

SECRETARY OF LABOR,

Complainant,

v.

A.E. STALEY MANUFACTURING
CO.,

Respondent,

and

INTERNATIONAL UNION OF
ALLIED INDUSTRIAL WORKERS
OF AMERICA, LOCAL 837,

Authorized Employee
Representative.

OSHRC Docket Nos. 91-0637 & 91-0638

DECISION

BEFORE: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

A.E. Staley Manufacturing Co. maintains a large multi-building facility in Decatur, Illinois where it is engaged in grain wet milling and other activities. As a result of a lengthy inspection begun in July 1990, Staley received two separate sets of citations alleging a number of violations of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. §§ 651-678. The two sets of citations were designated Docket Nos. 91-0637 and 91-0638.

Docket No. 91-0637 contains two citations. Citation 2, items 1(a) and 1(b) alleged willful violations of the asbestos standard at 29 C.F.R. § 1910.1000(j)(2)(i) for failure to label damaged asbestos insulation on pipes at eleven locations throughout the site and 29 C.F.R. § 1910.1001(k)(1) for failure to clean asbestos debris at four locations at the site. A combined penalty of \$8000 was proposed by the Secretary. While Staley does not

dispute the existence of the violation, it contends that the violations were not willful. Administrative Law Judge James H. Barkley affirmed this citation as willful and assessed a combined penalty of \$8000.

Citation 2 items 2(a) and 2(b) alleged that Staley willfully violated the Hazard Communication (HazCom) standards at 29 C.F.R. § 1910.1200(h) by failing to provide HazCom training for 12 specific substances for which Staley did not have Material Safety Data Sheets (MSDS) and § 1910.1200(h)(3)(iv) by not properly training employees about the meaning of the HazCom symbols in use on storage tanks containing ethylene oxide, propylene oxide and sulfuric acid. The Secretary proposed a combined penalty of \$8000. Staley stipulated to the existence of the violations, but contended that they were not willful. The judge agreed with Staley, affirmed the violations as serious and assessed a combined penalty of \$6000.

Docket No. 91-0638, Citation 2 alleged a multitude of willful safety violations. Most of the items were settled before the hearing. Still before the Commission, however, is a citation alleging 212 separate items.¹ Included are items 1-99 alleging violations of 29 C.F.R. § 1910.23(c)(1)(unguarded platforms), § 1910.219(c)(2)(i) (machine guarding violations); §§ 1910.303(g)(2)(i), 1910.305(b)(2) and 1910.305(d)(improper or missing electrical equipment guarding). While some of the items were either vacated by the judge or withdrawn by the Secretary, those that were affirmed by the judge were found to be serious, but not willful. Additionally, the Secretary cited Staley for over a hundred individual willful violations of § 1910.307(b) (electrical equipment not approved for Class II, Division 2 locations)(items 100-212). Although several of these items were either vacated by the judge or withdrawn by the Secretary, the judge characterized as willful those items that he affirmed.

At issue before the Commission are the merits of some and the characterization of

¹As will be discussed, *infra*, several of these items are not before the Commission on review.

most of the violations affirmed by the judge.

Docket No. 91-0637

A. The Asbestos Violations

1. Background

Item 1(a) of willful citation 1 alleges a violation of § 1910.1001(j)(2)(i) ² for failure to label damaged asbestos insulation on pipes at eleven locations in the 1, 10, 5, 17, 20, 29, 44 and 118 Buildings.³ Item 1(b) alleges a violation of § 1910.1001(k)(1)⁴ for

²At the time of the citation, the cited standard stated:

§ 1910.1001 **Asbestos.**

* * *

(j) *Communication of hazards to employees*

* * *

(2) *Warning labels.* (i) Labeling. Warning labels shall be affixed to all raw materials, mixtures, scrap, waste, debris, and other products containing asbestos, tremolite, anthophyllite, or actinolite fibers, or to their containers.

³Specifically, the locations were:

- Building 10: third floor, streamline piping above the resin bins
- Building 1: second floor, insulation on a steam pipe west of Boiler #23
- Building 17: basement, insulation on pipe near elevator
- Building 5: fourth floor, insulation on pipe near the evaporator
- Building 20: 2 locations-basement and third floor
- Building 44: third floor, insulation on a pipe to hot water tank #18
- Building 29: 3 locations- third floor steam pipe
third floor crude oil tank
along pipe adjacent to the ascidulators catwalk
- Building 118: tank insulation

⁴At the time of the citation, the cited standard stated:

§ 1910.1001 **Asbestos.**

* * *

(k) *Housekeeping.* (1) All surfaces shall be maintained as free as practicable of

failure to clean up debris containing asbestos at four locations in the 1 Building and one location each in the 4 and 17 Buildings, where debris from asbestos containing pipe had not been cleaned up. A combined penalty of \$8000 was proposed by the Secretary. The judge agreed with the Secretary's characterization of the violations, and assessed the proposed penalty. Staley does not dispute the existence of the violations, but argues that the judge erred in finding that the violations were willful. We agree with the judge.

Staley was aware that the Decatur facility had significant quantities of asbestos in insulation and pipes and it was Decatur policy that, unless proven otherwise, all insulation installed before 1970 was presumed to contain asbestos. In May, 1987 a mock OSHA inspection conducted by safety supervisor J.B. Webb and Staley's director of corporate safety and risk management, Bob Moore, revealed that pipe lagging probably contained friable asbestos in the 20, 34, 59, 77, 113, 115 and 118 Buildings. Samples taken at locations around the facility, including areas in buildings cited here, revealed that the asbestos problem was extensive.

In response to its asbestos problem, Staley issued a Plant Asbestos Policy and Procedure Manual. The manual required that danger labels be affixed to "all raw materials, mixtures, scrap, waste, debris and other products containing asbestos fibers or to their containers," that "All external surfaces shall be maintained free of accumulation of asbestos fibers if their dispersion would be an excessive concentration" and that employees observing deteriorated or damaged asbestos-containing material "immediately report their findings to their supervisor."

In January 1989, an asbestos inspection of the 44 Building was conducted by Bodine Environmental Services. Bodine reported that

Although the projected scope of work does not include a management plan

accumulations of dusts and waste containing asbestos, tremolite, anthophyllite, or actinolite.

or risk assessment to determine proper management of the asbestos-containing materials in your facility, we feel that some sample areas are so obviously damaged that we should bring them to the attention of A.E. Staley Company...These materials in their significantly damaged condition can create asbestos exposures to Staley employees in these areas. As such, we recommend these asbestos-containing materials be removed.

Bodine also conducted a survey of the 5 and 10 Buildings in May, 1989. The survey reported significant exposed asbestos in areas throughout both buildings. Bodine warned that these areas "should be assessed by A.E. Staley as to whether they should be removed, repaired or encapsulated to limit asbestos exposure to building occupants."

In March 1989, NIOSH conducted an inspection of the Decatur facility. In notes he took during the conference held after the inspection, Bob Moore observed that:

Ms. McCammon indicated the asbestos identification & abatement program was 'lagging somewhat.' She said they observed some very frayed insulation and suggested that the program needed to be moved along.

Dr. Orgel, M.D. (NIOSH Medical Officer) reported that he had reviewed Staley's asbestos screening procedure and medical files. He found it to be an appropriate screening program and determined that anyone who had questionable findings were properly referred for additional testing and were properly notified (Documented). In his opinion, things were being done correctly.

In April 1989, shortly after the NIOSH inspection, a safety audit was conducted by Moore, Bob Trent, head of plant protection, Webb and Kendall Page, then Staley's associate Safety Engineer. In his audit report, Page stated that at the 44 Building:

Suspect Asbestos insulation is in extremely poor condition throughout the area. Bodine Environmental apparently has done a total building audit in the past few weeks. I believe that asbestos work should be done immediately. Lagging is in extremely poor condition.

Regarding conditions at the 29 Building, Page noted that

There are many sections of insulation that [contains] suspect asbestos. It is torn, ripped and literally hanging in many areas. Some tanks are also covered with this material. At a minimum the suspect material should be sampled, labeled, and encapsulated.

Referring to the asbestos and housekeeping problems, Page concluded that “Our potential liability here is very high. Bob Moore and J.B. Webb have expressed the same concerns as myself.”

In June 1990, an audit was conducted at the 118 Building. As with the other buildings, Page noted in his report:

The insulation in the building should be tested and identified for asbestos content. All asbestos containing material needs to be encapsulated and then labeled with an ACM label. Or if it is not encapsulated, it needs to be removed as soon as possible.

The report went on to specifically identify numerous locations throughout the building where suspected friable, exposed and damaged asbestos insulation had to be tested, encapsulated, labeled or removed.

In January 1990, Allied Industrial Workers of America union local president Dave Watts took Decatur Director of Operations Art Schoepfer on a tour of the boiler room in the 1 Building to show him the asbestos problem at that location. Schoepfer agreed that there was a lot of asbestos. However, he noted that the generation facilities in the building were being replaced and decided that a determination on what to do about the asbestos in the building would be made when the new facilities were on line.

Nonetheless, as a result of the asbestos situation, Staley decided to train employees for small routine maintenance and asbestos removal, and to use professional contractors for large removals. In May 1990, Staley sent a number of employees to Indianapolis for an EPA certified 3-day “Asbestos Workers Course.” The training was designed to inform employees how to remove asbestos in a safe manner.

In addition, Staley contracted with Bodine Environmental to remove asbestos at locations throughout the plant. However, Bodine's work was considered to be inadequate, and asbestos debris was frequently left lying around. Michael Stewart, who served on the plant safety committee from 1982-1991, testified that, due to the inadequacy of Bodine's work, the safety committee requested that the company's contract with Bodine be terminated. Indeed, several of the asbestos violations involve locations which were supposed to have been cleaned up by Bodine.⁵

2. Discussion

A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHD ¶ 30,059, p. 41,330 (No. 89-2883, 1993)(consolidated); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 CCH OSHD ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 CCH OSHD ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated). A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. *L.R. Willson and Sons Inc.*, 17

⁵*E.g.* item 1(a) instance (g), item 1(b) instance (a); item 1(b) instance (e)

BNA OSHC 2059, 2063, 1997 CCH OSHD ¶ 31,262, p. 43,890 (No. 94-1546, 1997), *rev'd on other grounds*, 134 F.3d 1235 (4th Cir. 1998); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one; whether the employer's efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997); *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC at 2068, 1991-93 CCH OSHD at p. 39,168; *Williams Enterp., Inc.* 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at pp. 36,589.

The record amply demonstrates that Staley was fully aware of the asbestos problems at its Decatur facility. In most of the cited locations, the exposed asbestos was not only in plain view, but also near employee work areas. The record also demonstrates that Staley published an asbestos policy which, if followed, would have abated the hazards. Despite this heightened awareness of the condition, Staley's efforts at abatement were sporadic and incomplete. The NIOSH survey, safety audits, and employee complaints put Staley on clear notice that its efforts were lagging. For example, there was no system for removing asbestos when it was identified. Rather, when notified of a problem, plant management would merely contact the department heads and seek their cooperation in getting the matter resolved. Even on a smaller scale, employees had to repeatedly ask management to remove small accumulations of asbestos insulation that had fallen off the pipes. When employees filed a work order in compliance with the company's safety work order system, they were often told that the work order had not been received. It was commonplace for a pile of asbestos to lay adjacent to an operations area for 2-3 weeks before being removed. On one particular occasion, employees William Bishop and Bill Sweeny were told to clean up a pile of debris behind the 17 Boiler in the 1 Building. The employees asked if the material

contained asbestos. The supervisor responded that the material had been sampled and tested negative for asbestos. At the risk of their jobs, the employees had the material sampled. The results revealed that, contrary to the supervisor's assurance, the material contained asbestos.

Nor did Staley attempt to centralize the abatement effort, place responsibility on Decatur management or mount a comprehensive plant-wide abatement effort. Bishop testified that after a series of meetings concerning the asbestos problem, he and other employees concluded that they were getting the runaround. In early July, 1990, a meeting was held with Bob Jansen, Executive Vice President of Manufacturing, who told him that a plan would be developed and promised that the company would dedicate \$2,000,000 to get things started. After months of promises, Bishop concluded that Jansen's promise was just "words." Finally, on July 12, 1990, Bishop filed a grievance. The grievance complained of the "hit and miss abatement" and asked that a comprehensive removal plan be developed and implemented. Supervisor Ken Toka replied with the "standard" response that they were "presently working on the asbestos removal project." Unhappy with the response, Bishop rejected Toka's answer, which meant that the grievance was automatically referred to the area manager. The area manager chastised Bishop for writing the grievance, but promised that several thousand dollars had been committed to abate the problem and that the matter would be handled after all bids were in. Moreover, while Staley's asbestos abatement program set forth procedures which should have abated the violative conditions, the program was not followed.⁶

⁶ Together with other evidence, this safety program may be considered when determining whether Staley willfully ignored its responsibilities. *Morrison-Knudsen Co./Yonkers Contract. Co., A Joint Venture*, 16 BNA OSHC 1105, 1127, 1993-95 CCH OSHD ¶ 30,048, p. 41,285 (No. 88-572, 1993).

Staley did undertake affirmative measures to abate the condition. It conducted asbestos surveys, hired asbestos removal firms, and sent employees for asbestos training. As noted, however, these efforts were sporadic and incomplete. For example, after the tour of the 1 Building by local union president Watts and Director of Operations Schoepfer revealed a large amount of loose, friable asbestos, no action was taken because Staley had plans to replace certain of the operations of the 1 Building at another location. The record discloses, however, that attempts to remedy the situation at the 1 Building had been going on for five years. During this entire period, Staley put off the repairs on the ground that it had plans to shut down the building within a few months. Nonetheless, employees continued to be exposed to the hazardous condition. Taken together with the evidence of its failure to take decisive action to remove asbestos, we cannot say that Staley's abatement efforts were objectively reasonable.

We therefore find that Staley's pattern of behavior demonstrated plain indifference to the widespread asbestos hazard at the facility. That evidence of plain indifference is not negated by the abatement measures it did take, which pale when compared to the magnitude and duration of the hazard. In these circumstances, we find that Staley's efforts were not objectively reasonable, and were not undertaken in good faith. We find that the violations were willful.

Although the Secretary cited two separate standards, she exercised her prosecutorial discretion to cite them as a single willful violation for penalty purposes. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981). The Secretary proposed a combined penalty of \$8000. The judge found the proposal to be appropriate.⁷ Staley is a large company with a history of prior violations. Moreover, with numerous employees exposed to a proven human

⁷We note that this case arose before the Act was amended to raise the penalty levels. At the time of the citation, the maximum penalty for a willful citation was \$10,000.

carcinogen, we find the gravity of the violation to be high. Accordingly, we find the \$8000 penalty to be appropriate.

B. The HazCom Violations

Items 2(a) and 2(b) of Citation 2 alleged that Staley violated the hazard communication standard at § 1910.1200(h).⁸ Item 2(a) alleged that Staley willfully failed to provide Hazard Communication (HazCom) training with respect to 12 specific substances⁹ for which Staley did not have MSDS's. Item 2(b) alleged that Staley failed to

⁸The standard provides in pertinent part:

§ 1910.1200 **Hazard communication.**

* * * *

(h) *Employee information and training.* (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area.

* * * *

(3) *Training.* Employee training shall include at least:

* * * *

(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet and how employees can obtain and use the appropriate hazard information.

⁹Item 2(a), as amended, alleged failures to train with regard to twelve substances at the following buildings:

- Silica sand-elevator D
- Filteraid- buildings 1, 5, 10, 11, 29
- Dicalite-building 90
- Nickel catalyst-building 90
- Feed dust-building 75
- Acid liquor-buildings 9, 29
- Sulfur dioxide-buildings 4, 6, 9

fully train employees about the meaning of the HazCom symbols in use on the caustic, ethylene oxide, propylene oxide and sulfuric acid storage tanks. The Secretary proposed a combined penalty of \$8000. Staley stipulated to the existence of the violations, but contended that the violations were not willful and, accordingly, that the penalties were excessive. The judge agreed with Staley and affirmed the items as serious. We disagree and find that the violations were properly cited as willful.

1. *Background*

The record establishes that Staley had substantial warning of serious deficiencies in its HazCom program. In November 1988, the Joint Plant Health and Safety Committee warned Staley of problems with filteraid.¹⁰ In a memo outlining specific health and safety concerns, the Committee observed that there were bags of filteraid strewn around and that the material was being tracked all over the 11 Building. The committee noted: “Building personnel need to be trained on the danger of this product.”

During the March 1989 NIOSH survey of the Decatur facility, inspectors

Bleach-building 20
 Carbon- buildings 1, 10, 85
 Flyash-building 123
 Coal dust-building 1, 123
 Asbestos-building 1, 5, 10, 20, 29, 44

In his decision, the judge incorrectly stated that the Secretary withdrew the allegations as to four substances. Although the Secretary amended the complaint to withdraw the allegations as to several buildings, HazCom violations for each of the cited substances were still alleged at other buildings. However, the judge still discussed them in his decision (i.e. filteraid), and neither the Secretary nor Staley mention the judge’s error.

¹⁰Filteraid is a generic name for a filtering material used in the beverage industry. Specifically, it is put in “check filters” used in the final step in the filtration of the carbon plant. The filteraid used by Staley was diatomaceous earth which is composed of 65-70% cristobalite, a type of silica.

evacuated the starch processing area when ethylene oxide and/or propylene oxide leaked into the air, making breathing difficult. The leak set off an outdoor alarm system, which is triggered by concentrations of 2000 parts ethylene oxide per million units of air. A respirator was requested for reentry, but none was immediately available. When a respirator was finally provided, it began to leak within a few minutes of exposure. Meanwhile, Staley operators continued to enter the area with no personal protective equipment. Staley received a report on the results of the survey on May 31, 1989. The NIOSH investigation into the incident revealed that work practices aimed at reducing the potential for such incidents were not implemented due to increased demand for product, lack of operator training, and/or lack of maintenance. The report concluded that the exposures were “due to improper work practices, poor management, oversight, and *emphasis of production over worker safety.*” (emphasis added). The report focused on potential hazardous exposures to three potential cancer causing agents in the starch area: ethylene oxide, propylene oxide, and vinyl acetate. The report concluded that

The potential for overexposures in the starch reaction area emphasizes the need for an effectively managed personal protective equipment program in that area specifically, *and throughout the plant.* The fact that programs for personal protective equipment were not effectively in place in starch processing *leads us to assume that they may be absent in other areas as well.* In addition, lack of training and demand for product seems to have circumvented measures which were specifically implemented to reduce potential exposure.

(emphasis added).

The safety audit conducted by Staley in 1989 also revealed serious deficiencies, notably in those buildings cited by the Secretary in this case. Although the audit showed that the HazCom program was “for the most part in-place” in the 4, 5, 6, 10, 11 and 29 Buildings, it also revealed that at the 44 Building, the “department needs to review and assure all aspects of the Hazard Communication procedure are in-place. Special attention

should be placed on obtaining up-to-date chemical Manufacturer's Data Sheets.”¹¹ The audit also suggested that stronger efforts be made to assure that MSDSs and inventories of chemicals being used are kept up to date. Bob Moore, Staley's director of corporate safety and risk management, who participated in the 1989 audit, testified that Staley's hazard communication compliance, respiratory protection and hazardous material control had deteriorated since 1986 and warned of potential major OSHA penalty liability. Moore received no reply to his report and was unaware of any effort to correct the problems.

In 1990, Kendall Page, then Staley's chief assistant engineer, conducted another safety and health audit. In the 14 Building and 18 Building, neither of which are mentioned in the citation, Page found several improperly labeled containers of hazardous material.

2. Discussion

We turn first to item 2(a), which alleges a willful failure to provide training with respect to 12 substances. We find that the record reveals problems with Staley's HazCom training program that were substantial and widespread. It received numerous warnings about these deficiencies from both NIOSH and its own internal audits. Despite its heightened awareness of these problems, Staley's HazCom program remained grossly deficient. The inspection disclosed that employees were not properly trained in the hazards of exposure to twelve substances in fourteen different buildings. For example, Staley employee Russell testified that although he was aware that there was an MSDS for nickel catalyst, he was never formally trained in the hazards and proper use of nickel catalyst, and became aware of the hazards of the substance by reading the warnings on the bags and talking to other operators. In addition, Area Manager Owsley testified that

¹¹The memo also noted, however, that, “[t]he department does need to assure that documented annual hazard communication review is conducted in a timely manner.”

prior to the OSHA inspection, he had no training in hazard recognition.

Staley's failure to act on the widespread problem with filteraid establishes that the company was indifferent to its obligations under the HazCom standards. As noted, problems with filteraid were highlighted in 1988 by the Joint Plant Health and Safety Committee's warning that filteraid was strewn around the 11 Building and that employees had to be trained on the danger of the product. Similarly, Page's 1988 report specifically complained of the large quantities of filteraid lying about the 11 Building. Indeed, the record is replete with warnings about the danger of filteraid and problems the company was having handling the product. Despite these warnings, these same conditions continued to exist at the time of the OSHA inspection. Indeed, Staley employee Marquis testified that, in the 10 Building filteraid would become airborne after fifty pound bags of filteraid were dumped into chutes.¹² At times employees would dump the material on the floor. According to the testimony, so much of the filteraid would accumulate, that they would carry it out in wheel barrels. Marquis testified that the material would get into his nose, throat, mouth, and irritate his eyes. He also testified that during the 25 years he worked with the material, he was never told the hazards of the material.¹³ Marquis was not advised of the HazCom standard, didn't know what an MSDS was, and was never advised that there was a HazCom program in his work area. Indeed, until the OSHA inspection, Staley did not even provide dust masks to employees. Given Staley's heightened awareness of the filteraid problem, we find that its failure to

¹²Marquis testified that, in an eight-hour shift, they would dump between ten bags and four pallets of filteraid. He did not indicate how many bags are in a pallet.

¹³The hazards of filteraid are those of silica. This includes silicosis which may result in debilitating, potentially life-threatening illnesses, typically due to the increased resistance within the lungs, and cardiac failure. Silica is also listed as a probable human carcinogen by the IARC (International Agency for Research on Carcinogens).

adequately train its employees in the hazards and proper handling of filteraid constitutes a willful violation of § 1910.1200(h).

We also find violation 2(b) to be willful. The incident that occurred during the 1989 NIOSH inspection, when employees entered the building even after the alarm sounded a warning that there was an ethylene oxide leak, and the NIOSH report on that incident, put Staley squarely on notice that its employees were woefully ignorant about the hazards associated with ethylene oxide and propylene oxide.¹⁴ The severity of the incident and the sternness of the warning establishes that Staley had a heightened awareness that its employees were not adequately trained. So viewed, Staley's failure to ensure by the time of the inspection that employees were fully trained in the meaning of the HazCom symbols for ethylene oxide and propylene oxide can be explained only by plain indifference to employee safety.

Again, although the Secretary cited two separate standards, she exercised her prosecutorial discretion to cite them as a single willful violation for penalty purposes. *See H.H. Hall Constr. Co.*, 10 BNA OSHC at 1046, 1981 CCH OSHD at p. 32,056. The Secretary proposed a combined penalty of \$8000 for the violations. We find that amount to properly reflect the potential for life-threatening illness posed by exposure to the substances, the duration of the violations, and the large number of employees exposed.

¹⁴The separate opinion of Commissioner Weisberg cites this incident as support for all of Staley's violations being willful. We agree that this incident is certainly relevant to Staley's heightened awareness that its employees were not adequately trained with respect to the hazards of ethylene oxide and propylene oxide. However, it is considerably less relevant to Staley's state of mind with respect to the other violations at issue in this case. Commissioner Weisberg apparently believes evidence supporting one willful violation can be used to show that all violations are willful, even unrelated ones, notwithstanding the fact that there is no pattern, practice, or course of conduct connecting the items. This position represents a significant departure from Commission precedent.

Docket No. 91-0638

In this docket, the Secretary cited Staley for numerous safety violations. While most of the items were settled by the parties, there remain before the Commission the merits or characterization of most of the items in citation 2, which alleged 212 individual willful violations. These violations fall into four basic categories. Items 1-22 alleged violations of the platform guarding standard at 29 C.F.R. § 1910.23(c)(1). Items 23-60¹⁵ alleged violations of the machine guarding standard at § 1910.219(c)(2)(i). Items 61-99¹⁶ alleged violations of the electrical standards at §§1910.303(g)(2)(i),¹⁷ 1910.305(b)(2) and 1910.305(d)¹⁸(improper or missing electrical equipment guarding). Finally, items 100-

¹⁵Item 25 was vacated by the judge and is not before us on review.

¹⁶Items 61, 62, 66, 67, 69, 70, 73, 79, 84-86, 93, and 99 were either withdrawn by the Secretary or vacated by the judge and are not before the Commission on review.

¹⁷§ 1910.303 **General Requirements**

* * *

(g) *600 Volts, nominal, or less*

* * *

(2) *Guarding of live parts.* (i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures. . .

¹⁸§ 1910.305 **Wiring methods, components, and equipment for general use.**

* * *

(b) *Cabinets boxes, and fittings.*

* * *

(2) *Covers and canopies.* All pull boxes, junction boxes, and fittings shall be provided with covers approved for the purpose. If metal covers are used they shall be grounded. In completed installations, each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

* * *

(d) *Switchboards and panelboards.* Switchboards that have any exposed live parts

212¹⁹ allege that Staley violated § 1910.307(b)²⁰ by using electrical equipment not approved for Class II, Division 2 locations.

For items 1-99, Staley challenges the existence of only items 7 and 53. As to items 100-212, Staley contends that 26 items involved areas that were not Class II Div. 2 locations. However, both the Secretary and Staley challenge the judge’s classification of all the affirmed items.²¹ We turn first to item 7.

A. Did the judge err by not holding that item 7 was duplicative of item 8?

Item 7 of citation 2 alleged a violation of § 1910.23(c)(1)²² on the grounds that

shall be located in permanently dry locations and accessible only to qualified persons. Panelboards shall be mounted in cabinets, cutout boxes, or enclosures approved for the purpose and shall be dead front. However, panelboards other than the dead front externally-operable type are permitted where accessible only to qualified persons. Exposed blades of knife switches shall be dead when open.

¹⁹Items 103, 105, 109, 112, 114, 115, 122, 124, 128, 132, 144, 158, 167, 183, 195, 196, 198-200, 204, 207, 208, 210, and 212 were either vacated by the judge or withdrawn by the Secretary and are not before us on review.

²⁰§ 1910.307 **Hazardous (classified) locations.**

* * *

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

Requirements for each of these options are as follows: * * *

²¹Thus, where the judge affirmed as serious an item alleged to be willful, the Secretary argues that the item should have been affirmed as willful, and Staley contends the items should have been affirmed as other than serious.

²²§ 1910.23 **Guarding floor and wall openings and holes.**

* * *

(c) *Protection of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by

Staley failed to adequately guard the number 26 packing station in 20 Building. Item 8 alleged a similar violation at the Red and Blue packing stations in the 20 Building. Staley stipulated that the stations were not properly guarded and, at the hearing, stipulated that there was employee access to the violative conditions. However, in its proposed findings of fact, Staley stated that the items were duplicative on the grounds that the #26 station cited in item 7 is the same location as the Red packing station cited in item 8. The judge did not consider this when he affirmed items 7 and 8 as separate violations. Because the record is unclear concerning the location of the two items, we vacate item 7.

The Secretary acknowledges that the compliance officer was confused about the location of these workstations. The compliance officer testified that items 7 and 8 were both depicted on a photographic exhibit. He testified that item 7 included the area by the material on the skids in the center of the photo with the staircase going up to the right-hand side of the platform. Later, however, the compliance officer seemed to locate the packing station at another location. He also testified that the various stations were referred to by several names by the people who worked at the plant. For example, the Red packing station was also known as Packing Station No. 55.

Jeffrey Kunzeman, a Staley employee, attempted to clarify the matter. Kunzeman testified that the platform depicted in the photograph has two stations on it, designated Red and Blue, which are also referred to as #55 and #56. Looking at a diagram of the floor he identified these locations cited in item 8 as the stations depicted on the left-center

a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,

- (i) Persons can pass,
- (ii) There is moving machinery, or
- (iii) There is equipment with which falling materials could create a hazard.

of the diagram. He testified that station 26 (which is explicitly referred to in item 7) is the packing platform, also known as the Dextrin Packing Platform, on the right-center part of the diagram, but that it is not shown on the photograph. Therefore, the photograph does not show the conditions cited in item 7.

The compliance officer's confusion, combined with the unavailability of a photograph depicting item 7, makes it impossible for us to discern which platform the compliance officer was referring to and, *a fortiori*, whether the platform cited in item 7 was improperly guarded. Accordingly, we find that the Secretary failed to establish, by a preponderance of the evidence, that the platform cited in item 7 was improperly guarded and the item is vacated.

B. Did the judge err by finding employee exposure to the shaft in item 53?

Item 53 alleges that Staley violated § 1910.219(c)(2)(i)²³ because:

At Building #75 on the 5th floor, employees were exposed to an

²³§ 1910.219 **Mechanical power-transmission apparatus.**

* * *

(c) *Shafting*

* * *

(2) *Guarding horizontal shafting.* (i) All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform, excepting runways used exclusively for oiling, or running adjustments, shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

unguarded rotating shaft and coupling on the motor for the 519 elevator conveyor outside catwalk area.

The judge affirmed the item on the grounds that employees performing maintenance in the area could be exposed to the unguarded shaft. The issue before the Commission is whether any employees were exposed to the hazard.

In order to meet her burden of establishing the exposure element of her *prima facie* case under the Act, the Secretary must show that it is reasonably predictable, either by inadvertence or otherwise, that employees have been, are, or will be in the zone of danger. *Fabricated Metals*, 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, p. 44,506 (No. 93-1853, 1997). The inquiry is not into whether exposure is theoretically possible, but whether it is reasonably predictable. *Id.*

The shaft is part of the mechanism used to raise the catwalk located in the area, which is a loading station. The compliance officer testified that employees would be in the area at least once a day during their shift to run the motor, and raise and lower the platform. During this procedure, they would be below the platform, approximately 8-10 feet away. The compliance officer also noted that employees “might” have cleaning responsibilities in the area as well. Staley supervisor, Ronald Young, testified that the shaft “only runs when we’re getting ready to load a car or a car has just been completed.” Young also testified that employees would not be on the platform when the shaft was running, but that they would be near the shaft when cleaning or performing maintenance.

We find that the Secretary failed to establish exposure. Testimony cited by the judge does not support a finding that it is predictable that employees would be in the zone of danger. To the contrary, the testimony of employee Young established that the operator activated the shaft by raising or lowering the catwalk from the next level down and had no need to be on the platform when it was operating. Employees would only be

on the platform to clean and maintain the area and mechanism. There is no evidence that the shaft would be rotating during maintenance. A photographic exhibit in evidence is not conclusive.²⁴ Absent evidence that employees were exposed to the unguarded shaft, the item is vacated.

C. Items 1-99

1. Background

The Secretary argues that the judge improperly reduced the characterization of each of the affirmed platform, electrical, and machine guarding violations in Citation 2 from willful to serious. Staley, on the other hand, while agreeing that the violations were not willful, specifically challenges the judge's characterization of 15 of these items as serious.

In support of the allegation that certain violations were willful, the Secretary relies on evidence relevant to her claim that Staley either voluntarily disregarded the requirements of the Act or was plainly indifferent to employee safety. *Pepperidge Farm, Inc.* 17 BNA OSHC 1993, 1998, 1995-97 CCH OSHD ¶ 31,301, p. 44,009 (No. 89-0265, 1997); *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

The Secretary's evidence of willfulness can be broken down into five categories, each of which will be examined individually:

1. Staley's knowledge of the requirements of the Act;
2. Staley's alleged refusal to take appropriate action in response to its April 1989 audit of the Decatur facility;

²⁴The photograph shows footprints and a floor mat near the shaft. The parties dispute the relevance of these footprints. While the Secretary contends that these are the footprints of employees, Staley contends that the footprints were made by the compliance officer and/or inspection party. The record sheds no light on who made these footprints.

3. Staley's alleged pattern and practice of placing production goals ahead of concern for employee safety;

4. Staley's alleged pattern and practice of engaging in a "cost benefit analysis," which weighed the costs of compliance against likely amounts to be assessed in penalties should OSHA issue citations; and

5. Staley's alleged failure to develop an adequate safety program, and overall lax training in and enforcement of safety codes, policies and procedures.

Staley's Knowledge of the Requirements of the Act.

The evidence establishes that Staley was aware of the requirements of the Act. At the start of the hearing, Staley stipulated that its Corporate Safety Office was familiar with all of the cited regulations. Bob Moore, Staley's Director of Corporate Safety and Risk Management, testified that he was familiar with OSHA regulations, subscribed to Bureau of National Affairs (BNA) Reports and read the Federal Register when it published something of significance. Ken Page, who was Staley's Safety Engineer at the time of the citations, testified that he had responsibility for compliance with OSHA regulations and to that end, conducted wall-to-wall audits of the Decatur facility. Finally, Staley's Safety Code Book states that "[t]he safety policies and procedures contained in this Safety Code Book and Decatur Plant Safety Manual meet the requirements of the Occupational Health and Safety Act of 1970 and other federal and state regulatory agencies." The code covers such areas relevant to this proceeding as asbestos, toxic substance identification and training, machine guarding, and electrical safety.

Staley's Reaction to its 1989 Audit

As noted earlier, in March 1989 the National Institute for Occupational Safety and Health conducted a survey of health hazards at the Decatur facility. As a result of that survey, and in response to employee complaints, Staley, in April 1989, conducted a safety

audit of 7 of its 24 departments at the Decatur facility. Leading the audit were Moore, J.B. Webb (Supervisor of Safety), Ken Page (Safety Engineer), and Bob Trent (head of plant protection) The focus of the audit involved hazard communications, respiratory protection, and potential employee exposure to various hazardous substances (including silica and asbestos) at the 11, 29, 111, and 116 Buildings.

Following the audit, Page submitted three handwritten memos to Lynn Elder, Staley's Corporate Director of Environmental Sciences and Safety. In those memos, Page found many weaknesses in Staley's HazCom and respiratory protection programs and in employee exposure to hazardous substances. Additionally, Page made the following observations regarding general safety conditions at the audited areas:

In addition to the above mentioned items there are literally hundreds of safety violations through out this area. In summary 4 & 6 buildings has some problems that need immediate attention.

* * *

This audit did not address specific safety violations, but this building [29] is full of electrical problems, safety shower, eye wash, and guarding problems. A complete top to bottom safety inspection should be done as soon as possible. There are many OSHA citations present.

* * *

Lynn, I have never seen this building [44] in such bad condition. The building has literally gone to hell in a hand-basket. As noted in other buildings, there are literally hundreds of safety type violations through out the area.

At the hearing, Page testified that the safety violations he was referring to included electrical boxes, panels and switches without covers, exposed live wires, and uncovered couplings on pumps and other motors. Page testified that Elder called him into his office and told Page that he was upset at the manner in which the memoranda was written. According to Page, Elder told him that the report could not be published and that they could either tear up the memos or send them to the legal department. In subsequent conversations, Elder told Page that the legal department would "crucify" them for the

information in the memos and that he could not send them to the legal department without stamping them “privileged and confidential.” Elder proposed that if Page would tear up the reports he would then take the matter up with Bob Jansen, the Corporate VP. Elder also gave Page the option of presenting his information verbally to the Decatur staff during a meeting. Nonetheless, Page made additional copies of his memos and distributed them to Moore, Bob Trent, and J.B. Webb because he “had a gut feeling that this was going to come back and probably haunt myself and the Decatur Facility.” Page further testified that, approximately a week later, Elder told him that he had spoken to Jansen who indicated that he was aware of the problems in the plant, but that they had to get the networking project²⁵ done before they tried to correct some of the problems at the plant.

Staley contends that Elder was not ordering Page to destroy the notes, and that the conversation was merely one colleague making a suggestion to another. Staley also contends that Elder “suggested” that the memos be destroyed so that they could be written to be more factual and less general. Staley further points out that Elder was the *corporate* Director of Environmental Sciences and Safety and that, as such, he had no managerial authority over the managers of the Decatur facility.

Production Goals v. Employee Safety

It is the Secretary’s position that Staley put profits and production goals ahead of employee safety and health. The Secretary contends that Staley’s placement of profits ahead of safety establishes that it recklessly disregarded its safety responsibilities and, therefore, willfully disregarded the safety of its employees. By all accounts, Staley supervisors were preoccupied with the networking project. The Secretary alleges that this preoccupation was at the expense of employee safety.

²⁵The networking project involved coordinating as one unit the operations of four large corn plants, including the Decatur facility, which had previously been run as separate units. This required substantial modifications at Decatur and other facilities.

In May 1989, NIOSH wrote a letter to Webb summarizing a health hazard evaluation conducted at Decatur. The letter noted that:

. . .we feel that there is significant potential for chemical overexposures in the starch reaction area, and possibly throughout the starch stream. This appears to be due to improper work practices, poor management, oversight, and emphasis of production over worker safety.

On January 4, 1990, Staley officials, including Webb, met with union members to discuss, among other things, a hexane spill that occurred the day before. Webb's notes of that meeting reveal such comments as:

Health and safety taking a back seat to production. (Watts)

* * *

Safety taking a back seat to production area committees must get back in control or someone's going to get seriously injured or killed. (G. Sharp)

* * *

Monthly health and safety committee meetings are not taking place, don't have time, etc. (J. Beals)

On September 12, 1990, the joint plant safety committee held a meeting with Larry Cunningham, the president and CEO of Staley. At that meeting, the union presented Cunningham with a memo, outlining their safety concerns and demands. Included in the memo were such comments as:

This company is so production and profit driven that all other systems that support the grind are falling down. The drive to meet production goals of '200,000' PLUS bushels per day has put people needs and safety at a very low priority.

We have all become pawns and expendable in the multi-corporate chess game of tremendous profit.

Testimony that Staley put profits ahead of safety came from a number of witnesses. Compliance Officer Denton testified that employees told him that, because of an increase in their workload, they no longer had time for housekeeping or to keep up

with dusty conditions. Moreover, in the majority of cases, safety committees were no longer meeting, and those that were meeting were disgusted with the fact that conditions over which they expressed concern weren't getting abated. Ken Carl, an Staley employee for 21 years, testified that because supervisors hurried them, the electricians left bolts off the electrical boxes. However, Carl did not clarify whether electricians were specifically instructed to leave bolts off boxes or whether that was a shortcut taken of their own volition in order to save time. Former Staley employee Gene Marquis testified that safety issues were often put on the back burner because they were upgrading production. Marquis observed that if things did not have to be shut down to effect a repair, it would get done. Otherwise, they wouldn't shut it down unless the condition was really serious.

Page testified that, in his opinion, there was a cost analysis involved in company decisions to take safety precautions, and that the company would take the least expensive course, regardless of its effect on employee safety. According to Page, the company was especially preoccupied with the networking project at the expense of employee safety during the 12-18 months prior to the inspection. Page also testified that, in 1988, he attempted to perform a safety audit of the Decatur facility, but was turned down by Director of Operations Schoepfer on the ground that there were too many other things to do. Schoepfer did not deny refusing Page permission to conduct the audit, but explained that, at the time of the request, the networking project was going on and, as a result, there was a lot of construction work and contractors at the site. Given this level of disruptive activity, Schoepfer testified that an audit would have been of little value.

Nonetheless, in 1989, the Decatur facility completed one million man hours without a lost time accident.

Cost-Benefit v. Safety

According to the Secretary, Staley compared the cost of compliance against its potential OSHA liability before undertaking abatement of safety and health hazards. This

analysis, the Secretary contends, is further evidence of Staley's overall reckless disregard of its health and safety obligations and bears directly on Staley's state of mind when the violations occurred and on whether Staley had a reasonable, good faith belief that it was complying with its OSHA obligations. *Monfort of Colorado Inc.*, 14 BNA OSHC 2055, 2062, 1991-93 CCH OSHD ¶ 29,246, p. 39,185 (No. 87-1220, 1991)

Page testified that, during the OSHA inspection, he had a conversation with vice-president of operations Jansen. When Page opined that the inspection was not going well, Jansen was unconcerned and stated that "we would let OSHA do the job of finding out what was wrong . We would have to pay a few thousand dollars in fines and everything would go away." Page also testified that, during one of his safety audits, a plant manager at an unidentified Staley facility asked him "if we don't do these, how much will the OSHA citation be?" It was Page's impression that the cost of compliance "seemed" determinative when management considered whether to abate a hazard.

Alleged Laxity of Safety Programs and Safety Training.

Given the size of the Decatur facility, Staley set up a fairly elaborate web of safety committees with varying authority and reporting requirements. The Union-Management Joint Plant Safety Committee is comprised of a union-designated chairman, two union-designated representatives, Webb (the Plant safety supervisor) and one other management-designated representative. The committee would meet once a month to review safety issues, discuss safety problems and determine what needed to be done. They would also discuss accidents that occurred and walk around the department to observe conditions.

Responsibilities of this committee included (1) preparing and distributing the safety Code book to employees; (2) developing new safety programs as needed; (3) responding to safety complaints; (4) reviewing new OSHA standards and maintaining the

safety manuals in conformance with those standards; (5) monitoring the conduct of building safety committees; (6) auditing compliance with safety programs and reviewing the results of their meetings; and (7) reviewing safety observations, safety grievances, and safety work orders. Although the Committee would recommend action necessary to correct unsafe conditions, it did not have authority to approve expenditures or write work orders, or direct the workforce to make the necessary corrections.

In addition to the Plant Committee were the Building Safety Committees, comprised of both union-designated and management representatives. The purpose of these committees was to improve communications, and to get employees involved in the safety effort. The committees were supposed to meet monthly and keep minutes, but approximately 50% of the committees failed to do so. The situation improved after a memo was circulated directing inactive committees to hold their monthly meetings. However, the committees failed to take walk-around tours of the buildings as required by company policy.

According to the Staley Safety Code Book, an employee finding an unsafe condition submits, in triplicate, a written observation form. One copy of the form goes to the supervisor, one copy goes to the building safety committee, and the third copy goes to the plant safety committee. If accepted by the supervisor, a safety work order is issued for correction of the condition on a priority basis. If the supervisor fails to act, the employee may invoke the Union grievance procedure which is enforced by third-party arbitration. In 1989 and 1990, employees filed approximately 25 safety related grievances.

Plant coordinator Schmidt testified that work orders resulting from safety observations were entered into a computer for tracking. Each maintenance supervisor was responsible for tracking the safety work orders relevant to his area. Shift coordinator Young testified that he never rejected a safety observation. However, he also stated that

there were times when, due to the nature of the repair necessary, backlogs on responding to the observations would occur. On the other hand, plant safety committee member Michael Stewart testified that 1988-89 was a period when a lot of grievances were filed, and that when he set up a meeting, management often failed to show up.

Staley employee Marquis testified that a number of safety observations got lost and were found in a supervisor's desk, while others wouldn't receive action for months. As a result, employees got frustrated trying to get safety matters fixed and stopped pursuing repair.

2. Discussion

a. Willfulness

The judge found that this general evidence did not establish willfulness either individually or collectively for the affirmed electrical, machine and platform guarding violations in items 1-99. We agree. As discussed earlier, one way in which the Secretary may establish a willful violation is by demonstrating that the employer had such a disregard for employee safety or the requirements of the law generally that it could be inferred that if the employer had known of the conduct or condition, it would not have cared that it was in violation of the Act. *Johnson Controls*, 16 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30,018, p. 41,142 (No. 90-2179, 1993); *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). Although the evidence demonstrates serious weaknesses in Staley's approach to safety, the record, with respect to these items, is insufficient to support an inference that, even if it knew of a particular violation, it would not care that it was in violation of the Act.²⁶

²⁶Commissioner Weisberg apparently concludes, without factual support, that Staley failed to take corrective action with respect to the numerous violative conditions

Similarly, the evidence fails to establish that the numerous safety violations set forth in items 1-99 were allowed to exist due to any “cost-benefit” analysis or by a decision by management that the abatement of these violations would slow production. We find that the entire line of testimony alleging that Staley weighed abatement against potential OSHA liability is of little probative value. First, Jansen’s alleged statement to Page, that Staley would let OSHA find out what was wrong and pay the penalty, must be viewed in context. It was made during the OSHA inspection. Jansen might have been just stating the obvious; with OSHA in the facility, it was too late to undertake a program to discover violations and avoid citation. OSHA would discover what was wrong and issue its citations and penalties. Second, Page’s impression that management “seemed” to consider the cost of abatement is indefinite and inconclusive. Moreover, his recollection regarding an unnamed manager’s query about the size of the penalties if hazards were not abated must be viewed as the unsubstantiated hearsay it is. Fed. R. Evid. 801. It was introduced to establish the truth of the matter asserted; that Staley measured abatement against the potential OSHA penalty. Yet, not only is the declarant unavailable for cross-examination, he/she is not even identified. Therefore, this entire line of testimony is of little, if any, probative value.²⁷

identified in the various audits. However, very few of the violations subsequently cited by the Secretary correlate to violations identified in the audit, and the few cited items that do correlate to items identified in the audits we find to be willful. Given the comprehensiveness of the Secretary’s inspection, one may infer that the violative conditions identified in the audits, but not subsequently cited by the Secretary, no longer existed. In any event, it is impossible to conclude that those audit items not subsequently cited by the Secretary went uncorrected by Staley. Accordingly, unlike Commissioner Weisberg, and recognizing that the Secretary has the burden of proof, we cannot conclude that, with respect to these items, Staley “consciously disregarded the report.”

²⁷Commissioner Weisberg’s separate statement relies on “Page’s un rebutted testimony” to support his view that the disparate guardrail, electrical, and machine guarding violations

Staley also points out that the overwhelming number of electrical devices, machines and platforms were in compliance with the applicable OSHA standards. For example, the violations occurred in 17 of the 120 buildings inspected where there were tens of thousands of electrical panels and over 1900 miles of conduit throughout the plant which met OSHA standards. Similarly, plant wide, approximately 5500 motors had standard shaft and coupling guards in place at the time of the inspection; and out of approximately eight miles of standard guardrails throughout the plant, the missing sections of guardrail totaled less than 60 feet in length. While the Commission has never adopted a percentage of compliance test for determining whether a violation is willful, and does not do so here, it has taken notice of the small number of prior violations in relationship to the total volume of work as relevant to respondent's state of mind. *Beta Constr. Co.*, 16 BNA OSHC 1435, 1445, 1993-95 CCH OSHD ¶ 30,239, p. 41,653 (No. 91-102, 1993) , *aff'd without published opinion*, 52 F.3d 1122 (D.C. Cir. 1995); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2211, 1993 CCH OSHD ¶ 29,964, pp. 41,029-30 (No. 87-2059, 1993).

Accordingly, we find that, standing alone, the "general evidence" does not demonstrate either an overt company policy not to abate those violations or a pattern or practice of not abating these violations when discovered sufficient to support a general determination of willfulness for each of the items. *See McKie Ford v. Secretary*, 191 F.3d 853, 857 (8th Cir. 1999); *Georgia Electric Co. v. Marshall*, 595 F.2d 309, 320 (5th Cir. 1979). We note, however, that this "general evidence" is relevant when determining

were willful. However, as noted, that aspect of his testimony is hearsay. Besides Page's hearsay testimony, Commissioner Weisberg points to no other evidence to establish that Staley's management considered implementing safety measures based on whether the cost of those measures outweighed possible OSHA penalties. We would not assign controlling weight to this unsubstantiated hearsay where the declarant is not only unavailable for cross-examination, but not even identified.

Staley's good faith toward employee safety and, therefore, the penalty for each violation.

We are unwilling to depart from Commission precedent to find a whole series of disparate violations willful, based on general evidence, where the violations are not part of a pattern, practice, or course of conduct. However, that does not preclude a determination that any individual item was willful in nature. Where the evidence establishes that Staley had a heightened awareness of the illegality of the conduct or condition, yet failed to take corrective action, a willful characterization of that item is appropriate. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC at 2068, 1991-93 CCH OSHD at p. 39,168.²⁸

²⁸Commissioner Weisberg states that we are departing from Commission precedent by requiring the Secretary to establish a heightened awareness of each individual item. Indeed, our colleague is ignoring our finding that the Class II Div. 2 items are willful based on Staley's heightened awareness of the general hazard of combustible dusts at its worksites, not on its heightened awareness of each individual item. In this case, Staley's heightened awareness of the hazard was equally applicable to each of the Class II Div. 2 items. These items have a similar factual basis and are reflective of a pattern or practice by Staley of ignoring the hazard of explosive dust. In contrast, there is no similar pattern, practice, or course of conduct uniting the disparate guarding, electrical, and machine guarding violations.

Furthermore, contrary to our colleague's suggestion, it is Commissioner Weisberg who is departing from Commission precedent by finding a willful violation based on general evidence without a commensurate finding that such evidence establishes a pattern, practice, or course of conduct that suggests an intentional disregard, heightened awareness, or indifferent attitude toward the violative conditions. *See Pepperidge Farm Inc.*, 17 BNA OSHC at 1999, 1995-97 CCH OSHD at p. 44,009. The evidence established such a pattern, practice, or course of conduct in *Kaspar Wire Works Inc.*, 18 BNA OSHC 2178, 2183-4, 2000 BNA OSHC ¶ 32,134 p. 48,408-9 (No. 90-2775, 2000), *appeal filed*, No. 00-1392 (D.C. Cir. Sept. 26, 2000) and *Pepperidge Farm*, both of which involved recordkeeping violations, which have a similar factual basis. In *Kaspar*, Commissioner Weisberg noted that Kaspar's recordkeeping errors were part of "an overall pattern that reflects its willful state of mind." 18 BNA OSHC at 2184, n. 15, 2000 BNA OSHC at p. 48,409, n.15. He also noted that both *Kaspar* and *Pepperidge Farm*

On this basis, the evidence with respect to specific items does establish that several of the violations were willful.

Item 4- The evidence established that the edge of a platform on the second floor of the 11 Building was unguarded. The condition existed approximately a year before the inspection and was photographed by Page during his 1989 audit. Therefore, Staley had a heightened awareness of the violation. Its failure to correct the violation was willful.

Item 5-This platform, on a walkway on the second floor of the 18 Building was unguarded from the time the walkway was constructed. Moreover, the condition was mentioned in the 1990 audit, establishing that Staley had a heightened awareness of the violation. Its failure to correct the condition was, therefore, willful.

Item 10-At the 44 Building, at the truck loadout area, a work platform eleven feet above the ground was guarded with a chain instead of a standard guardrail. Staley stipulated that supervisors were aware of the condition, establishing heightened awareness of the violation. The failure to abate the hazard was willful.

Item 12-On the roof of the 75 Building, employees worked on a platform in the storage bin area. The platform was 5 feet, 1 inch above the floor and had an unguarded edge. Employees working on the platform would bang on a tank with a 10-15 pound sledge hammer to free up material in the bin. Building operator Kenneth Carl testified

involved cases “where an employer’s willful state of mind informs a *course of conduct* with respect to a particular category of hazards or requirements.” *Id.* (emphasis added) Indeed, in *Kaspar*, the high incidence of reporting errors (86.5%) supported the conclusion that Kaspar’s failure to record was part of a willful pattern, practice, or course of conduct. In contrast, here the low “error rate” with respect to these items, combined with the disparate nature of the violations (and the fact that only a few violative instances noted in the audits were actually cited by the Secretary), cut against any finding of a consistent pattern, practice, or course of conduct motivated by a willful state of mind. Rather, the facts could just as easily support an inference of extreme laxity, but not willfulness.

that when employees swung the hammer, they were in danger of losing their balance in the direction of the unguarded edge. Carl further testified that, while he did not file a written complaint, he repeatedly told at least three foremen about the hazard. When Carl told his foremen of his reluctance to swing the sledge hammer due to the hazard, he was advised that “the job has to be done.” According to Carl, this condition persisted for 2-3 years. Carl’s testimony establishes that Staley had a heightened awareness of the hazard, yet failed to abate the condition. Its failure to abate this hazard was, therefore, willful.

Item 20-At the 90A Building, on the second level, a material receiving area, 15 feet above the ground, was protected only with a 36 inch high top chain extending across an access opening 5.5 feet wide. The condition existed for approximately 6 months before the inspection. Moreover, employees specifically complained to their foreman about the inadequacy of the chain. Therefore, Staley had a heightened awareness of the condition and the hazard it presented to its employees and the violation was properly cited as willful.

Item 54-In the 90A Building, on the first floor south of the control room, a 1 inch diameter horizontal rotating shaft and coupling on the motor leading to the Heil filter pump, located a foot from the floor, was not enclosed completely by a stationary casing. Two operators were exposed to the hazard of the unguarded shaft for approximately a half hour each day. The condition existed for approximately 6 months before the inspection and had been the subject of employee complaints to the foreman. We find that Staley had a heightened awareness of the violative condition and, therefore, that the violation was willful.

b. Seriousness

A violation is serious if there is a substantial probability that death or serious physical harm could result. This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury

is the likely result if an accident does occur. *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1824, 1991-93 CCH OSHD ¶ 29,808, p. 40,594 (No. 88-2572, 1992).

Staley argues that the judge's blanket finding that the items were serious ignores the evidence in 15 of the items where the rotating shafts were short, or the machines were partially guarded or guarded by location.

The Secretary counters that Staley's arguments goes to the likelihood of an accident. The compliance officer testified that the shafts rotated at a speed of 1500-2000 rpm. Thus, the Secretary points out, regardless of how unlikely it was that clothing could get caught in a shaft, had that occurred, the clothing would tighten around the employee's body, draw it toward the shaft and cause serious injuries such as lacerations, broken bones, or even death.²⁹

The judge lumped all 36 machine guarding violations together and determined that they were serious without making any distinctions among the machines. However, as Staley points out, the machines and the hazards they present vary greatly. Staley

²⁹The Secretary also points out that rotating couplings can fail and fly apart and that the lack of guards could expose employees to the danger of being struck by a piece of metal traveling at a high rate of speed and could result in serious injuries or death. The Secretary observes that employees recalled instances where couplings had flown apart. Our review of 29 C.F.R. §219(c)(2)(I) demonstrates that its purpose was to prevent entanglement. We find no support for the Secretary's contention in the language of the standard or its legislative history, or in the case law. The terms of this and most other machine guarding standards envision protection from normal operation, not from catastrophic failure. If the standard were designed to protect against a projectile hazard, the seven foot limit makes no sense. An employee walking under a disintegrating shaft one foot above his head, while not in danger of entanglement, would still be exposed to a serious projectile hazard. Although the Commission is required to defer to the Secretary's interpretation of an ambiguous standard when the regulatory language is not free from doubt, *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 150 (1991), we find no doubt as to the meaning of this standard. It clearly and unambiguously applies only to the hazard of entanglement.

challenges the characterization of the following 15 items. We will consider these items individually.

Items 24, 28, 32, 39, 40, and 58

In each of these items, Staley argues that the rotating shafts were too short to present a hazard of entanglement. The exposed portions of these shafts ranged in size from 4 to 7.5 inches in length. In each instance employees' work duties brought them close to the unguarded shafts and couplings. Though short, the shaft and coupling were exposed and could have caught hair or clothing. The length of the exposed shaft is relevant to the likelihood of entanglement, and therefore, the gravity of the violation, but the evidence shows that, should an accident occur, the consequences would be death or serious physical harm.

Item 33

On the roof area of the 9 Building, the horizontal rotating shaft and coupling for the motor which drives the 305 conveyor was located five feet above the ground and was not enclosed completely by a stationary casing. The area is visited occasionally by the lead operator and/or mechanics to assess malfunctions. Supervisory personnel were in the area periodically to observe operations. The condition existed for one year. There was no evidence regarding the size of the shaft and coupling. Nonetheless, the evidence establishes that the shaft and coupling were partially unguarded and, therefore, an employee could have gotten entangled.

Item 34

On the fourth floor of the 10 Building, a motor had a horizontal shaft and coupling that was not protected by a guard. There is no evidence to establish the size of the shaft. The motor was behind a grating, less than seven feet above the floor. However, the compliance officer testified that his conversation with employees suggested that they would access the area on a daily basis, to clean around the shaft and coupling.

Maintenance personnel also serviced the motor. Supervisors would be in the area about once a week and the condition was in plain view. The condition existed for about a year.

Staley contends that because the shaft and coupling were located beneath a grating, employees were protected and could not get entangled. While the evidence demonstrates that the violation was of low gravity, we find that the Secretary established that it was serious. Although partially protected by a grating, the evidence establishes that employees cleaning around the motor were exposed to the shaft and coupling and could get entangled and suffer serious physical harm.

Item 35

On the fourth floor of the 10 Building, a shaft and coupling was not protected by a stationary guard. There was no evidence to establish the size of the shaft. As with item 34, it was located underneath a grating and less than 7 feet above the floor. The condition had been in existence for about a year.

Again, Staley contends that because the shaft and coupling were located beneath a grating, employees were protected and could not get entangled. As with the previous item, however, the evidence establishes that maintenance people would be exposed to the rapidly rotating shaft. We therefore agree with the judge that this item was serious.

Item 36

On the west side of the 18 Building, an 8 inch long, 2 inch diameter horizontal rotating shaft and coupling on the drive motor for the corn oil mill dryer was not completely enclosed by a stationary casing. The motor was 4 feet 8 inches from the floor and located near a walkway. An operator would pass by the motor twice per shift and supervisory personnel were in the area at least once a week. The motor does not operate continuously, but is turned off and on periodically as needed. The condition was in plain view and existed for six months.

Staley contends that this violation was not serious because it was partially guarded

by its position. We find that the evidence is to the contrary. The evidence establishes that the motor was near a walkway and that the shaft was partially guarded on the bottom, but not at the top. Thus, it is reasonably predictable that an employee could get a piece of clothing entangled in the shaft, which could pull him or her into the machine with resultant serious injuries.

Item 38

On the fourth floor of the 26 Building, a 4 inch long, 1 inch diameter horizontal rotating shaft and coupling at the finished product collector motor was not enclosed completely by a stationary casing. The casing was lying on the floor. However, the shaft was partially protected by the upper framework of the motor. The casing had been off the motor for about a month. The motor was less than 7 feet from the floor. The motor was in plain view and supervisory personnel were in the area at least once a week. Maintenance and cleaning people also were in the area and a flash operator was exposed to the motor about 15 minutes a day.

Staley disputes the serious characterization of this item on the grounds that the shaft was short and partially guarded. The evidence shows that the partial guarding was not substantial enough to prevent an employee from getting close enough to the shaft to get entangled. If an employee were to get entangled, the result could have been death or serious physical harm. Therefore, the violation was properly characterized by the judge as serious.

Item 51

Outside of the 75 Building, near the railcar mover area, a 24 inch long, 2 inch diameter horizontal rotating shaft and coupling on the motor was not enclosed by a stationary casing. The motor was 27 inches from the floor. The pump was visible and supervisory personnel were in the area to observe operations at least once a week. The condition existed for approximately two weeks prior to the inspection.

While the compliance officer testified that all the other shafts in question spun at a rate of 1500 to 2000 rpm, he testified that the shaft involved in this item spun at a rate of only 3.5 rpm. While the evidence shows that employees were exposed to the condition, the rotation of this shaft was sufficiently slow that any injuries resulting from entanglement would be minor. Accordingly, we find this item to be nonserious.

Item 52

In the 75 Building, the 8 inch long and 1 inch diameter horizontal shaft and coupling on a motor at the west feed bin, located 16 inches above the floor, was not enclosed by a stationary casing. Employees were in the area daily, and would be exposed for about a half hour a day. However, a small raised platform between the machine and the walkway partially guarded the shaft and coupling. There was no partial protection on the other side where there was no walkway. The condition was in plain view and existed for six months prior to the inspection.

Staley argues that the shaft was recessed and, accordingly, that an employee could not get his or her clothing entangled. Although the evidence indicates that the shaft was not easily accessible, it was not inaccessible. This made the likelihood of an accident and the gravity of the violation low, but any employee who became entangled in the shaft could suffer serious physical harm.

Item 56

In the 11 Building, on the second floor of the Zwag dryer area, a 6 inch long, 1 inch diameter horizontal rotating shaft and coupling on the P211 pump, located 9 inches from the floor, was not completely enclosed by a stationary casing. Employees would be exposed on a daily basis, primarily during clean-up duty which would take them in close proximity to the hazard. However, access to the pump was partially obstructed by a retaining wall. The condition existed for six months and was in plain view.

Staley argues that the item is not serious because of the shortness of the shaft and

the partial obstruction of the shaft by the retaining wall. While the shortness of the shaft and the partial obstruction of access by the retaining wall goes to the likelihood of an accident and, therefore, the gravity of the violation, an employee becoming entangled could suffer serious injury. Therefore, we find that the item was serious.

Item 59

In the 5 Building, on the first floor, a 13 inch long, 1 inch diameter horizontal shaft and coupling on a motor next to the steam condensate pump, was not completely enclosed by a stationary casing. The casing was not properly positioned over the shaft and coupling. The compliance officer testified that the guard might have been shaken loose during operations. The pump was located 21 inches from the floor. Employees would be exposed when accessing valves and other equipment. Moreover, there are switches that turn on the motor, and employees would be in the area for cleaning and maintenance. The condition was in plain view and existed for a month.

Staley contends that this item was not serious because the guard that had been on the shaft was askew. Again, however, while that goes to the likelihood of an accident, it does not change the fact that had an employee become entangled in this rapidly rotating shaft, he or she could have suffered serious physical harm. Accordingly, the item was properly characterized as serious.

c. Penalties

On November 5, 1990, section 17 of the Act, 29 U.S.C. § 666, was amended to increase the maximum penalty for a willful violation from \$10,000 to \$70,000 and for a serious violation from \$1000 to \$7000. The judge applied the amended penalty structure and assessed penalties of \$2100 for serious items 1-12 and \$1750 for items 13 and 15-22. For the serious machine guarding violations (items 23, 24, 26-60³⁰) the judge assessed

³⁰The judge erroneously listed item 60 as alleging a violation of the electrical standards.

penalties of \$1750 for each affirmed item. Finally, a penalty of \$2450 was assessed by the judge for each of the serious electrical violations he affirmed (items 61-65, 68, 71, 72, 74-78, 80-83, 87-92, 94-98). We find that the judge erred by applying this amended penalty structure to the violations in this case. The Secretary stated that the amended penalty limits were to apply to all inspections initiated on or after March 1, 1991 and were to be used to calculate penalties for all violations determined to exist on or after November 5, 1990. OSHA Instruction CPL 2.45 B CH-2 (March 1, 1991). The Commission has applied the amended penalty limits only in cases initiated after the effective dates of the amendments. *E.g. R & R Builders Inc.*, 15 BNA OSHC 1383, 1393, n. 19, 1991 CCH OSHD ¶ 1991-93 CCH OSHD ¶ 29,531, p. 39,866, n.19 (No. 88-282, 1991); *Caterpillar Inc.*, 15 BNA OSHC 2153, 2170, n.15, 1991-93 CCH OSHD ¶ 29,962, p. 40,990, n.15 (No. 87-0922, 1993). The inspections in this case were begun on July 30, 1990 and concluded in September 1990. The citations were issued in January, 1991. Accordingly, the old penalty structure, with a maximum penalty of \$1000 for a serious violation, was in effect and should have been applied by the judge.

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give “due consideration” to four criteria: the size of the employer’s business, gravity of the violation, good faith, and prior history of violations. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-1993 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1992). Staley is a large corporation with a history of prior violations. Based on the Secretary’s evidence regarding Staley’s overall approach to safety, we find that the company is entitled to little credit for good faith. In assessing an appropriate penalty for each of the items, we look primarily to whether the violation was willful, serious or nonserious, and the gravity of the individual item. Having considered these factors, we assess the following penalties:

Items 1-3, 6, 8-9, 22-23, 26-27, 29-31, 37, 41-50, 55 and 57- Serious: 26 items at \$600

per item; for a total of \$15,600

Items 4, 5, 10 and 12-Willful: 4 items at \$6000 per item for a total of \$24,000

Items 11, 13-19, 21, 63-65, 68, 71-72, 74-78, 80-83, 87-92, 94-98-Serious: 35 items at \$700 per item: total \$24,500

Items 20 and 54-Willful: \$5000 per item for a total of \$10,000

Item 24, 28, 32, 34, 36, 38-40, 56, 58 and 59-Serious: 11 items at \$250 per item for a total of \$2750.

Items 33, 35 and 52-Serious: \$100 per item for a total of \$300.

Item 51-Other than serious: \$50

Item 60-Serious: \$500

D. Items 100-212

1. *Did the judge err by finding that 26 locations at the plant were Class II Division 2 Locations?*

a. Background

According to § 1910.399

A Class II, Division 2 location is a location in which: (a) combustible dust will not normally be in suspension in the air in quantities sufficient to produce explosive or ignitable mixtures, and dust accumulations are normally insufficient to interfere with the normal operation of electrical equipment or other apparatus; or (b) dust may be in suspension in the air as a result of infrequent malfunctioning of handling or processing equipment, and dust accumulations resulting therefrom may be ignitable by abnormal operation or failure of electrical equipment or other apparatus.

Note: This classification includes locations where dangerous concentrations of suspended dust would not be likely but where dust accumulations might form on or in the vicinity of electric equipment. These areas may contain equipment from which appreciable quantities of dust would escape under abnormal operating conditions or be adjacent to a Class II Division 1 location, as described above, into which an explosive or

ignitable concentration of dust may be put into suspension under abnormal operating conditions.

(Emphasis added)

As noted earlier, items 100-212 allege that Staley violated § 1910.307(b) at locations throughout the facility by not having fixtures and wiring approved for use in a Class II Div. 2 location. At issue is whether 26 of these locations³¹ were Class II Div. 2 locations as defined by § 1910.399. There is no dispute that, if properly classified as Class II Div. 2 locations, the standard was violated because there were electrical devices inappropriate for a Class II Div. 2 location at each of the disputed areas.

The definition of a Class II Division 2 location encompasses two primary hazards. First, should combustible dust be carried into the air, there is the risk of explosion from an ignition source, such as an electrical spark. Second, accumulations of dust on machinery pose the hazard of ignition and fire from heat sources such as the surface of light bulbs. Another hazard of accumulations of combustible dusts involves secondary explosions. If an explosion occurs in an area of dust concentrations, the concussion of the explosion could create a windstorm that would blow surface dust into the air and force it into suspension where it could present a risk of explosion from an ignition source. This secondary explosion usually creates more damage than the initial explosion.

Staley has a history of dust explosions. At the hearing, the parties focused on an explosion that occurred in 1989 when feed dust in a dryer in the 14 Building ignited due to heat build-up caused by friction in a bearing. The ignition traveled through a conveyor and into the dust collector in the 75 building. Although there were no injuries, the ensuing explosion blew out windows and caused \$500,000 worth of damage. The Secretary pointed to this explosion as an example of the hazard of dust explosions and to

³¹At issue here are items 107, 108, 113, 117, 118, 123, 126, 127, 130, 140, 146, 147, 151, 153, 168-171, 174, 180, 190, 191-194, and 203.

establish the likelihood of potentially explosive environments at the Staley facility.

The judge affirmed the 26 violations. He found that all of the disputed areas contained combustible dusts in sufficient quantities to meet the criteria for Class II Div 2 locations set out in § 1910.399. The judge rejected Staley's claims that, for the areas to be classified as Class II Div. 2, the concentrations of dust in those areas had to exceed the Lower Explosive Limit (LEL)³² for that dust. The judge also rejected Staley's contention that a Class II Div. 2 location must be within a certain distance from the source of the dust. Specifically, the judge rejected the testimony of Staley's control director, Bob Moore, that NFPA 497B (*Classification of Class II Hazardous (Classified) Locations for Electrical Installations in Chemical Process Areas*) was applicable to Staley's facility. NFPA 497B limits Class II Div. 2 areas to locations 10-30 feet from a dust source (depending on certain physical properties of the dust). Central to his rejection of Moore's testimony was the judge's conclusion that NFPA 497B applies to chemical process areas, while Staley's plant was an agricultural facility. The judge noted that Staley's interpretation of the NFPA document was inconsistent with both NFPA's recommended practice as well as the plain language of § 1910.399.

Staley renews these claims on review.

b. *Discussion*

Contrary to Staley's assertion, the language of § 1910.399 makes it clear that a

³²The LEL is the minimum concentration of dust in the air (in grams per cubic meter of air) which creates a danger of explosion. This generally varies from 50-100 grams per cubic meter of air. Dr. Charles Kauffman, an associate professor of aeronautical engineering at the University of Michigan, who has investigated approximately 40 grain facility explosions since he first became involved in explosion research in 1966, testified that, to be safe, a site should stay below half that concentration. The dust necessary to create an explosive atmosphere need not be in atmospheric suspension. Due to the possibility of the dust being kicked up into the air by some force, it is enough that the dust is laying on the floor or other surfaces.

Class II Div. 2 classification does not depend on whether these combustible³³ dusts are present in excess of its LEL.³⁴ As § 1910.399 states: “A Class II, Division 2 location is a location in which: combustible dust *will not normally* be in suspension in the air in quantities sufficient to produce explosive or ignitable mixtures” The parties do not dispute that the dusts here are technically considered “combustible.” However, Staley argues that the judge failed to consider the degree of combustibility of the various dusts when determining whether an area was properly classified as a Class II Div. 2 location.

The provisions of the standard do take into account the fact that certain dusts are more combustible than others. For example, under §1910.307(b)(2) the explosive character of the dust is relevant in determining what type of equipment should be used in the classified location. However, neither § 1910.307 nor § 1910.399, the standard which defines Class II Div. 2 locations, rely on the degree of combustibility of the dusts when determining whether an area is a Class II Div.2 location. Staley’s argument assumes that because dextrose, which is one of the less combustible dusts, melts, it presents no danger of igniting from prolonged contact with uncovered light bulbs or unprotected electrical connections. However, the evidence also establishes that when dust is on a bulb, it creates an insulating effect causing the bulb to burn hotter. This increases the possibility

³³Webster’s Third International Dictionary defines “combustible” as “capable of undergoing combustion or of burning-used esp. of materials that catch fire and burn when subjected to fire.”

³⁴The judge stated “that the [Class II Div. 2] classification includes any locations where explosive or ignitable dust accumulations may be found ‘on or in the vicinity of ’ an electrical ignition source.” Staley erroneously reads this as suggesting that there must be a possibility that combustible levels, i.e. the LEL, of the dust will accumulate in an area before it must be designated as a Class II Div. 2 location.

of a dust cloud explosion should there be sufficient accumulations of dust. Also, over time, layered dust will carbonize. Carbonized dust will catch fire at a lower temperature than uncarbonized dust. A warning about the hazards of carbonized dust is contained in the appendix to each of the agricultural NFPA standards (1987 Edition) (i.e. NFPA 61-A -appendix A-7-1.4; NFPA 61-B-appendix A-7-7-1.4; NFPA 61-C -appendix A-6-1.4; and NFPA 61-D-appendix A-6-1.4):

Static deposits of combustible dust on heated surfaces are subject to ignition due to carbonization of the dust. Understanding of the mechanism involved is lacking, but it does appear that there is no direct relationship between the temperature required to ignite a dust cloud and that required to ignite a dust layer. Rather, a time versus energy (temperature) relationship appears to be involved. The higher the temperature, the shorter the time needed for carbonization and subsequent ignition.

The energy required to ignite a dust cloud must be great enough to raise the dust particles to their ignition temperature and overcome heat losses to the surrounding air. The energy must also be of sufficient duration to ignite enough adjacent dust particles to sustain propagation of the flame front. A static dust deposit has none of the dynamic motion and heat losses of a dust cloud. Also, the insulating characteristics of organic dusts act to retard the heat loss from particles of dust in intimate contact with the heated surface. Thus, a lower temperature is required to establish the time/energy relationship leading to ignition. This behavior, combined with the fact that the ignition temperature of an organic dust is lowered by prolonged heat exposure, gives cause for concern over dust deposits on heated surfaces. The ignition of a dust layer and the subsequent quiescent burning may provide the pilot flame necessary to ignite a dust cloud.³⁵

(Emphasis added)

We also reject Staley's argument that, based on language in NFPA 497B, Class II

³⁵The identical paragraph exists in the appendix of the 1995 version of NFPA 61 at A-7-1.4. Note that the 1995 edition states that the appendix "is not part of the requirements of this NFPA document but is included for informational purposes only."

Div. 2 locations are limited to those 10-30 feet from a dust source.³⁶ Although they are not controlling, the Commission has looked to other standards and codes to clarify the meaning of standards. *See ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1142, n.4, 1993-1995 CCH OSHD ¶ 30,045 , p.41,235 , n.4 (No. 88-1250, 1993), *rev'd on other grounds*, 25 F.3d 653 (8th Cir. 1994); *Gold-Kist, Inc.* 7 BNA OSHC 1855, 1859-60; 1980 CCH OSHD ¶ 24,205, p. 29,443 (No.76-2049, 1979)(standard using broad terms acquires meaning when read together with other codes or indicia of industry custom). Here, however, NFPA 497B, which Staley relies upon, is not a standard the Commission would rely on to clarify the definition of a Class II Div. 2 area.

At the outset, we find nothing in § 1910.399, which defines a Class II Div. 2 area, that can be reconciled with a requirement that a Class II Div. 2 location be within 10-30 feet of a dust source. The first part of the standard states that a Class II Div. 2 location is a location where “combustible dust will not normally be in suspension in the air in quantities sufficient to produce explosive or ignitable mixtures, and dust accumulations are normally insufficient to interfere with the normal operation of electrical equipment or other apparatus. . .” Nothing in this definition depends on or is conditioned upon the location from the dust source. Reading such a distance requirement into the definition would not clarify § 1910.307, it would change the standard beyond anything apparent

³⁶In Appendix A to subpart S, Electrical, which includes sections 1910.307 and 399, numerous ANSI and NFPA standards are described as containing “information which can be helpful in understanding and complying with the requirements contained in Subpart S.”

NFPA 497B, which was issued after Subpart S was promulgated, is not on the list. Section 1910.307 does refer to NFPA 70 for the list and definition of hazardous gases, vapors, and dusts by groups characterized by their ignitable or combustible properties, and for the guidelines for determining the type and design of equipment appropriate for various hazardous locations. However, the standards do not refer to or rely on the NFPA to define what constitutes a classified location. See §§ 1910.307(b)(2)(i) and (b)(3).

from a fair reading of it.

Moreover, as the judge properly noted, NFPA 497B applies to chemical facilities, while Staley's plant is an agricultural facility. We find unpersuasive Staley's claim that its plant should be considered a chemical facility because, except for the three elevators where corn is received, stored and handled, the plant uses chemical processes to manufacture agricultural products. It points to section 1-1.2 of the document which defines a chemical process area as "part of a manufacturing facility where combustible dusts are produced or used in chemical reactions or are handled or used in operations such as mixing, coating, extrusion, conveying, drying, grinding, etc." However, Staley fails to consider sections 1-1.3, 1-1.4, and 1-1.6 of NFPA 497B. Section 1-1.3 states that NFPA 497B:

. . . does not apply to situations that may involve catastrophic failure of, or catastrophic discharge from, silos, process vessels, pipelines, tanks, hoppers, or conveying or elevating systems.

Along the same lines, Section 1-1.4 states that NFPA 497B

. . . does not apply to agricultural grain handling facilities except where powdered grain is used in a chemical reaction or mixture.

Most telling, section 1-1.6 states that the document is

. . . not intended to supersede or conflict with applicable requirements of the following NFPA dust standards:

. . . NFPA 61A, *Manufacturing and Handling Starch*

NFPA 61B, *Grain Elevators and Facilities Handling Bulk Raw Agricultural Commodities*

NFPA 61C, *Feed Mills*

NFPA 61D, *Milling of Agricultural Commodities for Human Consumption*

These four documents all appear to be more applicable to Staley's workplace than

NFPA 497B. Their scope provisions state that NFPA 61A³⁷ applies to “all facilities designed for drying, grinding, conveying, storage and packaging of dry starches,” while NFPA 61B applies to “all facilities designed for receiving, shipping, handling, and storing

³⁷All references to NFPA 61A-D are to the 1987 versions. The document was amended in 1989. However, the 1989 version is currently unavailable. In 1995, the A-D divisions of the standards for agriculture and food product facilities were combined into a single NFPA 61. By comparing the 1987 and 1995 versions, we were able to determine that no significant changes have occurred in 1989 that would alter our analysis.

The scope provision of this new NFPA 61 states that it applies to the following:

- (a) All facilities that handle, process, blend, mill, receive, load, ship, package, store, or unload dry agricultural bulk materials, their by-products, or dusts that include grains, oilseeds, agricultural seeds, legumes, sugar, spices, feeds, and other related materials;
- (b) All facilities designed for manufacturing and handling starch, including drying, grinding, conveying, processing, packaging, and storage of dry or modified starch and dry products and dusts generated from these processes; and
- (c) Those seed preparation and meal-handling systems of oilseed processing plants not covered by NFPA 36, *Standard for Solvent Extraction Plants*.

NFPA 61 § 1-1.1

The following definitions are relevant in determining the scope of this section:

Bulk Raw Grain. Bulk raw grain includes grain materials, such as cereal grains, oilseeds, and legumes, that have not undergone processing or size reduction. Cleaning or drying does not constitute processing.

Starch. For the purposes of this standard, starch refers to the manufacture of starch products by the wet milling process.

NFPA 61 § 1-4

of bulk raw agricultural commodities.” NFPA 61C is applicable to “all facilities designed principally for the production of dry feed products from agricultural commodities,” and NFPA 61D applies to “all facilities designed principally for the cleaning, size reduction, purifying, integral packaging and bagging, classifying, bulk loading of agricultural commodities such as (but not limited to) wheat, rye, barley, corn, milo, oats, rice, safflower seed, soybeans, cocoa, spices, and similar commodities which may present a fire or dust explosion hazard.” While chemical processes may be incidental to the primary purpose of refining corn products, it is undisputed that the purpose of the Decatur facility was the production of corn by-products³⁸ through the milling process. Processes at the facility included the production, storage and packing of starches (NFPA 61A), feed products (NFPA 61C) and handling of corn (NFPA 61D). Certainly, the majority of the disputed items involved areas that were unquestionably involved in processes directly controlled by the NFPA agricultural provisions. The provisions of these codes refer the reader to the general Fire Protection provisions for Class II Div. 2 areas set forth in NFPA 70 (which does not limit applicability to distance from the source). (See e.g. NFPA 61-A 12-1.2; NFPA 61-B 11-1.2; NFPA 61-C 11-1.2; NFPA 61-D 11-1.2)

Staley also points out that NFPA 497B specifically applies to group F and G type dusts and that the dust types are divided by their “nature.” Group G type dusts include flour and grain, but also includes, “wood flour, plastic, and chemicals.” Thus, Type E dusts include combustible metals, while Type F relates to combustible carbonaceous dusts. Type G is a catchall group that includes “other combustible dusts.” However, nothing in the list of dusts applicable to NFPA 497B suggests that they are intended to be exclusive. Therefore, the listed dust types could be relevant to other parts of the NFPA.

³⁸The facility produced such corn by-products as corn starch, corn oil, fructose and dextrose, corn gluten, corn fiber, and starches.

Indeed, if the inclusion of grain and flour in Type G *a fortiori* means that all flours and grains are covered by NFPA 497B, then there would be no reason for NFPA 61A-D.³⁹

Moreover, the facts of this case suggest why the Secretary did not make the classification of an area dependent upon its distance from a dust source. The evidence establishes that there was a substantial amount of dust which accumulated because of Staley's poor housekeeping practices.⁴⁰ It is undisputed that there were sources sufficient to leave layers of dextrose fines over various locations in the plant, including each of the disputed areas involving dextrose dust. Thus, it is possible that, over time, large quantities of dextrose dust could accumulate beyond the distances set out in NFPA 497B.⁴¹

³⁹We also find it instructive that Staley's Director of corporate safety and risk management, Bob Moore, has served as a member of the technical committee for NFPA on the agricultural dust standards, NFPA 61A-D. (Staley supported Moore's work with the committee.)

⁴⁰Staley's contention that certain cited areas were too far from the source to allow combustible quantities of dust to accumulate, must be weighed against the evidence that combustible dusts did accumulate in those areas, and that the plant was plagued with poor housekeeping which created the possibility that combustible quantities of these dusts would accumulate over time.

⁴¹In finding that all 26 areas contained combustible dust more than sufficient to trigger the requirements of the standard, the judge relied on the testimony of Dr. Kauffman, who stated that, as a "rule of thumb" 1/64 inch of any combustible or ignitable dust is enough to qualify an area as a Class II Div. 2 location. Although we have no precise measurements for the levels of dust at the cited work sites, the photographic exhibits show substantial amounts of dust at each location. In the circumstances, the Commission need not decide whether any of these tests are appropriate. The rationale behind the classification at issue is a precautionary one: "where dangerous concentrations of suspended dust would not be likely but where dust accumulations might form...." § 1910.399. Accordingly, when determining whether an area should be classified as a Class II Div. 2 area, we must consider not only the amount of dust currently at the location, but also the potential for dangerous levels of dust to accumulate.

Finally, Staley argues that some locations should not be classified as Class II Div.2 locations because they were closed off from the dust source. Even though NFPA 497B, which Staley relies on, states that “partial partitions” may constitute a barrier sufficient to prevent an area from being classified as Class II Div. 2, that barrier must be “effective in preventing the passage of dust in suspension or layer form.” NFPA 497-B at ¶ 3-4.5. The evidence demonstrates that the barriers adjacent to the 26 disputed locations were not effective, with substantial quantities of dust being present in each of the disputed locations. Therefore, even if NFPA 497B were applicable, Staley’s partial partitions were insufficient to prevent the areas from being classified as Class II Div. 2 locations.

We find that, for each item, the evidence establishes that there was sufficient dust to warrant classification as a Class II Div. 2 location. For each item, there is evidence of substantial quantities of dust on the floor or on equipment. While some areas had accumulations caused by leaking equipment⁴² or leaky bags of dextrose,⁴³ others, though distant from the source of the dust, were in locations where the configuration of the building created a wind tunnel effect that carried dust from the source to the cited area.⁴⁴ Accordingly, we affirm the violations of § 1910.307(b) as to the 26 disputed areas.

2. Characterization

Although we found that the general evidence did not establish the willfulness of items 1-99, that evidence combined with evidence specifically relevant to Staley’s overall attitude toward the hazard of explosive dust and its concomitant obligation to provide electrical equipment approved for Class II Div. 2 locations, is sufficient to establish that

⁴²*E.g.* Items 123, 174, 191,

⁴³*E.g.* Items 170, 171, 174, 191, 192, 193

⁴⁴*E.g.* Items 118, 123, 126, 127, 130, 146, 147.

the company was plainly indifferent to the requirements of § 1910.307(b).⁴⁵

As noted, *infra*, Staley suffered an explosion in 1989 when feed dust in a dryer in the 14 Building ignited due to heat build-up caused by friction in a bearing. The ignition traveled through a conveyor and into the dust collector in the 75 building. An event of this magnitude would have given Staley a heightened awareness of the danger of combustible dusts. In fact, Staley was sufficiently aware of the problem that it classified entire buildings as Class II Division 2 areas to take the discretion of categorizing particular locations out of the hands of the individual area supervisors. Furthermore, a mock OSHA inspection, conducted in 1987, and Page's 1989 audit warned Staley that many electrical devices were missing bolts, had exposed wires, or otherwise were not proper for a Class II Div. 2 location. Yet, despite this heightened awareness of the hazard of explosive dust throughout its facility, and of the numerous noncompliant electrical devices at those locations, the evidence establishes that many of Staley's supervisory personnel were not properly trained regarding the hazards presented by a Class II Div. 2 area so that they could take proper measures to abate the violative conditions. Supervisors such as Plant Operations Manager Michael Slimbarski were unaware that the areas they supervised were even considered Class II Div. 2 locations. Other managers received no training on the classification of areas or the requirements regarding approved electrical equipment in areas containing combustible dusts. Shift coordinator Gordon Green testified that he was not given any specific training regarding the need for approved electrical equipment in either the 12 or 26 Building. He was also unaware of the potential for an explosion when electrical boxes are not kept dust ignition proof, or the reasons why it was important to have protective globes on bulbs. Indeed, Green erroneously believed that the reason for having globes on bulbs was to protect the

⁴⁵Contrary to the implication in Commissioner Weisberg's separate statement, we note that the decision to find these citation items willful is unanimous.

bulb from being broken. Moreover, Green testified that, not only was he not responsible for assuring that electrical equipment in his area was approved, he could not identify who was responsible. Similarly, shift coordinator Ron Young testified that, to the best of his knowledge, shock was the only hazard posed by improperly sealed junction boxes. He was unaware of the explosion hazard posed by improperly sealed boxes in a dusty environment.

The results of Staley's failure to properly train its supervisory personnel regarding hazards associated with Class II Div. 2 locations is demonstrated by the conditions in the 20 Building, at the elevator penthouse. Jeffrey Kunzeman, a Staley employee, testified that employees would go to this area and entertain themselves by watching sparking caused by dust particles being ignited by the elevator contacts. According to Kunzeman, rather than expressing alarm at the situation, supervisory personnel he told about the condition "thought it was pretty neat." While the supervisors discussed cleaning the area with Kunzeman, there is no evidence that the area was cleaned or that the condition was abated.⁴⁶ Nor, despite the obvious explosion hazard, did the supervisors find it necessary to ensure that all electrical devices were appropriate for the location.

These failures to train supervisors establish a pattern and course of conduct that demonstrates that Staley was plainly indifferent to Class II Div. 2 hazards. *See Kaspar Wire Works Inc.* 18 BNA OSHC 2178, 2183, 2000 BNA OSHC ¶ 32,134, p. 48,408 (No. 90-2775, 2000), *appeal filed*, No.00-1392 (D.C. Cir. Sept. 6, 2000). Considering this evidence in conjunction with the evidence about Staley's heightened awareness and the

⁴⁶Staley contends that Kunzeman's testimony should not be credited because it was internally inconsistent. We are unable to discern the nature of this alleged inconsistency. Presumably, Staley is arguing that Kunzeman's statement that the supervisors thought that the sparking was "neat" is inconsistent with his later statement that they discussed cleaning the area. We fail to see the inconsistency. In what Kunzeman described as 15-20 minute conversations, it was certainly possible for both statements to have been made.

general evidence discussed earlier, we find that the 89 violations cited here were properly classified as willful. *Pepperidge Farm, Inc.* 17 BNA OSHC at 1999, 1995-97 CCH OSHD at p. 44,009.

3. Penalties

Although we find each of the affirmed Class II Div. 2 violations to be willful, we agree with Staley that the judge improperly failed to consider the individual characteristics of each violation when determining the penalty. While Staley's plain indifference to the hazard of Class II Div 2 locations is common to each of the affirmed items,⁴⁷ the particular characteristics of each location are not the same, particularly the levels and nature of the dusts. These factors go directly to the likelihood of an explosion or fire and, therefore, the gravity of the violations. Other factors involved are the number of employees exposed at each location, and the duration of each violation.

Classifying the items according to their gravity, we find that the evidence establishes that the following items are of moderately high gravity. These items were either in high dust areas and/or had substantial exposed wiring that resulted in a heightened possibility of explosion or fire:

High Gravity Items: 102, 106-108, 110, 113, 116, 118, 135-138, 146, 148, 149, 153, 159, 160, 178, 179, 197, 201, 202 and 205. For each of these 24 willful items, we find an appropriate penalty to be \$8000, for a total penalty of \$192,000.

We find that the following items to be of moderate gravity, based on lower dust levels and/or less exposed wiring. While presenting a substantial risk of fire or explosion, these items did not rise to the gravity of the previous group of items.

Moderate Gravity Items: 101, 104, 111, 117, 119, 120, 123, 125, 129, 131, 133, 134,

⁴⁷Items 103, 105, 109, 112, 114, 115, 122, 124, 128, 132, 144, 158, 167, 183, 195, 196, 198-200, 204, 207, 208, 210 and 212 were either withdrawn by the Secretary or vacated by the judge.

139-143, 145, 147, 150-152, 155, 157, 168-171, 173, 176, 181, 182, 184-188, 203, 206, 209, 211. For each of these 41 willful items, we find an appropriate penalty to be \$6500, for a total penalty of \$266,500.

Finally, we find the following items to be of low gravity due to the lower levels of dust present in the area and, therefore, the reduced risk of fire or explosion. Many of these items involve areas where dextrose dust was present. As noted earlier, dextrose, while combustible, is far less likely to explode or burn than other forms of organic dusts.⁴⁸

Low Gravity Items: 100, 121, 126, 127, 130, 154, 156, 161-166, 172, 174, 175, 177, 180, 189-194. For each of these 24 willful items, we find an penalty of \$5000 to be appropriate, for a total penalty of \$120,000.

Summary

For reasons set forth in this decision:

In Docket No. 91-0637:

1. Citation 2, items 1(a) and 1(b) for violations of 29 C.F.R. § § 1910.1001(j)(2) and (k)(1) are affirmed as willful and a combined penalty of \$8000 is assessed.

2. Citations 2, items 2(a) and 2(b) for violations of 29 C.F.R. § § 1910.1200(h) and (h)(3)(iv) are affirmed as willful and a combined penalty of \$8000 is assessed.

In Docket No. 91-0638:

1. Citation 2, item 7 for violation of 29 C.F.R. § 1910.23(c)(1) and item 53 for violation of 29 C.F.R. § 1910.219(c)(2)(i) are vacated.

⁴⁸We note that some areas where there was dextrose dust are classified as of moderate gravity due to the especially high levels of that dust in the area (i.e. items 168, 169, 170, 171, 173 and 176)

2. Citation 2, items 4, 5, 10, 12 and 20, for violations of 29 C.F.R. § 1910.23(c)(1) are affirmed as willful and a combined penalty of \$29,000 is assessed.

3. Citation 2, items 1-3, 6, 8, 9, 11, 13-19, 21, and 22 for violations of 29 C.F.R. § 1910.23(c)(1) are affirmed as serious and a total penalty of \$10,500 is assessed.

4. Citation 2, items 23, 24, 26-50, 52, 55-60 for violations of 29 C.F.R. § 1910.219(c)(2)(i) are affirmed as serious and a total penalty of \$14,950 is assessed.

5. Citation 2, item 51 for violation of 29 C.F.R. § 1910.219(c)(2)(i) is affirmed as other than serious and a penalty of \$50 is assessed.

6. Citation 2, item 54 for violation of 29 C.F.R. § 1910.1910.219(c)(2)(i) is affirmed as willful and a penalty of \$5000 is assessed.

7. Citation 2, items 63-65, 68, 71-72, 74-78, 80-83, 87-92 and 94-98 for violations of 29 C.F.R. § § 1910.303(g)(2)(i), 1910.305(b)(2) and 1910.305(d) are affirmed as serious and a total penalty of \$18,200 is assessed.

8. Citation 2, items 100-102, 104, 106-108, 110, 111, 113, 116-121, 123, 125-127, 129-131, 133-143, 145-157, 159-166, 168-182, 184-194, 197, 201-203, 205, 206, 209 and 211 for violations of 29 C.F.R. § 1910.307(b) are affirmed as willful and a total penalty of \$578,500 is assessed.

Thomasina V. Rogers
Chairman

Dated: October 18, 2000

VISSCHER, Commissioner, concurring in part, dissenting in part:

I agree with the majority's decision to vacate items 7 and 53 of Citation 2 in Docket No. 91-0638. I also agree with the majority's characterization of the fifteen machine guarding violations found in Citation 2 of the same docket number. But I disagree with the majority's findings of willfulness regarding certain of the violations here. After a thorough review of the evidence, the judge determined that only the violations of 29 C.F.R. §§ 1910.1001(j)(2) and (k)(1)(for failure to label and to clean up debris containing asbestos), and 29 C.F.R. § 1910.307(b)(for failure to use electrical equipment approved for Class II Division 2 locations) were willful. The judge found that the "generic evidence" of willfulness offered by the Secretary in this case was not sufficient to establish the willfulness of any of the cited violations. But when that evidence was viewed together with evidence that was specific to the asbestos and electrical equipment violations, the judge concluded that willfulness was established with regard to those violations. As the judge gave sound reasons for his conclusions, I would adopt his analysis with regard to the willfulness of Staley's violations.¹

Since I disagree with the majority with regard to the willfulness of items 2(a) and 2(b) of Citation 2 in Docket No. 91-0637 (for violations of the hazard communication standard) and items 4, 5, 10, 20, and 54 of Citation 2 in Docket No. 91-0638 (for

¹Staley acknowledges that under Commission precedents each instance of failing to take proper precautions with regard to electrical equipment in Class II Division 2 locations may be cited as a separate violation, but argues that it is inconsistent to then use generalized evidence common to all items to find each violation willful. I agree with Staley's argument. *See Kasper Wire Works*, 18 BNA OSHC 2178, 2199, 2000 CCH OSHD ¶ 32,134, p. 48,425 (No. 90-2775, 2000) (Visscher, Commissioner, dissenting), *appeal filed*, No. 00-1392 (D.C. Cir. Sept. 26, 2000). However, the evidence relied upon by the judge to find that these violations were willful is specific to Staley's "heightened awareness" and state of mind with regard to the Class II Division 2 hazard, and appears to apply equally to each violation.

violations of platform guarding and machine guarding standards), it follows that I would assess lower penalties for those violations.²

/s/
Gary L. Visscher
Commissioner

Date: October 18, 2000

²As the majority notes, the maximum penalties provided by section 17 of the Act were increased effective with inspections initiated after March 1, 1991. Since the inspection here was conducted from June to September, 1990, the maximum penalty for serious and “other-than-serious” violations in this case is \$1000.

WEISBERG, Commissioner, concurring in part and dissenting in part:

I concur, for the reasons set forth in the lead opinion, in the decision in Docket No. 91-0637 to affirm Citation 2, items 1(a) (failure to affix warning labels to asbestos-containing materials) and 1(b) (allowing asbestos dust to accumulate) as willful violations and to assess a combined penalty of \$8,000, and to affirm items 2(a) and 2(b) as willful violations of the Hazard Communication (HazCom) standard and to assess a combined penalty of \$8,000. I also join in the decision in Docket No. 91-0638 to vacate Citation 2, item 7 (based on the Secretary's failure to establish that it was a separate item) and item 53 (based on a lack of proof of exposure).

Unlike my colleagues, however, I would also affirm all of the remaining citation items as willful, relying primarily on the evidence relating to Staley's refusal to take timely and appropriate action in response to the April 1989 audit at the Decatur facility. This report informed the company that there were literally hundreds of safety violations in the inspected areas, many of which required immediate attention, and that building 44 was in such bad condition that it had "literally gone to hell in a hand-basket." In my view, this establishes that Staley had a heightened awareness of the cited hazards and acted with plain indifference by consciously disregarding the audit report and failing to take corrective action.¹

I take issue with my colleague's finding that *nothing* in the general evidence demonstrates that Staley consciously disregarded or was plainly indifferent to employee safety sufficient to show a willful state of mind. In my view, the evidence amply establishes the company's willful state of mind -- its heightened awareness of hundreds of

¹However, alternatively, even considering each item individually for specific evidence of heightened awareness, I agree with my colleagues that the violations for items 4, 5, 10, 20, 54, 100-102, 104, 106-108, 110, 111, 113, 116-121, 123, 125-127, 129-131, 133-143, 145-157, 159-166, 168-182, 184-194, 197, 201-203, 205, 206, 209, and 211 of Citation 2 of Docket No. 91-0638 should be characterized as willful and concur with the penalty amounts to be assessed.

hazards, and its indifference and refusal to take timely and appropriate action to correct those hazards.

By way of background, in March 1989 the National Institute for Occupational Safety and Health (NIOSH) conducted a survey of health hazards at Staley's Decatur facility. During this survey the inspectors were forced to evacuate the starch processing area when ethylene oxide and /or propylene oxide leaked into the air, making breathing difficult and setting off an outdoor alarm system. A respirator was requested for reentry, but none was immediately available. When a respirator was finally provided, it began to leak within a few minutes of exposure. Meanwhile, Staley operators continued to enter the area with no personal protection. The NIOSH report on its investigation into the incident concluded:

The fact that programs for personal protective equipment were not effectively in place in starch processing leads us to assume that they may be absent in other areas as well. In addition, lack of training and demand for product seems to have circumvented measures which were specifically implemented to reduce potential exposure.²

In April 1989, in response to employee complaints and the NIOSH evaluation, Staley safety personnel conducted a safety audit of 7 of the 24 departments at the Decatur facility. Staley safety engineer Kendall Page took notes and photographs during the audit. Following the audit Page prepared three handwritten reports which he submitted to Lynn Elder, Staley's corporate director of safety. In addition to comments on Staley's

²Contrary to my colleague's assertion, I do not rely on this incident or report as evidence that all of Staley's violations were willful. This report pertains most directly to whether the violations concerning ethylene oxide and/or propylene oxide leakage in the starch processing area were willful. However, it also provides background and context concerning conditions at the plant and, most importantly, it was the catalyst for Staley's 1989 internal audit that identified widespread and significant hazards that Staley chose to ignore. It is the audit report that I rely on to establish Staley's willful state of mind and not, as my colleague suggests, prior unrelated willful violations.

HazCom program, Page noted in his report that there were hundreds of “safety type violations.” Page’s report specifically stated:

In addition to the above mentioned items there are literally hundreds of safety violations through out this area. In summary 4 & 6 buildings has some problems that need immediate attention.

....

[about building 29]

[T]his building is full of electrical problems, . . . and guarding problems. A complete top to bottom safety inspection should be done as soon as possible. There are many OSHA citations present.

....

[about building 44]

Lynn, I have never seen this building in such bad condition. The building has literally gone to hell in a hand-basket. As noted in other buildings, there are literally hundreds of safety type violations through out the area.

According to Page, his reference to hundreds of safety violations included a load out area platform not equipped with guardrails, electrical boxes without covers, exposed live wires, electrical panels without covers, switches without covers and unguarded couplings on pumps and other motors.

Most of these violations were obvious and clearly visible to supervisors in the area, and had existed for months and, in some instances, for years. When Page informed management of the violations and requested permission to conduct a thorough inspection in light of the hazards identified during the audit, his request was refused. Rather, Lynn Elder asked Page to destroy his notes. Page testified that about a week later Elder told him that he had spoken to Robert Jansen, Corporate Vice President of Operations, about the contents of the reports, and that Jansen indicated that he was aware of the problems in the plant but that they had to get the networking project (a long term capital improvement plan intended to increase the production capability in the Decatur facility) done before they would try to correct some of the safety problems at the plant. In addition, there is Page’s un rebutted testimony that certain individuals in Staley’s management considered

implementing safety measures based not on whether those measures would further employee safety, but on whether the cost of effectuating such measures outweighed possible OSHA penalties which Staley might incur.³

To prove that a violation is willful, the Secretary must show that the violation “was committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety.” *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1613, 1991-93 CCH OSHD ¶ 29,673, p. 40,210 (No. 87-2007, 1992). To show intentional disregard, there must be evidence that an employer knew of an applicable standard or provision prohibiting the condition and consciously disregarded it. *Williams Enterp. Inc.*, 13 BNA OSHC 1249, 1257, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987).

Recently, in *Branham Sign Company*, 18 BNA OSHC 2132, 2134, 2000 CCH OSHD ¶ 32,106, p. 48,263 (No. 98-752, 2000) my colleagues discussed the criteria for determining whether a violation is willful:

A violation is willful if committed with intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). Thus, the focal point of a willful classification is the employer’s state of mind when the violation was committed. *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987); *Monfort of Colorado, Inc.*, 14 BNA OSHC 2055, 2062, 1991-93 CCH OSHD ¶ 29,246, p. 39,186 (No. 87-1220, 1991). The Secretary must

³Contrary to the implication in the lead opinion, I do not “assign controlling weight” to this testimony but, rather, find that it is consistent with the uncontroverted evidence of Page’s explicit warnings of widespread hazardous conditions that went significantly unheeded by Staley. I also note that while Page’s testimony might be hearsay, Staley’s counsel neither objected to it at trial nor presented *any* rebuttal evidence. Moreover, finding this testimony “[p]erhaps the most troubling,” the judge viewed it as an indication of Staley’s attitude, and relied on it “as an element of good faith [that was] given weight in determining the appropriate penalty.”

show that the employer had a heightened awareness' of the illegality of the conduct at issue. *E.g. Pentecost Contrac. Corp.*, 17 BNA OSHC 1953, 1955, 1995-97 CCH OSHD ¶ 31,289, p. 43,965 (No. 92-3788, 1997); *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,589. An employer who knows an employee is exposed to a hazard and fails to correct or eliminate the hazardous exposure commits a willful violation if the employer knows of the legal duty to act, for an employer's failure to act in the face of a known duty demonstrates the knowing disregard that characterizes willfulness. *See Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1613, 1991-93 CCH OSHD ¶ 29,673, p. 40,210 (No.87-2007, 1992); *accord A. Schonbek & Co.*, 9 BNA OSHC 1189, 1191, 1980 CCH OSHD ¶ 25,081, p. 30,984 (No.76-3980, 1980), *aff'd*, 646 F.2d 799, 800 (2d Cir. 1981); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541, 1991-93 CCH OSHD ¶ 29,617, pp. 40,103-04 (No. 86-360, 1992). Alternatively, the Secretary can establish willfulness by showing that the employer had a state of mind such that, if informed of the duty to act, it would not have cared. *Morello*, 809 F.2d at 164.

In addition, a willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,589.

In *Kaspar Wire Works*, 18 BNA OSHC 2178, 2188-89, 2000 CCH OSHD ¶ 32,134, 48,413-14 (No. 2775, 2000), *appeal docketed*, No. 00-1392 (DC Cir. Sep. 1, 2000) my colleagues, following and applying extant Commission precedent, agreed that the employer's failure to install a point of operation guard on a punch press showed plain indifference and constituted a willful violation. A unanimous Commission concluded that Kaspar had a heightened awareness of the hazard created by an unguarded punch press based on a prior citation for failure to guard a different punch press under the same standard, which was affirmed by a Commission judge, and the fact that management personnel knew that there had been a "rash" of serious punch press accidents. Although Kaspar had a heightened awareness of punch press injuries and accidents in general, there

was no evidence of a heightened awareness that the cited punch press was unguarded.

In the instant case, however, faced with similar evidence of Staley's heightened awareness of numerous guardrail, machine guarding, and electrical equipment guarding hazards and its conscious disregard of, or plain indifference to, correcting or eliminating those hazards, my colleagues have chosen to depart from Commission precedent and to add a new requirement to the legal test for willfulness and impose a new burden on the Secretary --to establish a heightened awareness of each individual item, i.e. on a machine by machine or guardrail by guardrail basis. It is clearly incumbent upon the Secretary to establish each separate violation cited.⁴ While the Secretary must establish an employer's willful state of mind, and arguably must show a "heightened awareness" of the violative conditions, it does not necessarily follow that the Secretary must also show a "heightened awareness" of the existence of each individual citation item. In *Kaspar Wire Works*, the Commission also found that the company's failure to record the vast majority of illnesses and injuries suffered by its employees during 1988 and 1989 constituted separate willful recordkeeping violations. 18 BNA OSHC at 2184-85, 2000 CCH OSHD at pp. 48,409-10. The Commission majority did not require the Secretary in that case to show a "heightened awareness" for each separate recordkeeping violation.⁵ As I noted in

⁴The Secretary has the burden of proving for each individual violation that: (1) the standard applies to the working conditions cited; (2) the employer's noncompliance with the terms of the standard; (3) employees had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1386, 1995-97 CCH OSHD ¶ 30,909, p. 43,029 (No. 921-262, 1995). With a few exceptions, Staley stipulated before the judge that it was in violation of the standards but contended that the violations were not willful.

⁵Commissioner Visscher dissented on the ground that the Secretary must show a willful state of mind for each separate willful violation and that there was "no evidence [there] connecting a state of mind with the individual recordkeeping violations." 18 BNA OSHC

Kaspar, there may be circumstances

where an employer's willful state of mind informs a course of conduct with respect to a particular category of hazards or requirements. Consistent with that view is the Commission's decision in *Pepperidge Farm Inc.*, [citation omitted] where the Commission affirmed as willful 176 separate recordkeeping violations, most of which derived from a failure to follow the OSHA 200 instructions, where Pepperidge Farm's management officials failed to ensure compliance with a company-wide directive to accurately adhere to OSHA recordkeeping requirements. There was no other individualized evidence relied on in that case to support the willful characterization of each of the violations.

18 BNA OSHC at 2184, n.15, 2000 CCH OSHD at pp. 48,409-10, n.15.

In the instant case, it is undisputed that Staley management officials at the Decatur facility were aware of and familiar with the provisions of all the cited standards. Provisions of the company's Safety Code Book related directly to the cited items involving fall protection (items 1-22), machine guarding (items 23-60), and electrical safety (items 61-99). Safety engineer Page called management's attention to the existence of hundreds of safety violations including guarding and electrical violations but was told to omit those items from his formal report. By showing that Staley knew of the Act's requirements and knowingly disregarded them, the Secretary established a prima facie case of willfulness based on conscious disregard. *See Donovan v. Williams Enterp.*, 744 F.2d 170, 180 (D.C. Cir. 1984) (where Secretary's repeated warnings and advice to company about failure to comply with construction site safety standards went unheeded, court held that "[t]hese facts alone are sufficient to establish 'intentional disregard of' and 'plain indifference to' OSHA's regulations"); *Calang Corp.*, 14 BNA OSHC 1789, 1791-92, 1987-90 CCH OSHD ¶ 29,080, pp. 38,870-71 (No. 85-319, 1990) (willful violation where company consciously disregarded OSHA requirements after compliance officer

at 2200, 2000 CCH OSHD at p. 48,426.

had correctly explained requirements of trenching standard); *Central Soya De P.R. v. Secretary of Labor*, 653 F.2d 38, 39 (1st Cir. 1981) (given knowledge of the violative condition, it follows that company's failure to take corrective action was in conscious disregard of the requirements of the Act and therefore willful).

Notwithstanding that Staley was put on notice by the April 1989 audit that hundreds of guardrail, machine guarding, and electrical equipment guarding violations existed in several of its buildings, many requiring immediate attention, and that building 44 was in such bad condition that it was described as "hav[ing] gone to hell in a hand-basket," the lead opinion contends that the company's refusal in such circumstances to take appropriate actions does not demonstrate a willful state of mind. Rather, Chairman Rogers simply believes that this evidence "demonstrates serious weaknesses in Staley's approach to safety." She argues that the record is insufficient to support an inference that, even if Staley knew of a particular violation, it would not care that it was in violation of the Act. However, in the instant case, it is not necessary to draw any inferences -- Staley was specifically and clearly informed by the audit report about the existence of serious and widespread hazards but consciously disregarded the report.⁶

⁶The lead opinion argues that there is no factual support for the conclusion that Staley failed to take corrective action with respect to the hundreds of violations described in the audit report. Yet, Page's testimony is basically uncontroverted -- when he called management's attention to the existence of hundreds of safety violations in the inspected areas, Elder asked him to tear up the reports; Elder subsequently informed Page that safety and health issues would not be addressed until after the "networking project" was completed; and Page's request to perform a complete safety audit of the entire facility was denied. Based on the undisputed evidence that Staley management was aware of and familiar with the provisions of all the cited standards and the above evidence showing that Staley consciously disregarded the audit report, the Secretary met her burden of establishing a *prima facie* case of willfulness. Staley failed to present evidence to rebut this *prima facie* evidence of its willful state of mind. Staley did not refute Page's testimony or establish what, if any, affirmative action it took in response to the hazards and unsafe conditions described in the audit report. My colleague does not cite to any

My colleague contends that Staley's refusal to act on the report does not establish that the violations were willful because there were tens of thousands of electrical panels, thousands of motors, and approximately eight miles of guardrails throughout the plant which were in compliance with applicable OSHA standards.⁷ My colleague appears to be applying something akin to a "substantial" or "percentage of compliance" test to relieve the company of liability for its willful failure to take corrective action here. The cases that my colleague relies on as precedent are readily distinguishable. In *Beta Construction Co.*, 16 BNA OSHC 1435, 1445, 1993 CCH OSHD ¶ 30,239, p. 41,653 (No. 91-102, 1993), *aff'd without published opinion*, 52 F.3d 1122 (D.C. Cir. 1995), the Commission found that a history of three [safety monitoring] violations over a period of five years for a large roofing contractor was not sufficiently significant in light of the extent of the company's

such evidence. Instead, she "infer[s]" that Staley corrected these hazards solely because some of the violations identified in the audit report do not appear to have been cited by the Secretary.

⁷The lead opinion suggests that it would be a departure from Commission precedent to rely on the "general evidence" to establish a willful state of mind because the cited items are "not part of a pattern, practice, or course of conduct." In this regard, I can only emphasize that Staley was specifically and clearly alerted to the existence of serious and widespread hazards of the particular types that were cited as willful -- guardrails, machine guarding, and electrical hazards -- but the warning went unheeded. In *Kaspar Wire Works*, in the absence of such direct evidence bearing on the employer's state of mind, the Commission inferred a willful state of mind based on circumstantial evidence, including the company's 86.5% error rate in failing to report injuries and illnesses on its OSHA 200 log. In the instant case, Staley's willful state of mind is clearly and directly established by its conscious disregard of the audit report and its refusal to take corrective action to address the hundreds of safety violations brought to its attention by that report. No inference is necessary in the face of this direct evidence. In my view, the fact that the OSHA inspection of this plant resulted in over one thousand citations, but apparently did not contain a larger percentage of machine guarding, fall protection, and electrical safety violations, does not negate the impact of the audit report on Staley's state of mind as it pertained to those conditions that were violative.

roofing work to put the company on notice that its safety procedures and safety program were inadequate and to establish a willful state of mind. Similarly, in *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2211, 1991-93 CCH OSHD ¶ 29,964, pp. 41,029-30 (No. 87-2059, 1993), the Commission found with respect to Jones, a major general construction contractor of international scope which had been involved in a substantial number of extensive projects, that the company's prior history of OSHA citations at various locations throughout the country were not sufficient to place the company on notice of any serious flaws in its overall safety program. Neither *Beta Construction* nor *J.A. Jones* suggest that it is appropriate for the Commission to apply a percentage of compliance test to negate willfulness. Rather, these cases hold that the mere existence of a small number of similar violations by a large company working at a substantial number of projects does not necessarily establish "heightened awareness." In neither of these cases had the company received reports of existing hazards or been specifically warned by a safety audit that there were hundreds of safety violations and failed to take corrective action in conscious disregard of the requirements of the Act, as in the instant case.

Accordingly, I dissent from the majority's conclusion that Staley's violations pertaining to guardrails, machine guarding and electrical hazards were not all willful.

/s/

Stuart E. Weisberg
Commissioner

Dated: October 18, 2000