Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. TIMBERLINE HARDWOOD FLOORS LLC, Respondent.	OSHRC Docket Nos. 18-1211 and 18-1212 (Consolidated)

Appearances: Kate S. O'Scannlain, Solicitor of Labor
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For the Secretary of Labor

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For Respondent

Before: The Honorable Dennis L. Phillips
U.S. OSHRC Judge

DECISION AND ORDER

I. BACKGROUND

In 2012, Timberline Hardwood Dimensions, Inc. (THD), a company co-owned by Thomas A. Vavra (Thomas Vavra or Mr. Vavra), settled and affirmed Occupational Safety and Health Administration (OSHA) citation items for violations of the same hearing conservation, lockout/tagout, forklift training and hazard communication standards in 2012 as are at issue in the instant case. In August 2012, as part of the settlement of those 2012 citations, Mr. Vavra

personally signed abatement certifications on behalf of THD containing detailed explanations of how every citation item had been abated.

Mr. Vavra is the co-owner and sole manager of Timberline Hardwood Floors LLC (Respondent or Timberline). In January 2018, OSHA initiated an inspection of Timberline's worksite located at 99 Harris Street, Fulton, New York 13069. Respondent is a hardwood flooring manufacturer. It is located at the same address as THD. Respondent does the same type of work, uses the same machinery and employs most of the same workers as THD. OSHA found that THD and Respondent had not taken any action since 2012 to establish a hearing conservation program, train employees on noise, require employees to have hearing tests/audiograms (also audio grams), or ensure that employees always wore hearing protection. Similarly, OSHA found that Mr. Vavra misrepresented that in April 2012 he had developed and implemented an energy control program and procedures for servicing and maintaining the hazardous machines at THD that had been cited by OSHA. OSHA also found that THD had not abated its 2012 hazardous communication and forklift violations.

On July 25, 2018, Respondent contested the three citations OSHA issued to it on July 3, 2018 pursuant to section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. § 651 *et seq*.) (the OSH Act). (Exs. 1, 20). A trial on the merits was conducted on December 10 and 11, 2019, in Syracuse, New York. Both parties filed post-trial briefs on April 27, 2020.[1] On May 12, 2020, Complainant filed his Reply Brief.

II. STIPULATIONS OF FACT AND LAW

The following facts and law were stipulated to by both parties in the Joint Pre-Hearing Statement (Jt. Pre-Hrg. Stmt.) and the stipulations were accepted by the Court. (Jt. Pre-Hrg.

[1] Respondent's Brief is styled as "Respondent's Post-Trial Brief" (Resp't Post-Trial Br.).

Stmt.; Tr. 36)

A. Docket No. 18-1211

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act. (Jt. Pre-Hrg. Stmt., § 5).

2. Respondent Timberline Hardwood Floors LLC, a corporation doing business in the State of New York, maintaining its principal office and place of business at 99 Harris Street, Fulton, New York 13069, at all relevant times is and was engaged in the manufacturing of hardwood flooring and related activities. (Jt. Pre-Hrg. Stmt., § 4(a)).

3. Many of the materials and supplies used and/or manufactured by Respondent originated and/or were shipped from outside the State of New York and the Respondent was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the OSH Act and is an employer within the meaning of section 3(5) of the Act. (Jt. Pre-Hrg. Stmt., § 4(b)).

4. On or about July 3, 2018, Complainant issued one citation to Respondent alleging violations at a worksite located at 99 Harris Street, Fulton, New York 13069. (Jt. Pre-Hrg. Stmt., § 4(c)).

5. By letter dated July 25, 2018, Respondent timely notified Complainant of its intent to contest the citation. (Jt. Pre-Hrg. Stmt., § 4(d)).

6. Timberline Hardwood Dimensions, Inc. was issued a citation for "Serious" violation of 29 C.F.R. § 1910.95(c)(1) on June 12, 2012 in Inspection No. 331026 (Citation 1, Item 1a). (Jt. Pre-Hrg. Stmt., § 4(e)).

7. On August 30, 2012, Thomas Vavra signed an abatement certification on behalf of Timberline Hardwood Dimensions, Inc. certifying that the violation of 29 C.F.R. §

1910.95(c)(1) contained in the citation issued in Inspection No. 331026 had been corrected/abated on April 22, 2012. (Jt. Pre-Hrg. Stmt., § 4(f)).

8. Timberline Hardwood Dimensions, Inc. was issued a citation for "Serious" violation of 29 C.F.R. § 1910.1200(e)(1) on June 12, 2012 in Inspection No. 331026 (Citation 1, Item 2a). (Jt. Pre-Hrg. Stmt., § 4(g)).

9. Timberline Hardwood Dimensions, Inc. was issued a citation for "Serious" violation of 29 C.F.R. § 1910.1200(g)(1) on June 12, 2012 in Inspection No. 331026 (Citation 1, Item 2b). (Jt. Pre-Hrg. Stmt., § 4(h)).

10. On August 30, 2012, Thomas Vavra signed abatement certification on behalf of Timberline Hardwood Dimensions, Inc. certifying that the violations of 29 C.F.R. § 1910.1200(e)(1) and §1910.1200(g)(1) contained in the citation issued for Inspection No. 331026 had been corrected/abated on April 23, 2012. (Jt. Pre-Hrg. Stmt., § 4(i)).

11. Thomas Vavra signed a Stipulated Settlement on behalf of Timberline Hardwood Dimensions, Inc. affirming the citations for violation of 29 C.F.R. § 1910.95(c), § 1910.1200(e)(1) and § 1910.1200(g)(1) in Inspection No. 331026. (Jt. Pre-Hrg. Stmt., § 4(j)).

12. The citations issued to Timberline Hardwood Dimensions on June 12, 2012 in Inspection No. 331026 became a final order of the Occupational Safety and Health Review Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(k)).

13. Thomas Vavra was an owner of Timberline Hardwood Dimensions, Inc. in 2012 and 2013. (Jt. Pre-Hrg. Stmt. § 4(l)).

14. Thomas Vavra was an owner of Timberline Hardwood Floors LLC in 2018. (Jt. Pre-Hrg. Stmt., § 4(m)).

15. The assets of Timberline Hardwood Dimensions, Inc. were transferred to

Timberline Hardwood Floors LLC. (Jt. Pre-Hrg. Stmt., § 4(n)).

B. Docket No. 18-1212

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act. (Jt. Pre-Hrg. Stmt., § 5).

2. Respondent Timberline Hardwood Floors LLC, a corporation doing business in the State of New York, maintaining its principal office and place of business at 99 Harris Street, Fulton, New York 13069, is and at all relevant times was engaged in the manufacturing of hardwood flooring and related activities. (Jt. Pre-Hrg. Stmt., § 4(a)).

3. Many of the materials and supplies used and/or manufactured by Respondent originated and/or were shipped from outside the State of New York and the Respondent was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and is an employer within the meaning of section 3(5) of the Act. (Jt. Pre-Hrg. Stmt., § 4(b)).

4. On or about July 3, 2018, Complainant issued two citations to Respondent alleging violations at a worksite located at 99 Harris Street, Fulton, New York 13069. (Jt. Pre-Hrg. Stmt., § 4(c)).

5. By letter dated July 25, 2018, Respondent timely notified Complainant of its intent to contest the citations. (Jt. Pre-Hrg. Stmt., § 4(d)).

6. Timberline Hardwood Dimensions, Inc. was issued a citation for "Serious" violation of 29 C.F.R. § 1910.147(c)(1) on June 12, 2012 in Inspection No. 330566 (Citation 1, Item 3). (Jt. Pre-Hrg. Stmt., § 4(e)).

7. Timberline Hardwood Dimensions, Inc. was issued a "Serious" citation for violation of 29 C.F.R. § 1910.178(l)(1)(i) on June 12, 2012 in Inspection No. 330566 (Citation 1,

Item 4). (Jt. Pre-Hrg. Stmt., § 4(f)).

8. On August 30, 2012, Thomas Vavra signed abatement certification on behalf of Timberline Hardwood Dimensions, Inc. certifying that the violations of 29 C.F.R. § 1910.147(c)(1) and § 1910.178(l)(1)(i) contained in the citation issued for Inspection No. 330566 had been corrected/abated in April 2012. (Jt. Pre-Hrg. Stmt., § 4(g)).

9. Thomas Vavra signed a Stipulated Settlement on behalf of Timberline Hardwood Dimensions, Inc. affirming the citations for violation of 29 C.F.R. § 1910.147(c)(1) and § 1910.178(l)(1)(i) in Inspection No. 330566. (Jt. Pre-Hrg. Stmt., § 4(h)).

10. The citations issued to Timberline Hardwood Dimensions, Inc. on June 12, 2012 in Inspection No. 330566 became a final order of the Occupational Safety and Health Review Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(i)).

11. Thomas Vavra was an owner of Timberline Hardwood Dimensions, Inc. in 2012 and 2013. (Jt. Pre-Hrg. Stmt., § 4(j)).

12. Thomas Vavra was an owner of Timberline Hardwood Floors LLC in 2018. (Jt. Pre-Hrg. Stmt., § 4(k)).

13. The assets of Timberline Hardwood Dimensions, Inc. were transferred to Timberline Hardwood Floors LLC. (Jt. Pre-Hrg. Stmt., § 4(l)).

III. FINDINGS OF FACTS

A. Respondent's Corporate Identity and Operations

Respondent is a corporation doing business in the State of New York, maintaining its principal office and place of business at 99 Harris Street, Fulton, New York 13069. It is and at all relevant times was engaged in the manufacturing of hardwood flooring and related activities. (Jt. Pre-Hrg. Stmt., § 4(a); Tr. 324). Timberline was registered with the New York State

Department of State on July 10, 2009. (Ex. 37). Thomas Vavra has been the President and 50% co-owner of Respondent since at least 2014. (Tr. 323-24; Ex. 38, at 10-11; Jt. Pre-Hrg. Stmt., §§ 4(k)(m)). Respondent's other 50% co-owner is a silent partner, Mr. Cucit, who is not involved in running the business. (Tr. 324; Ex. 38, at 9-12). Thomas Vavra has run the day-to-day operations of Respondent on his own since at least 2014. (Tr. 324; Ex. 38, at 11-12). Melissa Vavra, Thomas Vavra's wife, is Respondent's Secretary. (Tr. 325; Ex. 38, at 13). Thomas and Melissa Vavra are Respondent's only officers. (Tr. 325).

In 2017 and 2018, Thomas Vavra was responsible for Respondent's safety programs, training Respondent's employees on safety, and ensuring Respondent's compliance with OSHA standards. (Tr. 325-26; Ex. 38, at 13-14). On January 11, 2018, Respondent had about ten to fourteen employees.[2] (Tr. 51, 231, 235, 364). OSHA had not inspected Respondent in the five years that preceded its issuance of the citations in this case. (Tr. 57-58, 267-68).

Prior to running Respondent, Thomas Vavra co-owned and managed THD. (Tr. 326; Ex. 38, at 14-15). THD was registered with the New York State Department of Corporations on July 10, 2000. (Ex. 36). He was the Chief Executive Officer and THD's only officer listed with the New York State Department of Corporations. (Ex. 36). In 2012, THD operated its workplace out of the same address as Respondent at 99 Harris Street, Fulton, New York. (Tr. 324-26; Exs. 29-30, 33, 38, at 16; Jt. Pre-Hrg. Stmt., §4(a)). THD also manufactured hardwood flooring. (Tr. 326, Ex. 38, at 14). In 2012, Thomas Vavra ran THD's day-to-day operations. (Tr. 326, Ex. 38, at 14-15).

In 2014, THD restructured into Timberline Hardwood Floors LLC. (Tr. 326-27). THD's

[2] CSHO Calderon testified that there were either 10 or 14 employees at the worksite at the time of the OSHA inspection in 2018. (Tr. 63, 231, 235). At trial, Mr. Vavra testified that Respondent had fourteen employees. (Tr. 364). In its Post Trial Brief, Respondent asserted that it had fourteen employees. (Resp't Post Trial Br., at 2, 26-27).

assets were transferred to Respondent with no payments made for those assets. (Tr. 327; Ex. 38, at 18-19; Jt. Pre-Hrg. Stmt., §§ 4(l), (n)). Its equipment and machinery were also obtained by Respondent at no cost. (Tr. 324-28; Ex. 38, at 19). Most of THD's employees went to work for Respondent after the restructuring. (Tr. 327, 364, 438, 464, 494; Ex. 38, at 19). Other than ownership structure, there was no difference between THD and Timberline. (Tr. 328; Ex. 38, at 19-20). THD ceased operations sometime after 2012. (Tr. 328; Ex. 38, at 16-17).

The only safety program Respondent maintained is contained in its Employee Handbook which was written by Melissa Vavra. (Tr. 57, 331; Ex. 8, at 7-8, Ex. 18, at 1, ¶¶ 1-2, 8-9, Ex. 28, at 1, ¶ 1, Ex. 38, at 32-33).

B. OSHA's Inspection Nos. 1287433 (Health) and 1286609 (Safety)

On or about January 9, 2018, OSHA's Syracuse Area Office opened a programmed safety inspection of Respondent's workplace pursuant to an emphasis program on amputations. Timberline was randomly selected. (Tr. 47-50). Respondent's workplace consists of approximately 80,000 square feet, 8,000 of which is the mill where most of the employees work. The remainder of the building is used as a warehouse, where raw material, lumber, and finished product are stored. (Tr. 397-98). Respondent's employees use upcut saws, a planer, a moulder,[3] a rip saw/ripper and other woodworking equipment to manufacture the hardwood flooring. (Tr. 51, 378-79, 419-20, 439, 465-66; Exs. 9, 13-15).

OSHA Compliance Safety and Health Officer (CSHO) Lydia Ginette Calderon Hernandez (Calderon) initiated her onsite inspection of Respondent's workplace on January 9, 2018 and held an opening conference with Thomas Vavra, who identified himself as the owner

[3] Moulders mold wood to smaller pieces. (Tr. 109). It's Respondent's main piece of equipment that actually makes the flooring. (Tr. 378). It surfaces all four sides of raw lumber and puts the tongue and groove on two sides. It essentially makes the raw lumber into flooring. (Tr. 419-20, 439).

of the company.[4] (Tr. 45, 48, 50). On that day, CSHO Calderon observed that it was very loud in the workplace. She made a referral to the Syracuse Area Office for a health inspection of the workplace. (Tr. 49, 175). As a result of CSHO Calderon's referral, OSHA Senior Industrial Hygienist (IH) Donalea Marie Maloney was assigned to conduct a health inspection of Respondent's workplace.[5] On January 11, 2018, IH Maloney accompanied CSHO Calderon to the workplace and initiated a health inspection that included noise sampling.[6] (Tr. 174-75). On that day, IH Maloney conducted an opening conference with Anthony Vavra,[7] who identified himself as a co-owner with his brother Thomas Vavra. (Tr. 50-51, 176-77). IH Maloney subsequently met Thomas Vavra that same day and explained the purpose of her inspection. (Tr. 177). IH Maloney described Respondent's facility as a "big warehouse, a lot of area, with stacking of wood floors. And then there was an area where the actual cutting and processing was taking place." (Tr. 177-78). CSHO Calderon also continued her onsite safety inspection on January 11, 2018. (Tr. 51). CSHO Calderon and IH Maloney visited the workplace again on January 19 and February 20, 2018.[8] (Tr. 48, 175-76). During both the safety and health inspections, CSHO Calderon and IH Maloney observed and documented various unsafe conditions at the workplace.

C. OSHA's Noise Sampling

IH Maloney conducted noise sampling at the workplace on January 11, 2018 by following standard OSHA procedures. (Tr. 185). Prior to going to the workplace that day, IH

[4] CSHO Calderon worked for OSHA for nine-and-a-half years. She has served as a CSHO for about four-and-a-half years. She has conducted about 170 OSHA safety inspections. (Tr. 46-47).
[5] IH Maloney has worked at OSHA for more than 29 years. She has conducted over 1,500 OSHA inspections. She focuses on conducting health inspections, including performing noise and air sampling. (Tr. 174).
[6] Mark Evans, CSHO Calderon's supervisor, also accompanied CSHO Calderon and IH Maloney during the inspection on January 11, 2018. (Tr. 175).
[7] Anthony Vavra supervises employees. (Tr. 325; Ex. 38, at 12). Herein, he is always referred to as Anthony Vavra.
[8] Then Assistant Area Director (AAD) Jeffrey Prebish and current AAD Evans also accompanied CSHO Calderon during her February 20, 2018 visit to Timberline. (Tr. 48-49).

Maloney pre-calibrated all six of the dosimeters[9]/pumps that she was planning to use to sample noise exposure for Respondent's employees using a Dupont dosimeter calibrator (serial number 012002) in order to ensure that the dosimeters were all calibrated properly.[10] (Tr. 186-88, 191-92, 197-200; Exs. 22, 39-45). In addition, IH Maloney pre-calibrated a sound level meter[11] when she arrived at Respondent's workplace on January 11, 2018.[12] (Tr. 194, 201-02; Exs. 46-53). IH Maloney then recorded all of the pre-calibration data on her field notes.[13] (Tr. 185-87, 197-201; Ex. 22, at 1).

On January 11, 2018, IH Maloney performed noise sampling on six of Respondent's employees: Messrs. [redacted],[14] [redacted],[15] [redacted],[16] [redacted],[17] [redacted][18] and [redacted],[19] by hanging a dosimeter on each employee's waist and placing the attached microphone close to his ear.[20] (Tr. 202; Ex. 21, at 1-4, Ex. 23). The dosimeters were worn by

[9] Dosimeters are the instruments OSHA uses to conduct noise sampling by calculating decibels and the dose percentage. (Tr. 186; Exs. 39-41). They are also referred to as "pumps." (Tr. 186). Three photographs of Dosimeter serial number 012851 are at Exhibits 39-41. (Tr. 185-86, 190-91; Exs. 39-41).

[10] For demonstrative purposes, three photographs of the calibrator serial number Dupont 012002 used by IH Maloney on January 11, 2018 are at Exhibits 42-45. (Tr. 192-93; Exs. 42-45).

[11] IH Maloney used a sound level meter when conducting noise sampling to take instantaneous noised readings while an employee was working. (Tr. 194). Two photographs of a sound level meter serial number C339862 used by IH Maloney on January 11, 2018 are at Exhibits 46-47. (Tr. 194-96, 200; Exs. 46-47). For demonstrative purposes, six photographs of the calibrator serial number 0627849 used by IH Maloney on January 11, 2018 for the sound level meter are at exhibits 48-53. (Tr. 196-97, 200; Exs. 48-53).

[12] IH Maloney post-calibrated the sound level meter before she left the facility that day. (Tr. 201; Ex. 22, at 1-3). At the end of the day on January 11, 2018, IH Maloney post-calibrated the dosimeters and recorded that data on her field notes. (Tr. 199-200; Ex. 22, at 1).

[13] IH Maloney testified that she was certain that all of the equipment had been calibrated by the OSHA laboratory in Cincinnati within one year of the time she used them to sample noise in this case. (Tr. 210-11).

[14] [redacted] was one of eight laborers who worked at the worksite. (Tr. 223-25; Ex. 23, at 1).

[15] [redacted] worked at Timberline for eleven years where he operates the Maureen ripsaw that cuts boards into size. He has also operated the planer. (Tr. 102, 218, 464-66; Ex. 23, at 3). He was running an End Matcher on January 11, 2018. (Tr. 219, Ex. 23, at 3).

[16] Mr. [redacted] was a supervisor and moulder and Cantek planer operator. He has worked in the wood business for 25 years, including 18-20 years at Timberline and THD. (Tr. 438-39, 456). He is in charge of everyone when Mr. Vavra is away from the facility. (Tr. 458).

[17] Mr. [redacted] was a laborer and an upcut saw operator. (Tr. 103; Ex. 23, at 5).

[18] Mr. [redacted] was a laborer who also chopped wood. (Ex. 23, at 7).

[19] Mr. [redacted] was a laborer at the worksite, who also operated powered industrial trucks (PIT) (also referred to as forklifts). (Tr. 116-17, 337-38; Ex. 23, at 11).

[20] CSHO Calderon saw Mr. [redacted] not wearing ear plugs that day. She saw that the other five employees were wearing ear plugs. (Tr. 224-26, Ex. 23). There is a sign at the back door to the workplace that says (in part):

the employees that day from approximately 10:00 a.m. until around 2:30 p.m. (Tr. 203; Ex. 22, at 2, Ex. 23). Work stopped that day at around 2:30 p.m. because there was no more wood to cut. (Tr. 203; Ex. 22, at 3). IH Maloney then took the readings from the dosimeters and recorded the readings on her field notes. The relevant data recorded on her field notes are each employee's name, the dosimeter's serial number, the dose percentage reading at the 80 threshold ((66) DOSE % 80)[21], average decibels (LAVG dB), and total time the dosimeter was on the employee. (Tr. 203-06; Ex. 22, at 2-3).

IH Maloney used the data recorded from the dosimeters to calculate whether or not the six employees were exposed over the time-weighted average (TWA) at the 80 percentage/85 decibels (dBA or decibels) on the A weighted scale threshold on Noise Survey Reports (Form OSHA-92). (Tr. 214-15, 274, 301; Ex. 23). IH Maloney focused on the 80 percentage/85 dBA threshold because she had sampled the employees for only about four and a half hours due to the wood running out.[22] (Tr. 215, 247; Ex. 22, at 2). The Noise Survey Reports contain the calculations of the eight-hour TWA sound level for all six employees using the formula mandated in Appendix A to § 1910.95, section I(2). (Tr. 219-23; Ex. 23).[23] That section of Appendix A provides that the eight-hour TWA sound level, in decibels, may be computed from the dose, in percent, by means of the formula: TWA = 16.61 log (Dose/100) + 90. All six

"CAUTION EAR PROTECTION REQUIRED". (Tr. 231; Ex. 21, at 5).

[21] IH Maloney explained that the "(66) DOSE % 80" on her field notes indicates that if the number in that column is greater than 66, then sampling is above the 80 percent threshold and a hearing conservation program is required. (Tr. 204-05, 245-46; Ex. 22, at 2). The number in that column exceeded 66 for all six sampled employees, thereby requiring Respondent to have a hearing conservation program. (Tr. 205; ex. 22).

[22] IH Maloney explained that she focused on the 80 percentage/85 decibels threshold because no employees were exposed above the 90 decibels threshold due to the fact that she only noise sampled the six employees for four and a half hours. (Tr. 215; Ex. 22, at 2). She said employers are required to comply with additional hearing conservation requirements when employees are exposed at or above the 90 dBA threshold. (Tr. 215). *See* 29 C.F.R. § 1910.95(j)(2).

[23] Each Noise Survey Report also contains various information including the employee's name, job title, number of employees doing the same work, time the dosimeter was placed on and off and whether or not the employee was using hearing protection. (Tr. 215-19; Ex. 23).

employees who were sampled on January 11, 2018 were exposed at an eight-hour TWA sound level above the 85 dBA threshold. (Tr. 220, 228, 245-46; Ex. 20, at 6-7, Ex. 23).

For example, IH Maloney calculated the eight-hour TWA for Mr. [redacted], who was loading wood into the end matcher and the machine was cutting the wood, as follows:

69.9 (Dose at 80%) divided by 100 = 0.699

Log of .699 = -0.1555

-0.1555 multiplied by 16.61 = -2.583

-2.583 plus 90 = 87.42 TWA[24]

(Tr. 223-25; Ex. 23, at 1).

Further, IH Maloney calculated the eight-hour TWA for Mr. [redacted], as follows:

137.6 (Dose at 80%) divided by 100 = 1.376

Log of 1.376 = 0.1386

0.1386 multiplied by 16.61 = 2.302

2.302 plus 90 = 92.30 TWA

(Tr. 102, 227; Ex. 23, at 9).

In addition, IH Maloney also used a hand-held sound level meter to conduct instantaneous background noise readings while employees were working throughout the day at the workplace and recorded those readings in columns A and B on the Noise Survey Reports. (Tr. 194, 219; Exs. 23, 46-47). The noise level readings taken with the sound level meter were also over the action level of 85 decibels. (Tr. 194, 219; Exs. 23, 46-47).

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[24] At the trial, IH Maloney testified that she had transcribed the wrong dose amount (91.4) onto [redacted]'s Noise Survey Report. The calculation above uses the correct dose amount (69.9) for [redacted]. (Tr. 224; Ex. 22, at 2, Ex. 23, at 1).

1. Citation 1, Item 1

Based on noise sampling performed by IH Maloney on January 11, 2018, six of Respondent's employees working in the mill area of the workplace were exposed to continuous noise above the eight-hour TWA sound level of 85 dBA. (Tr. 181, 185, 220, 225-228; Ex. 20, at 6-7, Exs. 22-23).

Thomas Vavra was notified on or about June 12, 2012 that in April 2012 employees engaged in woodworking activities at the workplace were exposed to noise levels above the eight-hour TWA average sound level of 85 dBA. (Tr. 341, 346; Ex. 33, at 2, Ex. 38, at 50).

Respondent has never administered a hearing conservation program.[25] (Tr. 181-82, 277, 343-44, 398; Ex. 28, at 1-2, ¶¶ 3-4, Ex. 38, at 45-46, 52). Respondent failed to ensure that audiograms/hearing tests were performed as required on employees when information indicated that the employees were exposed to noise levels above the eight-hour TWA sound level of 85 dBA.[26] (Tr. 182, 185, 227, 301, 341-51, 420, 461, 477-78, 485, 499-502; Ex. 28, at 1-2, ¶ 4, Ex. 33, at 2, Ex. 38, at 49, 53-54). Respondent failed to train employees on the hazards of exposure to noise.[27] (Tr. 182-83, 344, 349-50; Ex. 28, at 2, ¶¶ 9-10, Ex. 38, at 49, 53). Respondent failed to ensure that employees who had not received baseline audiograms/hearing tests always wore some type of hearing protection when information indicated that the employees were exposed to noise levels above the eight-hour TWA sound level of 85 dBA.[28] (Tr. 183, 250-51, 341, 344-46; Ex. 21, at 2, Ex. 28, at 2, ¶ 9, Ex. 33, at 2, Ex. 38, at 48-49, 53). Respondent failed to do any

[25] Thomas Vavra and the six employees IH Maloney noise sampled on January 11, 2018 told IH Maloney that Respondent did not have a hearing conservation program. (Tr. 181-82, 277). At trial, Mr. Vavra admitted that Respondent did not have anything in writing regarding a hearing conservation program. (Tr. 398).
[26] The six employees IH Maloney noise sampled on January 11, 2018 told IH Maloney that they had not received a hearing test from Respondent. (Tr. 182; Ex. 23, at 3, 5, 7, 9).
[27] The six employees IH Maloney noise sampled on January 11, 2018 told IH Maloney that they had not received any noise training by Respondent. (Tr. 182).
[28] Thomas Vavra told IH Maloney that Respondent had not provided audiograms to its employees. (Tr. 184).

monitoring of noise levels when information indicated that employees were exposed to noise levels above the eight-hour TWA sound level of 85 dBA. (Tr. 346-49; Ex. 33, at 2, Ex. 38, at 49-50). Respondent's failure to institute a hearing conservation program as required by 29 C.F.R. § 1910.95(c)(1) exposed at least six of Respondent's employees to the serious injury of hearing loss. (Tr. 231-32, 251).

THD was issued a citation for "Serious" violation of 29 C.F.R. § 1910.95(c)(1) on June 12, 2012 in Inspection No. 331026 (Citation 1, Item 1a). (Jt. Pre-Hrg. Stmt., § 4(e); Tr. 341; Ex. 33, at 2). On August 30, 2012, Thomas Vavra signed an abatement certification on behalf of THD certifying that the violation of 29 C.F.R. § 1910.95(c)(1) contained in the citation issued in Inspection No. 331026 had been corrected/abated on April 22, 2012.[29] (Jt. Pre-Hrg. Stmt., § 4(f); Tr. 342-43; Ex. 34). On or about August 30, 2012, Thomas Vavra sent a signed letter to the Syracuse OSHA Area Office representing that the violation of 29 C.F.R. § 1910.95(c)(1) contained in the citation issued in Inspection No. 331026 had been abated. (Tr. 356; Ex. 30). In November 2012, Thomas Vavra signed a Stipulated Settlement on behalf of THD affirming the citation for violation of 29 C.F.R. § 1910.95(c)(1) in Inspection No. 331026 and certifying that the violation had been abated. (Jt. Pre-Hrg. Stmt., § 4(j); Tr. 341-42; Ex. 35). The representations made in the abatement certification, letter to OSHA and Stipulated Settlement all signed by Thomas Vavra relating to abatement of the citation for violation of 29 C.F.R. § 1910.95(c)(1) in Inspection No. 331026 were, at best, inaccurate. (Tr. 343-47, 350; Exs. 30-32, Ex. 38, at 52-53). The citation issued to THD on June 12, 2012 for violation of 29 C.F.R. § 1910.95(c)(1) in Inspection No. 331026 became a final order of the Occupational Safety and

[29] While Mr. Vavra testified that an owner of an adjacent business, Jennifer Reebel, drafted the abatement certification, he admitted that he read it before he signed it. (Tr. 343, 368-69; Exs. 31, 34, 38, at 27-29, 51-52).

Health Review Commission (Commission) on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(k)). The violation of 29 C.F.R. § 1910.95(c) contained in the 2012 citation for Inspection No. 331026 was substantially similar to the violation of 29 C.F.R. § 1910.95(c)(1) as cited in Citation 1, Item 1 in Docket No. 18-1211.

2. Citation 1, Items 2a, 2b and 2c

Respondent did not develop, implement and/or maintain a written hazard communication program at its workplace on January 11, 2018.[30] (Tr. 233-35, 351, 401; Ex. 8, at 7-8, Ex. 20, at 8, Ex. 28, at 2, ¶¶ 6-8, Ex. 38, 54-55, 58). Hazardous chemicals and materials such as propane,[31] TC bed lubricant and various types of wood/wood dust, including white oak, red oak, maple, hickory, cherry, and walnut, were present and used in the workplace on January 11, 2018. The presence of these hazardous chemicals or materials at Respondent's workplace required a written hazard communication program. (Tr. 233-34, 237-39, 402-03, 456-57, 478; Exs. 24-27, Ex. 38, at 54-55). Both Thomas and Anthony Vavra knew that hazardous chemicals and materials were present at the workplace. (Tr. 235). At the time of the OSHA 2018 inspection, Respondent did not have any safety data sheets at the workplace for propane, TC bed lubricant or wood/wood dust that employees were exposed to daily.[32] (Tr. 236-37, 351-52, 356; Ex. 28, at 2, ¶ 8, Ex. 38, at 56-58). Respondent also did not provide information or training to employees on the hazardous chemicals and materials in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area.[33] (Tr. 240-41, 352, 355-56, 486;

[30] Thomas Vavra told IH Maloney that Respondent did not have a written hazard communication program. (Tr. 233).
[31] Mr. [redacted] testified that the forklifts use propane. He has handled propane himself. He said that the tank on the forklift has to be replenished with propane about once a week. (Tr. 456-57). [redacted] said the tank on the forklift that runs on propane needed to be changed once every four days. (Tr. 478).
[32] Thomas Vavra and Respondent's employees told IH Maloney that Respondent did not have any safety data sheets for the workplace. (Tr. 236-37).
[33] Thomas Vavra told IH Maloney that "he couldn't provide me with any training information, didn't recall ever doing it" and "employees told me [IH Maloney] that they had not been trained." (Tr. 241).

Ex. 28, at 2, ¶¶ 7, 10, Ex. 38, at 58). The presence and use of hazardous chemicals and materials such as propane, TC bed lubricant and various types of wood/wood dust, including white oak, red oak, maple, hickory, cherry, and walnut, in the workplace on January 11, 2018 required Respondent to provide employees with training on hazardous chemicals and materials in the workplace. (Tr. 241). [redacted] testified that he had not received any training on propane while working at Timberline. (Tr. 486). Respondent's failure to: a) develop, implement and/or maintain a written hazardous communication program in the workplace, b) have safety data sheets for each hazardous chemical in use at the workplace, and c) train employees on the hazardous chemicals in their work area, exposed all ten to fourteen of Respondent's employees to violative conditions that could lead to death or serious physical harm as discussed further below. (Tr. 235-41; Ex. 25, at 1, Ex. 26, at 1-2, Ex. 27, at 1-2).

THD was issued citations for "Serious" violation of 29 C.F.R. § 1910.1200(e)(1), § 1910.1200(g)(1) and § 1910.1200(h)(1) on June 12, 2012 in Inspection No. 331026 (Citation 1, Items 2a, 2b and 2c). (Jt. Pre-Hrg. Stmt., § 4(g) & (h); Tr. 354; Ex. 33, at 3-4, Ex. 38, at 57). The citations issued to THD in Inspection No. 331026 for violation of 29 C.F.R. § 1910.1200(e)(1), § 1910.1200(g)(1) and § 1910.1200(h)(1) noted that propane and lubricant were among the hazardous chemicals at the workplace. (Ex. 33, at 3-4). On August 30, 2012, Thomas Vavra signed abatement certification on behalf of THD certifying that the violations of 29 C.F.R. § 1910.1200(e)(1), §1910.1200(g)(1) and § 1910.1200(h)(1) contained in the citations issued for Inspection No. 331026 had been corrected/abated on April 23, 2012.[34] (Jt. Pre-Hrg.

[34] The certification stated, in pertinent part:
List the **SPECIFIC** method of correction for **EACH** item on the citation and the date of correction (emphasis in original): …
Citation # 01 Item # 002a A hazard communication program has been developed and implemented. Employees have been trained on program and applicable MSDS sheets.
Completion date: 4/23/12

Stmt., § 4(i), Tr. 353; Ex. 34, Ex. 38, at 51-52).

On or about August 30, 2012, Thomas Vavra sent a signed letter to the Syracuse OSHA Area Office representing that the violations of 29 C.F.R. § 1910.1200(e)(1), §1910.1200(g)(1) and § 1910.1200(h)(1) contained in the citations issued in Inspection No. 331026 had been abated. (Tr. 356; Ex. 30). In November 2012, Thomas Vavra signed a Stipulated Settlement on behalf of THD affirming the citations for violation of 29 C.F.R. § 1910.1200(e)(1), § 1910.1200(g)(1) and § 1910.1200(h)(1) in Inspection No. 331026 and certifying that the violations had been abated.[35] (Jt. Pre-Hrg. Stmt., § 4(j); Tr. 342-43; Ex. 35). The representations made in the abatement certification, letter to OSHA and Stipulated Settlement signed by Thomas Vavra relating to abatement of the citations for violations of 29 C.F.R. § 1910.1200(e)(1), § 1910.1200(g)(1) and § 1910.1200(h)(1) in Inspection No. 331026 were, at best, inaccurate. (Tr. 233-37, 240-41, 351-52, 355-56, 401; Exs. 30-32, Ex. 38, at 52-59). The citations issued to THD on June 12, 2012 in Inspection No. 331026 became a final order of the Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(k)).

The violation of 29 C.F.R. § 1910.1200(e)(1) contained in the 2012 citation for Inspection No. 331026 was substantially similar to the violation of 29 C.F.R. § 1910.1200(e)(1) as cited in Citation 1, Item 2a in Docket No. 18-1211. The violation of 29 C.F.R. § 1910.1200(g)(1)

Citation # 01 Item # 002b A MSDS binder has been supplied to employees and will be maintained and monitored as per our hazard communication program.

Completion date: 4/23/12

…

Endorsement

I certify that all violations on the subject citation have been corrected/abated and that the information provided is accurate.

Signature – Thomas A. Vavra

Date: 8/30/12

(Ex. 34).

[35] The STIPULATED SETTLEMENT stated in pertinent part:

3. Respondent affirmatively states that:

(a) All violations alleged in the citation(s) have been abated.

(Ex. 35, at 2).

contained in the 2012 citation for Inspection No. 331026 was substantially similar to the violation of 29 C.F.R. § 1910.1200(g)(1) as cited in Citation 1, Item 2b in Docket No. 18-1211. The violation of 29 C.F.R. § 1910.1200(h)(1) contained in the 2012 citation for Inspection No. 331026 was substantially similar to the violation of 29 C.F.R. § 1910.1200(h)(1) as cited in Citation 1, Item 2c in Docket No. 18-1211.

E. Docket No. 18-1212

1. Citation 1, Item 1

Citation 1, Item 1 in Docket No. 18-1212 has been withdrawn by the Secretary. A Stipulation of Withdrawal signed by both parties was received and approved by the Court at the commencement of the trial. (Tr. 8-9).

2. Citation 1, Item 2

On January 19, 2018, a door designated as an emergency exit at the South end of the mill that led outdoors at Respondent's workplace was locked by a deadbolt.[36] (Tr. 52-54, 120-23, 178, 244, 373; Exs. 6-7, 19, at 4, ¶ 4a). CSHO Calderon tried but was unable to open the door. (Tr. 52). IH Maloney testified that the "door was dead bolted shut. You had – you had to unlatch the deadbolt and push the bar." (Tr. 243-44). A photograph of the exit door taken by CSHO Calderon is at Exhibit 7. (Tr. 52-53; Ex. 7). Photographs of the lock taken by CSHO Calderon are at Exhibit 6 and Exhibit 7, at A. (Tr. 53-54, 120; Exs. 6-7). In order to unlock the exit door, one had to lift up the deadbolt, slide it and then push the bar on the door. (Tr. 179, 243, 372; Exs. 6-7).

Thomas Vavra was aware the exit door was locked with a deadbolt. (Tr. 55, 372). He

[36] CSHO Calderon found the door locked all four days she was at Respondent's mill; i.e. January 9, 11, 19, 2018, and February 20, 2018. (Tr. 54).

told CSHO Calderon that the door was kept locked to keep the cold from getting into the building, which was not heated. The locked exit door exposed all ten to fourteen of Respondent's employees to serious physical injuries resulting from delay in evacuating the workplace in the event of a fire hazard. (Tr. 54-55, 123-25, 177-78).

3. Citation 1, Item 3

On January 19, 2018, the exit sign above a designated exit door at the south end of the mill was not illuminated. (Tr. 11-12, 58-59, 126; Ex. 7). The unlit exit sign was in plain view. (Tr. 59; Ex. 7). The unlit exit sign exposed all ten to fourteen of Respondent's employees to serious physical injuries resulting from an inability to see the exit door to evacuate the workplace in the event of a fire. (Tr. 59).

4. Citation 1, Item 4

Respondent provided portable fire extinguishers in the workplace for employees to use to fight fires. (Tr. 376, 460, 482; Ex. 38, at 31). Respondent's employees were expected to use the fire extinguishers at the workplace in the event of a fire. (Tr. 63, 340, 460, 482; Ex. 38, at 33-34). Respondent did not train employees on the use of portable fire extinguishers and/or the hazards involved with incipient stage firefighting. (Tr. 61-62, 130-31, 160, 339-40, 377, 425, 459-60, 482; Ex. 18, at 2, ¶¶ 6, 9, Ex. 38, at 31, 34). Respondent's failure to train employees on the use of portable fire extinguishers and/or the hazards involved with incipient stage fire-fighting exposed all ten to fourteen of its employees to serious physical injury, such as smoke inhalation or burns, in the event of a fire at the workplace. (Tr. 63).

5. Citation 1, Item 5 a) Whirlwind up-cut saw and b) Northtech up-cut saw

On January 11, 2018, the points of operation on both the Whirlwind and Northtech up-cut saws (also upcut saw) were completely unguarded. (Tr. 65, 71, 74). On January 11, 2018,

Thomas Vavra told CSHO Calderon that guards get in the way of production. (Tr. 65-66, 71-72). On January 11, 2018, CSHO Calderon notified Thomas Vavra that both up-cut saws needed to be guarded. (Tr. 66).

On January 19, 2018, the Whirlwind and Northtech up-cut saws used by employees were not adequately guarded to protect Respondent's employees from point of operation hazards. (Tr. 12, 64-67, 70-74, 132-35; Ex. 9). The blades of both up-cut saws are engaged by foot pedals which move the blades upward to cut wood. (Tr. 65, 378-79). On January 19, 2018 the guards installed for the points of operation on both up-cut saws did not fully guard employees from point of operation hazards. The guards still allowed for contact at the point of operation. (Tr. 66-67, 72; Ex. 9, at 1, "A", at 3, "B").

The photographs at pages 1 and 3, Exhibit 9, taken by CSHO Calderon on January 19, 2018, show a partial guard at page 1, "A", and page 3, "B", on the Whirlwind up-cut saw. (Tr. 66-68; Ex. 9, at 1, "A", at 3, "B"). On January 19, 2018, CSHO Calderon observed Mr. [redacted] using the Whirlwind upcut saw with his hands about an inch from the point of operation.[37] (Tr. 67-70; Ex. 9, at 3, "A"). Employees' hands had to be so close to the point of operation because the employees "were required to push the wood to keep it in place on the saw." (Tr. 70).

CSHO Calderon measured the one-inch distance from the employee's hands to the point of operation on the Northtech upcut saw. (Tr. 72). Mr. [redacted] also told CSHO Calderon that the distance of the exposed additional space at the Northtech upcut saw was approximately four inches. (Tr. 72-73).

[37] CSHO Calderon measured the distance of Mr. [redacted]'s hand to the point of operation on the Whirlwind upcut saw. The guard did not completely cover the exposed area. (Tr. 70-73). CSHO Calderon testified that adequate guarding was commercially available for both upcut saws. (Tr. 74-75). Mr. Vavra testified that he was aware of larger saw guards being available but asserted that their use created more danger for the operator. (Tr. 380-83; Exs. 9, 19, at 14-17).

On both up-cut saws, approximately four inches were exposed between the bottom of the guards and the points of operation. (Tr. 70-73; Ex. 9, at 1, "A", at 3, "B"). On both up-cut saws, employees' hands were approximately one inch from the point of operation when the saws were in use. (Tr. 70-72; Ex. 9, at 3). The position of the guards on the up-cut saws were in plain view. (Ex. 9). Respondent's failure to adequately guard the points of operation on the Whirlwind and Northtech up-cut saws exposed approximately four employees, including Mr. [redacted], to serious physical injury such as amputation. (Tr. 73-75, 137).

6. Citation 1, Item 6

On January 19, 2018, the pressure of two compressed air guns used by Respondent's employees every workday to clean wood dust off machinery was not reduced to less than 30 pounds per square inch (p.s.i.). (Tr. 12, 76-81, 429; Ex. 10). The two compressed air guns were hooked up to a compressed air tank that had pressure at 90 p.s.i. (Tr. 161). Using an air pressure gauge, CSHO Calderon measured the pressure of the compressed air gun at the Maureen Johnson wood saw at 40 p.s.i. and at the Cantek planer[38] cleaner at 50 p.s.i., respectively. (Tr. 77-78). CSHO Calderon observed two employees using the compressed air guns during her onsite inspection in January 2018. (Tr. 77, 80). The photograph at Exhibit 10, at 1, taken by CSHO Calderon in January 2018, shows an employee at the Cantek planer using an air gun without a reducer to clean off the wood dust from the equipment. (Tr. 78-83; Ex. 10, at 1). Thomas Vavra was aware that the two compressed air guns did not have reducers. He told CSHO Calderon that reducers "were no longer being used." (Tr. 80-81, 429). Respondent's failure to reduce the air pressure on two compressed air guns used for cleaning purposes to below 30 p.s.i. exposed approximately four employees, including Messrs. [redacted] and [redacted], to serious physical

[38] CSHO Calderon testified that a Cantek planer "parallels the wood." (Tr. 78, 109). It takes an inch and an eight thick rough, hard lumber and planes it down to about 15/16th of an inch. (Tr. 419-20).

injury such as cuts to the skin, lacerations and/or embolisms. (Tr. 79-83).

7. Citation 1, Item 7

On January 11 and 19, 2018, the circuit breaker box powering various machinery at Respondent's workplace was missing a dead front enclosure.[39] (Tr. 13, 83-85, 142; Ex. 12). The photograph at Exhibit 12, at 1, taken by CSHO Calderon on either January 11 or January 19, 2018, shows that the dead front was missing on the bottom half of the breaker box. (Tr. 85, 162; Ex. 12, at 1, "C"). Employees used the circuit breaker box to switch breakers for various machines every day. (Tr. 86-87, 91). The door to the circuit breaker box was left open and the exposed electrical parts were in plain view. Exposure allegedly occurred when the door was left open or when the door was opened whereupon in either instance employees were exposed to live parts because the dead front was missing. (Tr. 87, 91, 142, 161-62; Ex. 12). CSCO Calderon also testified that an employee could allegedly still be exposed to electrical shock or fire caused by the uncovered conduits and circuits inside even where the circuit breaker door was closed. (Tr. 143-44). Respondent's failure to enclose all live electrical parts in the circuit breaker box allegedly exposed approximately two employees, including Messrs. [redacted] and [redacted], to serious physical injury such as electrical shock when they switched breakers. (Tr. 86-87; 144).

8. Citation 1, Item 8

a. Citation 1, Item 8a

On January 11 and 19, 2018, the circuit breaker box powering various machinery, including the planer, chop saw, and end matcher, at Respondent's workplace had live openings missing filler plates. (Tr. 13, 89-90; Ex. 12). Employees used the circuit breaker box to switch breakers for various machinery every day. (Tr. 86-87, 91). The photograph at exhibit 12, page 1, taken by

[39] CSHO Calderon defined a "dead front" as "a cover to the circuit breaker box." (Tr. 142).

CSHO Calderon on either January 11 or January 19, 2018, shows the missing filler plates at "A", "B", and "C". (Tr. 89; Ex. 12). The photograph at exhibit 12, page 2, taken by CSHO Calderon on either January 11 or January 19, 2018, shows the missing filler plate at "A". (Tr. 89; Ex. 12, at 2, "A"). The door to the circuit breaker box was left open and the exposed electrical parts were in plain view. (Tr. 87, 91, 142, 161-62; Ex. 12). Respondent's failure to close all live openings in the circuit breaker box exposed approximately two employees, including Messrs. [redacted] and [redacted], to serious physical injury such as electrical shock. (Tr. 91).

b. Citation 1, Item 8b

On January 11 and 19, 2018, a conduit box connected to the chipper was missing a cover. (Tr. 13, 91-92; Ex. 11). The conduit box connected to the chipper contained electrical conduit and wood chips. The conduit box was only covered with cardboard and duct tape. (Tr. 92; Ex. 11). The conduit box was in plain view. (Tr. 93-94; Ex. 11). The photograph at exhibit 11, page 1, taken by CSHO Calderon on either January 11 or January 19, 2018, shows the conduit box covered with a "piece of cardboard and tape." (Tr. 92; Ex. 11, at 1). The photograph at exhibit 11, page 2, taken by CSHO Calderon on either January 11 or January 19, 2018, shows that the inside of the conduit box contains conduit and wood chips. (Tr. 92; Ex. 11, at 2). Respondent's failure to properly cover the conduit box connected to the chipper exposed all ten to fourteen employees to a fire hazard. (Tr. 93).

9. Citation 2, Items 1a and 1b (Alleging Willful, Repeat, and Serious violations in the alternative)

a. Citation 2, Item 1a:

On January 11 and 19, 2018, Respondent failed to establish a program consisting of energy control (lockout/tagout) procedures, employee training and periodic inspections for employees who performed servicing and/or maintenance on machines such as the planer, rip saw/ripper,

moulder and upcut saws.[40] CSHO Calderon testified that an energy control program is required when an employee could potentially be exposed to equipment reenergizing while they are performing maintenance, service or fixing the machine. (Tr. 13, 95-96, 157-58, 163-65, 258, 331, 337, 386, 451-52; Ex. 18, at 1-2, ¶¶ 3-5, Ex. 38, at 34, 37-38). Respondent's employees regularly performed servicing and/or maintenance on the planer, rip saw/ripper, moulder and upcut saws such as replacing blades and knives and applying lubricant. (Tr. 96, 102-03, 108-12, 334, 403, 433, 447-49, 458-59, 468; Ex. 38, at 39-40). Respondent failed to train any employees who performed servicing and/or maintenance on the planer, rip saw/ripper, moulder and upcut saws on energy control procedures (lockout/tagout).[41] (Tr. 98-104, 434; Ex. 18, at 1-2, ¶¶ 5, 9, Ex. 38, at 36). Respondent failed to do periodic inspections of energy control procedures at the workplace for employees who performed servicing and/or maintenance on machines such as the planer, rip saw/ripper, moulder and upcut saws.[42] (Tr. 104; Ex. 18, at 1, ¶¶ 3-4). Although there

[40] Thomas Vavra told CSHO Calderon that Respondent did not have an energy control program. (Tr. 95). At trial, Mr. Vavra admitted that Respondent did not have any written procedures for any energy control program. (Tr. 331). In its Post-Trial Brief, Respondent argues that it had an unwritten "program" that had a limited number of trained employees authorized to perform maintenance on a machine. (Resp't Post-Trial Br., at 9). The Court rejects this argument and finds Respondent did not have an energy control program of any kind, written or otherwise. It also did not have specific energy control procedures. (Tr. 95-98, 102-14, 157-58, 163-67, 171-72, 331, 334, 337, 386, 434; Exs. 9, 13-16, Ex. 18, at 1-2, ¶¶ 3-5, Ex. 38, at 34, 38-40). Messrs. Thomas Vavra, Anthony Vavra, [redacted], [redacted] and [redacted] all told CSHO Calderon Respondent did not have a procedure in place for when they were performing maintenance or servicing machines. (Tr. 157). They all told her they only turned off the machine at the power source. (Tr. 158, 163-64). At trial, Mr. Vavra denied that Respondent's energy control procedures were simply turning the machines off. (Tr. 331-32). This testimony was contradicted at his deposition and at trial. At his October 23, 2019 Rule 30(b)(6) deposition, Mr. Vavra said that Respondent's procedure for de-energizing its saws was "a simple task of just turning off. It's like a light switch. You just shut it off." (Tr. 332-33; Ex. 38, at 39). He also admitted that there were no other energy control procedures in place other than turning the machine off. (Tr. 333; Ex. 38, at 40). At trial, Jeffrey Prebish, Area Director (AD) of the Syracuse area office, testified that Respondent was not only required to turn its machines off, but also required to verify that the machine is isolated by bleeding any stored energy from the system to prevent it from restarting. (Tr. 258-60).

[41] Thomas Vavra told CSHO Calderon that Respondent's employees had not been trained on lockout/tagout or energy control procedures. (Tr. 98). Messrs. [redacted], [redacted] and [redacted] told CSHO Calderon that they had not been trained on lockout/tagout or energy control. (Tr. 103-04). At trial, Mr. Vavra testified that Respondent "don't have training on lockout/tagout." (Tr. 434). The Court finds that Respondent's assertion in its responses to Interrogatory No. 12a and 13a that Messrs. [redacted] and [redacted] had been trained in lockout/tagout procedures to be without adequate basis. (Tr. 432-34; Ex. 19, at 10-11).

[42] Thomas Vavra told CSHO Calderon that Respondent had not performed any periodic inspections of its machines for lockout/tagout purposes. (Tr. 104).

were unopened locks and tags present at the workplace, none were used to lockout and/or tagout energy prior to OSHA's 2018 inspection. (Tr. 97-98, 334; Ex. 16, at 2-3, Ex. 38, at 42-43). Respondent's failure to establish a program consisting of energy control (lockout/tagout) procedures, employee training and periodic inspections exposed employees, including Messrs. [redacted], [redacted], and [redacted], to serious physical injuries such as amputation in the event a machine unexpectedly restarted while the employees were performing servicing and/or maintenance. (Tr. 102-05). Respondent failed to develop, document and/or utilize specific procedures for the control of potentially hazardous energy for employees who performed servicing and/or maintenance on machines such as the planer, rip saw/ripper, moulder and upcut saws. (Tr. 95-98, 102-14, 157-58, 163-67, 171-72, 331, 334, 337, 386, 434; Exs. 9, 13-16, Ex. 18, at 1-2, ¶¶ 3-5, Ex. 38, at 34, 38-40). The planer, rip saw/ripper, moulder and upcut saws on which Respondent's employees performed servicing and/or maintenance were all powered by both electricity and air. (Tr. 105-13, 165-66, 460, 481-82; Ex. 15, at 2). Respondent's failure to develop, document and/or utilize specific procedures for the control of potentially hazardous energy exposed employees, including Messrs. [redacted], [redacted], and [redacted], to serious physical injury such as amputation in the event a machine unexpectedly restarted while the employees were performing servicing and/or maintenance.[43] (Tr. 114-15).

THD was issued a citation for "Serious" violation of 29 C.F.R. § 1910.147(c)(1) on June 12, 2012 in Inspection No. 330566 (Citation 1, Item 3) as a result of a April 10, 2012 OSHA

[43] While admitting Respondent had no written procedures, Mr. Vavra further said when he personally serviced the planer he de-energized it by turning the power off by pressing three buttons, depressing the emergency stop, and turning off the breaker at a panel. He said that only he, Anthony Vavra and Mr. [redacted] service the planer. Mr. Vavra said it was possible, but highly unlikely, for someone to turn on the power to the planer while it was being serviced. (Tr. 386-95). Mr. [redacted] testified that when servicing the moulder he de-energized it by pressing six buttons on the control panel and then hitting the emergency stop button and lifting the lid. (Tr. 449). Mr. [redacted] said he did not use lockout/tagout procedures on the moulder. (Tr. 451-52).

inspection at 99 Harris Street, Fulton, New York 13069, the same inspection site as in this case.[44] (Jt. Pre-Hrg. Stmt., § 4(e); Tr. 328-29; Ex. 29, at 1, 3). On August 30, 2012, Thomas Vavra signed an abatement certification on behalf of THD certifying that the violation of 29 C.F.R. § 1910.147(c)(1) contained in the citation issued for Inspection No. 330566 had been corrected/abated on April 24, 2012. (Jt. Pre-Hrg. Stmt., § 4(g); Tr. 264-65, 330; Ex. 31).[45] On or about August 30, 2012, Thomas Vavra sent a signed letter to the Syracuse OSHA Area Office representing that the violation of 29 C.F.R. § 1910.147(c)(1) contained in the citation issued in Inspection No. 330566 had been abated.[46] (Tr. 356; Ex. 30). In November 2012, Thomas A. Vavra signed a Stipulated Settlement on behalf of THD affirming the citation for violation of 29 C.F.R. § 1910.147(c)(1) in Inspection No. 330566 and certifying that the violation had been

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[44]The citation was addressed to Thomas Vavra, Treasurer. (Ex. 29, at 1). The citation stated:

> 29 CFR 1910.147(c)(1): The employer did not establish a program consisting of an energy control procedure, employee training and periodic inspections to ensure that before any employee performed any servicing or maintenance on a machine or equipment where the unexpected energizing, startup or release of stored energy could occur and cause injury, the machine or equipment would be isolated from the energy source and rendered inoperative:
>
> a) At establishment, on or about 4/10/12: Where employees perform servicing and/or maintenance on various machinery and equipment, including, but not limited to moulder, grinder, end match machine, saws, dust collection system, etc., the employer had not established a lockout/tagout program which includes written energy control procedures, employee training and periodic inspections, to prevent the unexpected energizing, start up or release of stored energy of the equipment.
>
> Abatement certification must be submitted for this item.
>
> Date by which Violation must be abated: 07/12/2012

(Ex. 29, at 3).

[45] The certification stated, in pertinent part:

List the **SPECIFIC** method of correction for **EACH** item on the citation and the date of correction (emphasis in original): …

Citation # 01 Item # 003 An energy control program with a lock out tag out procedure has been developed and implemented. It's inclusive of procedures, training and inspections.

Completion date: 4/24/12

…

Endorsement

I certify that all violations on the subject citation have been corrected/abated and that the information provided is accurate.

Signature – Thomas A. Vavra

Date: 8/30/12

(Ex. 31).

[46] AD Prebish testified that this representation was false. (Tr. 265, 291).

abated.[47] (Jt. Pre-Hrg. Stmt., § 4(h); Tr. 263-64, 329-30, 336, 357; Ex. 32). The representations made in the abatement certification, letter to OSHA and Stipulated Settlement signed by Thomas Vavra relating to abatement of the citation for violation of 29 C.F.R. § 1910.147(c)(1) in Inspection No. 330566 were, at best, not accurate. (Tr. 337; Exs. 30-32, 38, at 40-41). The citation issued to THD for violation of 29 C.F.R. § 1910.147(c)(1) on June 12, 2012 in Inspection No. 330566 became a final order of the Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(i)). The violation of 29 C.F.R. § 1910.147(c)(1) contained in the citation for Inspection No. 330566 was substantially similar to the violation of 29 C.F.R. § 1910.147(c)(1) as cited in Citation 2, Item 1a in Docket No. 18-1212.

b. Citation 2, Item 1b

Thomas Vavra told CSHO Calderon that Respondent had not developed specific procedures to control potentially hazardous energy for its Cantek planer, Maureen ripsaw, the [LMC 630] moulder, and the Whirlwind and Northtech upcut saws.[48] (Tr. 105-06). CSHO Calderon testified that lockout/tagout procedures were required for the moulder because moulders have multiple energy sources, such as electrical and air (also pneumatic).[49] (Tr. 107, 258-59, 460).

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[47] The STIPULATED SETTLEMENT stated in pertinent part:
3. Respondent affirmatively states that:
(a) All violations alleged in the citation(s) have been abated.
(Ex. 32, at 2).

[48] Respondent agrees it did not document any such procedures but argues "that amounts to no more than a technical rule violation." (Resp't Post-Trial Br., at 10). The cited standard requires procedures to be "developed, *documented* and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section." (emphasis added). The Court finds that all of the elements to the "Exception" to documenting found in the NOTE to 29 CFR § 1910.147(c)(4)(i) did not exist; e.g. (1) where energy has not been completely dissipated, and (2), as the machines had multiple energy sources. The exception does not apply here. (Tr. 107-13, 154-56, 164-67, 171-72; Sec'y Post Hrg. Br., at 5-6). The Court further finds Respondent violated the cited standard by not developing, documenting and utilizing procedures to control potentially hazardous energy for its Cantek planer, Maureen ripsaw, the [LMC 630] moulder, and the Whirlwind and Northtech upcut saws on January 11 and 18, 2018.

[49] AD Prebish testified that to deenergize the electric source a company generally shuts the machine off at either the breaker or motor control center. He said to deenergize an air source a company shuts "off the valve and then bleed the air that's remaining in the line between the switch or the valve and the machinery." AD Prebish said these procedures were not taken at Timberline. (Tr. 259-60).

She said she never observed a lock on the lockout point of a moulder. (Tr. 107-08; Ex. 13, at 3). Two photographs at exhibit 13, taken by CSHO Calderon on either January 11 or 18, 2018, show the moulder. (Tr. 106-07; Ex. 13, at 1-2). CSHO Calderon testified that Mr. [redacted] told her that employees performed service or maintenance on moulders, including changing knives, on an as needed basis. (Tr. 108). At trial, Mr. [redacted] testified that he switched knives on the moulder "probably once or maybe twice a week." Knives, also referred to as blades, are switched to provide "a better outcome on the flooring, the finish, and everything." (Tr. 448, 459).

The photograph at exhibit 14, taken by CSHO Calderon on either January 11 or 18, 2018, shows the Cantek planer. (Tr. 109; Ex. 14, at 1). CSHO Calderon said she never observed a lock on the lockout point of the Cantek planer. (Tr. 110; Ex. 14, at 3-4). CSHO Calderon testified that lockout/tagout procedures were required for the Cantek planer because it had multiple energy sources, such as electrical and air. (Tr. 110, 258-59, 481-82). CSHO Calderon testified that Mr. [redacted] told her that employees performed service or maintenance on the Cantek planer, including changing knives, bimonthly. (Tr. 110-11).

The photograph at exhibit 15, taken by CSHO Calderon on either January 11 or 18, 2018, shows the Whirlwind Upcut saw. (Tr. 111; Ex. 15, at 1). CSHO Calderon testified that specific procedures for energy control were required for the Whirlwind Upcut saw because it had multiple energy sources, such as electrical and air. (Tr. 110, 258-59). CSHO Calderon testified that Mr. [redacted] told her that employees performed service or maintenance on the Whirlwind Upcut saw, including changing knives. (Tr. 111-12).

CSHO Calderon testified that specific procedures for energy control were required for the Maureen-Johnson Ripsaw because it had multiple energy sources, such as electrical and air. (Tr.

112-13). CSHO Calderon testified that [redacted] told her that employees performed service or maintenance on the Maureen-Johnson Ripsaw, including changing knives six times per week.[50] (Tr. 112-13).

CSHO Calderon testified that lockout/tagout procedures were required for the Northtech saw because it had multiple energy sources, such as electrical and air. (Tr. 110). CSHO Calderon testified that Mr. [redacted] told her that employees performed service or maintenance on the Northtech saw, including changing knives, bimonthly. (Tr. 113-14).

Respondent's failure to develop, document and/or utilize specific procedures for the control of potentially hazardous energy on the Cantek planer, Maureen-Johnson Ripsaw, LMC 630 moulder, and Whirlwind and Northtech upcut saws, exposed employees, including Messrs. [redacted], [redacted], and [redacted], to serious physical injury such as amputation in the event a machine unexpectedly restarted while the employees were performing servicing and/or maintenance, including changing knives and blades. (Tr. 114-15).

The violation of 29 C.F.R. § 1910.147(c)(1) contained in the 2012 citation for Inspection No. 330566 was substantially similar to the violation of 29 C.F.R. § 1910.147(c)(4)(i) as cited in Citation 2, Item 1b in Docket No. 18-1212.

10. Citation 2, Item 2 (Alleging Willful, Repeat, and Serious violations in the alternative)

Respondent failed to train and evaluate all employees who operated PITs to ensure that they were competent to operate them safely.[51] (Tr. 115-18, 159, 337-39, 461, 476, 484-85; Exs. 17,

[50] At trial, [redacted] denied telling CSHO Calderon that he changed saw blades six times a week. (Tr. 469). He also said when servicing the ripsaw he pressed the emergency stop button to stop the ripsaw, shut off the main breaker five feet away, and put a sleeve over the end of the shaft to stop it from turning. (Tr. 469-73). When changing fuses, he also opens the door to the main fuse box which also stops the machine from being turned on. (Tr. 473). He agreed that a tag could be used to lock down the power switches but that would not be good because the switches are five feet away from him. He said no one could get to the main breaker because he would be standing next to it when changing blades. (Tr. 475-76).

[51] Respondent concedes its forklift operators "have not undergone formal safety training", but argues the forklifts "are

18, at 2, ¶¶ 7, 9, Ex. 38, at 43-44). At the time of the 2018 OSHA inspection, two forklifts were routinely operated by Mr. Vavra and employees at the workplace. Two employees use a forklift to bring lumber to equipment such as the moulder. Mr. [redacted] testified that a forklift is used about twelve times each eight-hour day to bring lumber to the moulder. A third forklift is available as a backup. (Tr. 116, 337-38, 395-96, 454-55, 461, 476, 484-85; Ex. 17, Ex. 38, at 43-44). Thomas Vavra told CSHO Calderon that Respondent had not trained or evaluated for competency PIT operators. (Tr. 115-16). On January 11, 2018, she observed Mr. [redacted] unsafely operating a PIT as he was not wearing a seatbelt. She also observed Messrs. [redacted] and Anthony Vavra operating a forklift. She said that a forklift was being operated the entire time she was at Respondent's worksite. (Tr. 158-60). Mr. [redacted] told CSHO that Respondent "did not train the operators or test them." [52] (Tr. 117). [redacted] told the CSHO that he had not had any training. (Tr. 159). Respondent's failure to ensure that all PIT operators were competent exposed all ten to fourteen employees to serious physical injuries from the hazard of being struck by a forklift or other materials. (Tr. 118).

THD was issued a "Serious" citation for violation of 29 C.F.R. § 1910.178(l)(1)(i) on June 12, 2012 in Inspection No. 330566 (Citation 1, Item 4). (Jt. Pre-Hrg. Stmt., § 4(f); Tr. 328-29; Ex. 29, at 4). On August 30, 2012, Thomas Vavra signed an abatement certification on behalf of THD certifying that the violation of 29 C.F.R. § 1910.178(l)(1)(i) contained in the citation issued for Inspection No. 330566 had been corrected/abated on April 23, 2012.[53] (Jt. Pre-Hrg. Stmt., §

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only used on a very limited basis each day." (Resp't Post-Trial Br., at 10). Respondent's argument is rejected because the use of a forklift by an untrained operator for even a limited basis each day is still a violation of the cited standard.

[52] Mr. [redacted] told CSHO Calderon that he had been provided forklift "training at a previous employer, eight years prior." (Tr. 159).

[53] The certification stated, in pertinent part:
List the **SPECIFIC** method of correction for **EACH** item on the citation and the date of correction (emphasis in original): …
Citation # 01 Item # 004 A forklift training program has been developed and implemented. It's inclusive of training with a written and driving exam.

4(g); Tr. 330; Ex. 31). On or about August 30, 2012, Thomas Vavra sent a signed letter to the Syracuse OSHA Area Office representing that the violation of 29 C.F.R. § 1910.178(l)(1)(i) contained in the citation issued in Inspection No. 330566 had been abated. (Tr. 356; Ex. 30). In November 2012, Thomas Vavra signed a Stipulated Settlement on behalf of THD affirming the citation for violation of 29 C.F.R. § 1910.178(l)(1)(i) in Inspection No. 330566 and certifying that the violation had been abated. (Jt. Pre-Hrg. Stmt., § 4(h); Tr. 339; Ex. 32). The representations made in the abatement certification, letter to OSHA and Stipulated Settlement signed by Thomas Vavra relating to abatement of the citation for violation of 29 C.F.R. § 1910.178(l)(1)(i) in Inspection No. 330566 were, at best, not accurate. (Tr. 339; Exs. 30-32, Ex. 38, at 45). The citation issued to THD for violation of 29 C.F.R. § 1910.178(l)(1)(i) on June 12, 2012 in Inspection No. 330566 became a final order of the Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(i)). The violation of 29 C.F.R. § 1910.178(l)(1)(i) contained in the 2012 citation for Inspection No. 330566 was substantially similar to the violation of 29 C.F.R. § 1910.178(l)(1)(i) as cited in Citation 2, Item 2 in Docket No. 18-1212.

IV. THE SECRETARY'S BURDEN OF PROOF

To demonstrate a *prima facie* violation of a standard under the OSH Act, the Secretary must show that: (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; and (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative

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Completion date: 4/23/12

…

Endorsement

I certify that all violations on the subject citation have been corrected/abated and that the information provided is accurate.

Signature – Thomas A. Vavra

Date: 8/30/12

(Ex. 31).

condition. *NY State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982); *see also Public Util. Maint. v. Sec'y of Labor*, 417 F.App'x. 58, 62 (2d Cir. 2011). It is sufficient for the Secretary to prove access to the zone of danger, rather than actual exposure to the immediate risk of injury or death. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 811-812 (3d Cir. 1985). The Secretary must show only that it was "reasonably certain that some employee was or would be exposed to the danger" of the cited hazard, not that an employee was actually injured or that an accident occurred. *Mineral Indus. & Heavy Constr. Group*, 639 F.2d 1289, 1294 (5th Cir. 1981).

V. DISCUSSION

A. ALL THE WILLFUL CITATION ITEMS ARE AFFIRMED.

1. The Willful Standard Under the OSH Act.

A willful violation under section 17(a) of the OSH Act is "an act done voluntarily with either an intentional disregard of, or plain indifference to the Act's requirements." *A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1345 (D.C. Cir. 2002) (citing *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1127 (D.C. Cir. 2001)). Such a violation is distinguished from other types of violations by the employer's heightened awareness of the violative nature of its conduct or the conditions at its workplace. *A Schonbek & Co. Inc. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981). The Second Circuit, in which this case arises, adopted the Commission's and OSHA's definition of a willful violation as one "done either with intentional disregard of, or plain indifference to, the statute." *See Am. Recycling & Mfg. Co., Inc. v. Sec'y of Labor*, 676 F.App'x. 65, 69 (2d Cir. 2017) (unpublished); *A Schonbek & Co. Inc.*, 646 F.2d at 800.

Intentional or conscious disregard must be established by evidence "that an employer

knew of an applicable standard or provision prohibiting the conduct or condition, and consciously disregarded the standard." *Caterpillar, Inc.*, No. 87-0922, 1993 WL 44416, at *23 (O.S.H.R.C., Feb. 5, 1993). "Plain indifference" may be inferred where "if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it." *Id*. In addition to knowledge or plain indifference, other factors can be considered in assessing the appropriateness of a willful violation. These factors include the employer's general attitude towards safety and good faith efforts made to comply. *See e.g., Asbestos Textile Co., Inc.*, No. 79-3831, 1984 WL 34962, at *1 (O.S.H.R.C., Oct. 31, 1984); *Mobile Oil Corp.*, No. 79–4802, 1983 WL 23910, at *1 (O.S.H.R.C., Oct. 28, 1983). "An employer that consciously disregards an OSHA standard acts willfully even though it believes in good faith that the violation is not hazardous to employees." *Sec'y v. Capital Citv Excavating Co., Inc.*, 712 F.2d 1008, 1010 (6th Cir. 1983).

An act may be willful if the employer shows "indifference to the rules; he need not be consciously aware that the conduct is forbidden at the time he performs it, but his state of mind is such that, if he were informed of the rule, he would not care." *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004); *Brock v. Morello Bros. Constr., Inc*. 809 F.2d 161, 164 (1st Cir. 1987); *see also Capeway Roofing Sys., Inc. v. Chao*, 391 F.3d 56, 60-61 (1st Cir. 2004). (Sec'y Post Hrg. Br., at 29-30).

2. Respondent's Conduct was Willful.

The record establishes that Respondent, generally through Thomas Vavra's knowledge and actions, exhibited both intentional disregard and plain indifference to the requirements for all of the willfully cited standards, as addressed in detail below.

Mr. Vavra, co-owner and sole manager of Respondent, had a heightened awareness of the

hazardous conditions presented by all the willful violations in this case because his nearly identical predecessor company located at the same workplace, THD, Inc., was cited in July 2012 for violation of all the same standards where willful violations are now alleged. (Tr. 328-29, 341, 354; Ex. 29, at 3-4, Ex. 33, at 2-4, Ex. 38, at 50, 57; Jt. Pre-Hrg. Stmt., §§ 4(j)-(n)). THD also manufactured hardwood flooring, operated out of the same address, used the same equipment and employed many of the same employees as Respondent. (Tr. 326-27, 364, 438, 464, 494; Ex. 38, at 14, 16, 19). The prior 2012 citations addressed the same hazardous conditions as all the willful items in Docket Nos. 18-1211 and 18-1212. "[A] willful violation can be found where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist." *J.A. Jones Constr. Co.*, No. 87-2059, 1993 WL 61950, at *9 (O.S.H.R.C., Feb. 19, 1993).

In addition to his heightened awareness of the requirements of the standards as a result of receiving those 2012 citations, Mr. Vavra also signed settlement agreements with the Secretary affirming all the prior 2012 citations, yet never took meaningful steps to comply with those standards. (Exs. 32, 35). Mr. Vavra failed to come into compliance with the cited standards. He also affirmatively misled OSHA in multiple documents by claiming that THD had abated the 2012 violations, when it had not. On August 30, 2012, Mr. Vavra signed a letter and abatement certifications on behalf of THD certifying that all the cited violations had been corrected/abated in April 2012. (Tr. 330, 341-43, 353, 356; Exs. 30-31, 34).

In November 2012, Mr. Vavra signed two Stipulated Settlement Agreements on behalf of THD affirming all the prior citations and again certifying that they had all been abated. (Tr. 329-30, 336, 339, 341, 357; Exs. 32, 35). As set forth below, all Mr. Vavra's representations regarding the supposed abatement of the 2012 citation items issued to THD in 2012 were, at best,

inaccurate. Mr. Vavra's misrepresentations to OSHA in 2012 are evidence that support a finding of willful conduct in 2018. *See Hardaway Co.*, No. 89-64, 1990 WL 118151, at *7 (O.S.H.R.C.A.L.J., Feb. 5, 1990); *Kilby & Gannon Constr. Serv., LLC*, No. 10-0755, 2012 WL 10829293, at *18 (O.S.H.R.C.A.L.J., May 14, 2012).

Not only had Mr. Vavra not abated the 2012 citations at the time he claimed to have done so, he still had not come into compliance with any of the standards cited in Docket Nos. 18-1211 and 18-1212 at the time of OSHA's inspections in January 2018, nearly six years later. "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." *Branham Sign Co.*, No. 98-752, 2000 WL 675530, at *2 (O.S.H.R.C., May 15, 2000). Supervisor [redacted] exemplified Respondent's indifference to workplace safety when he testified that they do not use lockout/tagout procedures on the moulder because "you wouldn't make any money."[54] (Tr. 453). For all of the willful items in this case, Mr. Vavra had heightened awareness of the violations, knew Respondent was not in compliance with the cited standards and misled OSHA about THD having abated the conditions. The willful items are affirmed as cited. (Sec'y Post Hrg. Br., at 30-32).

3. The Willful Citation Items Are Also Repeat Violations.

All the items cited as willful were also repeat violations under section 17(a) of the OSH

[54] Mr. [redacted] testified:
Q So I'll ask again. Does lockout/tagout procedure offer any more safety to keeping the machine powered off when you're working on it?
A No.
Q And why is that?
A It'd be more of a process. I mean we wouldn't be getting nothing accomplished in a day. As many times I've switched the sizes on that machine a day, I mean, lockout/tagout you wouldn't make any money.
(Tr. 453).

Act, 29 U.S.C. § 666(a). A violation is repeated if, at the time of the time of the alleged repeated violation, there was a Commission final order against the same employer for substantially similar violations. *Potlach Corp.*, No.16183, 1979 WL 61360, at *3 (O.S.H.R.C. Jan. 22, 1979).

As discussed above, on June 12, 2012, Respondent's predecessor THD was issued safety and health citations for violations of the same OSHA standards that were cited in the willful citations in Docket Nos. 18-1211 and 18-1212. (Exs. 1, 20, 29, 33). Mr. Vavra signed Stipulated Settlement Agreements with the Secretary affirming all of the 2012 citations in November 2012. (Exs. 32, 35). All of the citations issued to THD in June 2012 became a final order of the Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(k) (Docket No. 18-1211), Jt. Pre-Hrg. Stmt., § 4(i) (Docket No. 18-1212)).

The citations issued to THD in 2012 are a proper basis for a repeat classification of citations in this case. In *Sharon & Walter Constr., Inc.*, No. 00-1402, 2010 WL 4792625 (O.S.H.R.C., Nov. 18, 2010), the Commission found that citations against a predecessor entity may be used against the successor if there is substantial continuity between them. *Id.,* at *11. The Commission adopted the "substantial continuity" test used by the National Labor Relations Board (NLRB) which looks to the following factors: (1) whether the businesses of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products and basically has the same body of customers. *Id.,* at *9*; see Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

The Commission viewed the substantial continuity test formulated by the NLRB as focusing on three categories of factors. The first category examines the nature of the business

and is important "because continuity in the type of business, products/services offered and customers served indicates that there has been no substantive change in the enterprise. Such continuity also typically indicates that the nature of the activities associated with the business and the inherent safety and health considerations are likewise unchanged." *Sharon & Walter Constr., Inc.*, 2010 WL 4792625, at *10. The second category examines the jobs and working conditions which "is especially relevant under the Act because of its close correlation with particular safety and health hazards." *Id.* The third category looks to the personnel who control decisions regarding safety and health and is important "because the decisions of such personnel relate directly to the extent to which the employer complies with the statute's requirements." *Id.,* at *10.

Here, all three criteria of the Commission's substantial continuity test weigh strongly in favor of successor liability. The first and second criteria, nature of the business and personnel, are both met because Respondent is engaged in the same exact same type of business activity (hardwood flooring manufacturing) as THD, operating out of the same location, employing the same employees, and using the identical machinery and equipment. (Tr. 323-28, 364, 438, 464, 494; Exs. 29-30, 33, Ex. 38, at 14, 16, 19). Mr. Vavra testified that other than a change in the identities of his co-owners, there was no difference at all between THD and Respondent. (Tr. 328; Ex. 38, at 19-20). The third criteria, continuity of decision-making personnel, is similarly met because Mr. Vavra solely ran both the day-to day business of THD in 2012 as well as the day-to–day business of Respondent. (Tr. 324-26; Ex. 38, at 9-15). Mr. Vavra was responsible for Respondent's safety programs, training Respondent's employees on safety and ensuring Respondent's compliance with OSHA standards. (Tr. 325-26; Ex. 38, at 13-14). "Substantial continuity" has been shown. As such, the citations issued to THD in 2012 can be used as a basis

for repeat classifications in Docket Nos. 18-1211 and 18-1212. (Sec'y Post Hrg. Br., at 32-34).

B. DOCKET NUMBER 18-1211

1. Citation 1, Item 1: Willful Failure to Establish a Hearing Conservation Program

a. Respondent Violated 29 C.F.R. § 1910.95(c)(1).

29 C.F.R. § 1910.95(c)(1) requires that an employer shall administer a continuing, effective hearing conservation program whenever employee noise exposures equal or exceed an 8-hour TWA sound level of 85 dBA. (Tr. 274, 301). The 8-hour TWA of 85 dBA is referred to in the standard as the "action level." 29 C.F.R. § 1910.95(c)(2). When employees are exposed to noise above the action level, the employer is required to administer a hearing conservation program that includes monitoring of sound levels in the workplace, notifying employees of sound levels at or above the action level, providing baseline and annual audiograms/hearing tests to employees at no cost, providing hearing protection to employees, ensuring hearing protection is worn by all employees, training employees on the hazards of noise exposure and the proper use of hearing protection and recordkeeping of the results of all employee audiograms/hearing tests. (Tr. 184). *See* 29 C.F.R. § 1910.95(c) – (n); *Reich v. Trinity Indus. Inc.*, 16 F.3d 1149, 1150 (11th Cir. 1994).

The cited standard applies because noise sampling performed by IH Maloney on January 11, 2018 established that six of Respondent's employees were exposed to continuous noise above the action level of 85 dBA. (Tr. 205, 301; Ex. 20, at 6-7, Ex. 22, at 2-3, Ex. 23). As detailed in the above Findings of Facts, the Court finds that IH Maloney's sampling results and calculations are credible and reliable and she testified in detail how she conducted noise sampling and calculated noise exposure on January 11, 2018 at the workplace. The Court finds that the allegation set forth in Citation 1, Item 1a) pertains to Mr. [redacted], 1b) pertains to Mr.

[redacted], 1c) pertains to Mr. [redacted], 1d) pertains to [redacted], 1e) pertains to [redacted], and 1f) pertains to Mr. [redacted]. (Exs. 20, 22-23). Respondent failed to comply with § 1910.95(c)(1) because it is undisputed that no hearing conservation program was administered at the workplace as of January 11, 2018. Mr. Vavra admitted that Respondent had no hearing conservation program. (Tr. 181-82, 277, 343-44; Ex. 28, at 1, ¶¶ 3-4, Ex. 38, at 45-46, 52). In its Post Trial Brief, Respondent admitted "Timberline's program did not fully comply with the statute" and acknowledged that "Timberline violated the regulation by failing to have mandatory testing procedures in place." (Resp't Post Trial Br., at 18).

Mr. Vavra had knowledge of the condition because he was put on notice on or about June 12, 2012 that as a result of an OSHA inspection in April 2012 employees working for THD at the same workplace performing the same work using the same machines as at the time of the inspection in Docket No. 18-1211 were exposed to noise levels above the eight-hour TWA sound level of 85 dBA. (Tr. 327-28, 341, 346-48; Ex. 33, at 2, Ex. 38, at 19-20, 50). The noisy conditions at the workplace were readily apparent. CSHO Calderon testified that on the first day of her onsite inspection, January 9, 2018, it was so loud in the workplace that she could barely have a conversation with someone standing close to her. (Tr. 49). As a result of the noisy conditions, she made a referral to her Area Office for a health inspection to be initiated. (Tr. 49). Despite the noisy conditions, and its knowledge of the 2012 sampling results and citation, Respondent never provided or ensured that employees had baseline and/or annual audiograms/hearing tests. (Tr. 182, 185, 227, 341-51, 420, 461, 477-78, 485, 499-502; Ex. 23, at 1, 3, 5, 7, 9, Ex. 28, at 1, ¶ 4, Ex. 33, at 2, Ex. 34, Ex. 38, at 49, 53-54). Mr. Vavra admitted that he did not make hearing tests mandatory.[55] Mr. Vavra testified that it was the employee's

[55] Mr. [redacted] testified that his prior employer required employees to have hearing tests. (Tr. 461).

responsibility to ask for a hearing test. (Tr. 184, 369-70, 398-99, 420, 456; Ex. 38, at 48).

Respondent failed to do any monitoring of noise levels at the workplace and failed to train employees on the hazards of exposure to noise. (Tr. 182-83, 344-50; Ex. 28, at 2, ¶¶ 9-10, Ex. 38, at 49-53). Although Respondent did provide employees with earplugs, it failed to ensure that all employees always wore some type of hearing protection. On January 11, 2018, CSHO saw one employee, Laborer Mr. [redacted], working by a machine not wearing ear plugs. Instead, he was wearing ear buds listening to music.[56] On January 19, 2018, she saw three employees not wearing ear plugs. IH Maloney testified that there were three employees who told her that they never wore ear plugs.[57] (Tr. 183, 250-51, 341, 344-46, 349; Ex. 21, at 2, Ex. 23, at 11, Ex. 28, at 2, ¶ 9, Ex. 33, at 2, Ex. 38, at 48-49, 53). Respondent also failed to train employees on the importance of using hearing protection and how to properly wear it. (Tr. 183-84, 250-51, 344). Failure to train the employees and to ensure the use of hearing protection was apparent because during the 2018 OSHA inspection not all employees were wearing hearing protection and one employee, Mr. [redacted], was only wearing ear buds to listen to music. (Tr. 183, 250-51; Ex. 21, at 2). Mr. Vavra testified that he left it up to the employees whether to use hearing protection and admitted that some listened to music while working. (Tr. 344; Ex. 38, at 48-49).

Respondent failed to produce any persuasive evidence to contradict or discredit the noise sampling or calculations performed by IH Maloney at the workplace. At his deposition, Mr. Vavra testified that he subjectively did not "find it's all that loud in there" but then acknowledged that OSHA found it to be otherwise. (Ex. 38, at 53). He testified at trial that he

[56] CSHO Calderon took a photograph of Mr. [redacted] wearing ear buds. (Tr. 228-29; Ex. 21, at 2).
[57] Mr. Vavra testified that to his knowledge all employees had hearing protection and they all use it except when equipment is not running in the mill. (Tr. 399-400).

never took any action to assess employees' exposure to noise prior to the OSHA inspection in January 2018. (Tr. 346). At the trial, Respondent attempted to argue that the noise sampling calculations were unreliable because the employees were not sampled for a full eight-hour period. However, both IH Maloney and AD Prebish[58] testified that the sampling and the calculation contained in Appendix A to the standard considers any time not sampled. *See* Appendix A to § 1910.95, section I(2). (Tr. 246-47, 272, 294-97). AD Prebish explained that the calculations are based on an eight-hour TWA and any time not sampled is considered zero or no exposure. (Tr. 272, 294-96). *See Swiftex Inc.*, No. 90-1393, 1992 WL 226438, at *4 (O.S.H.R.C.A.L.J., Aug. 31, 1992) (noting that "not sampling for a full eight hours is actually to the employer's advantage because any unsampled periods assume zero exposure."). The January 11, 2018 noise sampling results were also consistent with the results found in the 2012 inspection of THD. (Ex. 23, Ex. 33, at 2).

Respondent's failure to administer a continuing, effective hearing conservation program exposed at least six employees to hearing loss. (Tr. 231-32, 277-78). IH Maloney and AD Prebish both testified that the requirements of § 1910.95(c) including employee training, baseline and annual audiograms/hearing tests and proper use of hearing protection are all integral to minimize employees' hearing loss. (Tr. 184, 248-51, 279-98, 299-300). *See Reich v. Trinity Indus., Inc.*, 16 F.3d at 1151 (An employer subject to the hearing conservation program must perform baseline audiograms of employees against which subsequent audiograms may be compared); *Miniature Nut and Screw Corp.*, No. 93-2535, 1996 WL 88763, at *2 (O.S.H.R.C., Feb. 23, 1996) (An employer's failure to conduct audiometric testing may allow hearing loss to

[58] AD Prebish worked at OSHA for twelve years. At the time of the OSHA 2018 inspection he was serving as the AAD for the Syracuse area office and had served as the AAD for seven years. Before that, he was a CSHO for four years. (Tr. 255-57).

go undetected, thereby preventing the employee and his employer from becoming aware of the situation and taking appropriate remedial measures.). (Sec'y Post Hrg. Br., at 34-38).

It its Post-Trial Brief, Respondent notes that the TWA dBA level for the six noise sampled employees was between 87-92, "only barely above the 85db level where a hearing conservation program is required." It also notes that all of its employees were offered ear plugs as hearing protection devices. Consequently, Respondent argues "its violation in failing to provide [audiogram] testing and education (training) is really only a paperwork violation." (Resp't Post-Trial Br., at 11; Sec'y Reply Br., at 4).

The Court does not view Respondent's failure to comply with the cited standard as "really only a paperwork violation." Respondent's action as recounted above constitutes a clear violation of the cited standard warranting meaningful penalties.

b. Citation 1, Item 1 Was Properly Classified as Willful.

Citation 1, Item 1 was properly classified as willful.[59] As noted in section VA2 *supra*, Mr. Vavra had a heightened awareness of the requirements of § 1910.95(c)(1) because of the prior citation issued to THD. (Jt. Pre-Hrg. Stmt., § 4(e); Tr. 341; Ex. 33, at 2). *See N. Atl. Fish Co.*, No. 98-0848, 2001 WL 1263331, at *15 (O.S.H.R.C.A.L.J., July 9, 2001) (consolidated) (finding willful violation of 29 C.F.R. § 1910.95(c)(1) where employer previously warned of excessive noise levels). The noise conditions at the workplace had not materially changed from 2012 to 2018. As a result of the 2012 citation, Mr. Vavra knew that employees were exposed to noise levels above the eight-hour TWA sound level of 85 dBA. (Tr. 301, 341, 346-48; Ex. 33, at 2, Ex. 38, at 50).

[59] In its Post-Trial Brief, Respondent admits "Timberline's program did not fully comply with the statute," and "[w]hile Timberline violated the regulation by failing to have mandatory testing procedures in place, the violation was not willful." (Resp't Post-Trial Br., at 18).

In the abatement certification he signed and submitted to OSHA in August 2012, Mr. Vavra certified that corrective actions were taken to abate the hearing conservation violation.[60] The record shows that all of Mr. Vavra's representations and certifications to OSHA in 2012 that the citation for violation of 29 C.F.R. § 1910.95(c)(1) had been abated were, at best, not accurate.[61] (Tr. 343-47, 350; Exs. 30, 34-35, Ex. 38, at 52-53). At trial, Mr. Vavra admitted that other than buying earplugs, he failed to take any of the other abatement measures he attested to on the abatement certification including training, monitoring and hearing tests.[62] (Tr. 348-50). Mr. Vavra testified that as of December 11, 2019, none of Respondent's employees had received audiograms/hearing tests.[63] (Tr. 347, 350-51).

In addition, IH Maloney testified that when she asked Mr. Vavra if he had provided the employees with audiograms, his response was that he was not going to pay for employees to get

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[60] The certification stated, in pertinent part:
List the **SPECIFIC** method of correction for **EACH** item on the citation and the date of correction (emphasis in original): …
Citation # 01 Item # 001a A hearing conservation program has been developed and implemented. The program addresses monitoring, hear[sic] protection devices, employee education, training and recordkeeping. Completion date: 4/22/12
Citation # 01 Item # 001b Pursuant to the above mentioned hearing conservation program subsection hearing protection devices we have addressed the basic requirements with two device options, attenuation and employee training.
Completion date: 4/20/12
…
Endorsement
I certify that all violations on the subject citation have been corrected/abated and that the information provided is accurate.
Signature – Thomas A. Vavra
Date: 8/30/12
(Tr. 275-76; Ex. 34).

[61] At trial, Mr. Vavra testified that he felt as though THD had abated the 2012 violations. (Tr. 369).

[62] At trial, Mr. Vavra testified:
Q So the representation here that employees that the program addresses training is not true?
A Correct. I did not train them to put their earplugs in correctly.
At his October 23, 2019 Rule 30(b)(6) deposition, Mr. Vavra also stated:
Q Starting at Line 12, I asked you: "Did you train them on exposure to noise?"
Answer: "No."
(Tr. 350; Ex. 38, at 53).

[63] Messrs. [redacted], [redacted], and [redacted] testified that they never had an audiogram or hearing test while employed by Respondent. (Tr. 460, 477, 502).

a hearing test if they were not working. (Tr. 184). The company's limited "safety program" contained in its Employee Handbook is severely lacking in any substantive information. (Ex. 8, at 7-8). Respondent did not provide employees with any safety or health training. Mr. Vavra's lax attitude towards safety and health, inaccurate misrepresentations to OSHA in 2012, and lack of good faith efforts to comply with the hearing conservation standard establish the willfulness of Citation 1, Item 1. (Sec'y Post Hrg. Br., at 38-40).

c. In the Alternative, Citation 1, Item 1 was also a Repeat Violation.

The Court further finds that Citation 1, Item 1 was a repeat violation of 29 C.F.R. § 1910.95(c). (Tr. 9-10; Ex. 20, at 6-7). On June 12, 2012, Respondent's predecessor at the workplace, THD, was issued a citation for violation of 29 C.F.R. § 1910.95(c)(1) in Inspection No. 331026 (Citation 1, Item 1a). (Ex. 33, at 2). The prior citation found that two of Mr. Vavra's employees operating the same or similar woodworking machinery as in the instant case were exposed to noise levels above the action level in the same workplace. (Ex. 20, at 6-7, Ex. 33, at 2). In November 2012, Mr. Vavra signed a Stipulated Settlement on behalf of THD affirming the citation for violation of 29 C.F.R. § 1910.95(c).[64] (Ex. 35). The citation issued to THD for violation of 29 C.F.R. § 1910.95(c)(1) on June 12, 2012 in Inspection No. 331026 became a final order of the Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(k) (Docket No. 18-1211)). Because Respondent violated the same standard and employees were exposed to the same hazard of hearing loss, Citation 1, Item 1 was also a repeat violation of § 1910.95(c)(1).

d. In the alternative, Citation 1, Item 1 Was Also a Serious Violation.

In addition to being willful and repeat, Citation 1, Item 1 constituted a serious violation.

[64] The STIPULATED SETTLEMENT stated in pertinent part:
3. Respondent affirmatively states that:
(a) All violations alleged in the citation(s) have been abated.
(Ex. 35, at 1).

Section 17(k) of the Act provides:

> ...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists...in such a place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(Tr. 9-10). 29 U.S.C. § 666(k). *See Sec'y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 401 (3d Cir. 2007); *Mosser Constr., Inc.,* No. 08-0631, 2010 WL 711322, at *2 (O.S.H.R.C., Feb. 23, 2010). Serious physical harm is the type of injury that requires hospitalization and/or medical treatment and could keep an employee out of work for a few days or more. The determination as to what is considered serious physical harm is made on a case-by-case basis. In making such determination the court looks to the nature of the hazard against which the standard was intended to protect. *Anaconda Aluminum Co.*, No. 13102, 1981 WL 18874, at *20 (O.S.H.R.C., Mar. 31, 1981).

Here, at least six employees were exposed to hearing loss from prolonged exposure to noise. (Tr. 231-32). The Commission has characterized hearing loss as serious physical harm within the meaning of section 17(k) of the OSH Act. *Miniature Nut and Screw Corp.*, 1996 WL 88763, at *2 ("failure to make audiometric tests available to employees *can* result in serious physical harm.") (emphasis in original); *Sun Shipbuilding & Drydock Co.,* No. 268, 1974 WL 4588, at *2 (O.S.H.R.C., Aug. 28, 1974) (hearing impairment constitutes a serious injury where exposure occurs over a normal working lifetime). (Sec'y Post Hrg. Br., at 40-41).

e. The Secretary's Proposed Penalty for Citation 1, Item 1 is Appropriate.

Pursuant to section 17(j) of the OSH Act, in assessing penalties the Commission must give due consideration to the following factors: (1) the size of the employer's business; (2) gravity of the violation; (3) good faith; and (4) prior history of violations. 29 U.S.C. § 666(j); *L*

& L Painting, *Co.*, No. 05-0055, 2012 WL 3552925, at *18 (O.S.H.R.C., June 28, 2012); *Mosser Constr. Inc.*, 2010 WL 711322, at *4; *Valdak Corp*., No. 93-0239, 1995 WL 139505, at *4 (O.S.H.R.C., Mar. 29, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Gravity of a violation is the primary factor in the penalty assessment. The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury could result. *Mosser Constr.,* 2010 WL 711322, at *4; *Valdak Corp.,* 1995 WL 139505, at *4.

As discussed above, Respondent's violation of § 1910.95(c)(1) was willful, repeat and serious. The gravity of a violation is determined by its severity and its probability. AD Prebish testified that the gravity-based penalty proposed for Citation 1, Item 1 was $129,336 because the gravity of the violation was rated "High (Severity)" and "Greater (Probability)." [65] (Tr. 278-79). All six exposed employees gave IH Maloney information regarding their work activity and how long they did it every day (usually 8 hours) and she recorded that information on the Noise Survey Reports at Box 12.c. (Tr. 217-18, 226-27; Ex. 23, at 1, 3, 5, 7, 9, 11). The six employees had worked for Mr. Vavra at the workplace for periods ranging from five to eighteen years. (Tr. 217; Ex. 23, at 1, 3, 5, 7, 9, 11, Box 12.b.). They were exposed to noisy conditions without audiograms or other hearing conservation precautions for long periods of time. Given the risk of hearing loss and the willful and repeat nature of the violation, OSHA used appropriate judgment in determining the gravity of the violation. (Tr. 231-32, 278).

AD Prebish testified that the gravity-based penalty was reduced by 60% for size based on of the number of employees Respondent had at the time of the inspection. (Tr. 278). According

[65] In 2018, the maximum penalty for a willful or repeat violation was $129,336. 29 C.F.R. §§ 1903.15(d)(1) and (d)(2) (2018).

to OSHA's Field Operations Manual (FOM) (Directive CPL 02-00-163), Chapter 6, VI.B., at 6-14, the maximum size reduction allowed for serious willful citations for employers with 11-20 employees was 60%.[66] (Tr. 266-67). At the time of OSHA's 2018 inspection, Respondent had about ten to fourteen employees. (Tr. 51, 231, 235, 364). AD Prebish further testified that no reductions were given for good faith in any of the citation items issued in this case because Respondent was issued several willful citations and its safety program was severely lacking. (Tr. 267, 278; Ex. 8, at 7-8). *See* OSHA FOM Chapter 6, III.B.3.a., at 6-8. AD Prebish also testified that Respondent received no penalty adjustment for history because it had not been inspected by OSHA in the five years prior to the issuance of the citations in this case. (Tr. 267, 278; Sec'y Reply Br., at 3). *See* OSHA FOM Chapter 6, III.B.2.c., at 6-8.

OSHA made appropriate and supported determinations of all of the required factors. (Tr. 279). The Court has considered all of the required factors and affirms Citation 1, Item 1, as a willful, repeat and serious violation and the proposed adjusted gravity-based penalty of $51,734.

2. Citation 1, Items 2a, 2b, and 2c: Willful Failure to Comply with the Requirements for Hazardous Chemicals.

a. Respondent Violated 29 C.F.R. § 1910.1200(e)(1).

29 C.F.R. § 1910.1200(e)(1) requires that employers develop, implement and maintain a written hazard communication program which describes how the criteria specified in § 1910.1200(f), (g) and (h) will be met. The cited standard applies because employees used and were exposed to hazardous chemicals and materials at the workplace, including flammable materials, carcinogens, and ear, nose and throat irritants from propane, lubricant and wood dust. (Tr. 233-34, 237-39, 402-03, 456-57, 478; Exs. 24-27, Ex. 38, at 55). The safety data sheet for

[66] The penalty reduction provisions contained in OSHA's FOM that were in effect in 2018 are the same as in the current version of the FOM which is available online at https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-163.pdf.

the TC Bed Lube[67] used at the workplace as lubricant for machinery indicates that it "[m]ay be fatal if swallowed or enters airways" and is a combustible liquid. (Exs. 24-25, at 1). The safety data sheet for wood dust indicates that it is a carcinogen and may "cause nasopharyngeal cancer and/or cancer of the nasal cavities and paranasal sinuses by inhalation." (Ex. 26, at 1). The safety data sheet for the Airgas USA, LLC propane used at the workplace indicates that it is extremely flammable and can cause frostbite. (Ex. 27, at 1).

Respondent failed to meet the requirements of § 1910.1200(e)(1) because it had no written hazard communication program for the workplace on January 11, 2018. (Tr. 233-35, 351, 401; Ex. 8, at 7-8, Ex. 20, at 8, Ex. 28, at 2, ¶¶ 6-8, Ex. 38, at 54-55, 58). In its Post Trial Brief, Respondent admitted that "Timberline's actions violated the regulation." (Resp't Post Trial Br., at 19, ¶ 56). All ten to fourteen employees were exposed to the violative condition that could lead to death or serious physical harm if: a) the lubricant was swallowed or caught fire, b) wood dust were inhaled and caused cancer, or c) propane exploded or caused frostbite. These employees were also exposed to moderate irritation of ears, nose, throat and respiratory tract. The Court finds that the evidence shows that there is a substantial probability that death or serious physical harm could result from exposure to the violative condition. (Tr. 235, 239-41; Exs. 25-27). (Sec'y Post Hrg. Br., at 43-44).

b. Respondent Violated 29 C.F.R. § 1910.1200(g)(1).

29 C.F.R. § 1910.1200(g)(1) requires that employers have a safety data sheet in the workplace for every hazardous chemical which they use. The cited standard applies because employees used and were exposed to hazardous chemicals and materials at the workplace including propane, lubricant and wood/wood dust. (Tr. 233-34, 237-39, 402-03, 456-57, 478;

[67] TC Bed Lube is used on Respondent's moulder. A dispenser emits it onto bed plates while the moulder is running to ensure that the wood runs through the moulder smoothly. (Tr. 402-03).

Exs. 24-27, Ex. 38, at 55). Respondent failed to comply with § 1910.1200(g)(1). Respondent did not have any safety data sheets at the workplace on January 11, 2018. (Tr. 236-37, 351-352, 356; Ex. 28, at 2, ¶ 8, Ex. 38, at 56-58). As discussed above, all ten to fourteen employees were exposed to the violative condition that could lead to death or serious physical harm if: a) the lubricant was swallowed or caught fire, b) wood dust were inhaled and caused cancer, or c) propane exploded or caused frostbite. These employees were also exposed to moderate irritation of ears, nose, throat and respiratory tract. The Court finds that the evidence shows that there is a substantial probability that death or serious physical harm could result from exposure to the violative condition. (Tr. 235, 239-41; Exs. 25-27). (Sec'y Post Hrg. Br., at 44).

c. Respondent Violated 29 C.F.R. § 1910.1200(h)(1).

29 C.F.R. § 1910.1200(h)(1) requires that employers provide training to employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard is introduced to their work area. The cited standard applies because employees used and were exposed to hazardous chemicals and materials at the workplace including propane, lubricant and wood/wood dust. (Tr. 233-34, 237-39, 402-03, 456-57, 478; Exs. 24-27, Ex. 38, at 55). Respondent failed to comply with § 1910.1200(h)(1) because as of January 11, 2018, it had not provided information or training to employees on the propane, lubricant and wood/wood dust in their work area.[68] (Tr. 233-34, 237-41, 352, 355-56, 402-03, 456-57, 478; Exs. 24-27, Ex. 28, at 2, ¶¶ 7, 10, Ex. 38, at 55, 58). As discussed above, all ten to fourteen employees were exposed to the violative condition that could lead to death or serious physical harm if: a) the lubricant was swallowed or caught fire, b) wood dust were inhaled and caused cancer, or c) propane exploded or caused frostbite. These

[68] At trial, Mr. Vavra admitted that Respondent's employees had not received any training on hazardous chemicals and materials. (Tr. 352-56).

employees were also exposed to moderate irritation of ears, nose, throat and respiratory tract. The Court finds that the evidence shows that there is a substantial probability that death or serious physical harm could result from exposure to the violative condition. (Tr. 235, 239-41; Exs. 25-27). (Sec'y Post Hrg. Br., at 44-45).

d. Citation 1, Items 2a, 2b and 2c Were Properly Classified as Willful.

As discussed in detail *supra* in section VA2, Citation 1, Items 2a, 2b and 2c were properly classified as willful.[69] Mr. Vavra exhibited both intentional disregard and plain indifference to the requirements of the standards cited in Items 2a–2c. Further, Mr. Vavra made no good faith efforts to comply. Mr. Vavra had a heightened awareness of the hazardous conditions presented by hazardous chemicals in the workplace because Respondent's predecessor at the workplace, THD, was cited for serious violations of § 1910.1200(e)(1), § 1910.1200(g)(1) and § 1910.1200(h)(1) in July 2012. (Tr. 354; Ex. 33, at 3-4, Ex. 38, at 57). *See N. Atl. Fish Co.*, 2001 WL 1263331, at *16 (finding willful violations of 29 C.F.R. § 1910.1200(e)(1), 1910.1200(g)(8) and 1910.1200(h) where employer previously cited for similar violations a few years before and certified it had corrected the violations.). As in the current case, the prior 2012 citation listed propane and lubricant as hazardous chemicals at the workplace.[70] (Ex. 20, at 8-10, Ex. 33, at 3-4). As a result of the 2012 citation, Mr. Vavra was

[69] In its Post-Trial Brief, Respondent admits "Timberline's actions violated the regulation" alleged in Citation 1, Item 2a, but argues the violation was not willful. (Resp't Post-Trial Br., at 18-19).

[70] As noted by Respondent in its Post-Trial Brief, wood dust was not identified as a hazardous chemical in the 2012 Citation 1, Items 2a-2c. (Ex. 33, at 3-4; Resp't Post Trial Br., at 12). Consequently, Respondent argues that on January 11, 2018 it was not aware that wood dust was considered a hazardous chemical. (Resp't Post Trial Br., at 12). AD Prebish testified that the classification of wood dust "has been changed from just wood dust to nuisance to a carcinogen in the last 10 years." He further said that this "information would've been readily available to somebody who works in" woodworking. (Tr. 306-07). At trial, Mr. Vavra testified that he never heard that wood dust was considered a hazardous chemical. (Tr. 400). He admitted that Respondent did not have any safety data sheets for wood dust in January 2018. (Tr. 352-56, 401; Ex. 38, at 56). [redacted] testified that he knew that wood dust was a hazardous chemical because he had been working wood for years. (Tr. 477-78).

put on notice that employees were exposed to hazardous chemicals and that he was required to develop and implement a written hazard communication program, maintain safety data sheets at the workplace and train employees on hazardous chemicals in their work area.

In August 2012, Mr. Vavra certified that the following actions had been taken to abate the prior cited violations:

> As to § 1910.1200(e)(1) and § 1910.1200(h)(1):
>
> A hazard communication program has been developed and implemented. Employees have been trained on program and applicable MSDS sheets.
>
> As to § 1910.1200(g)(1):
>
> A MSDS binder has been supplied to employees and will be maintained and monitored as per our hazard communication program.

(Ex. 34). All the representations made by Mr. Vavra to OSHA in 2012 relating to abatement of the citation for violations of § 1910.1200(e)(1), § 1910.1200(g)(1) and § 1910.1200(h)(1) in Inspection No. 331026 were also, at best, inaccurate. (Tr. 233-41, 351-56, 401; Exs. 30-32, Ex. 38, at 52-60). When asked at his deposition why he signed a document falsely certifying that a written hazard communication program had been developed and implemented, Mr. Vavra's response was, "I probably should not have signed it or I should have done the program for the two items we were cited for." He also said that he did not "have a good answer" to explain why Respondent did not have a written hazardous chemical program on January 11, 2018. (Ex. 38, at 59-60). In relation to Citation 1, Item 2b, Mr. Vavra testified that in 2012 there was a MSDS binder kept in a file cabinet in the mill that contained some safety data sheets for propane, PB blaster, and slick bed lubricant, but the binder had been lost at some unknown time and was unavailable on January 11, 2018. (Tr. 351-52, 356, 371; Ex. 38, at 60). Mr. Vavra's disregard towards safety and health, inaccurate statements to OSHA, and lack of good faith efforts to

comply establish the willfulness of Citation 1, Items 2a, 2b and 2c.

e. In the Alternative, Citation 1, Items 2a, 2b and 2c Are Repeat Violations.

The Court also finds that Citation 1, Items 2a, 2b and 2c, are alternatively repeat violations. (Tr. 9-10). On June 12, 2012, THD was issued serious citations for violations of the exact same three standards (29 C.F.R. § 1910.1200(e)(1), § 1910.1200(g)(1) and § 1910.1200(h)(1)) in Inspection No. 331026 (Citation 1, Items 2a, 2b and 2c). (Tr. 354; Ex. 33, at 3-4, Ex. 38, at 57). Both the current 2018 and the 2012 citations address the same hazardous condition; i.e. exposure to propane and lubricant. (Ex. 20, at 8-10, Ex. 33, at 3-4). In November 2012, Mr. Vavra signed a Stipulated Settlement affirming all of the prior hazard communication citation items. (Tr. 354; Ex. 35). The citations issued to THD in Inspection No. 331026 became a final order of the Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(k)).

f. In the Alternative, Citation 1, Items 2a, 2b and 2c Are Other Than Serious Violations.

The Court also finds that Citation 1, Items 2a, 2b and 2c, are alternatively other-than-serious violations under section 17(c) of the OSH Act. (Tr. 9-12). *See* 29 U.S.C. § 666(c). An other-than-serious violation "is one in which there is a direct and immediate relationship between the violative condition and occupational safety and health, but not of such relationship that a resultant injury or illness is death or serious physical harms." *Gen. Motors Corp. Electro-Motive Div.*, No. 82-630, 1991 WL 41251, at *5 (O.S.H.R.C., Feb. 15, 1991) (consolidated) (Nonserious records access violation not properly classified as de minimis). The Court finds that there is, at least, a direct and immediate relationship between the violative conditions alleged in citation 1, Items 2a, 2b, and 2c, and occupational safety and health. *See Ryder Truck Lines, Inc. v. Brennan,* 497 F.2d 230, 233 (5th Cir. 1974) ("Avoidance of minor injuries, as well as major ones,

was intended to be within the purview of this liberal Act.").

g. The Penalty Proposed for Citation 1, Items 2a, 2b and 2c is Appropriate.

As discussed above, the violations contained in Citation 1, Items 2a, 2b and 2c were willful, repeat, and other-than-serious. AD Prebish testified that the gravity-based penalty proposed for Citation 1, Items 2a, 2b and 2c, was $9,239 because the gravity of the violation was assigned a "Minimal (Severity)" and "Lesser (Probability)." (Tr. 286). Respondent's failure to: a) develop, implement and/or maintain a written hazardous communication program in the workplace, b) have safety data sheets for each hazardous chemical in use at the workplace, and c) train employees on the hazardous chemicals in their work area, exposed all ten to fourteen of Respondent's employees to violative conditions that could lead to death or serious physical harm. (Tr. 235, 239-41; Exs. 25-27). AD Prebish testified that no reductions were given for size because $9,239 was the minimum penalty allowed for a willful violation. (Tr. 286). *See* 29 C.F.R. 1903.15(d)(1) (2018).

OSHA made appropriate and supported determinations of all of the required factors. (Tr. 286). The Court has considered all of the required factors and affirms Citation 1, Items 2a, 2b and 2c, as a willful, repeat and other-than-serious violation and the proposed adjusted gravity-based penalty of $9,239.

C. THE VIOLATIONS ALLEGED IN CITATION 1 IN DOCKET NUMBER 18-1212 AND THEIR PROPOSED PENALTIES ARE AFFIRMED; EXCEPT AS TO WITHDRAWN ITEM 1 AND ITEM 7 WHICH IS VACATED.

1. **Citation 1, Item 1** has been withdrawn.

2. Citation 1, Item 2: Locked Exit Door

a. Respondent Violated 29 C.F.R. § 1910.36(d)(1).

29 C.F.R. § 1910.36(d)(1) requires that exit doors be unlocked and that employees must

be able to open an exit route door from the inside at all times without keys, tools, or special knowledge. The cited standard applies because, a door at the workplace designated as an emergency exit with an exit sign that led outdoors was locked with a deadbolt lock.[71] (Tr. 52-54, 120-23, 178, 244, 372-73; Ex. 1, at 8, Exs. 6-7). Respondent failed to comply with the requirements of § 1910.36(d)(1) because on January 19, 2018 the exit door in the workplace was locked and all ten to fourteen employees were exposed to the hazard of a delay in evacuating the building in the event of a fire. (Tr. 54-55). In order to unlock the deadbolt on the exit door from inside the mill, an employee would have to lift up the deadbolt and then slide it to the side.[72] Then, the employee would have to push the bar on the door to open it in order to evacuate the building.[73] Notwithstanding Thomas Vavra's testimony to the contrary, the Court finds that this process required at least some prohibited "special knowledge" to open the door. (Tr. 121-25, 179, 243, 313, 372-74, 445; Exs. 6-7; Sec'y Reply Br., at 7). The cited standard permits devices such as a panic bar that locks only from the outside, but does not permit an exit door to be locked from the inside as this one was. *See* 29 C.F.R. § 1910.36(d)(1). Thomas Vavra admitted to CSHO Calderon that he was aware the exit door was locked. (Tr. 55). He testified that the new building owner installed a new door there because he did not want to allow Respondent's employees "access into the other side of the building anymore" because he wanted to separate the Mill from the bakery there. Mr. Vavra said, "we just can't have people going back and forth." He said that the door had to be secured at night "so we put a deadbolt there so that we

[71] *See Jeanette M. Gould, d/b/a Gould Publ'ns,* No. 89-2033, 1992 WL 675228, at *3 (O.S.H.R.C.A.L.J., Aug. 24, 1992) (doors locked by deadbolts make "emergency egress difficult at best."), *aff'd in relevant part,* No. 89-2033, 1994 WL 382497 (O.S.H.R.C., July 19, 1994).
[72] Mr. [redacted] testified:
Q Any special knowledge?
A Slide the bar to the side. It's the only knowledge you need.
(Tr. 445).
[73] No keys or tools were required to open the door. (Tr. 374, 445, 468).

could – could still lock it up." Mr. Vavra testified that the door was "unlocked in the morning, meaning the deadbolt is released" and not locked again until the end of the day. He further stated that on the days OSHA inspectors visited the mill a "couple different employees" requested that the door be locked so that they [unidentified employees] would not be "bothered by the inspectors while they were on break [on the other side of the door]. And so they [unidentified employees] asked if they [unidentified employees] could keep that locked so that they [unidentified employees] didn't have access to them [OSHA inspectors]." He also claimed the door was locked to keep the cold from getting inside as there was no heat in the building. The Court finds that the door was locked on January 19, 2018 at the time of CSHO Calderon's inspection and special knowledge was required to open it then as CSHO Calderon was not able to open the door herself. [74] (Tr. 52, 55, 372-74, 445). CSHO Calderon testified that both she and IH Maloney could not unlock the deadbolt without [redacted] first explaining how. (Tr. 122-24). IH Maloney unlocked the door on January 19, 2018 by lifting off the bolt and sliding it to the left and opened the door with a second motion. (Tr. 178-79; Ex. 6).

b. Citation 1, Item 2 Was Properly Classified as Serious and the Penalty Proposed is Appropriate.

Citation 1, Item 2 was properly classified as serious because employees were exposed to serious physical injuries resulting from delay in evacuating the workplace in the event of a fire.[75] (Tr. 54-55, 123-25). CSHO Calderon testified that the gravity-based penalty proposed for Citation 1, Item 2 was $7,391 because the gravity of the violation was assigned a "Medium

[74] *See Am. Recycling & Mfg. Co., Inc.,* No. 13-1101, 2015 WL 6438288, at *15 (O.S.H.R.C.A.L.J., Sept. 14, 2015) (consolidated) (Serious violation of 29 C.F.R. § 1910.36(d)(1) found where exit door missing handle and did not open), *irrelevant citation vacated,* 676 F.App'x. 65, 72 (2nd Cir. 2017); *Unifirst Corp.*, No. 12-1304, 2014 WL 6722567, at *4-5 (O.S.H.R.C.A.L.J., Oct. 17, 2014) (Serious violation of 29 C.F.R. § 1910.36(d)(1) found where exit door locked.).

[75] *See Jeanette M. Gould, d/b/a Gould Publ'ns*, 1994 WL 382497, at *2 (violation is serious "based on the compliance officer's unrebutted testimony that death or serious physical harm could result from delays in exiting during an emergency due to the locked door.").

(Severity)" and "Lesser (Probability)." (Tr. 56). All ten to fourteen employees were exposed to the hazard. (Tr. 55). According to OSHA's FOM, Chapter 6, VI.B.4.b., at 6-10, the maximum size reduction allowed for serious citations for employers with 11-20 employees was 60%. (Tr. 51, 56, 364). Complainant did not give any reduction for good faith because Respondent was also issued willful citations in Docket No. 18-1212, and because it lacked an adequate safety program. (Tr. 56-57, 267; Ex. 8, at 7-8). *See* OSHA FOM Chapter 6, III.B.3.a., at 6-8. Respondent received no adjustments for history by the Secretary because it had not been inspected by OSHA in the five years prior to the citations in this case. (Tr. 57, 267-68).[76] *See* OSHA FOM Chapter 6, III.B.2.c., at 6-8. OSHA made appropriate and supported determinations of all of the required factors. (Tr. 58). The Court has considered all of the required factors and affirms Citation 1, Item 2 as a serious violation and the proposed adjusted gravity-based penalty of $2,956.

3. Citation 1, Item 3: Unlit Exit Sign

a. Respondent Violated 29 C.F.R. § 1910.37(b)(6).

29 C.F.R. § 1910.37(b)(6) requires that each exit sign must be illuminated by a reliable light source and be distinctive in color. The cited standard applies because on January 19, 2018 an exit sign above a designated exit route door was completely unlit.[77] (Tr. 58-59, 126, 424; Ex. 1, at 9, Ex. 7). Respondent failed to comply with § 1910.37(b)(6) because CSHO Calderon observed that the sign was unlit on all four days she conducted her onsite inspection. (Tr. 59). In its Post Trial Brief, Respondent admits "the exit sign is not illuminated at all times", but claims that it did not violate 29 C.F.R. § 1910.37(b)(6) because the exit sign would illuminate

[76] Respondent did not receive a reduction for good faith or any adjustments for history in any of the citation items issued in Docket Nos. 18-1211 and 18-1212. (Tr. 58, 267-68).
[77] Citation 1, Item 3 and the Complaint were amended to allege that the violation occurred on or about January 19, 2018. (Tr. 12).

when an alarm is deployed. (Resp't Post Trial Br., at 13). This assertion is based on Mr. Vavra's vague and uncorroborated testimony. When asked at the trial by Respondent's counsel if the exit sign illuminated, Mr. Vavra equivocally replied, "I believe it does." (Tr. 374-76). Respondent provided insufficient evidence as to the circumstances that caused the alarm to activate or account for a situation necessitating emergency egress when the alarm, for whatever reason, is not promptly activated. Mr. Vavra's courtroom testimony is also undermined by CSHO Calderon's testimony that during her inspection Mr. Vavra told her that there were no alarms in the building. (Tr. 126-27). Regardless, § 1910.37(b)(6) specifically requires that each exit sign be illuminated. There are no exceptions from that requirement, related to alarms or otherwise. *See J.C. Watson Co*., No. 05-0175, 2006 WL 5692683, at *20 (O.S.H.R.C.A.L.J., Oct. 10, 2006) (consolidated) (violation of 29 C.F.R. § 1910.37(b)(6) established where exit sign not illuminated), *aff'd,* No. 05—0175, 2008 WL 2045818 (O.S.H.R.C., May 6, 2008) (consolidated). (Tr. 127; Sec'y Reply Br., at 7-8).

All of the employees at the workplace were exposed to the hazard of a delay in evacuating the building in the event of a fire. Respondent had knowledge of the violative condition because the unlit exit sign was in plain view to Mr. Vavra, for weeks if not months. (Tr. 59; Ex. 7). The Court finds that the sign above the exit door was unlit on all four days CSHO Calderon conducted her onsite inspection proving that a violation of 29 C.F.R. § 1910.37(b)(6) occurred on January 19, 2018 as alleged in Citation 1, Item 3.[78] (Tr. 59; Ex. 7).

b. Citation 1, Item 3 Was Properly Classified as Serious and the Penalty Proposed is Appropriate.

Citation 1, Item 3 was properly classified as serious because all ten to fourteen employees

[78] Respondent concedes that "[t]here is an exit sign above the exit door described in Citation 1, Item 2 that was not illuminated during the investigation conducted by OSHA." (Resp't Post-Trial Br., at 6).

were exposed to serious physical injuries resulting from inability to see the exit door in order to evacuate the workplace quickly in the event of a fire. (Tr. 59-60). CSHO Calderon testified that the gravity-based penalty proposed for Citation 1, Item 3 was $5,543 because the gravity of the violation was assigned a "Low (Severity)" and "Lesser (Probability)." (Tr. 60). Complainant reduced the gravity-based penalty by 60% for size. (Tr. 60). No reductions were given for good faith or history. (Tr. 60-61). OSHA made appropriate and supported determinations of all of the required factors. (Tr. 61). The Court has considered all of the required factors and affirms Citation 1, Item 3 as a serious violation and the proposed adjusted gravity-based penalty of $2,217.

4. Citation 1, Item 4: Failure to Train Employees on Use of Fire Extinguishers.

a. Respondent Violated 29 C.F.R. § 1910.157(g)(1).

29 C.F.R. § 1910.157(g)(1) requires that where an employer has provided portable fire extinguishers for employee use in the workplace, the employer must also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage firefighting.[79] (Ex. 1, at 10). The cited standard applies here because Respondent provided various portable fire extinguishers in the workplace and employees were expected to use them in the event of a fire. (Tr. 63, 340, 376, 460; Ex. 38, at 31, 33-34). Mr. Vavra testified at his deposition that he told employees to use the fire extinguishers in the event of a fire. (Tr. 340; Ex. 38, at 33). Both Messrs. [redacted] and [redacted] testified that they were expected to use the fire extinguishers in the event of a fire. (Tr. 460, 482). Respondent did not comply with any of the requirements of the cited standard. On January 11, 2018, Respondent failed to provide any training to employees as required. (Tr. 61-62, 130-31,

[79] CSHO Calderon explained that incipient stage firefighting refers to small fires. (Tr. 130).

160, 339-40, 377, 425, 446, 459-60, 482; Ex. 18, at 2, ¶¶ 6, 9, Ex. 38, at 31, 34). Respondent asserted the fire extinguishers "are self-explanatory and easily operated." (Ex. 19, at 5, ¶ 6a). All the employees at the workplace were exposed to serious physical injuries such as smoke inhalation or burns in the event of a fire at the workplace as a result of not being trained on the use of fire extinguishers and incipient stage firefighting. (Tr. 63). Mr. Vavra admitted that Respondent had not given the training on the use of fire extinguishers or firefighting.[80] He further admitted Respondent did not have any written training program. (Tr. 61-62, 339, 377; Ex. 38, at 31, 34). In its Post Trial Brief, Respondent acknowledged that "it admittedly did not provide the training required, and therefore, violated the regulation." (Resp't Post Trial Br., at 14).

Neither Messrs. Vavra nor [redacted] knew what class of fire extinguishers were present at the workplace. (Tr. 424-25, 439, 459-60). One mill employee, Amber Eckert, told CSHO Calderon that she did not know how to operate the fire extinguishers.[81] (Tr. 62, 130-31, 160). Respondent's purported "safety manual" states only that "Employees should know where the fire extinguishers are located and understand how to use them." (Ex. 8, at 8). The evidence shows that Respondent did not impart that basic understanding to employees.

b. Citation 1, Item 4 Was Properly Classified as Serious and the Penalty Proposed is Appropriate.

Citation 1, Item 4 was properly classified as serious because in the event of a fire at the workplace, employees were exposed to serious physical injuries such as smoke inhalation or burns as a result of not being trained on the use of fire extinguishers and incipient stage

[80] Messrs. [redacted] and [redacted] also admitted that Respondent had not provided any training on how to operate a fire extinguisher. (Tr. 446, 468).
[81] Mr. Vavra testified that he "talked to all employees, and they all feel comfortable on how to use them [fire extinguishers] if they, if they so, if they deem it necessary to." (Tr. 376-77). This broad sweeping assertion is without foundation and is given little weight by the Court.

firefighting.[82] (Tr. 63). CSHO Calderon testified that the gravity-based penalty proposed for Citation 1, Item 4 was $7,391 because the gravity of the violation was assigned a "Medium (Severity)" and "Lesser (Probability)." (Tr. 64). All ten to fourteen employees were exposed to the hazard. The gravity-based penalty was reduced by 60% for size. (Tr. 64). The Secretary did not give any reductions for good faith or history. (Tr. 267-68). OSHA made appropriate and supported determinations of all of the required factors. (Tr. 63-64). The Court has considered all of the required factors and affirms Citation 1, Item 4 as a serious violation and the proposed adjusted gravity-based penalty of $2,956.

5. Citation 1, Item 5: Lack of Machine Guarding a) Whirlwind up-cut saw and b) Northtech up-cut saw

a. Respondent Violated 29 C.F.R. § 1910.212(a)(1).

29 C.F.R. § 1910.212(a)(1) requires that one or more methods of machine guarding shall be provided to protect the operator and other employees from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. The cited standard applies here because Respondent's employees used the Whirlwind and Northtech upcut saws to cut wood. Respondent failed to comply with § 1910.212(a)(1) because on January 11, 2018, neither upcut saw was guarded to protect the employees from point of operation hazards; and on January 19, 2018, each upcut saw was guarded inadequately. (Tr. 64-74, 132; Ex. 1, at 11, Ex. 9).[83] The Whirlwind and Northtech upcut saws are table saws that cut wood and remove defects

[82] *See Jake's Fireworks, Inc*., No. 15-0260, 2017 WL 2501140, at *15 (O.S.H.R.C.A.L.J., Apr. 24, 2017) (Violation of 29 C.F.R. § 1910.212(a)(1) serious where lack of any fire extinguisher education training could cause serious injury, up to and including death.), *aff'd,* 893 F.3d 1248 (10th Cir. 2018).

[83] Respondent asserts that the "saw blade guard has never been removed or modified so long as the saw was in the building." (Tr. 377-78; Resp't Post Trial Br., at 7). This assertion is rejected as without credible basis. Respondent points to testimony by Messrs. Vavra, [redacted] and [redacted] in support of its assertion. Mr. Varna testified that "[f]rom the time that I purchased them those guards have been on those machines." (Tr. 377-78). Mr. Varna was a co-owner at not an upcut saw operator. Mr. [redacted] testified that he "don't normally work on them [Whirlwind and Northtech upcut saws]." (Tr. 446). Mr. [redacted] was not working at Timberline in January or February 2018. (Tr. 495-96). Based upon the Court's observation of her courtroom demeanor when testifying, the Court finds

from the flooring that come out of the moulder. (Tr. 65, 378-79). The blades of both saws are engaged by foot pedals that force the blades upward to cut the wood. (Tr. 65, 379, 496-97). The point of operation on both upcut saws was the open area where the saw blade popped up after being engaged by a foot pedal. (Tr. 69; Ex. 9, at 3, "A").

Respondent failed to meet the requirements of § 1910.212(a)(1). CSHO Calderon testified that when she observed employees using the Whirlwind upcut saw on January 11, 2018, it did not have a guard on it. (Tr. 65, 132). She observed that the Northtech saw also did not have a guard on it. (Tr. 71, 132). When she brought the lack of guards to Mr. Vavra's attention, he stated that guards get in the way of production. (Tr. 65-66, 71-72). CSHO Calderon then informed him that both upcut saws needed to be guarded. (Tr. 66).

When CSHO Calderon returned to the workplace on January 19, 2018, she observed that guards had been installed on both upcut saws, but that neither guard was installed properly to fully protect employees from point of operation hazards. (Tr. 66-67, 72, 134-35; Ex. 9). That day, she observed Mr. [redacted] using the Whirlwind upcut saw with his hands only about an inch from the point of operation. (Tr. 67-70; Ex. 9, at 1, 3). She also learned through measurement and employee interviews that the employees' hands would be approximately one inch from the point of operation on the Northtech saw while cutting wood. (Tr. 72). She measured that approximately four inches was exposed between the bottom of the guards and the points of operation on both the upcut saws. (Tr. 70-73; Ex. 9, at 1, 3). CSHO Calderon testified that both saws could and should have been fully guarded with a larger, commercially available guard that would prevent employees' hands from being close to the point of operation. (Tr. 74-75, 136). Mr. Vavra testified that he was aware that larger guards are available. (Tr. 380). Mr.

CSHO Calderon's testimony that there were no machine guards on the Whirlwind and Northtech upcut saws on January 11, 2018 to be entirely credible and based upon her personal observations.

Vavra had knowledge of the hazardous condition on January 11, 2018 as he told the CSHO that guards get in the way of production. (Tr. 65-66, 71-72). He was also aware of the inadequate positioning of the guards on the upcut saws on January 19, 2018 as they were in plain view. (Ex. 9).

Respondent asserted in its Post-Trial Brief that using a larger guard on the upcut saws presented a greater hazard. (Resp't Post-Trial Br., at 7). Respondent's affirmative defense is without merit. Respondent failed to raise this affirmative defense in its Answer and the Court considers it waived. *See* 29 C.F.R. § 2200.34(b)(3) and (4). Respondent has also not met its burden to establish the greater hazard defense. To show greater hazard, an employer must prove that: (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protecting employees are unavailable; and (3) a variance is unavailable or inappropriate. *Modern Drop Forge Co. v. Sec'y of Labor*, 683 F.2d 1105, 1116 (7th Cir. 1982); *Spancrete N.E. Inc.*, No. 90-1726, 1994 WL 48832, at *3 (O.S.H.R.C., Feb. 16, 1994).

Respondent has not met any of the three required factors to establish the greater hazard defense. Mr. Vavra testified that he used his own judgment and did not consult with anyone regarding guarding the upcut saws. (Tr. 426-27; Ex. 19, at 17-19). CSHO Calderon credibly testified that both the points of operation on the upcut saws could have been fully guarded with larger, commercially available guards. Respondent did not produce adequate evidence to show that alternative protection could not be provided. (Tr. 74-75, 136; Sec'y Reply Br., at 8). Respondent's untimely claim of greater hazard is rejected.

b. Citation 1, Item 5 a) and b) Was Properly Classified as Serious and the Penalty Proposed is Appropriate.

Citation 1, Item 5 was properly classified as serious because employees were exposed to serious physical injury such as amputation due to Respondent's failure to adequately guard the

points of operation on the Whirlwind and Northtech upcut saws. (Tr. 73-75, 137). *See United Mobile Homes, Inc.,* No. 79-0898, 1980 WL 10561, at *2 (O.S.H.R.C.A.L.J., Dec. 18, 1980) (finding violations serious where saws unguarded). Approximately four employees, including Mr. [redacted], were exposed to the hazard on multiple days. (Tr. 65-67, 73-74). CSHO Calderon testified that the gravity-based penalty proposed for Citation 1, Item 5 was $12,934 because the gravity of the violation was assigned a "Greater (Severity)" and "Higher (Probability)." (Tr. 75). The gravity-based penalty was reduced by 60% for size. (Tr. 76). The Secretary did not give any reductions or good faith or history. (Tr. 76, 267-68). OSHA made appropriate and supported determinations of all of the required factors. (Tr. 75-76). The Court has considered all of the required factors and affirms Citation 1, Item 5 a) and b) as a serious violation and the proposed adjusted gravity-based penalty of $5,174.

6. Citation 1, Item 6: Failure to Reduce the Pressure of Compressed Air a) at the Maureen Johnson Rip Saw and b) at the CANTEK Planer.

a. Respondent Violated 29 C.F.R. § 1910.242(b).

29 C.F.R. § 1910.242(b) provides that compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. The cited standard applies because Respondent's employees used two compressed air guns every workday to clean wood dust off machinery. Respondent failed to comply with § 1910.242(b) because on the cited date neither compressed air gun was reduced to less than 30 p.s.i.[84] (Tr. 76-81, 429; Ex. 10). During her onsite inspection, CSHO Calderon observed Messrs. [redacted] and [redacted] using the compressed air guns. (Tr. 77-83; Ex. 10). The two compressed air guns were hooked up to a compressed air tank that had pressure at 90 p.s.i. (Tr. 161). Using an air gauge, CSHO

[84] Citation 1, Item 6 and the Complaint were amended to allege that the violation occurred on or about January 19, 2018. (Tr. 12; Court Order dated November 13, 2019).

Calderon measured the pressure of the compressed air gun at the Maureen Johnson wood saw at 40 p.s.i. and at the Cantek planer[85] cleaner at 50 p.s.i. respectively. (Tr. 77-78).[86] Employees were exposed to serious physical injuries such as cuts to the skin, lacerations and/or embolisms from excessive air pressure. (Tr. 79-83). Thomas Vavra was aware that the two compressed air guns did not have reducers. THD had been cited for and affirmed a violation of the same standard in 2012. During OSHA's 2018 inspection, Mr. Vavra told CSHO Calderon that reducers were no longer being used on compressed air guns.[87] (Tr. 80, 428-30; Ex. 29, at 5, Ex. 31, at 2, Ex. 32). Mr. Vavra testified that when he purchased new compressed air guns, he did not put reducers on them. (Tr. 429-30).

b. Citation 1, Item 6 a) at the Maureen Johnson Rip Saw and b) at the CANTEK Planer Was Properly Classified as Serious and the Penalty Proposed is Appropriate.

Citation 1, Item 6 was properly classified as serious because employees were exposed to serious physical injuries such as cuts to the skin, lacerations and/or embolisms. (Tr. 79-83, 141-42). *See Quality Stamping Prods. Co.*, No. 91-414, 1992 WL 675227, at *14 (O.S.H.R.C.A.L.J., Nov. 23, 1992)(Violation of 29 C.F.R. §1910.242(b) serious where air p.s.i. exceeding 30 p.s.i. can cause lacerations), *aff'd,* No. 91-414, 1994 WL 382494 (O.S.H.R.C., June 21, 1994). CSHO Calderon testified that the gravity-based penalty proposed for Citation 1, Item 6 was $5,543 because the gravity of the violation was assigned a "Low (Severity)" and "Lesser (Probability)." (Tr. 81). Four employees, including Messrs. [redacted] and [redacted], were exposed to the hazard. (Tr. 79-83). The Secretary reduced the gravity-based penalty by 60% for size. (Tr. 81).

[85] CSHO Calderon testified that a Cantek planer "parallels the wood." (Tr. 78).
[86] Mr. Vavra testified that Respondent did not have a gauge or any way of testing the pressure on an air gun. He said he purchased the air guns from NAPA and assumed they were OSHA compliant. (Tr. 384, 429-30).
[87] Thomas Vavra testified he did not remove any diffusers or tell the OSHA investigator that he had removed some. (Tr. 383-84). Based upon the Court's observation of her courtroom demeanor when testifying, the Court finds that CSHO Calderon's testimony that Mr. Vavra told her that reducers were no longer being used on compressed air guns at Timberline to be credible.

No reductions were given for good faith or history. (Tr. 267-68). OSHA made appropriate and supported determinations of all of the required factors. (Tr. 81-82). The Court has considered all of the required factors and affirms Citation 1, Item 6 a) and b) as a serious violation and the proposed adjusted gravity-based penalty of $2,217.[88]

(Sec'y Post Hrg. Br., at 61-68).

7. Citation 1, Item 7: Alleged Failure to Guard Live Electric Parts in the Circuit Breaker box

a. The Secretary has not shown Respondent Violated 29 C.F.R. § 1910.303(g)(2)(i).

29 C.F.R. § 1910.303(g)(2)(i) requires that live parts of electric equipment operating at **50 volts or more** be guarded against accidental contact by use of approved cabinets or other forms of acceptable enclosures. (emphasis added). Respondent argues that "the Secretary did not sustain his burden of proving a violation of the regulation" because there is "no evidence presented as to the number of volts that were present in the circuit box." (Resp't Post-Trial Br., at 15). The Court agrees. Respondent is correct. The Secretary has not shown that 29 C.F.R. § 1910.303(g)(2)(i) applies. CSHO Calderon testified: Q Do you know how many volts were being serviced by the circuit breaker box? A I don't. (Tr. 144). Accordingly, Citation 1, Item 7 is vacated, and no penalty is assessed by the Court.

8. Citation 1, Items 8a and 8b: Failure to cover live electrical parts

a. Respondent Violated 29 C.F.R. § 1910.305(b)(1)(ii).

29 C.F.R. § 1910.305(b)(1)(ii) requires that unused openings in boxes, cabinets and fittings be effectively closed. The cited standard applies because the circuit breaker box was used daily at the workplace to power machinery, such as but not limited to the planer, chop saw

[88] In its Post-Trial Brief, Respondent admits "Timberline violated the regulation, but the violation was Other Than Serious." (Resp't Post-Trial Br., at 15, ¶ 23).

and end matcher. Respondent failed to comply with § 1910.305(b)(1)(ii) because the circuit breaker box was missing several filler plates.[89] (Tr. 84, 89-90; Ex. 1, at 14, Ex. 12). Employees used the circuit breaker box to switch breakers for various machinery every day. (Tr. 86-87, 91, 385). CSHO Calderon testified that there needed to be filler plates in several places on the breaker panel. (Tr. 89-90, 146; Ex. 12, at 1, "A"-"C", at 2, "B"). The door to the circuit breaker box was left open on a daily basis and the exposed electrical parts were in plain view.[90] (Tr. 87, 91, 142, 161-62; Ex. 12). *See Lloyd Indus., Inc*., No. 15-0846, 2017 WL 3284204, at *35 (O.S.H.R.C.A.L.J., June 19, 2017) (consolidated) (unclosed opening violation in plain view could have been observed by supervisors). CSHO Calderon observed the condition on both January 11 and 19, 2018. (Tr. 84). Respondent's argument that the circuit breaker box was originally installed by a licensed electrician at some point in time does not offer any substantive defense to this violation that occurred on January 11, and 19, 2018. (Tr. 385-86; Resp't Post-Trial Br., at 9).

b. Respondent Violated 29 C.F.R. § 1910.305(b)(2)(i).

29 C.F.R. § 1910.305(b)(2)(i) requires that each outlet box in completed installations have a cover, faceplate, or fixture canopy. The cited standard applies because an uncovered conduit box was connected to the chipper at the workplace. (Ex. 1, at 2, at 3, "A"). Respondent failed to comply with § 1910.305(b)(2)(i) because CSHO Calderon saw on January 11 and January 19, 2018, that the conduit box was missing an adequate cover.[91] (Tr. 91-92; Ex. 1, at 15,

[89] Citation 1, Item 8a and the Complaint were amended to allege that the violation occurred on or about January 11 and 19, 2018. (Tr. 13; Order dated November 13, 2019).
[90] In its Response to Complainant's First Set of Interrogatories, Respondent asserted an employee had left the door open and "[i]t was unknown to Respondent that the circuit breaker door was open and therefore infeasible for the Respondent to close the door immediately." (Ex. 19, at 8-9, ¶ 10a). This was not a one-time failing. The door was open on a daily basis and the exposed electrical parts were in plain view. (Tr. 84, 87, 91, 142, 161-62; Ex. 12).
[91] Citation 1, Item 8b and the Complaint were amended to allege that the violation occurred on or about January 11 and 19, 2018. (Tr. 13; Order dated November 13, 2019).

Ex. 11). The conduit box was only covered with cardboard and duct tape and had electrical conduit and wood chips inside of it. (Tr. 92; Ex. 11). The uncovered conduit box was in plain view.[92] (Tr. 93-94; Ex. 11). The condition of the conduit box was the same on both January 11 and 19, 2018. (Tr. 92). In its Post Trial Brief, Respondent admitted that the missing cover to the conduit box "is a violation of the regulation". (Resp't Post-Trial Br., at 16, ¶¶ 31-32). It concedes that the allegation "may constitute a technical violation," but argues that there was no evidence as to any alleged danger created by the violation. (Resp't Post-Trial Br., at 9, 16, ¶32). Respondent is mistaken. CSHO Calderon testified that everyone in the workplace was exposed to a fire hazard that could occur "[w]ith the wood chips in the box with the conduit." (Tr. 93). *See Automated Handling & Metalfab, Inc.*, No. 07-1763, 2008 WL 5111329, at *6 (O.S.H.R.C.A.L.J., Aug. 29, 2008) (The hazard created by the missing cover was exposing employees to the risk of electrical shock).

c. Citation 1, Items 8a and 8b, Were Properly Classified as Serious and the Penalty Proposed is Appropriate.

Respondent's failure to close all live openings in the circuit breaker box as alleged in Item 8a exposed employees to serious physical injury such as electrical shock. (Tr. 90, 94, 142, 144). In addition, Respondent's failure to properly cover the conduit box connected to the chipper as alleged in Item 8b exposed employees to a fire hazard. (Tr. 93-94). CSHO Calderon testified that the gravity-based penalty proposed for Citation 1, Items 8a and 8b was $9,239 because the gravity of the violation was assigned a "High (Severity)" and "Lesser (Probability)." (Tr. 94). Item 8a was assigned high severity because employees were exposed to electrical

[92] In its Response to Complainant's First Set of Interrogatories, Respondent asserted an employee had left the circuit breaker door open and "[i]t was unknown to Respondent that the circuit breaker door was open and therefore infeasible for the Respondent to close the door immediately." (Ex. 19, at 9, ¶ 11a). This was not a one-time failing. The condition occurred on a daily basis and the uncovered conduit box was in plain view. (Tr. 93-94; Ex. 11).

shock hazards every day. (Tr. 86-87). Item 8b was assigned high severity because everyone in the workplace was exposed to a fire hazard. (Tr. 93). The Secretary reduced the proposed gravity-based penalty by 60% for size. (Tr. 94). The Secretary did not give any reductions for good faith or history. (Tr. 94, 267-68). OSHA made appropriate and supported determinations of all of the required factors. (Tr. 94-95). The Court has considered all of the required factors and affirms Citation 1, Items 8a and 8b, as serious violations and the proposed adjusted gravity-based penalty of $3,696.[93] (Sec'y Post Hrg. Br., at 70-71).

9. Citation 2, Items 1a and 1b: Willful/Repeat/Serious (In the alternative) Failure to Comply with the Lockout/Tagout Standard.

a. Respondent Violated 29 C.F.R. § 1910.147(c)(1).

29 C.F.R. § 1910.147(c)(1) requires that the employer establish a program consisting of energy control procedures, employee training, and periodic inspections to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, startup or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source, and rendered inoperative. The standards contained in 29 C.F.R. § 1910.147 cover the "servicing and maintenance of machines and equipment in which the *unexpected* energization or start-up of machines or equipment" could injure an employee. 29 C.F.R. § 1910.147(a)(1)(i) (emphasis in original).

The cited standard applies here because Respondent's employees regularly performed servicing and maintenance on several machines at the workplace such as the planer, ripper, moulder and upcut saws that could have unexpectedly energized and/or started up. Energy control procedures are required whenever an employee is required to perform servicing and/or

[93] In its Post-Trial Brief, Respondent admits Timberline violated Citation 1, Items 8a and 8b, but asserts that the violations were "Other Than Serious." (Resp't Post-Trial Br., at 16, ¶¶ 30, 32).

maintain a machine or equipment when there is potential for the machine or equipment to "energize, start up, or released stored energy without sufficient advance notice to the employee." *Dayton Tire, Bridgestone/Firestone*, No. 94-1374, 2010 WL 3701876, at *5 (O.S.H.R.C., Sept. 10, 2010), *aff'd in relevant part*, 671 F.3d 1249 (D.C. Cir. 2012). *See also Gen. Motors Corp.*, *Delco Chassis Div.*, 1995 WL 247469, at *2 (O.S.H.R.C., Apr. 26, 1995) (consolidated) (holding employers shall establish energy control procedures when employee is expected to interact with machine or equipment that can unexpectedly energize, start up, or release stored energy and cause injury), *aff'd sub nom. Reich v. Gen. Motors Corp.*, 89 F.3d 313 (6th Cir. 1996).

Respondent's employees regularly performed servicing and maintenance on the planer, rip saw/ripper, moulder and upcut saws such as tool changes, replacing blades and knives, and applying lubrication. (Tr. 96, 102-03, 108-13, 334, 403, 433, 448-49, 458-59, 468; Ex. 38, at 39-40). The blades on the ripper/ripsaw were changed between one and six times a week. (Tr. 113, 468). The knives on the planer and the blades on the upcut saws were changed bi-monthly. (Tr. 110-14). Under 29 C.F.R. § 1910.147(b), "servicing and maintenance" is defined as:

> Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include **lubrication**, cleaning or unjamming of machines or equipment, and making adjustments or **tool changes**… (emphases added).

See Gen. Motors Corp., *Delco Chassis Div.*, No. 91-2973, 1995 WL 247469, at *2. Further, OSHA's Directive CPL 02-00-147[94] that applies to the control of hazardous energy (lockout/tagout) provides:

> Activities requiring machine or equipment shutoff and disassembly, such as **changing a machine tool or cutting blade**, usually take place outside of the normal production process and require energy isolating device lockout tagout in accordance with §1910.147. (emphasis added).

[94] OSHA's Directive CPL 02-00-147 can be found online at: https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-147.pdf

CPL 02-00-147, Ch. 3, Pt. IV, at 3-25. The same section of CPL 02-00-147 also provides that activities such as lubrication are covered by § 1910.147. Respondent does not dispute that the replacing of blades and knives and lubrication performed by employees at the workplace constituted servicing and maintenance under the standard. (Resp't Post Trial Br., at 9-10).

Respondent failed to comply with § 1910.147(c)(1) on the cited dates.[95] First, it failed to establish any hazardous energy control (lockout/tagout) program or procedures as required. (Tr. 95-96, 157-58, 163-65, 331, 337, 386, 451-52; Ex. 18, at 1-2, ¶¶ 3-5, Ex. 38, at 34, 37-38). Respondent's safety program does not mention energy control procedures. (Tr. 331; Ex. 8, at 7-8). Respondent failed to adequately train all employees who performed service and/or maintenance on the machines. (Tr. 98-104, 335-36, 434; Ex. 18, at 5, ¶¶ 5, 9, Ex. 38, at 36). Further, Respondent failed to do any inspections relating to hazardous energy control procedures at the workplace for employees who performed service and/or maintenance on the machines. (Tr. 104, Ex. 18, at 2, ¶¶ 3-4). Employees were exposed to the hazard of amputation or worse. (Tr. 104-05).

Respondent argued that even though it had no written program, it had a procedure to "lock it out by taking the energy away from the machine."[96] (Ex. 38, at 39). While there were locks and tags present at the workplace, none were used, and they were sitting in an unopened box when the OSHA inspection started in January 2018. (Tr. 97-98, 107, 112, 260-61, 334; Ex. 16, at 2-3, Ex. 38, at 39, 42-43). Machines at the workplace had specific lock points where the locks could have been easily installed. (Tr. 107, 112; Ex. 13, at 3, Ex. 14, at 3-4). Respondent

[95] Citation 2, Item 1a and the Complaint were amended to allege that the violation occurred on or about January 11 and 19, 2018. (Tr. 13; Order dated November 13, 2019).

[96] At trial, Respondent appeared to argue that it did not violate § 1910.147(c)(1) because the term "lockout/tagout" is not mentioned in that standard. Mr. Vavra freely admits that he had no lockout/tagout program or procedures. (Tr. 337). Respondent's argument is meritless. The title of 29 C.F.R. § 1910.147 is "The control of hazardous energy (lockout/tagout)." Further, 29 C.F.R. §§ 1910.147(c)(2)(i) and (ii) provide that an employer's energy control program under § 1910.147(c)(1) shall utilize lockout and/or tagout to control hazardous energy.

purchased lockout/tagout equipment, but Mr. Vavra admitted that it was never used. (Tr. 334; Ex. 38, at. 41-43). Mr. Vavra told CSHO Calderon that he did not use the lockout/tagout equipment because it was "common sense" not to touch the equipment. (Tr. 98).

Mr. Vavra testified at trial and at his Rule 30(b)(6) deposition that the "procedure" used by employees was limited to merely switching the machines off. (Tr. 331-33, Ex. 38, at 39-40). Because the machines were only switched off without being locked out, Mr. Vavra admitted at trial that it was possible for someone to turn a machine on while an employee was performing service or maintenance. (Tr. 389, 394). Further, employees interviewed by CSHO Calderon told her that there were no energy control procedures in place and that, consistent with Mr. Vavra's account, they just turned off the power for servicing and maintenance.[97] (Tr. 157-58, 163-64).

b. Respondent Violated 29 C.F.R. § 1910.147(c)(4)(i).

29 C.F.R. § 1910.147(c)(4)(i) requires that procedures be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by that section. The standards contained in 29 C.F.R. § 1910.147 cover the "servicing and maintenance of machines and equipment in which the *unexpected* energization or startup of machines or equipment" could injure an employee. 29 C.F.R. § 1910.147(a)(1)(i)

[97] Messrs. [redacted] and [redacted] testified that they followed a series of steps to deenergize the moulder, rip saw/ripper and the planer. (Tr. 432-33, 464; Ex. 39-40). Their testimony on this issue is not credible because it contradicts Respondent's discovery responses, statements made to OSHA by Respondent's employees, the testimony of Respondent's owner and manager, and the fact that locks and tags were available on site but were never opened. In any event, neither employee claimed that he actually used any lockout/tagout equipment during these alleged steps. (Tr. 451-52). Furthermore, the moulder, rip saw/ripper and the planer are all powered both by electricity and air. (Tr. 105-07, 110-13, 165-66, 460, 481-82). Under 29 C.F.R. § 1910.147(d)(5)(i), all potentially hazardous stored or residual energy must be relieved, disconnected, restrained, and otherwise rendered safe. Even assuming *arguendo* that there is any veracity to the procedures described by Messrs. [redacted] and [redacted], there is no evidence that any measures were taken to ensure that the air powering all the machines was isolated and/or rendered safe. (Tr. 166-67, 171-72, 259-60). Further, energy control procedures were not developed or utilized for the two upcut saws. [redacted] operated the Northtech and Whirlwind saws at Timberline and THD for thirteen years. (Tr. 495). Mr. [redacted] testified that he did not work for Respondent from September 2017 through March 2018. (Tr. 500-01). Because Mr. [redacted] was not employed by Respondent when the onsite inspection was conducted in January and February 2018, his testimony regarding conditions at the workplace and procedures followed during that period of time are given no weight. (Tr. 501-02).

(emphasis in original). As discussed above, the cited standard applies here because Respondent's employees performed service and maintenance on various machines at the workplace that had two power sources. The planer, rip saw/ripper, moulder and upcut saws were all powered by both electricity and air. (Tr. 105-07, 110-13, 165-66, 460, 481-82; Ex. 15, at 2). Because those machines had multiple energy sources that had the potential for the release of stored or residual energy that could endanger employees when they performed service and maintenance, machine-specific procedures to control potentially hazardous energy were required. *Drexel Chem. Co.*, No. 94-1460, 1997 WL 93945, at *6 (O.S.H.R.C., Mar. 3, 1997) (holding that specific procedures are required when machines have multiple energy sources).

Respondent failed to comply with the requirements of § 1910.147(c)(4)(i) on the cited dates.[98] As discussed, Respondent did not utilize lockout/tagout equipment and procedures. Respondent did not have any written hazardous energy control program or procedures. (Tr. 95, 105, 331, 337, 386; Ex. 8, at 7-8, Exs. 9, 13-16, Ex. 18, at 1-2, ¶¶ 3-5, Ex. 38, at 34, 38). A written hazardous energy control program must include: (1) the names of affected employees; (2) the types and magnitudes of energy involved; (3) the hazards involved; (4) the methods that should be used to control energy sources; (5) the types and location of the machines and energy isolating devices; (6) the types of stored energy and methods to dissipate or restrain energy; and (7) the method of verifying the isolation of the equipment at issue. *Drexel Chem. Co.*, 1997 WL 93945, at *5. Employees, including Messrs. [redacted], [redacted], and [redacted], were exposed to serious injuries such as amputation. (Tr. 114-15).

c. Citation 2, Items 1a and 1b, Are Classified as Willful.

As established in section VA2, Citation 2, Items 1a and 1b were properly classified as

[98] Citation 2, Item 1b and the Complaint were amended to allege that the violation occurred on or about January 11 and 19, 2018. (Tr. 13; Order dated November 13, 2019).

willful under section 17(a) of the OSH Act. The record establishes that Respondent, again generally through Thomas Vavra's actions, exhibited both intentional disregard and plain indifference to the requirements of both cited standards and made no good faith effort to comply. Mr. Vavra had a heightened awareness of the cited standard and hazardous conditions presented by failing to establish hazardous energy control procedures because THD was cited for a serious violation of 29 C.F.R. § 1910.147(c)(1) in July 2012. (Tr. 328-29; Ex. 29, at 3). The prior citation specifically noted that the moulder and saws required energy control procedures for employees performing servicing and maintenance. (Ex. 29, at 3). As a result of that 2012 citation, Mr. Vavra was put on notice that a hazardous energy control program consisting of energy control procedures, employee training and periodic inspections were required at the workplace. (Tr. 328-29; Ex. 29, at 3, Ex. 38 at 40). *See N. Atl. Fish Co.*, 2001 WL 1263331, at *11 (finding willful violation of 29 C.F.R. § 1910.147(c)(1) where employer previously cited for same violative condition a few years before and probably not corrected clearly demonstrating a "failure to act in the face of a known duty.").

In August 2012, Mr. Vavra certified that the following actions were taken to abate the cited violation:

> An energy control program with a lock out tag out procedure has been developed and implemented. It is inclusive of procedures, training and inspections.

(Ex. 31). The record establishes that all of Mr. Vavra's representations and certifications to OSHA in 2012 that the citation for violation of 29 C.F.R. § 1910.147(c)(1) had been abated were, at best, inaccurate.[99] (Tr. 337; Exs. 30-32, 38, at 40-41). Mr. Vavra, despite possessing

[99] At trial, Mr. Vavra testified:
Q Isn't [it] true that no lockout/tagout procedures were implemented after the 2012 citation?
A Not the lockout/tagout, specifically, no.
(Tr. 337).

lockout/tagout equipment, chose not to utilize it because he thought it better to rely on "common sense" rather than complying with the lockout/tagout standards to protect employee safety. *Sec'y v. Capital City Excavating Co., Inc.*, 712 F.2d at 1010 (employer's belief employees were not exposed to a hazard inapplicable to a determination violation was willful). When asked by Respondent's counsel why Respondent did not use lockout/tagout at the workplace, Mr. [redacted] replied, "you wouldn't make any money." (Tr. 453). Mr. [redacted], who testified that he is a supervisor and would be in charge in Mr. Vavra's absence, revealed in his answer how Respondent prioritizes production and profit over employee safety. (Tr. 439, 458). *See Worldwide Mfg., Inc.*, No. 97-1381, 2000 WL 1086717, at *4 (O.S.H.R.C., Aug. 2, 2000)(putting production over employee safety constitutes willful conduct).

Contrary to what Mr. Vavra certified was done to abate the prior 2012 citation, no employees who performed servicing and/or maintenance on the machines were adequately trained on energy control or lockout/tagout and no inspections relating to hazardous energy control procedures were done as certified. (Tr. 98-100, 103-04, 434; Ex. 18, at 1-2, ¶¶ 3-5, 9, Ex. 31, Ex. 38, at 36). In addition, no energy control procedures, written or otherwise, were "developed and implemented" as certified. (Tr. 95, 105, 331, 337, 386; Ex. 8, at 7-8, Exs. 9, 13-16, Ex. 18, at 1-2, ¶¶ 3-5, Ex. 31, Ex. 38, at 34, 38). The Court finds that the violations in Citation 2, Items 1a and 1b, are properly classified as willful.

d. In the Alternative, Citation 2, Items 1a and 1b Are Repeat Violations.

The Court also finds Citation 2, Items 1a and 1b, repeat violations under section 17(a).[100] On June 12, 2012, Respondent's predecessor at the worksite, THD, was issued a citation for

[100] Citation 2, Items 1a and 1b and the Complaint were amended to reflect that the classifications for the violations were also Repeat. (Tr. 13).

violation of 29 C.F.R. § 1910.147(c)(1) in Inspection No. 330566 (Citation 1, Item 3) for not establishing an energy control program for employees performing service and maintenance on various machines including, as in the instant case, the moulder and saws. (Tr. 328-29; Ex. 29, at 3). In November 2012, Mr. Vavra signed a Stipulated Settlement on behalf of THD affirming the citation for violation of 29 C.F.R. § 1910.147(c)(1). (Tr. 329-30, 336, 357; Ex. 32). The citation issued to THD for violation of 29 C.F.R. § 1910.147(c)(1) on June 12, 2012 in Inspection No. 331026 became a final order of the Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(i) (Docket No. 18-1212)). Citation 2, Item 1a, is affirmed as a repeat violation.

In addition, the prior citation issued to THD can be used as a basis for a repeat classification of the citation issued for violation of 29 C.F.R. § 1910.147(c)(4)(i) as alleged in Citation 2, Item 1b. Both energy control standards are substantially similar in that they both address the same hazard of machines unexpectedly reenergizing, restarting or releasing stored energy that could injure cause employees to suffer serious injury as amputations while engaged in service or maintenance. *Potlach Corp.*, 1979 WL 61360, at *4 (violations that involve similar hazards are substantially similar, notwithstanding that a different standard was cited). In addition, both the prior 2012 citation and Item 2b note that employees were performing service and maintenance on the moulder and saws. (Ex. 1, at 17, Ex. 29, at 3). Citation 2, Item 1b, is also affirmed as a repeat violation.

e. In the alternative, Citation 2, Items 1a and 1b Are Also Serious Violations.

Citation 2, Items 1a and 1b are also Serious violations under section 17(k) of the OSH Act because Respondent's failure to establish a program consisting of energy control procedures, employee training and periodic inspections as well as failure to have any written procedures for the control of potentially hazardous energy exposed employees to serious physical injuries such

as amputation in the event a machine unexpectedly restarted while the employees were performing service and/or maintenance.[101] (Tr. 104-05, 114-15). *See Neb. Aluminum Castings, Inc.*, No. 09-0800, 2010 WL 8609338, at *10 (O.S.H.R.C., Sept. 30, 2010).

f. The Violations are Affirmed and the Court Assesses a Penalty of $41,734 for Citation 2, Items 1a and 1b.

As discussed above, Respondent's violations of § 1910.147(c)(1) and § 1910.147(c)(4)(i) were willful, repeat, and serious violations. The gravity of a violation is determined by its severity and its probability. AD Prebish testified that the gravity-based penalty proposed for Citation 2, Items 1a and 1b, was $129,336 because the gravity of the violation was rated "High (Severity)" and "Greater (Probability)."[102] Employees frequently performed service and/or maintenance on the machines for many years. (Tr. 96, 102-03, 108-12, 266, 334, 403, 433, 448-49, 458-59, 468; Ex. 38, at 39-40). Given the risk of amputations and the willful and repeat nature of the violations, a meaningful penalty is appropriate. (Tr. 104-05, 114, 266). AD Prebish testified that the gravity-based penalty was reduced by 60% for employer size. (Tr. 266). No reductions were given by the Secretary for good faith or history. (Tr. 267, 278).

The Court affirms Citation 2, Items 1a and 1b, as a willful, repeat, and serious violation of the cited standard. The Court has considered all of the required factors for consideration with regard to Citation 2, Items 1a and 1b, and assesses a penalty of $41,734, and not the $51,734 proposed by the Secretary. While Timberline concedes it did not have any written procedures in place, its machine operators followed unwritten procedures while servicing or maintaining Respondent's machines. Respondent permits only a few long-term employees to service its

[101] In its Post-Trial Brief, Respondent admits as to Citation 2, Item 1a that "Timberline violated the regulation by failing to document its procedures. However, the violation was Other Than Serious…." (Resp't Post-Trial Br., at 17, ¶ 38). As to Citation 2, Item 1b, Respondent also admits "While Timberline violated the regulation, the violation was Other Than Serious…." (Resp't Post-Trial Br., at 17, ¶ 41).
[102] In 2018, the maximum penalty for a willful or repeat violation was $129,336. 29 C.F.R. §§ 1903.15(d)(1) and (d)(2) (2018).

machines. Neither THD nor Respondent have ever had any lost time accidents. (Tr. 365-66, 439-40, 466; Resp't Post Trial Br., at 3, 26).

(Sec'y Post Hrg. Br., at 48-56).

10. Citation 2, Item 2: Willful Failure to Train and Evaluate Forklift Operators.

a. Respondent Violated 29 C.F.R. § 1910.178(l)(1)(i).

29 C.F.R. § 1910.178(l)(1)(i) requires that the employer ensure that each operator of powered industrial trucks is competent to operate a PIT safely, as demonstrated by the successful completion of the training and evaluation specified in § 1910.178(l). The cited standard applies because two forklifts were routinely operated by employees at the workplace who had not been trained by Respondent on forklift operations, including Messrs. Anthony Vavra, [redacted], and [redacted]. (Tr. 116, 158-59, 337-38, 395, 455, 461, 476, 484-85; Ex. 17, Ex. 38, at 43). Respondent failed to comply with the standard. It took no action to train or evaluate any employees who operated the forklifts to ensure that they were competent to operate them safely. (Tr. 115-17, 159, 337-39, 461, 476, 484-85; Ex. 18, at 2, ¶¶ 7, 9, Ex. 38, at 43-44). Respondent failed to meet any of the requirements set forth in § 1910.178(l). Respondent has no records that it ever evaluated or trained any employees on forklifts. (Ex. 18, at 2, ¶¶ 7, 9). All Respondent's employees were exposed to hazards from being struck by a forklift or materials. (Tr. 118). Mr. Vavra admitted that he never evaluated the competency of forklift operators, including Messrs. [redacted] and [redacted], or gave them written or driving examinations. (Tr. 337-39; Ex. 38, at 44-45; Resp't Post Trial Br., at 24).

Both Messrs. [redacted] and [redacted] testified that they had never been given a written or driving test while employed by Respondent. (Tr. 337, 461, 484-85; Ex. 38, at 44). The lack of training and evaluation manifested itself in an unsafe practice. CSHO Calderon testified that

when she was conducting her onsite inspection in January 2018, she observed Mr. [redacted] operating a forklift without wearing a seat belt. Mr. [redacted] told CSHO Calderon that Respondent had not trained, tested or evaluated him on his ability to operate a forklift competently. (Tr. 117, 159). She also saw Messrs. [redacted] and Anthony Vavra operating a forklift. (Tr. 117, 158-59). [redacted] told her that he had not received any forklift training.

b. Citation 2, Item 2 Was Properly Classified as Willful.

The record establishes that Respondent exhibited both intentional disregard and plain indifference to the requirements of 29 C.F.R. § 1910.178(l)(1)(i) and made no good faith efforts to comply. Mr. Vavra had a heightened awareness of the hazardous conditions presented by failing to ensure that forklift operators were trained and evaluated to be competent because THD was cited for serious violation of the same standard in July 2012. (Tr. 328-29; Ex. 29, at 4). As a result of that 2012 citation, Mr. Vavra was put on notice that he was required to ensure that all forklift operators were trained as required by the standard and evaluated to make sure they operated the PITs competently. (Tr. 328-29; Ex. 28, at 2, ¶ 9, Ex. 38, at 40).

In August 2012, Mr. Vavra certified to OSHA that the following actions were taken to abate the cited violation:

> A forklift training program has been developed and implemented. It's inclusive of training with a written and driving exam.
>
> Completion date: 4/23/12

(Ex. 31).[103] Mr. Vavra admitted that none of these measures were taken and offered no explanation for his failure to abate the violation in 2012. (Tr. 339; Ex. 38, at 45). Citation 2, Item 2 was properly classified as willful.

c. In the Alternative, Citation 2, Item 2 is Affirmed as a Repeat Violation.

[103] AD Prebish testified that this representation was false. (Tr. 270-71).

In the alternative, Citation 2, Item 2 was a repeat violation because there was a Commission final order against THD for violation of the same exact standard in 2012.[104] THD was cited for violation of 29 C.F.R. § 1910.178(l)(1)(i) in Inspection No. 330566 on July 12, 2012. (Tr. 328; Ex. 29, at 4). In November 2012, Mr. Vavra signed a Stipulated Settlement on behalf of THD affirming the citation. (Tr. 339; Ex. 32). The citation issued to THD for violation of 29 C.F.R. § 1910.178(l)(1)(i) became a final order of the Commission on February 6, 2013. (Jt. Pre-Hrg. Stmt., § 4(i) (Docket No. 18-1212)). Because both citations are for violation of the same standard and employees were exposed to the same struck by hazards, Citation 2, Item 2 is also affirmed as a repeat violation.

d. In the Alternative, Citation 2, Item 2 is Also Affirmed as a Serious Violation.

Citation 2, Item 2 was also a Serious violation under section 17(k) of the OSH Act because employees were exposed to serious hazards from being struck by a forklift or other materials due to Respondent's failure to train and evaluate forklift operators to ensure they were competent.[105] (Tr. 118).

e. The Penalty Proposed for Citation 2, Item 2 is Appropriate and is Affirmed.

Respondent's violation of § 1910.178(l)(1)(i) was willful and in the alternative both repeat and serious. AD Prebish testified that the gravity-based penalty proposed for Citation 2, Item 2 was $110,856 because the gravity of the violation was rated "Medium (Severity)" and "Lesser (Probability)." (Tr. 271). Given the fact that the forklifts were operated every day by employees who had not been trained and evaluated, the gravity determination was justified. (Tr.

[104] Citation 2, Item 2 and the Complaint were amended to reflect that the classification for the violation was also Repeat. (Tr. 13).
[105] In its Post-Trial Brief, Respondent admits "Timberline violated the regulation, but the violation was Other Than Serious…." (Resp't Post-Trial Br., at 18, ¶ 46).

455). Due to the hazards resulting from the violation and its willful, repeat, and serious nature, OSHA used appropriate judgment in determining the gravity of the violation. (Tr. 118).

AD Prebish testified that the gravity-based penalty was reduced by 60% for size. (Tr. 171). No reductions were given for good faith and no penalty adjustments were applied for history. (Tr. 271). He said that the adjusted gravity-based penalty was $44,342. (Tr. 271). OSHA made appropriate and supported determinations of all of the required factors. (Tr. 271). The Court has considered all of the required factors and affirms Citation 2, Item 2, as a willful, repeat, and serious violation and the proposed adjusted gravity-based penalty of $44,342.

(Sec'y Post Hrg. Br., at 57-60).

D. RESPONDENT FAILED TO PROVE UNPREVENTABLE EMPLOYEE MISCONDUCT AND INFEASIBILITY

In both Answers to the Complaints in this case, Respondent generally pled the affirmative defenses of unpreventable employee misconduct[106] and infeasibility.[107] Respondent produced insufficient evidence at trial to establish either affirmative defense for any violation. (Exs. 18-19, 28).

1. Respondent Failed to Establish Unpreventable Employee Misconduct in Citation 1, Items 8a, 8b, Docket No. 18-1212.

[106] In its Answer in Docket No. 18-1212, Respondent stated its Third Affirmative Defense of unpreventable employee misconduct applied to "all or some of the citations." In its Response to Complainant's First Set of Interrogatories in Docket No. 18-1212, Respondent asserted that its unpreventable employee misconduct defense specifically applied to Citation 1, Items 8a, 8b, and Citation 2, Items 1a, 1b. (Ex. 19, at 19, ¶ 24). However, its related discovery responses only applied to Citation 1, Items 8a, 8b. (Ex. 19, at 19-21). Respondent has abandoned any unpreventable employee misconduct defense as to Citation 2, Items 1a, 1b, in Docket No. 18-1212 by failing to provide responsive discovery responses, raise it at trial and address it in its Post-Trial Brief. (Ex. 19, at 15-19).

[107] In its Answer in Docket No. 18-1212, Respondent stated its Second Affirmative Defense of infeasibility applied to "all or some of the citations." In its Response to Complainant's First Set of Interrogatories in Docket No. 18-1212, Respondent asserted that its infeasibility/impossibility defense specifically applied to Citation 1, Items 2-3 and Item 5. (Ex. 19, at 14, ¶ 18). However, its related discovery responses only applied to Citation 1, Item 5. (Ex. 19, at 15-19). Respondent has abandoned any infeasibility/impossibility affirmative defense as to Citation 1, Items 2-3, in Docket No. 18-1212 by failing to provide responsive discovery responses, raise it at trial and address it in its Post-Trial Brief. (Ex. 19, at 15-19).

In order to establish unpreventable employee misconduct, an employer is required to prove: "(1) that the employer has established work rules designed to prevent the violation; (2) that it has adequately communicated those rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Precast Serv., Inc.*, No. 93-2971, 1995 WL 693954, at *1 (O.S.H.R.C., Nov. 14, 1995) (quoting *Nooter Constr. Co.,* No. 91-0237, 1994 WL 27750, at *6 (O.S.H.R.C., Jan. 31, 1994)), *aff'd*, 106 F.3d 401 (6th Cir. 1997); s*ee also, Capform, Inc.*, No. 91-1613, 1994 WL 530815, at *3 (O.S.H.R.C., Sept. 29, 1994). First, Respondent had practically no safety work rules. Only about a one-page section identified as "Employee Safety Program" was contained in its Employee Handbook. (Tr. 57; Ex. 8, at 7-8, Ex. 18, at ¶ 1, Ex. 28, at ¶ 1). Respondent has a deficient safety program. (Tr. 267; Ex. 8, at 7-8). Second, Respondent failed to train employees on significant safety and health issues, including hearing conservation, hazardous chemicals, fire extinguisher use, hazardous energy control, or safe operation of forklifts. There are no training records in the record. (Ex. 18, at 2, ¶¶ 5-6. 8-10, Ex. 28, at 1-2, ¶¶ 3, 7, 9-11). Respondent has also not shown that it took adequate steps to ensure employees were working safely. Lastly, Respondent offered no evidence showing employees were disciplined for violating any work rules. (Ex. 18, at 2, ¶ 11, Ex. 19, at 21, Ex. 28, at 3, ¶ 12). (Sec'y Post Hrg. Br., at 72-73).

2. Respondent Failed to Establish Infeasibility as to Citation 1, Item 5, Docket No. 18-1212.

To establish an infeasibility affirmative defense, an employer must prove that: (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that: (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would be technologically or economically infeasible after its implementation, and (2): either (a) an alternative method of protection was used, or (b)

there was no feasible alternative means of protection. *Armstrong Steel Erection, Inc.*, No. 92-262, 1995 WL 561592, at *2 (O.S.H.R.C., Sept. 20, 1995). Respondent has the burden of proof to prove infeasibility. *A.J. McNulty & Co., Inc.*, No. 94-1758, 2000 WL 1490235, at *10 (O.S.H.R.C., Oct. 5, 2000). Respondent has not met its burden to show that compliance with any of the cited standards, including Citation 1, Item 5, Docket No. 18-1212, was infeasible. Respondent asserted infeasibility with regard to the guarding violation alleged in Citation 1, Item 5 in Docket No. 18-1212.[108] In its Post-Trial Brief, Respondent argues a wider (or extended) saw blade guard would be impractical "because a wider guard would obscure the operator's view of where the saw would cut the wood" and create a pinch point dangerous to the operator's hands. (Tr. 380-82; Ex. 9, at 3; Resp't Post Trial Br., at 7, 14-15). Mr. Vavra admitted that he did not consult with any safety consultants or research how the upcut saws could be fully guarded, he merely used his own "common sense." (Tr. 426-27; Ex. 19, at 16). He told CSHO Calderon during the OSHA inspection that guards get in the way of production. (Tr. 65-66, 71-72). CSHO Calderon testified that both upcut saws could have been properly guarded with a larger, commercially available guard that would provide full protection and Mr. Vavra testified that he was aware that larger guards are available. (Tr. 74-75, 136, 380). (Sec'y Post Hrg. Br., at 73-74).

E. Respondent's Tax Returns Do Not Justify any further Penalty Reduction.

At the trial, Respondent offered into evidence its federal tax returns for the years 2015, 2016, 2017 and 2018 claiming they should be considered as a factor of the size of the company

[108] In discovery, Complainant asked Respondent to produce documents and information to support this affirmative defense. Complainant says nothing was provided. (Ex. 18, at 2-3, ¶¶ 12-13, Ex. 19, at 6, ¶ 7c, 14-19, Ex. 28, at 3, ¶¶ 13-14; Sec'y Post-Hrg. Br., at 74). In its Response to Complainant's First Set of Interrogatories, Respondent stated "any further guarding than is currently in place would render the saw useless or inefficient, thus making additional guards infeasible." (Ex. 19, at 6, ¶ 7a).

for penalty purposes. (Tr. 32-33; Exs. B-E). Over the Secretary's objections, the Court admitted the tax returns into evidence, citing its prior decision in *J.C. Stucco and Stone, Inc.*, No. 14-1558, 2016 WL 7363932 (O.S.H.R.C.A.L.J., Nov. 7, 2016) (consolidated). In *J.C. Stucco and Stone, Inc.*, this Court similarly held that financial information can be relevant to the employer size factor for determination of penalty amount.[109] *Id.,* at *8. Here, the Secretary does not dispute that Respondent is a small employer and concedes Respondent is a small employer for penalty purposes. The Secretary's proposed penalties granted Respondent the full reductions permitted under the FOM based on Respondent's small size, as discussed *supra*.

The Court finds that Respondent's tax returns do not justify any further penalty reduction. "Before the Court can decide whether an employer's poor financial condition can properly weigh towards a penalty reduction, Respondent must actually prove its precarious financial condition and establish that it deserves to have its poor finances affect the penalty." *Id.,* at *9. Here Respondent introduced its tax returns at trial but did so without showing any financial hardship that warrants further reduction of the penalties. As in *J.C. Stucco and Stone*, Respondent "did not have the tax preparer testify or make any supporting documentation available." *Id.,* at *9 n. 21. Furthermore, in its most recent 2018 tax return, Respondent had $3,325,714 in gross sales, $25,787 in ordinary business income, and $1,127,721 in assets at the end of the tax year. (Tr. 407; Ex. E). The Court finds Respondent failed to show that its financial condition warrants any further reduction in penalty.

[109] Whether the employer should be considered a small employer for penalty purposes was an issue in dispute in *J.C. Stucco and Stone*. In *J.C. Stucco and Stone,* the employer had a small number of employees, but the Secretary took the position that any penalty reduction based on small employer size was inappropriate due to the extensive violation history and bad faith of that employer. However, the court found the returns could be relevant to size finding that: "In assessing the size factor here, the Court has relied primarily on the evidence regarding the number of employees and viewed the financial information as relevant to the extent that it supported Respondent's [*J.C. Stucco and Stone*] claim that it was a small employer." *J.C. Stucco and Stone, Inc.*, 2016 WL 7363932, at *8.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Docket No. 18-1211

1. Jurisdiction of this action is conferred upon the Commission by section 10(c) of the OSH Act (29 U.S.C. § 651, *et seq*.). (Jt. Pre-Hrg. Stmt., § 5).

2. At all relevant times, Respondent was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the OSH Act and was an employer within the meaning of section 3(5) of the OSH Act. (Jt. Pre-Hrg. Stmt., § 4(a)).

3. Respondent violated 29 C.F.R. § 1910.95(c)(1) by failing to institute a continuing, effective hearing conservation program when employee noise exposures equaled or exceeded an 8-hour TWA sound level of 85 dBA. (Citation 1, Item 1).

4. Respondent violated 29 C.F.R. § 1910.1200(e)(1) by failing to develop, implement and/or maintain a written hazard communication program at the workplace. (Citation 1, Item 2a).

5. Respondent violated 29 C.F.R. § 1910.1200(g)(1) by not having a safety data sheet in the workplace for each hazardous chemical used. (Citation 1, Item 2b).

6. Respondent violated 29 C.F.R. § 1910.1200(h)(1) by not providing employees with information and training on hazardous chemicals in their work area. (Citation 1, Item 2c).

7. The violations alleged in Citation 1, Item 1 and Items 2a, 2b, and 2c, issued to Respondent were willful violations under section 17(a) of the OSH Act.

8. In the alternative, the violations alleged in Citation 1, Item 1 and Items 2a, 2b, and 2c were repeat violations under section 17(a) of the OSH Act.

9. In the alternative, the violations alleged in Citation 1, Item 1 issued to Respondent were also serious violations under section 17(k) of the OSH Act.

10. In the alternative, the violations alleged in Citation 1, Items 2a, 2b and 2c were also other-than-serious violations within the meaning of section 17(c) of the OSH Act.

11. The penalties proposed by the Secretary for all of the alleged violations in Docket No. 18-1211 are appropriate and are affirmed.

B. Docket No. 18-1212

1. Jurisdiction of this action is conferred upon the Commission by section 10(c) of the OSH Act (29 U.S.C. § 651, *et seq*.). (Jt. Pre-Hrg. Stmt., § 5).

2. At all relevant times, Respondent was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the OSH Act and was an employer within the meaning of section 3(5) of the OSH Act. (Jt. Pre-Hrg. Stmt., § 4).

3. Respondent violated 29 C.F.R. § 1910.36(d)(1) by keeping an emergency exit improperly door locked. (Citation 1, Item 2).

4. Respondent violated 29 C.F.R. § 1910.37(b)(6) by having an exit sign not adequately illuminated. (Citation 1, Item 3).

5. Respondent violated 29 C.F.R. § 1910.157(g)(1) by not training employees on the general principles of fire extinguisher use and the hazards involved with incipient stage firefighting. (Citation 1, Item 4).

6. Respondent violated 29 C.F.R. § 1910.212(a)(1) by failing to properly guard points of operation hazards on the Whirlwind and Northtech up-cut saws used by employees.

(Citation 1, Item 5a),b)).

7. Respondent violated 29 C.F.R. § 1910.242(b) by not ensuring that compressed air used for cleaning purposes was reduced to less than 30 p.s.i. (Citation 1, Item 6a),b)).

8. Complainant did not show that Respondent violated 29 C.F.R. § 1910.303(g)(2)(i) by having live electrical parts exposed due to a missing dead front from a circuit breaker box for the planer, chop saw and end matcher because the Secretary did not show that the standard applied here; and Citation 1, Item 7 is vacated.

9. Respondent violated 29 C.F.R. § 1910.305(b)(1)(ii) by having live electrical parts exposed due to missing filler plates from a circuit breaker box for the planer, chop saw and end matcher. (Citation 1, Item 8a).

10. Respondent violated 29 C.F.R. § 1910.305(b)(2)(i) by having live electrical parts exposed due to a missing cover from a conduit box connected to the chipper. (Citation 1, Item 8b).

11. Respondent violated 29 C.F.R. § 1910.147(c)(1) by not establishing and implementing a program consisting of energy control procedures, employee training and periodic inspections for employees who serviced and maintained machines and equipment such as, but not limited to, the planer, rip saw/ripper, moulder, Whirlwind saw and Northtech saw. (Citation 2, Item 1a).

12. Respondent violated 29 C.F.R. § 1910.147(c)(4)(i) by not developing, documenting, or utilizing procedures for the control of potentially hazardous energy for employees who serviced and maintained machines and equipment such as, but not limited to, the planer, rip saw/ripper, moulder, Whirlwind saw and Northtech saw. (Citation 2, Item 1b).

13. Respondent violated 29 C.F.R. § 1910.178(l)(1)(i) by failing to ensure that each

PIT operator was competent to operate a PIT safely, as demonstrated by the successful completion of the training and evaluation specified in § 1910.178(l). (Citation 2, Item 2).

14. With the exception of withdrawn Citation 1, Item 1, and the vacated Citation 1, Item 7; all of the remaining violations alleged in Citations 1 and 2 issued to Respondent in Docket No. 18-1212 were serious violations under section 17(k) of the OSH Act.

15. The violations alleged in Citation 2 issued to Respondent were also willful violations under section 17(a) of the OSH Act.

16. In the alternative, the violations alleged in Citation 2 were repeat violations under section 17(a) of the OSH Act.

17. With the exception of Citation 2, Items 1a) and 1b) in Docket No. 18-1212 where the penalty assessed is $41,734 [and not $51,734 as proposed by the Secretary], withdrawn Citation 1, Item 1, and Citation 1, Item 7 in Docket No.18-1212 that is vacated with no penalty assessed, the penalties proposed by OSHA for all of the other alleged violations in 18-1212 are appropriate and are affirmed.

VII. ORDER

WHEREFORE based on these findings of fact and conclusions of law, it is **ORDERED** in Docket No. 18-1211 that Citation 1, Item 1, alleging a willful, repeat, and serious violation of 29 C.F.R. § 1910.95(c)(1) is **AFFIRMED** and a penalty of $51,734 is **ASSESSED,**

it is FURTHER **ORDERED** in Docket No. 18-1211 that Citation 1, Item 2, alleging a willful, repeat, and an other-than-serious violation of: a) Item 2a - 29 C.F.R. § 1910.1200(e)(1), b) Item 2b - 29 C.F.R. § 1910.1200(g)(1), and Item 2c - 29 C.F.R. § 1910.1200(h)(1) is **AFFIRMED** and a penalty of $9,239 is **ASSESSED,**

it is FURTHER **ORDERED** in Docket No. 18-1212 that Citation 1, Item 2, alleging a

serious violation of 29 C.F.R. § 1910.36(d)(1) is **AFFIRMED** and a penalty of $2,956 is **ASSESSED,**

it is FURTHER **ORDERED** in Docket No. 18-1212 that Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1910.37(b)(6) is **AFFIRMED** and a penalty of $2,217 is **ASSESSED,**

it is FURTHER **ORDERED** in Docket No. 18-1212 that Citation 1, Item 4, alleging a serious violation of 29 C.F.R. § 1910.157(g)(1) is **AFFIRMED** and a penalty of $2,956 is **ASSESSED,**

it is FURTHER **ORDERED** in Docket No. 18-1212 that Citation 1, Items 5a) and 5b), alleging a serious violation of 29 C.F.R. § 1910.212(a)(1) is **AFFIRMED** and a penalty of $5,174 is **ASSESSED,**

it is FURTHER **ORDERED** in Docket No. 18-1212 that Citation 1, Items 6a) and 6b), alleging a serious violation of 29 C.F.R. § 1910.242(b) is **AFFIRMED** and a penalty of $2,217 is **ASSESSED,**

it is FURTHER **ORDERED** in Docket No. 18-1212 that Citation 1, Item 7, alleging a serious violation of 29 C.F.R. § 1910.303(g)(2)(i) is **VACATED** and no penalty is **ASSESSED,**

it is FURTHER **ORDERED** in Docket No. 18-1212 that Citation 1, Items 8a) and 8b), alleging a serious violation of 29 C.F.R. § 1910.305(b)(1)(ii) and 29 C.F.R. § 1910.305(b)(2)(i) is **AFFIRMED** and a penalty of $3,696 is **ASSESSED,**

it is FURTHER **ORDERED** in Docket No. 18-1212 that Citation 2, Item 1a alleging a willful, repeat, and serious violation of 29 C.F.R. § 1910.147(c)(1) and Citation 2, Item 1b alleging a willful, repeat, and serious violation of 29 C.F.R. § 1910.147(c)(4)(i) is **AFFIRMED** and a penalty of $41,734 is **ASSESSED,** and

it is FURTHER **ORDERED** in Docket No. 18-1212 that Citation 2, Item 2, alleging a willful, repeat, and serious violation of 29 C.F.R. § 1910.178(1)(1)(i) is **AFFIRMED** and a penalty of $44,342 is **ASSESSED.**[110]

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: July 20, 2020
Washington, D.C.

[110] A total penalty of $166,265 is assessed for all of the violations affirmed by this Court in Docket Nos. 18-1211 and 18-1212.