all 6-8 of its non-managerial maintenance employees to enter the two gates (gates one and two on the diagram at McDonough Ex. 2), which were each locked with a single chain-and-lock padlock, and not interlocked. Long Dep. at 50, 54; Malter Dep. at 134-35; Rawson Dep. at 252.

40. Respondent's written policy governing entry into the wash alley, SFY-1060, Entering Shuttle Area Safely, did not require the shuttles to be de-energized or locked out if employees were servicing machinery in the wash alley and not working directly on the shuttle. McDonough Dep. at 178-80; McDonough Ex. 7.

41. This is because Respondent's policy distinguished between "Maintenance on the Shuttle" and "Work in the Shuttle Area on Non-Shuttle Equipment" and did not require lockout or de-energization of the moving shuttles for work in the wash alley other than maintenance on the shuttle itself. McDonough Dep. 178-80; McDonough Ex. 7 (also Malter Ex. 6).

42. Respondent's written procedures called for a "watch person" to be utilized for entry into the wash alley if interlocked gates were not used and employees were not performing tasks that Respondent designated "Maintenance on the Shuttle[s]" themselves. Malter Ex. 6, §§ 3.1-3.2 (also McDonough Ex. 7).

43. This policy required a dryer operator serving as a "watch person" to stand near the operator panel at the south end of the wash alley, and "observe and alert the person working on the inside of any possible hazards. [The policy] does not specify that they have to keep eye contact on the individual. They have to be aware of any hazards that may occur." McDonough Dep. at 189; see McDonough Ex. 2.

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

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

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

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

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

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

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

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

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

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

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

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

56. Respondent used an atmospheric PHD monitor to test the CBW for hazardous atmosphere after lockout and ventilation of the space when entry was required. Rawson Dep. at 173; Malter Dep. at 120-21; McDonough Dep. at 85; see also Rawson Ex. 5, App. B, §§ 5.23- 5.25, p.14 (also McDonough Ex. 3).

57. The manufacturer of the meter used by Respondent recommended that the meter be calibrated no more than one month prior to use. Malter Dep. at 120-21.

58. To calibrate the meter, one would take the meter into a clear-air environment outside the facility where there was no known hazardous atmosphere and calibrate the meter using calibration gas (i.e. "a known quantity of gas contained in a cylinder that you introduce into the meter to determine the accuracy of the meter" used only for the purposes of calibration) as instructed by the manufacturer. McDonough Dep. at 85-86.

59. After calibration, the meter was used in the CBW to evaluate hazards of the space. *Id*. at 86.

60. The only calibration gas at Respondent's facility expired prior to 2007 (OSHA's inspection of the worksite occurred in 2008). See Rawson Dep. at 375-76 (day 2); Malter Dep. at 124.

61. Respondent created a single permit for all of its permit-required spaces, including the Milnor dryers, with the exception of the CBW. See Rawson Dep. at 182; McDonough Ex. 3, App. D, p. 19-21.

62. McDonough Ex. 3 contains a true and accurate copy of that permit as it existed at all times relevant to the alleged violations.

63. Respondent created a separate entry permit for the CBWs. Malter Ex. 9.

64. Malter Ex. 9 is a true and accurate copy of that permit as it existed at all times relevant to the alleged violations.

65. Respondent's written confined space program provided that, in the event a confined space rescue was required, rescue services would be obtained from the Local Volunteer Ballston Spa Fire Department, and that the fire department would be summoned by calling 911. Rawson Ex. 5, §§ 7.2-7.3, p. 10-11 (also McDonough Ex. 3); Rawson Dep. at 202; McDonough Dep. at 149-50, 159.

66. The Ballston Spa Fire Department is located approximately 100 yards from Respondent's facility. McDonough Dep. at 154-58.

67. This plan did not require Respondent to call the fire department prior to each confined space rescue to determine whether the fire department was presently available to perform a rescue. McDonough Dep. at 160-62.

68. None of Respondent's employees were expected to perform a confined space rescue. McDonough Dep. at 146-48.

69. None of Respondent's employees were trained to perform a confined space rescue. Rawson Dep. at 206; McDonough Dep. at 146-47.

70. Ms. Rawson testified that the fire department did not have a qualified confined space rescue team and could not make a confined space rescue to retrieve a downed entrant. Rather, the fire department would need to call Mutual Aid through Saratoga County to summon additional assistance from the towns of either Colonie or Schuylerville, which each had a confined space rescue team. This additional assistance could take up to 30 minutes. Rawson Dep. at 208, 213. Mr. McDonough testified that the Ballston Spa Fire Department visited the Angelica facility in approximately 2001 to undertake an evaluation of confined space operations and conducted drills at least annually at the facility to ensure they were able to respond to various types of emergencies. McDonough Dep. at 154-163.

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

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

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

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

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

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

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

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

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

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

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

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

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

84. The nature of Respondent's business exposed some of Respondent's employees to potential exposure to blood and other infectious materials because it involved the laundering of medical supplies. See McDonough Dep. at 216.

85. Respondent rented textiles, including washcloths, towels, sheets, pillow cases, gowns, scrubs and surgical towels, to hospitals and nursing homes. McDonough Dep. at 9-11.

86. After the linens were soiled by Respondent's clients, linen was packaged by the client in plastic bags and picked up by Respondent and taken to its worksite. *Id*. at 10-11.

87. At Respondent's facility, employees opened bags of linen, emptied the linens onto the conveyor, and sorted the linen according to type. *Id*. at 11.

88. Respondent offered the Hepatitis B vaccine series to "those [employees] that had exposure, which would've been soil sort, RSR's, supervisors, management, washroom, dryer [operators], housekeeping." McDonough Dep. at 216.

89. Prior to the start of their regular duties, Respondent offered the vaccination series to newly-hired employees through a video-based training, which "explained the OSHA Hepatitis B bloodborne pathogen standards. And of course within that training it provide [d] information regarding the HBV [Hepatitis B] vaccination." McDonough Dep. at 216-17.

90. Angelica paid employees for the time spent watching the video. McDonough Dep. at 217.

91. After the video training and classroom training, these employees were given the option to receive the Hepatitis B vaccination series or sign a waiver. *Id*. at 217.

92. The depositions of Mr. McDonough, Mr. Malter, Mr. Long, Ms. Rawson, and Mr. Jerome, along with their exhibits, constitute the entire record in this matter. The parties stipulate the admissibility of the transcripts of these depositions, along with their exhibits.

93. Mr. McDonough and Mr. Long were managerial employees of Respondent at the time of their depositions. Mr. Malter was an expert designated by Respondent at the time of his deposition. Ms. Rawson and Mr. Jerome were employees of the Occupational Safety and Health Administration at the time of their depositions.

94. The Parties have a dispute over any fact not stipulated herein.

The Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

The parties do not dispute that the cited standards are applicable to Angelica's laundry facility. Angelica's internal safety procedures reflect the potential exposure of its employees to hazards from confined spaces, unexpected energization (lockout), chemical handling, and bloodborne pathogens. (*See* Stip. Facts 80-81, 83; McDonough Exh. 3-10).

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

Citation 1, Item 1

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

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

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

The Secretary must provide evidence to show that Angelica's required PPE was inadequate to protect an employee from that particular hazard. *See Weirton Steel Corp.*, 20 BNA OSHC 1255, 1265 (No. 98-0701, 2003) (vacating citation where the CO's opinion was the only evidence presented that a particular type of protective clothing was required). CO Rawson interviewed the employee responsible for the transfer; she did not observe the activity.[7] (Rawson Dep. 91-93). The Secretary offered CO Rawson's opinion testimony as evidence that the chemical-resistant apron provided was not adequate protection and that, instead, chemical-resistant clothing (coveralls) was necessary. (S. Br. 25). However, the Secretary has not presented any other evidence that the PPE designated and provided by Angelica was not sufficient protection or that chemical-resistant coveralls were the necessary protection for this work activity.[8] To the contrary, the parties have stipulated that Angelica did a PPE analysis and provided PPE. Because the Secretary did not meet her burden of showing that the PPE Angelica required and provided was inadequate, this item is vacated.

Citation 1, Item 2(b)

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

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

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

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

Item 2(b) lists three instances that allegedly violate the standard's requirements.[9] They are as follows: (b) Angelica's confined spaces program ("program") (at § 5.13) did not specify a means to verify that the power had been successfully shut off within the continuous batch washer ("CBW"); (c) Angelica's program requirement (at § 5.19) to lock out valves is not a proper means of isolation; and (d) Angelica's program (at § 5.23) did not specify the frequency of periodic atmospheric testing of the CBW.

Instance b

The Secretary alleges that Angelica's written program must include a detailed description of its lockout verification process for entry into a CBW. (S. Br. 37). She acknowledges that Angelica included a step to verify that the power has been successfully shut off; however, it did not specify the "means." (S. Br. 36-38; McDonough Exh. 3). The Secretary refers to the preamble of the LOTO standard to support her assertion that the subject standard requires the employer to provide a written, detailed set of verification instructions.[10] The Secretary does not explain how the LOTO standard's preamble applies to the confined spaces standard cited here.

Additionally, the Secretary points to CO Rawson's testimony that Angelica's maintenance manager told her that energy verification was not part of the procedure.[11] However, this uncorroborated assertion is in direct conflict with Angelica's written program, which requires verification of power shut-off. Further, the parties have stipulated that lockout can be verified by "pressing a 'start series' of buttons." (Stip. Fact 51).

[9] The original Citation listed five instances. The Secretary has withdrawn Instances (a) and (e) of this item.
[10] 54 Fed. Reg. 36,644, 36,770 (Sep. 1, 1989).
[11] There is no indication that CO Rawson referred to any inspection notes during her deposition testimony, and the record does not include any deposition testimony for Maintenance Manager Barnes.

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

Instance c

The Secretary contends that Angelica's written program used an improper means to isolate the CBW's water, steam, chemical, and air lines. Angelica's program specifies that a lockout system will be used to isolate the lines feeding the CBW. The Secretary asserts the only acceptable means of isolation are "blanking or blinding; misaligning or removing sections of the lines, pipes or ducts; or a double block and bleed system." The Secretary refers to an August 6, 2007 OSHA letter of interpretation to support her position.[12] (S. Br. 37-39).

Commission precedent establishes that the plain meaning of a regulation is given controlling weight. *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003) (citation omitted). The Secretary's interpretation is consulted only when the regulation is ambiguous or its meaning is unclear. *Id.* Here, the confined spaces standard defines "isolation." This definition includes the "lockout or tagout of all sources of energy" as one way to isolate a space. *See* 29 C.F.R. § 1910.146(b). I find the Secretary's position to be in direct conflict with the plain language of the standard, since lockout is explicitly included as a means of isolation.[13] This instance is vacated.[14]

Instance d

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

As discussed below, Angelica provides training, in addition to its written procedures, as a part of its confined spaces entry program. Angelica's safety and health manager testified that, during on-the-job training, information is provided as to how to determine the frequency of atmospheric testing. He further testified that each entry's conditions vary, so the testing frequency depends on the actual pre-entry readings and the conditions for that particular entry.

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[12] *See* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25949

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

[14] In view of my disposition of this instance, it is not necessary to address whether the interpretation letter, which deals with solenoid valves that cannot be locked out, would apply to this instance.

(McDonough Dep. 88-92; R. Br. 13). Additionally, Angelica's expert witness, Mr. Malter, confirmed that the frequency of testing in a CBW will be determined by the circumstances of that particular entry. (Malter Dep. 87-89.)

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

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

Citation 1, Item 3

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

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

The parties have stipulated that the CBW is a permit required confined space that could be entered to clear a jam or for other maintenance. (Stip. Facts 27-28). The Secretary alleges that Angelica did not properly maintain the PHD Plus Atmospheric Monitor ("PHD monitor" or "meter"). (S. Br. 43). The PHD monitor is used to test for a potentially hazardous atmosphere in a CBW confined space entry.[15] (Stip. Fact 56). The parties stipulated that the manufacturer recommends that the meter be calibrated no more than a month prior to its use. (Stip. Fact 57). The gas used to calibrate the meter at Angelica's facility expired prior to 2007 – more than 18 months before the inspection. (*See* Stip. Fact 60).

Angelica asserts this item should be vacated because there was no entry into the CBW, and therefore no exposure, in the six months before the citation. (R. Br. 14). However, as

[15] 29 C.F.R. § 1910.146(d)(5) requires, in pertinent part: "Evaluate permit space conditions as follows when entry operations are conducted: (i) Test conditions in the permit required space to determine if acceptable entry conditions exist . . . ."

discussed above, the Secretary need only show that employees could be exposed to the hazard in the normal course of their duties. Here, employees could enter a CBW to clear a jam or for other maintenance. (Stip. Fact 28). The Secretary has shown potential employee exposure.

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

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

Citation 1, Item 4(a)

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

> (f) *Entry permit*. The entry permit that documents compliance with this section and authorizes entry to a permit space shall identify:
> . . . .
> (6) The individual, by name, currently serving as entry supervisor,[16] with a space for the signature or initials of the entry supervisor who originally authorized entry;

The Secretary argues that an entry permit form must have two spaces -- one for the supervisor who authorizes the entry and another for the person currently serving as the entry supervisor. (S. Br. at 50-51.) The Secretary relies on the two sample permits at Appendix D of the confined spaces standard to support her position. *Id*. The note to 29 C.F.R. § 1910.146(e)(1)

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

states that Appendix D includes "examples of permits whose elements are considered to comply with the requirements of this section." 29 C.F.R. § 1910.146. The Secretary asserts that Angelica's forms provided a space for the authorizing party's signature, but did not provide a place to list the supervisor overseeing the entry. (S. Br. 51).

The parties have stipulated that Exhibit 9 to the Malter deposition and Exhibit 3 to the McDonough deposition were accurate representations of Angelica's CBW and Non-CBW entry permit forms. (Stip. Fact 62, 64.) Both permit forms included an instruction that "[t]his permit shall be issued by the Safety Coordinator or trained designee." (McDonough Exh. 3 at Appendices C & D). Both of Angelica's permits included a space for the following: "Entrant," "Attendant," "Entry Supervisor Signature," "Permit Issuer Signature," and "Safety Coordinator's or Designee's Signature." *Id.*

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

I have compared Angelica's entry permit forms to Appendix D's sample forms. I find that Angelica's permit forms include a space to identify the entry supervisor – "Entry Supervisor Signature." (McDonough Exh. 3; Malter Exh. 9). I further find that Angelica's permit form is functionally similar to the sample forms. Appendix D's sample forms demonstrate that a particular job title is not required on the permit form and that there is more than one way to design a compliant entry permit form. Therefore, contrary to the Secretary's allegation, Angelica's entry permit form does provide a space to identify the person currently serving as entry supervisor.[17] This citation item is vacated.

Citation 1, Item 4(b)

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

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

> (f) *Entry permit*. The entry permit that documents compliance with this section and authorizes entry to a permit space shall identify:
> * * *
> (10) The results of initial and periodic tests performed under paragraph (d)(5) of this section, accompanied by the names or initials of the testers and by an indication of when the tests were performed . . . .

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

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

The Secretary points to the standard's preamble as evidence that the tester must be separately identified on the permit form to provide the necessary accountability for testing.[18] (S. Br. 52). The preamble does highlight the need to identify the person conducting the testing to promote "individual responsibility." However, it does not state an additional space is necessary on the permit form.

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

Citation 1, Item 5

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

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

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

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

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

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

Training for Authorized Entrants[19]

The Secretary alleges that Angelica did not train its authorized entrants about the hazards of the CBW and that the video training was not facility-specific.[20] (S. Br. 56). First, there is no requirement in the cited standard that Angelica's video-based training must be tailored to its own facility. Further, the video training is just one component of Angelica's training program. I find that the Secretary has not established that Angelica's video training was inadequate.

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

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

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

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

Training for Attendants

The standard requires an attendant to "[s]ummon rescue and other emergency services as soon as the attendant determines that authorized entrants may need assistance to escape from permit space hazards." 29 C.F.R. § 1910.146(i)(7). The Secretary alleges that Angelica's training was inadequate because it did not train attendants to timely summon qualified rescue services.

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

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

The Secretary argues that because "Angelica had failed to develop the appropriate rescue procedures, Respondent clearly could not have trained its employees on these procedures."[21] (S. Br. 58). As noted above, Angelica has a multi-faceted training program. Training of attendants is a part of that program. (McDonough Exh. 3-4). The record shows that Angelica trained its attendants to summon rescue by dialing 911, in accordance with its rescue plan. (McDonough Dep. 149-50). I find this meets the standard's requirement to summon emergency services as soon as the attendant determines an entrant needs assistance. This instance is vacated.

Training for Entry Supervisors

The Secretary alleges that the training for entry supervisors was inadequate because it did not establish proficiency in calibrating the atmospheric testing equipment or in ensuring entry permits were completed.[22] (S. Br. 58; Rawson Dep. 378). To the contrary, the CO's testimony shows that Mr. Barnes, the maintenance manager, did know how to calibrate the PHD monitor. (Rawson Dep. 378). The Secretary has provided no additional evidence to support her allegation that entry supervisors were not proficient in the calibration of atmospheric testing equipment, and what she has presented is not persuasive.[23]

To illustrate that permits were improperly completed, and to show a lack of proficiency in training, the Secretary points to several completed entry permits that she alleges lack information related to atmospheric testing or an entry supervisor's signature. (S. Br. 59; Rawson Ex. 12; Malter Ex. 9). Eight permits were completed in 2006, and one was completed in 2007. (Rawson Exh. 12; Malter Exh. 9).

I have reviewed these forms and find there is some variation in how each was filled out. However, the Secretary did not describe why a particular permit was incomplete for its related confined space entry. Further, the Secretary did not explain how the forms and training that were in place in 2006 and 2007 were applicable to the training and procedures in effect at the time of

[21] Citation 1, Items 6(a)-6(c), discussed below, address the content of Angelica's rescue plan.
[22] The duties for an entry supervisor are set forth at 29 C.F.R. § 1910.146(j).
[23] Mr. McDonough testified that he believed employees had demonstrated proficiency because three employees successfully demonstrated use of the PHD monitor to him. (McDonough Dep. 145). The Secretary asserts that Mr. McDonough's deposition testimony about these three employees is irrelevant because this demonstration was conducted after the inspection and after additional training had been provided to employees. (S. Br. 56). To support this contention, the Secretary notes that Mr. McDonough began his employment after the start of OSHA's inspection. *Id.* However, the Citation lists this violation as occurring "on or about June 12, 2008." (Rawson Exh. 14). Mr. McDonough began his employment with Angelica on June 10, 2008. (McDonough Dep. 37). Because this is the only evidence the Secretary presents to dispute the validity of McDonough's testimony, I find the Secretary's argument unpersuasive.

the inspection.[24] I conclude that the Secretary has not demonstrated that Angelica's training for entry supervisors was inadequate. This instance is vacated. As all three instances have been vacated, Item 5 is vacated.

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

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

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

> Q. Is it your understanding that the [BSFD] is still -- well, strike that. Is it your understanding that at the present time that the [BSFD] is intending to provide rescue services, that was the import of your conversation with Chief Bowers?
> A. The [BSFD] cannot make an entry rescue into the CBW because it does not have people that are qualified for confined space entry.
> Q. That's the not the question I asked. Let's try it again. Do you have, based upon your communication with Chief Bowers, it's your understanding that the [BSFD] is going to respond -- let's try it that way -- is going to respond in the event that they are told that it's necessary for a rescue to occur from a confined space?
> A. Yes.
> Q. And is it your understanding that *they are going to conduct that rescue by cutting through the side of the CBW and retrieving the employee that way*?
> A. That was my last discussion with him, yes.

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

> Q. So there's two ways that you can do the rescue. You can go into the CBW, the [BSFD] can go in and they can take the employee out, is that right? That's one way to do it?
> A. Or you could have a retrieval system to pull the person out, to make a nonentry rescue.
> Q. And it's your understanding that today, the [BSFD], if called at least as indicated to you, they will respond and they will do a retrieval from the outside, is that correct?
> A. That's the only way they can retrieve somebody.
> Q. That's your understanding about what they will do, is that correct?
> A. Right. Can I answer that?
> Q. If you're done with your answer, no. If you're not done with your answer, yes.
> A. What I'd like to add to that is [BSFD] has indicated if they need additional support they would call Mutual Aid through Saratoga County, that Mutual Aid can take as long as 30 minutes to come because they would pull it from either the Town of Colony or Town of Schuylerville which has confined space rescue training teams.
> [Emphasis added].

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

Citation 1, Item 6(a)

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

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

The Secretary alleges that Angelica did not evaluate the local fire department's ability to timely respond to a rescue summons. She asserts that rescue must be available in a very short period of time based on the hazards at Angelica's facility. (S. Br. 63-64). Nonetheless, the Secretary did not cite Angelica for improper selection of a rescue team; instead, she alleges that Angelica did not conduct the required evaluation.[25]

CO Rawson admitted that an Angelica management employee told her that Angelica had contacted the BSFD to provide rescue services. (Rawson Dep. 215-16). Because the BSFD was

[25] 29 C.F.R. § 1910.146(k)(1)(iii) provides, in pertinent part: "(iii) Select a rescue team or service from those evaluated that: (A) Has the capability to reach the victim(s) within a time frame that is appropriate for the permit space hazard(s) identified; (B) Is equipped for and proficient in performing the needed rescue services . . . ."

located within 100 yards of Angelica's facility, I find that Angelica did not need to conduct a detailed study to determine that the BSFD's response would be timely.

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

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

Citation 1, Item 6(b)

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

> (k) *Rescue and emergency services.* (1) An employer who designates rescue and emergency services, pursuant to paragraph (d)(9) of this section, shall:
> . . . .
> (ii) Evaluate a prospective rescue service's ability, in terms of *proficiency with rescue-related tasks* and equipment to function appropriately while rescuing entrants from the particular permit space or types of permit spaces identified; . . . . [Emphasis added].

The Secretary alleges that Angelica did not conduct a "meaningful evaluation" of the BSFD's proficiency with rescue-related tasks and equipment before its designation as Angelica's rescue and emergency service.[26] She additionally alleges that because the BSFD would rescue an entrant by cutting into the CBW, instead of utilizing a retrieval system, Angelica did not conduct a proper evaluation. (S. Br. 65-67).

The Secretary is focused on what she believes is an inadequate method of rescue. She did not provide persuasive evidence that the BSFD's method of rescue was inadequate. Further, as noted above, Angelica had contacted the BSFD about using its rescue services, the BSFD had visited the facility, and the BSFD conducted drills prior to the OSHA inspection. The Secretary

[26] The CO's testimony as to what she learned about the BSFD's ability to retrieve an entrant is set out above.

has not shown by a preponderance of the evidence that Angelica did not evaluate the designated rescue team's proficiency. Item 6(b) is vacated.

Citation 1, Item 6(c)

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

> (k) *Rescue and emergency services.* (1) An employer who designates rescue and emergency services, pursuant to paragraph (d)(9) of this section, shall:
> . . . .
> (v) Provide the rescue team or service selected with *access to all permit spaces* from which rescue service may be necessary so that the rescue service can develop appropriate rescue plans and practice rescue operations. [Emphasis added].

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

Citation 1, Item 7

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

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

The Secretary alleges that Angelica did not enforce the procedures that protect employees from unexpected shuttle movement. (S. Br. 101). Angelica had a policy for employees entering the wash area to perform service and maintenance. (McDonough Exh. 5, 7 (SYF-1050, *Lockout/Tagout Program* and SYF-1060, *Shuttle Safety*)). This policy required lockout for work on shuttle equipment. It also required an employee to either lock out or use a watch person for work on non-shuttle equipment in the wash area. (McDonough Exh. 7). The Secretary offers three examples of how Angelica did not enforce these procedures: resetting the fire eyes on the dryers, clearing blockages in the press, and servicing the co-bucket shuttle. (S. Br. 86).

The parties have stipulated that an employee would enter the wash alley to reignite a fire eye. (Stip. Fact. 31). The Secretary alleges that an employee could be exposed to a moving shuttle when entering the wash area to reignite the dryers' fire eyes. (S. Br. 90). Evidence was

not presented to show when or how often an employee needed to reignite a fire eye.[27] Evidence was also not presented to show the method an employee used to reignite a fire eye. Because the Secretary has not offered sufficient information about the process used by Angelica's employees to reignite the fire eyes, I am unable to determine whether Angelica enforced its procedures. The Secretary has not proven this first example.

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

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

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

(Malter Dep. 140). As the excerpt shows, Mr. Malter was speculating generally about a blockage in a press; he was not commenting about Angelica's actual practice. Insufficient evidence was presented to establish that Angelica did not enforce its lockout procedures when an employee would clear a blockage in the press. The Secretary did not prove the second example.

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

To prove that a machine may become unexpectedly energized, "[t]he Secretary must show that there is some way in which the particular machine could energize, start up, or release stored energy without *sufficient advance warning* to the employee." *General Motors Corp.*, 17 BNA OSHC 1217, 1220-21 (Nos. 91-2973, 91-3116 & 91-3117, 1995) (emphasis added), *aff'd*,

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

89 F.3d 313 (6th Cir. 1995) ("*GM I*"). In *GM I*, the employer used an eight to twelve-step series of commands to reactivate the equipment and, prior to the restart, alarm warnings would sound to provide an employee time to avoid hazardous movement of the equipment. *Id.* The Commission found that this was sufficient to demonstrate that there was no unexpected energization. *Id*.

Here, the Secretary provided evidence that an employee, Mr. Thomas, entered the wash area to restart the co-bucket shuttle.[28] The record shows that the shuttle was shut down and in manual mode when Mr. Thomas entered the wash area. (Rawson Dep. 243). It also shows that, before the shuttle could be activated by an operator outside the wash area, an employee had to push a directional switch on the co-bucket shuttle itself to return it to automatic mode. (McDonough Dep. 193-96). Then, the operator (outside the fenced wash area) had to answer several question on the control panel before the shuttle would reactivate. When the operator put the shuttle back into operation, an alarm sounded, with a one-minute delay prior to shuttle reactivation. *Id*. This is analogous to the process in *GM I*, where the Commission found an employee was given sufficient warning. However, the Secretary asserts that the one-minute delay between the sounding of the alarm and the restart of the machine was too brief and that the re-energization process was less complex than the one found sufficient in the *GM I* decision. I disagree.

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

Based on the foregoing, Item 7 is vacated.

Citation 1, Item 8

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

> (ii) The procedures shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance including, but not limited to, the

[28] The Secretary provided a hand-drawn diagram of the fenced wash area; the diagram, however, does not include the distance between machines and the employee's path of travel to demonstrate exposure to moving equipment. (*See* McDonough Exh. 2).

> following: (A) A specific statement of the intended use of the procedure; (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy; (C) Specific procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them; and (D) Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.

The Secretary alleges that Angelica's lockout procedures did not sufficiently detail all of the specific procedural steps needed to control hazardous energy during maintenance or servicing activities.[29] The Secretary relies on the Commission's *Drexel* decision to support her contention that Angelica's lockout procedure lacked the necessary detail. *Drexel Chem. Co.*, 17 BNA OSHC 1909 (No. 94-1460, 1997). In *Drexel*, the employer did not have a procedure customized to its own machines and processes; instead, its lockout procedure was based on, without modification, the standard's sample in Appendix A. *Id.* at 1913. The Commission found that these generic procedures did not provide the information an employee would need to lockout a machine. *Id*. Further, the Commission stated that the purpose of the lockout procedure is to "guide an employee" through the process. *Id*. However, the facts of *Drexel* are not analogous to those here. Angelica's procedures included both a general lockout procedure which applied to all its equipment and supplemental machine-specific lockout surveys. (McDonough Exh. 5-10). I find that Angelica's procedures do not resemble the short generic procedure in *Drexel*.

Commission precedent holds that the required specificity for lockout procedures is evaluated according to a machine's complexity. *General Motors Corp.*, 22 BNA OSHC 1019, 1026-27 (Nos. 91-2834E & 91-2950, 2007) ("*GM II*"). In that case, the Commission noted that the lockout standard's preamble indicates that a lockout procedure should outline the steps to follow and that the amount of detail is relative to the equipment's complexity. *GM II* at 1025-27 (citing to the preamble).[30] The Commission also noted that the procedure should be a "guide"

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

[30] The preamble to the final rule for the LOTO standard sets out the following. "In this final standard, OSHA has retained the word "specific" when detailing the elements of the procedure. This was done to emphasize the need to have a detailed procedure, one which clearly and specifically outlines the steps to be followed. Overgeneralization can result in a document which has little or no utility to the employee who must follow the procedure. However, whereas the procedure is required to be written in detail, this does not mean that a separate procedure must be written for each and every machine or piece of equipment. . . . The written energy control procedure required by this

for an employee performing lockout. *Id.* at 1026 (citing to *Drexel* at 1913). The Commission found that the machinery in *GM II* was too complex for the company's generic three-page lockout procedure. To illustrate the level of the machinery's complexity, the Commission observed that one of the machines contained "15 or 16 automatics, 65 weld guns, probably 300 limit switches [and] over 150 disconnects." *GM II* at 1027.

Angelica argues that its lockout procedures are sufficiently detailed and notes that OSHA issued an interpretive letter in 2006 that supports its position.[31] (R. Br. 21-22). The letter states that lockout procedure must have "sufficient information to provide employees with adequate direction such that employees effectively can follow the procedure and safely perform the servicing and maintenance activities."[32] The letter also states that one way an employer can comply with the requirements of the standard is to have a general procedure that is supplemented by information for each machine. *Id.* This is consistent with Commission precedent, which holds that a lockout procedure is a guide that is evaluated according to a machine's complexity.

I find that Angelica's procedures include multiple steps which outline a general lockout procedure plus information specific to each machine.[33] This is quite different than *GM II's* generic three-page procedure coupled with its highly complex machinery. The Secretary did not provide evidence to establish that Angelica's machines were so complex that its procedures were an inadequate guide for its employees to use to perform a lockout. The Secretary thus has not met her burden of proving that Angelica's lockout procedures were inadequate. Item 8 is vacated.

Citation 1, Item 9

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

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standard need not be overly complicated or detailed, depending on the complexity of the equipment and the control measures to be utilized." 54 Fed. Reg. 36,644, 36,670 (Sept. 1, 1989).

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

[32] *See* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25576.

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

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

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

The Secretary asserts that because Angelica's energy control program was inadequate, the training for employees must also be inadequate.[34] (S. Br. 114). This argument fails because, as stipulated, Angelica's training program was broader than its written procedures. (*See* Stip. Fact 79). She also asserts that lockout training was inadequate based on CO Rawson's conclusion that Angelica's employees used different lockout methods.[35] (S. Br. 114). However, CO Rawson admitted that she based her conclusion about inadequate training on employee interviews, and that she did not ask employees to demonstrate the lockout process.[36] (R. Br. 22; Rawson Dep. 289-90).

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

Citation 1, Item 10

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

[34] Instance (b) for this item was withdrawn; it alleged a lack of training for employees cleaning in the wash area.
[35] Item 7, above, addressed whether Angelica's lockout procedures were enforced.
[36] There is no indication that CO Rawson consulted her interview notes during her deposition; she also did not identify the employees she interviewed, and there was no related documentation in the stipulated record.

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

Angelica asserts there was no employee exposure to the cited hazard of contact with sodium hydroxide solution because it required its employees to wear adequate PPE. (*See* Stip. Facts 80-81). As the Secretary points out, however, the purpose of having a drenching or flushing station for the body and eyes is in the event there is contact with the corrosive material; PPE is provided to prevent contact. (S. Br. 122). I find that the cited standard applies and that Angelica's employee, when transferring the sodium hydroxide solution in the facility, was exposed to having the solution contact his skin or eyes.[37]

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

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

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

The Secretary points to ANSI Z358.1, a consensus standard, in support of her position that the eyewash station Angelica had was too far away and that the drench hose was not a suitable replacement for an eyewash station or a safety shower. (S. Br 127). However, the ANSI standard the Secretary refers to has not been incorporated into the cited standard, and, therefore, it cannot be considered to be a requirement of the standard.[38]

The facts in this case compare favorably to those in *Atlantic Battery*. There, the employer had a drench hose in its acid-mixing room which an employee accessed by reaching over a conveyor-type apparatus. *Atlantic Battery* at 2167-68. The Commission found that the drench hose was in the work area, and there was no evidence that the conveyor impeded access; there was also no evidence that an eyewash station was the only adequate means to protect an exposed employee. *Id.* at 2168. The Commission found that the Secretary did not prove that the drench hose in Atlantic Battery's acid-mixing room was unsuitable and accordingly vacated that citation item. *Id.* at 2167-68. Here, a drench hose was in the work area, and there was no evidence of an impediment to reach the hose.[39] Further, there was no persuasive evidence that the drench hose was not an adequate means for drenching or flushing. I find the Secretary's assertion, that Angelica's drench hose was inadequate, to be unpersuasive.

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

[38] I also note that the ANSI standard is not among the documents that are included in the record.
[39] *See Bridgeport Brass Co.*, 11 BNA OSHC 2255 (No. 82-899, 1984). There, an employee transferring sulfuric acid outside the building had to walk 16 feet to the building's entrance, go through the entrance door, and then walk another 7 feet to the eyewash station. *Id.* at 2256. The Commission found the Secretary did not provide evidence to show that there was an "unreasonable impediment" to reach the location of the eyewash and shower. *Id.*at 2256.

eyewash station, Angelica had a drench hose available that was 20 feet from the solution transfer point. I find the Secretary's reliance on *Oberdorfer* to be misplaced.

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

Citation 1, Item 11

Item 11 alleges a serious violation of 29 C.F.R. § 1910.1030(f)(1)(ii),[40] which states, in pertinent part:

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

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

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

As to the first instance, the Secretary asserts that Angelica violated the standard because it did not compensate its newly-hired employees for time or travel expenses related to the getting the HBV vaccination. (S. Br. 13). The parties have stipulated that newly-hired employees receive training about the HBV vaccine and are given the option to receive the vaccination or sign a waiver. (Stip. Facts 88-91). CO Rawson testified that employees told her they were not

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

compensated for the time spent to get the vaccination. (Rawson Dep. 314). However, the Secretary did not provide evidence of the names of the employees or the dates the vaccinations were received. Further, Mr. McDonough testified that when he was hired by Angelica, he had the opportunity to receive his HBV vaccine very near Angelica's facility – as he put it, "right down on the corner."[41] He also testified that over the years, Angelica had used different strategies to offer the vaccines. (McDonough Dep. 218-20). I find that the CO's testimony, standing alone, is insufficient to establish this instance. Without supporting evidence, *i.e.*, records showing that the employees the CO spoke to had received the HBV vaccination, when they received it, and if they were compensated for their time, the record is inadequate to determine whether newly-hired employees did in fact incur uncompensated expenses when they obtained the HBV vaccination. The Secretary has not met her burden of demonstrating a violation for the cited instance.

As to the second instance, the record establishes that an employee, Mr. W., suffered a needle-stick injury while sorting laundry.[42] (S. Br. 132, McDonough Dep. 212-14; Rawson Dep. 312-13, 316). Mr. McDonough confirmed that Angelica's records showed that on the day of the injury, Mr. W. was compensated for the time he spent to get the first shot in the HBV series. Mr. McDonough, however, could not determine from those records whether Mr. W had been compensated for his time when getting the second shot. Further, he stated that he found no information in the records that Mr. W. was reimbursed for the cost of mileage for either shot. (McDonough Dep. 212-14, 221).

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

Serious Characterization

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

[41] Mr. McDonough began his employment as Angelica's environmental safety and health manager on June 10, 2008, which was five days after OSHA began its inspection. (McDonough Dep. 37, 166).
[42] The exact date of this injury was not provided. However, Mr. McDonough testified that Mr. W. received his second shot in the HBV series in mid-April, about a month after the incident. (McDonough Dep. 214-20).

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

Repeat Characterization

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

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

willful citation item."[43] (S. Br. 80-81). I cannot make this "leap," however. The Secretary has the burden of demonstrating that the two violations are "substantially similar." *See Monitor* at 1594. The settlement's citation item is generally related to the instant citation item, in that both address the requirements for a confined space entry program.[44] Regardless, they are not the same standard. While the Secretary does not have to show that the facts of both violations are identical, she must provide enough information to convince the undersigned that the violations are substantially similar. *See Id.* Here, she has not done so, and I find that the violations are not substantially similar. This item is not, therefore, properly classified as a repeat violation.

Penalty Determination

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

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

Angelica is a relatively large employer with 250 employees company-wide. Regarding Item 3, the Secretary assessed the gravity as high due to the potential for asphyxiation from the atmospheric hazard. The probability was found to be lesser due to the infrequency of entry into confined spaces. A good faith reduction was applied because of Angelica's written safety program. (S. Br. 142-44). I find a penalty of $2,125 to be appropriate for Item 3, upon giving due consideration to all the relevant factors.[45] Regarding Item 11, the Secretary assessed the gravity as medium because the effects of the Hepatitis B virus are sometimes reversible. The probability was determined to be lower because needle-sticks were infrequent. A good faith reduction was also applied to this item, based on Angelica's safety program. (S. Br. 144). I find

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

[44] It appears the prior violation was based on a lack of a written testing program; the current violation is related to expired gas in a meter. (S. Br. 84).

[45] As noted above, the Secretary amended Item 3 to repeat, but it has been affirmed as serious. The Secretary's formula for the proposed serious violations in this case was applied to arrive at the penalty of $2,125.

the proposed penalty of $1,700 for Item 11 appropriate. Accordingly, a penalty of $2,125 is assessed for Item 3, and a penalty of $1,700 is assessed for Item 11.

Findings of Fact and Conclusions of Law

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

ORDER

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

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1910.132(a), is VACATED.

2. Citation 1, Item 2b, alleging a repeat violations of 29 C.F.R. § 1910.146(d)(3), is VACATED

3. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1910.146(d)(4)(i), is AFFIRMED, and a penalty of $2,125 is assessed.

4. Citation 1, Items 4a and 4b, alleging serious violations of 29 C.F.R. §§ 1910.146(f)(6) and (f)(10), are VACATED.

5. Citation 1, Item 5, alleging a serious violation of 29 C.F.R. § 1910.146(g)(3), is VACATED.

6. Citation 1, Items 6a, 6b, and 6c, alleging serious violations of 29 C.F.R. §§ 1910.146(k)(1)(i), (ii), and (v), are VACATED.

7. Citation 1, Item 7, alleging a serious violation of 29 C.F.R. § 1910.147(c)(4)(i), is VACATED.

8. Citation 1, Item 8, alleging a repeat violation of 29 C.F.R. § 1910.147(c)(4)(ii), is VACATED.

9. Citation 1, Item 9, alleging a repeat violation of 29 C.F.R. § 1910.147(c)(7)(i), is VACATED.

10. Citation 1, Item 10, alleging a serious violation of 29 C.F.R. § 1910.151(c), is VACATED.

11. Citation 1, Item 11, alleging a serious violation of 29 C.F.R. § 1910.1030(f)(1)(ii), is AFFIRMED, and a penalty of $1,700 is assessed.

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

Dated Aug 27, 2012
Denver, Colorado