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

SECRETARY OF LABOR, Complainant, v. J.C. WATSON COMPANY, and its successors, Respondent.	OSHRC Docket Nos. 05-0175 & 05-0176

APPEARANCES:

John Shortall, Attorney; Daniel J. Mick, Counsel for Regional Litigation; Nathaniel I. Spiller, Assistant Deputy Solicitor; Joseph M. Woodward, Associate Solicitor; Jonathan L. Snare, Acting Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

James J. Gonzales, Esq.; Holland & Hart LLP, Denver, CO
For the Respondent

DECISION

Before: THOMPSON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

J.C. Watson ("Watson") owns and operates a packing facility in Parma, Idaho ("Parma facility"), where agricultural products are readied for market. On July 31, 2004, Luis Ramirez, a Watson employee, injured his arm in an accident while cleaning the area underneath a moving conveyor belt at the Parma facility. Following the accident, the Occupational Safety and Health Administration ("OSHA") conducted two inspections of the Parma facility. As a result of these inspections, OSHA issued Watson four citations alleging violations of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 ("the Act"), for Watson's failure to comply with various general industry standards codified at 29 C.F.R. part 1910, including provisions of the lockout/tagout ("LOTO") standard. A total penalty of $18,000 was proposed.

Watson contested the citations, which were docketed with the Commission as two cases and then consolidated by Judge James H. Barkley.[1] Following a hearing, Judge Barkley issued a decision in which he vacated five citation items, affirmed nineteen citation items, and assessed a total penalty of $9,300. In reaching his decision, the judge determined that Watson did not qualify for either the "agricultural operations" exemption at 29 C.F.R. § 1928.21(b) or the "agriculture employment" exemption at 29 C.F.R. § 1910.147(a)(1)(ii)(A) and, therefore, was subject to the requirements of the general industry standards. Watson timely petitioned for review of the judge's decision, and Chairman Thompson directed the case for review. For the following reasons, we affirm all nineteen citation items and assess the total penalty of $9,300.[2]

ISSUES

The Secretary cited Watson for alleged violations of general industry standards including § 1910.147, the LOTO standard. However, the LOTO standard provides an exemption for "agriculture employment." Additionally, 29 C.F.R. § 1928.21(b), which applies to "agricultural operations" states that subparts B through T and subpart Z of Part 1910 do not apply to agricultural operations. Watson argues the general industry standards cited by the Secretary do not apply to the cited conditions because it engages in agricultural operations and agriculture employment at the Parma facility. At issue on review is whether Watson established it engages in "agricultural operations" under 29 C.F.R. § 1928.21(b) or "agriculture employment" under 29 C.F.R. § 1910.147(a)(1)(ii)(A) and, therefore, is exempt from the cited general industry standards, including those set forth under the general industry LOTO standard. Also at issue is whether the judge properly affirmed seven of the nineteen citation items still in dispute.

FINDINGS OF FACT

The Parma facility is Watson's only facility used to conduct post-harvest activities for onions, its dominant crop. Almost all of the onions processed at the Parma facility are grown on land Watson either owns, leases, or otherwise works under a sharecropping relationship or as part of a joint venture. The remaining onions processed at the Parma facility have been either purchased by Watson on the spot market or brought to the Parma facility by other growers who

[1] Docket No. 05-0176 contains the citations resulting from OSHA's initial investigation. OSHA later expanded its initial investigation to a "wall-to-wall" inspection, and Docket No. 05-0175 contains the citations resulting from this expanded inspection.

[2] On review, the parties dispute neither the characterization of the violations nor the penalty amounts assessed by the judge.

have contracts with Watson for post-harvest production. Watson harvests onions from August to October and then cures them in storage for thirty days to six months. After curing, bins of onions are transported to the Parma facility by truck and then placed by forklift on a hydraulic lift that raises and tilts the bins, allowing the onions to roll onto a conveyor belt. The belt drops the onions onto a table where they are first graded and then sent to sorting tables where several employees work. Employees then feed the onions onto a second conveyor system, which sorts the onions by size and color. Finally, the onions are either bagged or boxed and readied for shipping.

On July 31, 2004, employee Ramirez was using a "mechanic's creeper"—a flat board with wheels that mechanics use to crawl under cars—to clean the area underneath a running conveyor belt in the Parma facility. While still on the mechanic's creeper and reaching up to push himself out of the area, Ramirez was seriously injured when his arm was caught in the conveyor.

I. APPLICABILITY OF THE GENERAL INDUSTRY STANDARDS

PRINCIPLES OF LAW

The "agricultural operations" exemption at 29 C.F.R. § 1928.21(b) provides that "[e]xcept to the extent specified in paragraph (a) of this section, the standards contained in subparts B through T and subpart Z of part 1910 of this title do not apply to agricultural operations." Determining whether this exemption has been established requires "examin[ing] the specific task that exposed the worker to the alleged noncomplying condition for which the employer was cited and decid[ing] whether the task is part of, or integrally related to, an agricultural operation." *Darragh Co.*, 9 BNA OSHC 1205, 1208, 1981 CCH OSHD ¶ 25,066, pp. 30,962-63 (Nos. 77-2555, 1980) (consolidated) ("*Darragh*").

The "agricultural operations" exemption notwithstanding, the general industry LOTO standard found under subpart J of part 1910 provides that its requirements do not apply to "agriculture employment." 29 C.F.R. § 1910.147(a)(1)(ii)(A).

ANALYSIS

In applying the Commission's test in *Darragh*, the judge correctly focused on the activities Watson's employees performed in the Parma facility rather than examining the company's operation as a whole. The Parma facility's activities specifically include: (1) receiving harvested items stored in a building next to the shed; (2) cleaning; (3) sorting; (4)

sizing and weighing for grading purposes; (5) inspecting; (6) stacking on pallets; (7) packaging; and (8) shipping. These post-harvest activities take place in a facility located away from the farm where the produce is grown.

Although the phrase "agricultural operations" is not specifically defined in part 1928, the Commission has addressed the exemption in two previous cases. *See Darragh*, 9 BNA OSHC at 1207, 1981 CCH OSHD at p. 30,961 (holding that delivery of chicken feed from an integrator of poultry products to farmers that house and feed its chickens is integrally related to agricultural operations and, therefore, employer fell under agricultural operations exemption); *Chapman & Stephens Co.*, 5 BNA OSHC 1395, 1396-97, 1977-78 CCH OSHD ¶ 21,802, p. 26,239 (No. 13535, 1977) ("*Chapman*") (holding that removal of a pipe necessary to maintain a citrus farmer's irrigation system was integrally related to agricultural operations and, therefore, employer fell under agricultural operations exemption). Specifically, the Commission developed a test for analyzing the exemption, which requires "examin[ing] the specific task that exposed the worker to the alleged noncomplying condition for which the employer was cited and decid[ing] whether the task is part of, or integrally related to, an agricultural operation." *Darragh*, 9 BNA OSHC at 1208, 1981 CCH OSHD at pp. 30,962-63. Moreover, when the activity in question takes place on a farm, it weighs in favor of a finding that the activity is integrally related to an agricultural operation. *Id*. (explaining the activities in question qualify for the agricultural operations exemption, in part, because they are performed on individual farms). Under these circumstances, we agree with the judge that the activities performed in the Parma facility are not "integral to the *growing* of onions[,]" the true agricultural operation here.[3] *See, e.g.*, *Chapman*, 5 BNA OSHC at 1396, 1977-78 CCH OSHD at p. 26,239 (growing citrus fruit is an agricultural operation). Consequently, the post-harvest activities conducted by Watson

[3] On review, Watson argues that the judge erroneously refused to permit Watson's expert witness, an occupational safety and health consultant, to testify that the activities conducted in the Parma facility constitute agricultural operations. While Watson mentions this refusal by the judge on the record, there is no further discussion on the record or in the judge's decision as to why the judge did not allow this witness to testify. However, we determine that, as Watson's intended purpose for the testimony of this witness was regarding a conclusion of law, the judge properly refused to permit his testimony. *United States v. Moran*, 493 F.3d 1002, 1008 (9th Cir. 2007).

in the Parma facility do not qualify for the "agricultural operations" exemption under § 1928.21(b).[4]

Likewise, the post-harvest activities conducted at the Parma facility do not constitute "agriculture employment" for purposes of the LOTO standard. The general industry standards do not contain a specific definition of "agriculture employment."[5] However, in the preamble to the LOTO standard, OSHA explains it exempted the construction, agriculture, and maritime industries because their uniqueness made it difficult to develop a generic energy control standard that would apply to all industries. Control of Hazardous Energy Sources (Lockout/Tagout): Final Rule, 54 Fed. Reg. 36,644, 36,657 (Sept. 1, 1989). Specifically, the preamble characterizes the agricultural industry as having "more rapidly changing employment" which is created, in part, by the fact that "agricultural harvesting (and its employment of migrant workers) and the use of harvesting machines are limited to those times when crops are ready to be harvested." *Id.* Unlike the working conditions in the agricultural industry, the Parma facility is not a highly

[4] The Commission considers § 1928.21(b) to be an exemption. *See Darragh*, 9 BNA OSHC at 1207, 1981 CCH OSHD at p. 30,961. Therefore, contrary to Watson's contention, we determine that the judge correctly placed the burden of proving that it qualified for the exemption on Watson, the party asserting its entitlement to the exemption. *See C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753, 1756, 1995-97 CCH OSHD ¶ 31,129, p. 44,476 (No. 93-3177, 1996) ("[A] party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception.").

[5] We reject Watson's contention that it qualifies for the "agriculture employment" exemption based on the judge's finding that Watson is an "agricultural employer" as defined in OSHA's field sanitation standard at 29 C.F.R. § 1928.110(b)(i)-(iii). Although similar, there is nothing in the text or legislative history of either standard to suggest OSHA intended these terms to have the same meaning. The LOTO standard, which was adopted approximately two years after the field sanitation standard, contains no cross-reference to the definition of "agricultural employer." *See* 29 C.F.R. § 1910.147(b) ("*Definitions applicable to this section*"). Furthermore, while "agricultural employer" and "agriculture employment" may sound similar, there is an important distinction between the terms, since "employer" focuses on the status of the company as a whole while "employment" focuses on the particular activity at issue. *See* Black's Law Dictionary 566 (8th ed. 2004) ("employment" is "[w]ork for which one has been hired and is being paid by an employer"); Black's Law Dictionary 525 (6th ed. 1990) (one definition of "employment" is "[a]ctivity in which person engages or is employed"). Moreover, the employees at the Parma facility are engaged in post-harvest activities, which are not the type of activities contemplated at the time the field sanitation standard was promulgated. *See* Field Sanitation: Final Rule, 52 Fed. Reg. 16,050, 16,086 (May 1, 1987) (explaining OSHA's development of a broad definition of agricultural employer "to hold jointly and severally responsible for compliance those who are best able to assure that adequate sanitation facilities and potable water are provided to *farmworkers in the fields*" (emphasis added)).

transient environment and the activities performed there are not limited to those times when crops are ready to harvest. Indeed, the Parma facility conducts packing operations beyond the harvesting period. Thus, given the facts of this particular case, we conclude Watson's activities at the Parma facility do not constitute agriculture employment. *Cf.* 29 C.F.R. § 1910.146(a) ("[The confined-space standard] does not apply to agriculture, to construction, or to shipyard employment (Parts 1928, 1926, and 1915 of this chapter, respectively)."). Accordingly, the general industry standards, including those set forth under the LOTO standard, are applicable to the cited conditions at the Parma facility.

II. CITATION ITEMS

Of the nineteen citation items affirmed by the judge, Watson only disputes seven items (Docket No. 05-0176) on review. For the following reasons, we affirm these seven citation items.

A. SERIOUS CITATION 1, ITEMS 5a, 5b, AND 5c—LOTO STANDARD

Under these items, the Secretary alleges Watson violated three provisions of the general industry LOTO standard by failing to (1) develop a specific energy control procedure for Parma facility equipment covered under the LOTO standard, including the Autoline conveyor system ("Autoline") and the automatic palletizer ("Palletizer");[6] (2) provide lockout training to employees;[7] and (3) require the authorized employee actually conducting the service or maintenance to perform his or her own lockout or tagout.[8]

As a general matter, we agree with the judge's finding that the LOTO standard applies to the cited conditions at the Parma facility. The LOTO standard applies "where the Secretary shows that unexpected energizing, start-up or release of stored energy could occur and cause

[6] Under the LOTO standard, energy control procedures "shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in" servicing and maintenance of machines and equipment. 29 C.F.R. § 1910.147(c)(4)(i).

[7] Under the LOTO standard, an employer "shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for safe application, usage, and removal of the energy controls are acquired by employees." 29 C.F.R. § 1910.147(c)(7)(i). Each authorized employee must receive training "in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control." 29 C.F.R. § 1910.147(c)(7)(i)(A).

[8] "Lockout or tagout shall be performed only by the authorized employees who are performing the servicing or maintenance." 29 C.F.R. § 1910.147(c)(8).

injury." *Gen. Motors Corp., Delco Chassis Div.*, 17 BNA OSHC 1217, 1219, 1993-95 CCH OSHD ¶ 30,793, p. 42,809 (No. 91-2973, 1995) (consolidated), *aff'd*, 89 F.3d 313 (6th Cir. 1996); *see* 29 C.F.R. § 1910.147(a)(1)(i). We also reject Watson's claim—made for the first time on review—that it is exempt from the requirements of the LOTO standard because its work activities fell within the standard's minor servicing exception. 29 C.F.R. § 1910.147(a)(2)(ii) (Note). In order to prove a job task falls within this exception, an employer must show that (1) the tool changes and adjustments, or servicing activities, are minor; (2) they are conducted during normal production operations; and (3) effective alternative protection is provided. *Westvaco Corp.*, 16 BNA OSHC 1374, 1378, 1380, 1993-95 CCH OSHD ¶ 30,201, pp. 41,566-67 (No. 90-1341, 1993). Here, the record supports the judge's finding that three Watson employees are assigned to conduct service and maintenance on the Autoline and the Palletizer—machines the evidence shows could unexpectedly energize or release stored energy. In addition to adjusting the scale and label devices on the Autoline, Watson's employees also change motors and fix air leaks on both machines. Watson failed to show that any of these tasks were, in fact, minor adjustments performed using effective alternative protection. Consequently, we conclude the LOTO standard applies to the Autoline and the Palletizer located in the Parma facility.

With regard to Item 5b, Watson contends the judge erroneously concluded its employees did not receive appropriate training because testimony from the OSHA compliance officer shows two of Watson's authorized employees were "extremely competent" in the operation of the Autoline. While training need not be formal, we agree with the judge that "being competent in the Autoline's operation does not equate [to] receiving lockout/tagout training."[9] The record also supports the judge's finding that Mel Frazier, an authorized employee, was "unaware of any

[9] The LOTO standard requires different levels of training depending on whether the employee is an affected, authorized, or other employee. 29 C.F.R. § 1910.147(c)(7)(i)(A)-(C). An authorized employee is "[a] person who locks out or tags out machines or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed." 29 C.F.R. § 1910.147(b). Here, the judge determined that janitor Butch Collins and Ramirez, the employee injured on the conveyor, were not authorized employees because they performed housekeeping, not service or maintenance, activities "in the vicinity of" the Autoline.

energy controls for the Palletizer." The record also supports the judge's findings with regard to Item 5a and 5c. Accordingly, we affirm Citation 1, Items 5a, 5b, and 5c.[10]

B. SERIOUS CITATION 1, ITEM 6f—LOAD BACKREST EXTENSION

Under Item 6f, the Secretary alleges a violation of 29 C.F.R. § 1910.178(m)(10) based on Watson's failure to use load backseat extensions on three industrial forklift trucks.[11] It is undisputed that the three forklifts in question lacked the required backrest extensions.

Watson argues it uses the forklifts exclusively as "farm vehicles" which are not subject to the requirements of the cited standard. *See* 29 C.F.R. § 1910.178(a)(1) ("This section does not apply to . . . farm vehicles."). Yet the forklifts are not used as "farm vehicles" in the fields but are only used to move onions within the Parma facility where, as we have already held, Watson was not engaged in agricultural operations. Thus, the exception for "farm vehicles" does not apply to the forklifts Watson used at the Parma facility.

Watson also claims that, even if the forklifts were subject to the cited requirement, each forklift was equipped with factory installed overhead guards that protect the operator from the potential hazard of falling onions. 29 C.F.R. § 1910.178(m)(9) ("An overhead guard shall be used as protection against falling objects."). As the judge found, § 1910.178(m)(9) nevertheless requires overhead package guards in addition to, not in lieu of, backrest extensions when a backrest extension is "necessary" to protect the operator. The judge has adequately addressed why the overhead guard provided only partial protection and why backrest extensions were "necessary" here. Accordingly, we affirm Item 6f.

C. SERIOUS CITATION 1, ITEM 7—MACHINE GUARDING

Under Item 7, the Secretary alleges a violation of 29 C.F.R. § 1910.212(a) based on Watson's failure to provide machine guarding on various pieces of equipment in the Parma

[10] For Items 5b and 5c, Watson argues these citation items only refer to housekeeping activities and cannot be construed as referring to maintenance of mechanical equipment. However, these citation items do not limit the cited activities to housekeeping, as both items contain the phrase "but not limited to housekeeping." For example, Item 5b states in pertinent part: "[E]mployee(s) were not instructed to stop and deenergize equipment such as but not limited to motorized conveyors while performing activities such as *but not limited to* housekeeping adjacent to and underneath running conveyors." (Emphasis added.)

[11] Section 1910.178(m)(10) states that "[a] load backrest extension shall be used whenever necessary to minimize the possibility of the load or part of it from falling rearward."

facility.[12] The judge affirmed three of the four instances alleged under this citation item. On review, Watson argues the equipment areas at issue were guarded by physical guards, location, or design, and there was no exposure and no record of any injuries. However, the record provides numerous examples of employee exposure to the cited unguarded areas and, therefore, supports the judge's exposure findings. Accordingly, we affirm Item 7.

D. SERIOUS CITATION 1, ITEMS 8 AND 10—MECHANICAL POWER–TRANSMISSION APPARATUS

Under Item 8, the Secretary alleges a violation of 29 C.F.R. § 1910.219(c)(4)(i) based on Watson's failure to provide adequate guarding for unguarded projecting-shaft ends on the floor side of the dump area for the transfer bins, the Grade American Onion Line, and the main taping machine conveyor.[13] The judge affirmed three of the four instances alleged under this citation item, finding that an employee's clothing could be caught in an unguarded shaft when he is working near or walking by the specified locations. Under Item 10, the Secretary alleges a serious violation of 29 C.F.R. § 1910.219(f)(3) based on Watson's failure to enclose or guard its chain and sprocket assembly.[14] The judge affirmed this citation, finding that the chain and sprocket were not enclosed and that an employee was exposed to the cited hazard.

Again, Watson argues that there was no exposure to the conditions cited under these items and no record of any injuries. However, as with Item 7, the record provides numerous examples of employee exposure to the cited unguarded areas and, therefore, supports the judge's exposure findings. Accordingly, we affirm Items 8 and 10.

---

[12] This standard requires that "[o]ne or more methods of machine guarding . . . be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc." 29 C.F.R. § 1910.212(a)(1).

[13] Section 1910.219(c)(4)(i) states that "[p]rojecting shaft ends shall present a smooth edge and end and shall not project more than one-half the diameter of the shaft unless guarded by nonrotating caps or safety sleeves."

[14] Section 1910.219(f)(3) states that "[a]ll sprocket wheels and chains shall be enclosed unless they are more than seven (7) feet above the floor or platform. Where the drive extends over other machine or working areas, protection against falling shall be provided. This subparagraph does not apply to manually operated sprockets."

CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude that Watson failed to carry its burden of proving it is engaged in "agricultural operations" or "agriculture employment" at its Parma facility and, accordingly, hold that for these activities, Watson is subject to the general industry standards under 29 C.F.R. part 1910. We further conclude that the judge properly affirmed the nineteen citation items.

ORDER

We affirm Citation 1 (Docket No. 05-0175), Items 1b and 1c; Citation 1 (Docket No. 05-0176), Items 2a, 2b, 3b, 3c, 3d, 3e, 3g, 4a, 4c, 5a, 5b, 5c, 6f, 7, 8, 10, 11e, and we assess a total penalty of $9,300.

SO ORDERED.

/s/
Horace A. Thompson III
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: May 6, 2008

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. J. C. WATSON COMPANY, and its successors, Respondent.	OSHRC DOCKET NO. 05-0175 05-0176 (Consolidated)

APPEARANCES:

For the Complainant:
Patricia Drummond, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington

For the Respondent:
James J. Gonzales, Esq., Holland & Hart, Denver, Colorado

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, J. C. Watson Company (J. C. Watson) operated a packing facility in Parma, Idaho, where its agricultural products were readied for market. J. C. Watson admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On July 31, 2004, a J. C. Watson employee was injured when his arm was caught in a conveyor belt in the Parma facility. On August 11, 2004, after learning of the accident, the Occupational Safety and Health Administration (OSHA) initiated an investigation of the incident. As a result of that investigation, OSHA issued citations to J. C. Watson alleging violations of the General Industry Standards at 29 CFR 1910. By filing a timely notice of contest J. C. Watson brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Boise, Idaho beginning on June 22-23, 2005, and continuing on November 9-10, 2005 and April 19-20, 2006. To allow further cross-examination,

a deposition of Luis Ramirez was taken on January 13, 2006 in Eugene, Oregon and has been made part of the transcript.

Prior to the hearing, the parties settled Other than serious citation 2, item 1. In addition, the Secretary withdrew Serious citation 1, items 2b and 2c from Docket No. 05-0175 and Serious citation 1, items 1 and 11k from Docket No. 05-0176 (Tr. 26, 31). During the hearing, Serious citation 1, items 1a, and 2 and Other than serious citation 2, items 2, 3, 4, were dismissed from Docket No. 05-0175. The Secretary also dismissed Serious citation 1, items 2a (instance a only), 3a, 3f, 3h, 3k, 3l, 4b, 4d, 6a, 6b, 6c, 6d, 6e, 8 (instance d only), 9a(b), 9b, 11a, 11b, 11c, 11d, 11e (instance b only), 11f, 11h, 11i, 11l, 11m and Other than serious citation 2 from Docket No. 05-0176. (Tr. 26, 31, 184, 194, 233, 235, 267, 277-278, 368, 430, 496, 673, 1272).

Remaining at issue are: Docket No. 05-0175 - Citation 1, items 1b, and 1c (Tr. 374-375); Docket No. 05-0176 - Citation 1, items 2a [excluding instance (a)], 2b, 3b, 3c, 3d, 3e, 3g, 3i, 3j, 4a, 4c, 5a, 5b, 5c, 6f, 7, 8 [excluding instance (d)], 9a [excluding instance (b)], 10 [excluding instances (a) and (b)], 11e [exclude instance (b)], 11g, 11j.

Briefs have been submitted on the remaining issues, and this matter is ready for disposition.

AGRICULTURAL EXEMPTION

Facts

Overview of J. C. Watson Operations:

J. C. Watson is an S-Corporation involved in agriculture and the growing of various agricultural products (Tr. 908, 1439). Jon Watson is the President of the company (Tr. 1437-38). Since 2002, J. C. Watson has grown onions, alfalfa, potatoes, beans, wheat, corn and fruit (Tr. 1393). Its predominant crop, however, is onions (Tr. 1394, 1439, 1466). Onion sales account for about 75-80% of J.C. Watson's revenue (Tr. 1394). J. C. Watson also sells fertilizer, herbicides, pesticides, alfalfa seed, wheat seed and corn seed (Tr. 951). These products are sold directly to consumers and they account for 20% of J. C. Watson's gross business revenue (Tr. 951).

Onion Production:

Onions require very rich soil and can't be grown on the same land each year. (Tr. 1441). Therefore, J. C. Watson enters into sharecropping, joint venture and managed farm agreements to produce onions in addition to growing onions on its own land (Tr. 1395). Between 900 to 1000 acres each are utilized for onion production each year (Tr. 1441).

Generally, in sharecropping arrangements for growing onions, J. C. Watson's partner puts up the land (Tr. 1421). One half of the crop is owned by J. C. Watson and the other half by the partner who put up the land (Tr. 1421). The percentage of ownership can vary, however, depending on the agreement (Tr. 1421).

In most sharecrop arrangements, J. C. Watson supplies the equipment and the labor to grow and harvest the onions (Tr. 1431).

Joint Venture agreements allow J. C. Watson to become the landlord, in effect, of another farmer's land. J. C. Watson supplies all the money for the farmer to grow the crop and may also provide labor and equipment (Tr. 1429). However, the growing of the crop, the harvesting and the storage are usually the responsibility of the farmer (Tr.1431). The percentage of ownership of the crop depends on the agreement (Tr. 1431).

Managed acreage agreements also allow J. C. Watson to grow their crop on another farmer's land. In this type of arrangement, J. C. Watson works with the farmer throughout the process by lending its expertise (Tr. 1432). However, as a general rule, J. C. Watson does not supply the equipment or labor. (Tr. 1432). In each of these situations J. C. Watson makes all decisions relating to growing (Tr. 1398-99).

Onions are harvested from the middle of August until the middle of October (Tr. 1398). Once harvested, the onions are put into bulk trucks and then into 4 x 6 foot bins where they are stored for additional curing (Tr. 1405). Onions are kept in storage for 30 days to 9 months before they are put on a truck and taken to the packing facility in Parma (Tr. 1315, 1406). There is a temporary storage shed next to the Parma facility, Storage 16, that is used as a staging area (Tr. 917, 1304). Onions normally stay in the temporary shed for about 24 to 36 hours before they are processed in the Parma facility (Tr. 1315).

Parma Facility Operations:

The Parma facility is owned by J. C. Watson and it is the only facility used by J. C. Watson to sort, grade and pack onions or potatoes (Tr. 901, 941-942, 1207, 1447). The large facility (the enclosed portion of the operation measures approximately 100 x 200 feet) is situated on the main line of the Union Pacific Railroad and is centrally located to the farming operation (Tr. 1456; Exh. C-1, Exh. R-1). Approximately 93% to 95% of the onions processed at the Parma facility are grown on land J. C. Watson either owns, leases, sharecrops, or joint ventures (Tr. 905). However, when J. C. Watson believes there is a market for a particular type of onion, they may buy them on the "spot market" from other growers (Tr. 1423-1424). These onions are then processed in the Parma facility and marketed and sold under one of the J. C. Watson brands (Tr. 946). Spot growers are responsible for about 5% to 7% of the onions processed at the Parma facility. (Tr. 905, 966-967). J. C. Watson doesn't use the facility to sort onions they don't have an interest in (Tr. 1448).

Onions are sent through the Parma facility one batch or "run" at a time (Tr. 948). Forklifts unstack the bins of onions from temporary storage and bring them to the facility two at a time (Tr. 1304). The bins are put on a hydraulic lift that dumps them onto a conveyor outside the Parma facility (Tr. 1304-05). From this conveyor they travel up approximately 12 feet on an elevator belt (Tr. 1305). They are then dumped onto a belt that is tilted on an angle so the onions will roll off into the "toppers" (Tr. 1305). Toppers are steel

rollers that pinch off the top of the onions (Tr. 1305). After topping, the onions are moved toward the packing line on another conveyor (Tr. 1305). Before they enter the packing facility, the onions go across an Ernst sizer, which drops out rocks, clods, leaves and undersized onions (Tr. 1305). The onions then go inside the facility and are dropped on a six-foot flap belt (Tr. 1305).

The flap belt has six openings on it that allow the onions to fall down on one of six grading tables (Tr. 1304). There the graders throw out the bad onions along with any remaining rocks or clods (Tr. 1305). From the grading table the onions are conveyed onto one of two singulator belts, where they are lined up in a single line (Tr. 1348). Flaps on the east part of the singulator belt have square holes (Tr. 1349). Onions fall into the holes as they move across the belt; the flap gently lays the onion down on the Autoline (Tr. 1349).

The Autoline is an automated system run by a single operator using a computer console on a catwalk halfway between the front and back of the line (Tr. 1207). The operator sets the parameters for color and size on the Autoline system, which then scans and weighs each onion (Tr. 1306-07). Depending on the onion's parameters, it is sent to the box or sack line specified by the operator (Tr. 1307).

Once boxed, the onions go onto the box conveyor. The box conveyor is approximately 20 yards long and 3 feet wide and sits approximately 18 inches off the ground inside a metal frame (Tr. 62, 610-11, 738-739, 1324). The conveyor automatically starts and stops with the rest of the Autoline (Tr. 1209-10). The box conveyor moves the boxes through a taper, and onto a "dead track," *i.e.,* rollers without conveyors or other motorized parts, where they accumulate until employees stack them on the pallets (Tr. 1307, 1314, 1321).

Onions to be sacked or bagged are sent to one of the bagger stations (Tr. 1307). The employee manning the station manually puts the bag on a hanger (Tr. 1307). Conveyors drop onions into two separate hoppers with scales (Tr. 1248). Once the scale hits the desired weight, it will automatically fill the bag (Tr. 1249). Two automatic arms take the bag to the sewing machine where it is sewn shut (Tr. 1249). The bag falls on the belt and goes up to the palletizer (Tr. 1249). The large sized onions in sacks are generally hand stacked. Most of the others go to the automatic palletizer (Tr. 1307).

The palletizers are run by their own computers (Tr. 1229). Once the boxes or sacks are stacked on pallets, they are wrapped with a ventilated stretch net (Tr. 1308). Forklift drivers then put the pallets into inventory in the storage facility ready to be shipped (Tr. 1308).

The Parma facility packages the onions for distribution on the retail market or the food service market (Tr. 1426, 1435, 1449-50). However, the packaged onions are shipped only to wholesale distributors (Tr. 941, 1436).

Mr. Watson testified there are other packing houses available to pack fruits and vegetables for farmers (Tr. 1466). In fact J. C. Watson sends its fruit to Stemilt Growers to be packed (Tr. 1392). Mr. Watson testified he could grow onions and have them packed and marketed elsewhere, but not with the volume J. C.

Watson is growing now (Tr. 1464). He testified the automated equipment in the Parma facility makes the process more labor efficient. The Parma facility allows J. C. Watson to add value by arranging the onions by specific size and grade, so the customer gets exactly what they want (Tr. 1460). This enables J. C. Watson to increase its profit margin (Tr. 1460).

Standard Industrial Classification (SIC) Codes:

Standard Industrial Classification (SIC) Codes were developed by the Government's Office of Management and Budget (OMB). They allow government agencies to classify a specific business as belonging to a specific industry for statistical purposes. They are utilized by OSHA to identify the type of business being inspection by a standard classification for its internal record keeping.

OSHA has classified J. C. Watson's operations in the Parma facility under SIC code 5148 since 1980 (Tr. 138, 521, 561, 563, 569-70). The SIC Code 5148 is applied to the wholesale distribution of fresh fruit and vegetables (Tr. 138, 522, 561). OSHA Compliance Officer Van Howell testified that J. C. Watson's packaging and distribution of its potatoes and onions falls within this SIC code category, as onions and potatoes processed at the Parma facility are cleaned, sorted and packaged, but are not otherwise converted from the form in which they entered the facility (Tr. 523, 561).

The agricultural section of the SIC manual classifies post harvest activities under SIC code 0723[1]; Howell stated that code could include the type of activity he observed in the Parma facility, *i.e.,* cleaning and packing of a farmer's own products for distribution (Tr. 139, 521, 561). However, Howell testified, SIC code 0723 would not include buying products from other farmers and processing them (Tr. 521, 561-562). Moreover, even if this code was applicable to the Parma facility, Howell would still have recommended J. C. Watson be cited under the general industry standards at 29 CFR 1910 (Tr. 562). Throughout region 10 and Idaho, OSHA has applied 1910 standards to packaging operations classified under SIC code 0723 (Tr. 139-41, 562).

Discussion

As a threshold matter, J. C. Watson claims the Parma facility is an "agricultural operation" and that it is exempt from the application of the general industry standards pursuant to 29 CFR §1928.21(b), which states:

> (b) Except to the extent specified in paragraph (a) of this section, the standards contained in subparts B through T and subpart Z of part 1910 of this title do not apply to agricultural operations.

---

[1] Crop Preparation Services for Market, Except Cotton Ginning:
Establishments primarily engaged in performing services on crops, subsequent to their harvest, with the intent of preparing them for market or further processing

When a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception, here J. C. Watson. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1991-93 CCH OSHD ¶30,059 (No. 89-2883, 89-3444, 1993). The stated purpose of the Act is remedial in that it is intended "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . .." (29 U.S. C. §651(b)). Exemptions to the sweep of remedial legislation must be narrowly construed and limited to effect only the remedy intended. *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1379 (No. 15462, 1980).

Agricultural operations are not specifically defined in §1928. It is undisputed that J. C. Watson is, as it maintains, an agricultural employer, in that it owns and operates an agricultural establishment, *i.e.,* ". . . a business operation that uses paid employees in the production of food, fiber or other materials such as seed, seedlings, plants or parts of plants." [See the Field sanitation standard at §1928.110(b)(iii)]. Some of J. C. Watson's activities also fall under the definition of "farming operation" set forth in *Darragh Co.*, 9 BNA OSHC 1205, 1208 n.8, 1981 CCH OSHD ¶25,066 (Nos. 77-2555 & 77-3075, 1980), ". . . any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, dairy farms or similar farming establishments." It is undisputed that J. C. Watson grows and contracts with other growers to raise onions, alfalfa, potatoes and other agricultural products. Its growing operations, however, are not at issue here. The sole operation with which we are concerned is J. C. Watson's packing facility.

It is clear under Commission precedent that not all activities engaged in by an agricultural employer fall under the exemption for agricultural operations set forth at 29 CFR §1928.21(b). In *Darragh Co.,* 9 BNA OSHC 1205, 1981 CCH OSHD ¶25,066 (Nos. 77-2555 & 77-3075, 1980), the Commission reached the question of whether the activities of an agricultural integrator fell under the exemption for agricultural operations. The Commission did not find it dispositive that Darragh was "involved in all aspects of the raising, feeding and selling" of poultry, an agricultural product. *Id.* at 1206. The Commission found that to determine whether the agricultural exemption applied, it was necessary to examine the specific task that exposed the worker to the alleged noncomplying condition for which the employer was cited. Only then can it be decided "whether the task is part of, or integrally related to, an agricultural operation." *Id.* at 1208.

In *Darragh Co.* the Commission found that the cited activity, delivery of feed grain, took place on a farm and was integrally related to the raising of poultry, the farmer's agricultural operation. *See also, Chapman & Stephens Co.,* 5 BNA OSHC 1395, 1977-78 CCH OSHD ¶21,802 (No. 13535, 1977) [maintenance work on irrigation pipes in citrus grove integrally related to employer's growing operation].

In cases involving post harvest operations, however, Commission ALJ's have found the agricultural exemption inapplicable. *Missouri Farmers Association, Inc.*, 1 BNA OSHC 3019, 1973 CCH OSHD

¶15,674 (No. 1671, 1973) was decided before the Commission considered the agricultural exemption issue. The ALJ in that case stated the exemption for agricultural operations should not be extended to include operations that merely handle agricultural products and where employees are exposed to industrial hazards. Similar rulings ensued following the Commission's decision in *Darragh Co*. In *Amalgamated Sugar*, 17 BNA OSHC 1323, 1995 CCH OSHD ¶30,761 (No. 94-0096, 1995), the ALJ found that even though the Respondent beet processor negotiated the amount and type of beets to be raised by each farmer, and provided consulting services through the farmer's raising and harvesting of the crop, its receiving operations were not integrally related to beet farming. The receiving stations were not located on an agricultural establishment or farm, and the equipment operators exposed to the cited hazards were neither engaged in nor necessary to the growing and harvesting of beets. *Tyson Foods, Inc.*, 18 BNA OSHC 2039, 1999 CCH OSHD ¶31,964 (No. 97-1682, 1999) involved a poultry integrator whose forklift driver was killed on a contract farm while picking up chicken carcasses. The ALJ found that although Respondent owned the chickens and provided feed and expertise during the birds' life cycle, its rendering activities were separate from and not integrally related to the raising of chickens.

In this case the record establishes that, although J. C. Watson engages in farming operations, its packing facility is not located on a farm. No growing or harvesting activities take place at the Parma facility. J. C. Watson employees at the packing facility are not engaged in raising crops; they merely handle agricultural products produced elsewhere. The sorting, grading, sizing, packing, palletizing and storage that take place at the Parma facility utilize industrial equipment including conveyor systems, automated toppers, tapers and sewing machines, palletizers, and forklifts. The employees at the Parma facility work not in the fields, but on packing lines where they are exposed to machine guarding and lockout/tagout hazards, and on catwalks where they are exposed to fall hazards.

The Parma facility is a factory engaged in processing and packaging agricultural produce. It is clear that the Parma facility is not itself an agricultural operation. It is an industrial establishment, which, were it not operated by a grower, would be subject to the standards governing industrial hazards set forth at 29 C.F.R. §1910. J. C. Watson contends it should be exempted from the coverage of standards intended to protect workers from industrial hazards because it raises produce. According to Respondent, the packing of its produce is integrally related to its growing operations.

The processing and packaging of agricultural produce is not integrally related to the growing of that produce. J. C. Watson contends that its packing facility is "indispensable" to its ability to comply with U.S. Department of Agriculture grading requirements, PACA labeling and packing requirements and the Federal Growers Marketing Orders (Post hearing brief of J. C. Watson Company, p. 7). Its argument is not persuasive. As noted above, J. C. Watson grows produce that is not processed in its own packing facilities; its fruit is

packed by Stemlit Growers. The Parma facility packs onions purchased on the spot market, which are not grown by J. C. Watson. Respondent's onions could be packed and marketed by another packing house. Clearly packing is a separate, post-harvest activity that can, and often is performed by an employer other than the farmer. J. C. Watson's operation is not only geographically, but functionally removed from its farming operations. This is clearly illustrated where J. C. Watson purchases onions on the spot market for processing and resale. Respondent acts solely as a handler of agricultural products where those onions are involved. Respondent does not suggest that the operation of the Parma facility is integral to the production of onions purchased on the spot market.

The record shows that by operating its own packing house J. C. Watson is able to process more onions and, therefore, to contract to have more onions grown. In addition to increasing the volume of onions it can have grown, J. C. Watson adds value to its own crops by eliminating a middleman. By packaging its own produce, J. C. Watson is able to make more of a profit. The fact that J. C. Watson is able to increase its profit by becoming its own onion packer and marketing its own product does not transform the onion packing operation into an agricultural operation, or make it integral to the growing of onions. J. C. Watson's packing facility is a separate, post-harvest operation involving separate processes and employees. Integrating the packing facility under J. C. Watson's corporate umbrella does not change the nature of that operation.

Finally, the propriety of OSHA's classification of J. C. Watson's packing operations under SIC code 5148 is not dispositive here. The SIC codes developed by the OMB are utilized by OSHA merely to identify the type of business an employer is operating and what kinds of activities the employer engages in. The designation of an employer under the most appropriate SIC code is not required under the Act, and the Secretary is not legally bound by her assignment of a SIC code to a particular employer. Even if J. C. Watson's Parma facility were reclassified under an agricultural SIC code such as 0723, it would not establish the Parma facility's integral relation to J. C. Watson's farming operations. A facility primarily engaged in preparing crops for market after harvest may have no involvement whatsoever in the raising or harvesting of those crops.

An establishment's eligibility for the agricultural exemption rests entirely on a factual finding that its operations are integrally related to the raising or harvesting of agricultural products on a farming establishment. J. C. Watson is not engaged in raising or harvesting onions at its Parma facility. Packaging onions for market is not integral to Respondent's onion growing operation. Respondent failed to establish that its packing facility is an "agricultural operation" exempt from the application of the general industry standards. The Parma facility is, therefore, subject to the general industry standards found at 29 C.F.R. §1910.

Docket Number 05-0176

Alleged Violation of 1910.212(a)(1)

Serious citation 1, Item 7 alleges:

29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s)and other employees from hazard(s) created by:

(a) At the establishment - On or about July 31, 2004 and at times prior thereto, employee(s) authorized to perform maintenance activities such as but not limited to housekeeping adjacent to and underneath where the nip points of the conveyor were not guarded.

(b) Conveyor located to the north of the Dump Platform feeding into the Main Shed - On or about September 13, 2004, and at times prior thereto, the nip point of the conveyor was not completely guarded by the rubber flap guard.

(c) Hammer Bagging Station - On or about September 13, 2004, and at times prior thereto, the employee(s) working in this area are exposed to the hazard of being struck by the pre-singulator belt.

(d) Sack Peal Master Bag Loading Area - On or about September 20, 2004, and at times prior thereto, the interlock on the plexiglass door was bypassed; thereby providing unguarded access to the automated string mechanism.

The cited standard provides:

> (a) *Machine guarding*– (1) *Types of guarding*. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are–barrier guards, two-hand tripping devices, electronic safety devices, etc.

Facts

The Accident. On July 31, 2004 Luis Ramirez, a high school student and a seasonal worker for J.C. Watson, was injured while working at the Parma facility (Tr. 64). At the time of the accident, Ramirez was using a mechanic's creeper, a flat board with wheels that mechanics use to crawl under cars. Ramirez was using it to clean up potatoes from under the box conveyor belt (Tr. 66, 70). Ramirez stated there were water puddles on the floor, so instead of putting his hand in the water to push himself along on the creeper, he reached up with his right arm to push off the frame of the conveyor belt (Tr. 66). His right arm became caught in the conveyor and he was unable to free himself using his left arm (Tr. 66). Ramirez received a fractured radius and third degree burns to his right arm, second degree burns to his left arm and nerve damage (Tr. 67). Since the accident Mr. Ramirez has undergone 6 surgeries to repair damage to the arms (Tr. 67).

The OSHA investigation into the accident resulted in citations including, *inter alia,* Serious citation 1, item 7 addressing machine guarding. Watson's alleged failure to properly guard the box conveyor belt is cited at instance (a).

Instance a: The box conveyor moves boxes of potatoes and onions (Tr. 621-22). Its bottom stands approximately 18 inches off the floor and is situated under the Autoline platform (Tr. 382, 580, 645, 1209, 1211; Exh. C-41). During the relevant period, the top of the box conveyor was guarded with 5 to 8 inch tall metal barriers and supports, which protect against pinch points (Tr. 738-739, 1095). The underside of the conveyor was not guarded (Tr. 1096). Employees cleaned under the box conveyor while it was running, and, according to the Secretary, were exposed to nip points created by the moving parts (Tr. 604, 609, 617, 618, 743-44; Exh. R-24, p. 3 lines 98-102). OSHA Compliance Officer (CO) Kiely Parker testified the nip points' zone of danger are the areas within 6 inches of the belt (Tr. 613). An employee under the conveyor on a mechanics creeper, or on his or her knees reaching under the conveyor with a broom or squeegee would be immediately adjacent to the rollers and the roller bearings, and would be in the zone of danger posed by the conveyor's nip points (Tr. 608-09). Spilled produce is cleaned from the floor several times throughout the day (Tr. 614, 1195-98).

Glenwood (Butch) Collins is employed as a janitor at the Parma facility (Tr. 1145). During the relevant periods, it was Collins' responsibility to sweep up, and to clear the floor under the lines, including the area under the box conveyor, of spilled potatoes and onions (Tr. 606). Collins testified he uses a "regular size big broom" to clean under the box belt while he sits on the creeper, moving from one area to another by pushing with his feet or hands (Tr. 1181-1183). Collins stated he does not get close to the belt because the broom has a long handle (Tr. 1183).

There are 108 conveyor belts in the Parma facility, and Collins often asks for help cleaning (Tr. 1183-84, 1278) On the day of the accident, he asked the floor supervisor, Felipe Lira, to send Luis Ramirez to help him clean up (Tr. 1183-1184). Collins instructed Ramirez, training him as he had trained others who helped him (Tr. 1184). He showed Ramirez how to use the creeper, though Ramirez had used it before the accident, gave Ramirez a broom or squeegee to help rake up the potatoes, and demonstrated cleaning under the box conveyor with the broom (Tr. 1165-66, 1183-84). Collins told CO Parker that he had seen Ramirez on the creeper underneath a belt, though at the hearing he stated he had never seen Ramirez lie on his back on the creeper (Exh. R-24, p. 10, lines 418-420, 1181). Collins told Parker he instructed Ramirez, as he had others, not to reach into the conveyor while cleaning under the line (Tr. 1195; Exh. R-24, p. 1, lines 37-38, p. 2, lines 55-57, 80-82, p. 8, lines 352-358). Collins testified he never specifically asked Ramirez to use the creeper to go under the box conveyor to clean (Tr. 1163).

Collins testified that he requested the creeper so that he could go under the Autoline without having to get down low and crawl, which hurt his knees (Tr. 1153, 1165). John Grim, J. C. Watson's transportation and maintenance manager, secured the creeper for him (Tr. 115, 1153). Collins testified that he used the creeper only to go underneath the sizing platform and under conveyor belts higher than the box conveyor (Tr.

1150, 1161, 1164, 1195, 1200, 1202). He testified he never went under the box belt on the creeper, however, and explained that CO Parker misunderstood him when he said he used the creeper under the "line" (Tr. 1291-1292, 1200). According to Collins, it was customary to go under portions of the Autoline when it was operating, either using the creeper or getting down on hands and knees; however, since the accident, this practice is no longer allowed (Tr. 1195-98, 1200; Exh. R-24, p. 7, lines 282-309).

Luis Ramirez was employed with J. C. Watson in the summer of 2003 and 2004 when he was 16 and 17 (Tr. 58). He was hired to work at one of the bagging machines and to put the full bags on pallets (Tr. 73, 1382). During the 2003 season, at the direction of Felipe Lira, Ramirez helped Collins clean the work area a few times a week (Tr. 59, 60, 74). Ramirez stated he wasn't formally trained by Collins, but generally learned on the job, watching Collins work (Tr. 59). Collins showed Ramirez how to use the broom to sweep up. However, according to Ramirez, he never saw Collins using a broom or squeegee to rake potatoes (Tr. 90, 93). Instead, Collins used the creeper to access the areas under the operating conveyor belt and platform, where he would pick up potatoes and put them in boxes (Tr. 59, 94). Ramirez had seen Collins use the creeper everywhere except under the box conveyor in 2003 (Tr. 1036). Emulating Collins, Ramirez used the creeper to move under the conveyor to pick up potatoes in both 2003 and in 2004 (Tr. 60, 1031). He believed other workers saw him using the creeper to clean under the conveyors (Tr. 61, 63). No one told him he should not be on the creeper under the box conveyor (Tr. 61).

Melvin (Mel) Fraizer, the Parma facility manager (Tr. 1298), and Chris Fraizer, a managing supervisor (Tr. 1299), testified that a "safety"meeting was held on July 26, 2004, and was attended by everyone hired for the 2004 season (Tr. 1214-1215). At the meeting, the Fraizers reviewed the facility's work rules, which dealt mainly with theft, vandalism, smoking, time and attendance. Each employee was required to sign a form indicating their familiarity with the rules (Tr. 1218, Exh. R-7, p. 000201). Little in the rules relate to safety (Exh. R-7). Mel Fraizer testified that employees were told at the meeting to keep their hands out of the machines and not to reach for onions (Tr. 116, 1300). Mel Fraizer stated that Margaret Fraizer took notes of what was said at the meeting and then typed them up for the file (Tr. 1216-1217; Exh. R-7, p. 000200). Her notes state "Keep hands and body parts away from all moving equipment at all times. This was stressed several times." (Exh. R-7, p. 000200).

Ramirez attended the July 26, 2004 meeting, and signed a copy of the work rules (Tr. 79-80, 83), though he did not specifically remember being told not to touch the moving conveyors (Tr. 80). He did remember being told not to wear loose clothing or jewelry, but wasn't sure why (Tr. 84).

Chris Fraizer testified that Ramirez' job description did not require him to go underneath the box conveyor (Tr. 1214). Mel Fraizer stated he was not aware of anyone going under the box conveyor until Ramirez' accident (Tr. 1301). Parker believed J. C. Watson's management should have known of this

practice because of the presence of the mechanic's creeper around the conveyor system (Tr. 617). Lira told Parker the creeper was used to move boxes of potatoes or onions (Tr. 1139-40). Robert Shaver, the company's corporate controller and office manager (Tr. 897), testified that the creeper was used to move boxes (Tr. 961). Ramirez maintained the creeper was never used for that purpose (Tr. 91). Parker testified the function of the creeper is to allow people to get into low places; the only low place in the conveyor system was the box conveyor (Tr. 617).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative condition, and (d) the employer's actual or constructive knowledge of the violation (*i.e.,* the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.,* 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994). Specifically, in cases involving §1910.212(a)(1), the Secretary must establish it is reasonably predictable that employees will be, are, or have been in the zone of danger during the course of their normal assigned work duties. *Kaspar Electroplating Corp.,* 1993 CCH OSHD ¶30,303 (No. 90-2866, 1993); *National Envelope Corporation*, 1998 CCH OSHD ¶31,693 at p. 45997 (1998).

As discussed above, the general industry standards apply to the Parma facility. That hazardous nip points were created by the operation of the box conveyor is uncontested. Respondent argues that the conveyor belt was guarded by location, side rails, design and work rules. Respondent maintains, and the Secretary agrees, that employees working at the bagging station near the box conveyor are not exposed to nip points on the top of the conveyor, which is guarded by metal barrier guards. Only the underside of the conveyor is unguarded. Respondent maintains that the underside of the conveyor is guarded by location and administrative work rules prohibiting employees from going under the box conveyor.

It is clear from the record that the cited nip point hazard was guarded neither by location nor by administrative work rule. Prior to Ramirez' accident, produce was cleaned out from under the conveyors while the Autoline was running. J. C. Watson provided the mechanic's creeper to its janitor, Butch Collins, for the express purpose of cleaning underneath the Autoline's conveyors, as getting down on his knees to reach under the conveyors was uncomfortable. Collins used the creeper to go under the conveyors, and provided the creeper to his helpers, including Ramirez, who used it as he had seen Collins use it. It was predictable that he would do so given his age, his inexperience, his observations of Collins using the creeper, his own prior experience with and availability of the creeper. The use of the creeper to pick up produce under the conveyors was an accepted and encouraged practice.

J. C. Watson's assertion that it neither knew nor could have known of the practice is not credible. Both Collins and Ramirez had been using the creeper for its intended purpose for at least an entire season before July 2004. The floor under the Autoline required cleaning several times a day. J. C. Watson's floor supervisor, Felipe Lira, assigned Ramirez and other workers to help Collins clean. It is inconceivable that Lira never saw Ramirez, Collins or any of Collins' other helpers using the creeper to access the fallen produce under the conveyor lines.

J. C. Watson had no work rules specifically prohibiting the use of the creeper under the conveyor lines. Respondent's contention that an administrative rule existed is contradicted by the Fraizers' insistence that they were completely unaware of the practice, and believed the creeper was used for moving boxes of produce. If employees were told to keep their hands out of the machines, such a work rule is nothing more than a general reminder to work safely and is clearly insufficient to prevent an employee's accidental contact with a conveyor's rollers where the employee is working 6 inches below a conveyor operating over his head. Moreover, the record establishes that if such a rule existed, it was not uniformly enforced. Ramirez received a written reprimand after the accident (Tr. 938, 959, R-13), though Chris Fraizer received no written reprimand when his foot was stuck in the conveyor belt, nor did another employee who broke her hand when she stuck it in the rollers (Tr. 1357).

Butch Collins' testimony, stating he warned Ramirez not to go under the low box conveyor is not credible. As discussed above, J. C. Watson had no rules addressing the use of the creeper under the line and it is not believable that Collins, a janitor with a professed learning disability (Tr. 1144), had either the authority or the initiative to institute safety rules differentiating which conveyors the creeper might safely be used under. While Collins professed to be confused, and gave imprecise, and at times unresponsive testimony on other issues, on this issue Collins' testimony was uncharacteristically strong. To this judge his testimony appeared rehearsed, despite his protestations to the contrary.

Given the lack of any safety rule prohibiting the use of the creeper underneath the conveyors, including the box conveyor, Respondent's purchase of the creeper to enable employees to move under the conveyors and the frequency with which produce was cleared from the floor beneath the conveyors, this judge concludes Respondent either had actual knowledge or should have known that employees would be exposed to the unguarded underside of its conveyors, including the box conveyor, when using the creeper.

Finally, the record establishes a violation of the standard even in the absence of Ramirez' accident. Employees use of brooms and squeegees under the operating box conveyor exposed them to the same nip point hazards that caught Ramirez' arm. This violation has been established.

Instance b. The cited chain and sprocket are located on a conveyor near a dump platform. The rotating arm of the sprocket is partially guarded by a rubber flap guard (Tr. 248-49, 251, 465-66, C-50, C-51

and C-52). Chris Fraizer admitted the arm rotates out beyond the guard (Tr. 1286). Howell stated that an adequate guard for this chain and sprocket would completely cover the arms (Tr. 250, 249). The cited condition was in plain site and could be seen by anyone walking in the area (Tr. 251). Filipe Lira's tool box is located immediately adjacent to the partially guarded chain and sprocket (Tr. 249). Lira said he accessed the tool box a few times a week (Tr. 465). According to Howell an employee could get clothing caught by the arm of the sprocket and could be pulled into the chain and sprocket resulting in injuries including amputation of fingers (Tr. 249-250).

Discussion

The record establishes, by a preponderance of the evidence, that the violative condition existed, and that at least one employee was exposed to the resulting hazard. This instance is affirmed as a "serious" violation.

Instance c. On the north side of the Autoline conveyor, employees bagging onions on the Hammer bagging machine are exposed to rotating naugahyde flaps on the pre-singulator belt (Tr. 249-51, 469; C-53, 54, 55 and 57). Howell believed employees could be knocked down or lose their balance and strike their head on the support structure of the conveyor belt if struck by a rotating flap (Tr. 252). Mel Fraizer testified one of the flaps weighs 2.4 ounces (Tr. 1350, 1351). He stated the flaps are flexible and would not have any effect on an employee struck by them (Tr. 1352).

Discussion

Certain standards promulgated by the Secretary contain requirements or prohibitions that by their terms need only be observed when employees are exposed to a hazard described generally in the standard. In order for the Secretary to prove a violation of §1910.212(a), she must establish that the operation of the machine exposes employees to injury. *See, Cf., Rockwell International Corporation*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶24,979 (No. 12470, 1980)[addressing §1910.212(a)(3)(iii)]. Howell stated if this item was standing alone, he would cite it as "other than serious," as he had no evidence the foot-pound force of the rotating flap was sufficient in itself to cause serious injury (Tr. 468-71).

The Secretary failed to establish that the cited rotating part constituted a hazard, or that 29 CFR 1910.212(a)(1) is applicable to the cited condition. This instance is vacated.

Instance d. The Peal Sack Master bagging machine contains a stringing mechanism which automatically sews shut bags of produce. The stringing mechanism is normally protected by a magnetic interlock (Tr. 254-255; Exh. C-58, C-59). When the plexiglass door is closed, an electrical circuit is completed, allowing the bagger to operate (Tr. 254-255). A warning on the Sack Master states: "Do not attempt to operate or start this machine without all guards being in their correct position" (Exh. C-59). Throughout the inspection, Howell observed the machine operating with the plexiglass door open (Tr. 255, 473, 475). Unless the interlock is bypassed or defective, this machine should not operate with the door open (Tr. 475). Howell observed one employee working near each of the two Sack Master machines while they were operating (Tr. 255, 265, 1287). He stated that an employee could be caught by the moving stringer mechanism, or the belt and pulley below the stringer, and sustain fractures or amputations (Tr. 255). The condition was in plain view (Tr. 257).

Chris Fraizer testified employees who run the Sack Masters stand about four feet from the plexiglass door. The employees hang bags, which are filled from a hopper above. Once a bag is filled, two arms

automatically extend from the bagging machine and pull the bag into the stringing mechanism (Tr. 1248-50). If the machine malfunctions, the procedure is for the employee to hit the stop button located next to the bagging work station (Tr. 1249). This will completely shut down the machine (Tr. 1250). Once the employee fixes the problem he must go back and release the stop button by twisting it and push start (Tr. 1250). Chris Fraizer said the machine will not start until the sewing mechanism is in the right position, the stop button is released and the start button is pushed (Tr. 1250).

Chris Frazier did not know who made the modifications to the machine, which have been in place as long as he has been there (Tr. 1292, 1287-88).

Discussion

The manufacturer of the Peal Sack Master equipped it with a guard intended to protect operators from the stringer's point of operation and the attendant pulley mechanism. Warnings on the machine clearly notify the employer not to operate the machine without all the guards in place. J. C. Watson's modification of the machine, allowing it to function without the guards deemed necessary by the manufacturer, establishes a violation of the standard. The citation is affirmed as a "serious" violation, in that an employee contacting the point of operation could suffer amputation or fractures.

Penalty

A combined penalty of $2,500.00 was proposed for the cited violations.

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Factors affecting gravity include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.,* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

The three violations affirmed were all "serious," in that employees could, and in the case of Mr. Ramirez did suffer serious bodily harm as a result of J. C. Watson's failure to adequately guard machinery. The gravity of the combined violations is high. Even though the chance of an accident occurring in most cases is remote, the kind of injuries to which employees were exposed were severe, and included amputations and fractures. Though J. C. Watson took some steps to protect employees, it also eliminated factory equipped guards, failed to adequately supervise young employees working around dangerous equipment, and failed to uniformly enforce any safety rules it may have had [See, pictures of employees with

their shirts untucked in violation of J. C. Watson's ostensible rule prohibiting loose clothing (C-20, C-36, C-38, C-45, C-53, C-54, C-57)]. The proposed penalty of $2,500.00 is appropriate and will be assessed.

Alleged Violation of §1910.23(c)(1)

Serious citation 1, item 2a alleges:

29 CFR 1910.23(c)(1): Open sided floor(s) or platform(s) 4 feet or more above the adjacent floor or ground level were not guarded by standard railings (or equivalent as specified in 29 CFR 1910.23(e)(3)(i) through (v)), on all open sides:

(b) Catwalk platform east of the dump operator station - On or about 13 September 2004, and at times prior thereto, did not have standard guardrails protecting all open sides.

(c) Catwalk platform for Automatic Palletizer - On or about 13 September 2004, and at times prior thereto, did not have standard guardrails protecting all open sides.

The cited standard provides:

(c) *Protection of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,

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

Facts

Instance b: The catwalk is approximately 12 feet above the ground (Tr. 146). During the relevant period, the guardrail on the east end of the cited platform was missing (Tr. 145). In addition, there was a 29-inch gap in the guardrail along the length of the platform (Tr. 145-46; Exh. C-8). Mel Fraizer and employee Felipe Lira used this area of the catwalk to make equipment adjustments (Tr. 146, 1358). Employees also use the catwalk to check on the operation of the topper (Tr. 1331). Howell testified that the cited conditions were in plain view (Tr. 154-155). Mel Fraizer testified that the catwalk guardrails had been missing since he had been shed manager (Tr. 1358).

Instance c: No guardrails were in place at the end of the catwalk accessing the automatic palletizer (Tr. 153-154; Exh. C-10, C-11 and C-12). Mel Fraizer testified the catwalk is used for maintenance (Tr. 1332). Though he denied it at the hearing, Mel Fraizer told Howell he used the catwalk once a week to clean the electric eyes and lubricate the palletizer (Tr. 154, 1359). He admitted, however, that employees use the catwalk to un-jam the palletizer (Tr. 1359-60). Depending on their location, employees could fall from the catwalk into the palletizer, or they could fall 12 feet to the floor (Tr. 154, 395). Mel Fraizer testified that J.

C. Watson's insurance company recommended railings on all walking surfaces more than 4 feet above the floor, including the palletizer catwalk (Tr. 1332-33).

Discussion

The evidence establishes that the cited catwalks were more than 4 feet above the adjacent floors. Guardrails on the catwalks were missing or incomplete. Employees worked on the inadequately guarded platforms, where they were exposed to the danger of falling. J. C. Watson had constructive knowledge of the violative conditions as they were both long standing and in plain sight. In addition, Respondent had been warned by its insurance carrier to guard its open sided platforms, specifically referring to the catwalk cited at instance (c). The Secretary has established this violation.

Alleged Violation of §1910.23(c)(3)

Serious Citation 1, item 2b alleges:

29 CFR 1910.23(c)(3): Standard railing(s) and toeboards(s) were not provided on open sided floor(s), walkway(s), platform(s), or runway(s), adjacent to or above dangerous equipment.

> (a) Crossover decks for Autoline Conveyor - On or about 9 September 2004, and at times prior thereto, employees were exposed to the hazard of walking and/or working above a running conveyor line.
>
> The cited standard provides:
>
> (3) Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.

Facts

The Autoline crossover is a catwalk approximately 30 inches wide that crosses over the Autoline conveyor. At the crossover location, the Autoline consists of six lanes of plastic cups that travel between stationary metal strips (Tr. 1234, 1237, Exh. C-14, C-15, C-16, C-17). The Autoline's scales are on one side of the crossover and the sticker machine is on the other (Tr. 1233). The crossover allows the scales to be recalibrated without stepping on the machine itself (Tr. 1237, Exh. C-17). The clearance between the conveyor and the crossover is about fourteen inches (Tr. 156). The crossover has a toe board but no guardrails (Tr. 1234; Exh. C-17).

Both Howell and Parker testified that an employee falling from the catwalk onto the conveyor could be dragged under the catwalk or into other equipment and be seriously injured (Tr. 156, 878).

Mel Fraizer testified he would on occasion step on the stationary metal strips of the Autoline to do some maintenance work (Tr. 1361). During the inspection Parker saw Chris Fraizer on the catwalk reaching over the conveyor to adjust the sticker applicator (Tr. 765, C-17). Chris Fraizer walks on the crossover daily,

and works on the equipment pictured in Exhibit C-17 while it is running (Tr. 878-879, 1296). However, he has never tripped or fallen; nor has he seen anyone else trip and fall on the crossover in the five years it has been in operation (Tr. 1296). Moreover, he did not believe the plastic parts on the Autoline would seriously injure anyone unintentionally stepping from the crossover onto the Autoline (Tr. 1233-37, 1281).

Discussion

The cited standard is intended to address fall hazards which could result in injury to employees falling into "dangerous equipment." The term "dangerous equipment" is not defined, but is illustrated by reference to "pickling or galvanizing tanks and degreasing units." ALJ decisions examining the term have applied §1926.23(c) to walkways above or adjacent to a rock crusher, *Brown & Root, Inc., Power Plant Division*, 1977 CCH OSHD ¶21,884 (No. 76-3942, 1977), but not to those exposing employees to falls into construction lumber or a pipe rack. *See, D A & S Oil Well Servicing, Inc.,* 1986 CCH OSHD ¶27,495 (No. 85-0604, 1986).

The Secretary identified the hazard in this case as crushing injuries that might be sustained by employees falling from the crossover. The unsupported testimony of her compliance officers is insufficient to establish the existence of the crushing hazard. The photographic and testimonial evidence fail to show that the rows of plastic cups, capable of pulling onions down the Autoline, are capable of dragging a human being in the same way. It appears more likely that an employee would be supported by the stationary metal strips separating the moving parts of the Autoline.

Serious citation 1, item 2b is vacated.

Penalty

A combined penalty of $1,250.00 was proposed for both of the guarding violations cited at Serious citation 1, item 2.

The violation cited at citation 1, item 2b was vacated. The violations cited at citation 1, item 2a, however, were properly classified as "Serious." The National Institute of Occupational Safety and Health (NIOSH) has determined that falls from elevations of eleven feet or greater result in fatalities 50% of the time (Tr. 146). The substantial probability of death or serious physical harm required by the Act does not refer to the probability that an accident will, in fact, result, but only that if the accident were to occur, there would be a substantial probability that death or serious physical harm would result. *Whiting-Turner Contracting Co.,* 13 BNA OSHC 2155, 1987-90 CCH OSHD ¶28,501 (No. 87-1238, 1989). Nonetheless, the catwalks were partially guarded, and employee exposure was intermittent. The likelihood of an accident occurring was low (Tr. 148). J. C. Watson is a larger company, with more than 50 employees (Tr. 149). While it has no history of prior OSHA violations, there was no evidence of good faith adduced at this hearing.

Based on the statutory factors and the vacation of one of the alleged violations, a penalty of $625.00 is appropriate and will be assessed.

Alleged Violation of §1910.37(b)(1)

Serious Citation 1, item 3b alleges:

29 CFR 1910.37(b)(1): Each exit route was not adequately lighted so that an employee with normal vision can see along the exit route.

(a) Main shed area - On or about 20 September 2004, and at times prior thereto, was not provided with emergency lighting that upon a power failure to ensure adequate lighting for egress.
(b) Dump area - On or about 20 September 2004, and at times prior thereto, was not provided with emergency lighting that upon a power failure to ensure adequate lighting for egress.
(c) Loading Area - On or about 20 September 2004, and at times prior thereto, was not provided with emergency lighting that upon a power failure to ensure adequate lighting for egress.
(d) Rail Car loading area - On or about 20 September 2004, and at times prior thereto, was not provided with emergency lighting that upon a power failure to ensure adequate lighting for egress.

The cited standard provides:

Maintenance, safeguards, and operational features for exit routes. . . . (b) *Lighting and marking must be adequate and appropriate*. (1) Each exit route must be adequately lighted so that an employee with normal vision can see along the exit.

Facts

The Parma facility measures 99 feet wide and 130 feet long (Exh. R-1, C-2, Tr. 509). Receiving is on the east side of the main shed, the railroad loading dock is on the north, and the truck shipping dock is on the west (Exh. R-1, C-2).

The main shed area consists of the north and south sides of the Autoline and the areas associated with the line (Tr. 400, 402, 404). There are three doors on the south side of this area, including a 15 foot wide cargo door that was open during the inspection (Tr. 415, 401, Exh. R-28). There is emergency lighting only over the southwest door of the main shed (Tr. 158). Howell testified that although the large cargo door allows natural light into this area, it was not enough to illuminate the entire area (Tr. 403, 411). He also stated that approximately 40 workers worked in this area (Tr. 158-159). In the event of a fire or other emergency, the lack of emergency lighting could hinder employees attempting to exit the building (Tr. 167). Employees trying to leave the main shed area could strike their heads on overhead equipment, suffering concussions, or they could trip over conveyors (Tr. 158, 167; Exh. C-20).

The dump area is in the northeast corner of the Parma facility (Exh. C-2, R-1). There are two 15-foot wide cargo doors in this area that allow forklifts in and out; both were open during the inspection (Tr. 407). Howell testified that the area had never had emergency lights (Tr. 162, 164). He observed five employees in this area (Tr. 408).

The loading area is on the west side of the Parma facility, south of the palletizers and the rail car loading area (Exh. C-2, R-1). There are several cargo doors located on the west and south sides of the area, only one of which was open during the inspection (Tr. 410). There are not any emergency lights in the area and no evidence there were ever emergency lights present (Tr. 165). Howell observed three people in the area during the inspection (Tr. 165).

The rail car loading area is on the northwest side of the Parma facility and is about 200 feet long by 30 feet wide (Tr. 410, 411, C-2, R-1). There are approximately six doors in the area and none were open at the time of the inspection (Tr. 411). Howell testified that if all the doors were open they would provide enough natural light for emergency exit if the location were only occupied during daylight hours (Tr. 411-412). There are no emergency lights in the area, however, and it would be dark if the lights were off (Tr. 165, 411). Howell observed one person in this area during the inspection (Tr. 166).

The Parma facility is operated from August until April and is mostly in use from 8:00 a.m. until 5:00 p.m. (Tr. 1239). Margaret Fraizer told Howell that some employees worked until 10 p.m.; he understood her to mean employees who loaded the trucks and who performed housekeeping activities (Tr. 405). Howell and Parker also testified that Butch Collins told them he sometimes worked late, "past when everybody else left" (Tr. 405, 876). Mel Fraizer testified that employees didn't do any grading, packing or sorting at night (Tr. 1334).

Discussion

Part 1910 standards apply to the Parma Facility. The egress standards of Subpart E, which includes 1910.37, apply to every workplace in general industry except mobile workplaces. 1910.34 through 1910.39 of Subpart E "cover the minimum requirements for exit routes that employees must provide in their workplace so that employees may evacuate the workplace safely during an emergency."

Exit route means a continuous and unobstructed path of exit travel from any point within a workplace to a place of safety.

It is undisputed there was no emergency lighting in the Parma facility except over the southwest door. J. C. Watson maintains the natural light from open cargo bay doors and skylights in the receiving area were sufficient to allow emergency exit. Respondent's argument is unpersuasive. The receiving area, where skylights were located, was not cited. In order for the doors to provide adequate emergency lighting throughout the remainder of the facility, it would have to be daylight and the doors would have to be open at the time of the emergency. The Parma facility is located in Idaho and operates throughout the winter. It is unlikely that doors are left open throughout the winter solely to fulfill the requirements of the standard. It is noted that during the inspection an employee was working in the rail car loading area while all the doors were closed. Had all the lights gone out, that employee would have been in the dark. Moreover, the record

establishes that some employees work past 5:00 p.m. In the winter, at 5:00 p.m., in Idaho, it is twilight. The primary area of concern, the main shed area, is a large facility lit with fluorescent lights. Employees work in close quarters, hemmed in by packing equipment from which they could not easily extricate themselves without adequate lighting (Exh. C-1, C-20, C-21). It is clear that, even were it open, the light from a 15-foot cargo door would be insufficient to light the entire main shed in all weather conditions at all times of the year.

The violation has been established and is affirmed as a "serious" violation. The penalty assessment for the violations grouped under item 3 is discussed in the section following item 3j below.

Other Citation 1, item 3c:

29 CFR 1910.37(b)(6): Exit sign(s) were not suitably illuminated by a reliable light source which gave a value of not less than 5 foot candles on the illuminated surface.

(a) West side personnel door for the loading area - On or about 13 September 2004, and at times prior thereto, the AC powered exit light was inoperative.

(b) Main shed area - On or about 20 September 2004, with the exception of the personnel door located on the southwest corner, exit signs were not illuminated by a reliable light source.

The cited standard provides:

(b) *Lighting and marking must be adequate and appropriate*. (6) Each exit sign must be illuminated to a surface value of at least five foot-candles (54 lux) by a reliable light source and be distinctive in color. Self-luminous or electroluminescent signs that have a minimum luminance surface of at least .06 footlamberts (0.21 cd/m^2) are permitted.

Facts

Instance a: Howell testified that the personnel door located on the west side of the shipping area had an exit light that was not working (Tr. 169-170). He stated that AC portion of the power light was burnt out, so that it could not be seen during normal operations (Tr. 170). However, he said if there was a power upset the DC battery portion of the light fixture would work (Tr. 170). He did not turn off the lights to see if the signs could be seen in the dark (Tr. 414). Howell testified that in case of an emergency requiring employees to get out of the building, they might not be able to find the exit doors to escape (Tr. 170). Howell observed three employees working in this area (Tr. 170).

Instance b: Howell testified that only two doors on the main floor of the Parma facility had exit signs and only one, the southwest door, had an exit light (Tr. 168, 416; Exh. C-22). None of the other doors were marked or illuminated (Tr. 416, 417). In case of an emergency requiring employees to get out of the building, they might not be able to find the exit doors to escape. (Tr. 170). This hazard affected about 40 employees (Tr. 171).

Howell testified this standard can be met by having an external light source shining on an exit sign or by installing a florescent-type sign (Tr. 414). Howell did not do any lumen testing, nor did he turn off the lights in either of the cited areas to see the effect of not having artificial light (Tr. 753, 754).

Discussion

As discussed above, the general industry standards at § 1910, including the cited egress standards apply to the Parma facility.

The evidence shows that the exit light on the personnel door located on the west side of the shipping area was inoperative. In the main shed area, only one of the two doors designated as exits was marked with an illuminated sign.

With the exception of the southwest door in the main shed the exit signs violate § 1910.37(b)(6) as they were not illuminated by any source other than the ambient light provided for the work area. The exit light on the personnel door had a DC source and would have become illuminated in the event of a power outage. In addition, a large cargo door, though not designated as an exit, could, in the event of an emergency, be used for egress from the main shed (Tr. 401, 416). It is not likely that the violation of the cited standard could lead to serious injury. The violation was established and correctly classified as "other than serious."

Alleged Violation of §1910.37(e)

Serious Citation 1, item 3d:

29 CFR 1910.37(e): An employee alarm system which complies with 29 CFR 1910.165 was not installed and maintained:

(a) At the establishment - On or about 20 September 2004, and at times prior thereto, the employer's emergency action plan failed to establish an alarm system for notifying employees to evacuate the premises.

The cited standard provides:

An employee alarm system must be operable. Employers must install and maintain an operable employee alarm system that has distinctive signal to warn employees of fire or other emergencies, unless employees can promptly see or smell a fire or other hazard in time to provide adequate warning to them. The employee alarm system must comply with §1910.165.

§1910.165 states, *inter alia*:

(a) *Scope and application*: (1) this section applies to all emergency employee alarms installed to meet a particular OSHA standard.

* * *

(b) *General requirements*. (1) The employee alarm system shall provide warning for necessary emergency action as called for in the emergency action plan, or for reaction time for safe escape of employees from the workplace or the immediate work area, or both.
(2) The employee alarm shall be capable of being perceived above ambient noise or light levels by all employees in the affected portions of the work place. Tactile devices may be used to alert those employees who would not otherwise be able to recognize the audible or visual alarm.
(3) The employee alarm shall be distinctive and recognizable as a signal to evacuate the work area or to perform actions designated under the emergency action plan.
(4) The employer shall explain to each employee the preferred means of reporting emergencies, such as manual pull box alarms, public address systems, radio or telephones.
(5) The employer shall establish procedures for sounding emergency alarms in the workplace. For those employers with 10 or fewer employees in a particular workplace, direct voice communication is an acceptable procedure for sounding the alarm provided all employees can hear the alarm. Such workplaces need not have a back-up system.

Facts

Howell testified that the Parma facility did not have an alarm system to alert employees to exit the work area in the event of an emergency (Tr. 172). J. C. Watson's action plan does not refer to an alarm system (Tr. 172, Exh. R-20). None of the employees Howell interviewed knew how they would be notified in the event of an emergency (Tr. 172-73).

Chris Fraizer testified that J. C. Watson doesn't have a fire alarm in the Parma facility, but stated there is a bell he can ring through the computer system to notify employees to evacuate (Tr. 1219, 1274). He also testified that employees were told that a bell would ring in the event of an emergency. The bell would signal

them to exit, and to gather in the parking lot (Tr. 1218-1219). He stated that he did not mention the bell in his deposition, because he was only asked if there was a fire alarm system (Tr. 1274). Mel Fraizer initially testified he didn't know of any alarm system in the Parma facility for fires, but later stated he was aware the computer system had an alarm bell (Tr. 1363, 1380).

Discussion

Although the evidence shows there is an alarm bell on the Parma facility's computer system, it is clear that, prior to the investigation, J. C. Watson had not contemplated the use of the bell as an emergency alarm system. None of the supervisory employees initially identified the bell on the computer as a fire alarm when they were deposed. The Fraizers' claims that they were confused by OSHA's questions regarding a "fire alarm" and believed such an alarm was distinct from an "emergency alarm," while arguing that, of course, they would have sounded the emergency alarm in the event of a fire, is specious at best. Clearly neither of the Fraizers recognized the bell as a signal to evacuate the work area in the event of fire until after their depositions. None of the employees interviewed at the time of the inspection were aware that the bell would be sounded in the event of an emergency. The use of the computer's bell as an emergency alarm is not mentioned in J. C. Watson's Emergency Action Plan (Exh. R-20), and was not referred to in Watson's minutes of the July 26, 2004 orientation meeting (Exh. R-7).

The evidence establishes J. C. Watson did not have established procedures under which emergency alarms in the Parma facility would be sounded, nor had it trained employees to recognize the bell as a signal to evacuate, as required under §1910.165. Because confusion surrounding the sounding of the alarm bell on the computer could have resulted in employees failing to evacuate in the event of fire, this item is "serious." Citation 1 item 3d is affirmed.

Alleged Violation of §1910.38(b)

Serious Citation 1, item 3e alleges:

29 CFR 1910.38(b): The written emergency plan was not made available for employee review:

> (a) At the establishment - On or about 10 September 2004, and at times prior thereto, failed to ensure that the emergency action plan was available for employee review.

The cited standard provides:

> *Written and oral emergency action plans.* An emergency action plan must be in writing, kept in the workplace, and available to employees for review. However, an employer with 10 or fewer employees may communicate the plan orally to employees.

Facts

Howell testified that J. C. Watson had a written emergency action plan, but stated it was outdated and was not made available for employee review (Tr. 174). When Howell asked to see the Parma facility's emergency action plan during the inspection, Chris Fraizer told Howell he wasn't aware an emergency plan existed (Tr. 174). The facility manager, Mel Fraizer knew one existed, but when he went with CO Parker to retrieve the plan from the second floor office, he found an empty binder which was labeled Nyssa shed emergency action plan (Tr. 175). Exhibit C-23 is a copy of the empty Nyssa binder (Tr. 175). A copy of the emergency action plan was eventually located in J. C. Watson's main office (Tr. 176; Exh. C-105).

Discussion

The cited standard requires that a written emergency action plan be kept in the workplace and be available for employee review. When the OSHA CO asked to review the emergency action plan, none could be located at the workplace. The action plan J. C. Watson eventually located elsewhere was not current, and so would not have provided accurate information to employees. This violation has been established, and is affirmed as a "serious" violation.

Alleged Violation of §1910.38(f)

Serious Citation, item 3g alleges:

29 CFR 1910.38(f): The employer did not review the emergency action plan as required by 29 CFR 1910.38(f)(1) through (3) with each employee covered by the plan when the plan was developed, when the employees responsibilities or designated actions under the plan changed, and when the plan was changed.

(a) At the establishment - On or about 20 September 2004, and at times prior thereto, the emergency action plan was not kept up to date. The plan had several past managers with responsibilities who are no longer employed at the establishment.

The cited standard provides:

(f) *Review of emergency action plan*. An employer must review the emergency action plan with each employee covered by the plan:
(1) When the plan is developed or the employee is assigned initially to a job;
(2) When the employee's responsibilities under the plan change; and
(3) When the plan is changed.

Facts

As noted above, J. C. Watson has an action plan, although Howell stated it is outdated (Tr. 434; Exh. C-105). Howell stated the plan located during the OSHA inspection assigned key safety responsibilities to management personnel, Bill Dempsey and Oscar Perales, neither of whom now work for J. C. Watson (Tr. 431). Specifically, the written action plan requires Bill Dempsey to control accident scenes and coordinate with emergency personnel, while Oscar Perales is responsible for shutdown of major equipment and power

(Exh. C-105, pp. 7-8). The plan was last updated in 1995. The log accompanying the plan documents the last plan training as being held in 1995 (Exh. C-105, pp. 15-16).

During the inspection, Chris Fraizer told Howell he didn't know if J. C. Watson had a written action plan (Tr. 434). Chris Fraizer told Howell that, in the event of an emergency, 911 would be called (Tr. 427). He, Mel Fraizer, Felipe Lira and unidentified others would remain behind while the rest of the employees evacuated (Tr. 426).

Though the reassignment of safety responsibilities constituted a change in the plan, the written plan was never updated (Tr. 176, 179).

Discussion

The record establishes that J. C. Watson has not updated its written emergency action plan, or reviewed changes, including the reassignment of safety responsibilities, with employees. Chris Fraizer testified that he has responsibilities under J. C. Watson's current emergency procedures, however, he was unaware that a written plan even existed. It is noted that Chris Fraizer was not even mentioned in J. C. Watson's written action plan. J. C. Watson's failure to update its written plan to conform to current practice is not a defense to the citation.

J. C. Watson's failure to review its emergency action plan with affected employees could have resulted in confusion about emergency response procedures and resulted in serious injury to employees in the event of a fire. Had J. C. Watson updated its plan and trained affected employees, perhaps Chris Watson would have realized the bell on his computer was a fire alarm (if in fact that was its intended purpose). Citation 1, item 3g is affirmed as a "serious" violation.

Alleged violation of §1910.39(d)

Serious Citation 1, item 3i alleges:

29 CFR 1910.39(d): The employer did not inform employees upon initial assignment to a job of the fire hazards to which they are exposed:

(a) At the establishment - On or about 20 September 2004, and at times prior thereto, the employer failed to provide initial training concerning fire hazards.

The cited standard provides:

Employee information. An employer must inform employees upon initial assignment to a job of the fire hazards to which they are exposed. An employer must also review with each employee those parts of the fire prevention plan necessary for self-protection.

Facts

Howell testified that the employees he interviewed in the Parma facility had not been trained with regard to the fire hazards to which they are exposed (Tr. 180). Howell identified welding operations and damaged electrical cords as ignition sources, and compressed gas tanks, including propane tanks and oxygen and acetylene tanks as fuel sources which could constitute a fire hazard (Tr. 438-441).

J. C. Watson's forklift operators were trained on September 10, 2004 in propane handling (Tr. 440-41). Gas cylinders are stored in the maintenance room away from damaged electrical cords. (Tr. 440-441). Welding is not performed during cleaning, sorting and grading operations (Tr. 438-439). J. C. Watson prohibits smoking except in designated areas and at designated times (Tr. 1300, 1301, Exh. R-13). Employees are told that in case of a fire emergency they should evacuate to the parking lot (Tr. 1218-1219).

Discussion

The Secretary failed to establish that J. C. Watson's employees were not notified about fire hazards to which they were exposed. J. C. Watson's welders, who might have been exposed to distinct fire hazards inherent to their jobs, did not normally work in the Parma facility. Moreover, it is not clear that any welders were interviewed with regard to this item. Forklift operators working with propane gas were trained regarding hazards inherent in the use of propane. Other employees working in the packing facility are warned not to smoke outside of designated areas and are told what to do in the event of fire. The Secretary failed to establish that any more particularized information was necessary for those employees' self-protection.

In the absence of any evidence establishing what more Respondent should have done to comply with this standard, Citation 1, item 3i is vacated.

Alleged Violation of §1910.157(e)(2)

Serious Citation 1, item 3j Alleges:

29 CFR 1910.157(e)(2): Portable fire extinguishers were not visually inspected at least monthly:

(a) At the establishment - On or about 9 September 2004, and at times prior thereto, the employer failed to inspect their portable fire extinguishers on a monthly basis.

The cited standard provides:

(e) *Inspection, maintenance and testing*. (2) Portable extinguishers or hose used in lieu thereof under paragraph (d)(3) of this section shall be visually inspected monthly.

Facts

Mel Fraizer testified that fire extinguishers were inspected on a monthly basis; when the inspections were done it was annotated on the pink card attached to the extinguisher (Tr. 181). There were no annotations on the cards indicating the extinguishers had been inspected between March 2004 and September 2004 (Tr. 181-82; Exh. C-24, C-25).

Butch Collins testified he checked the Parma facility fire extinguishers on a monthly basis as part of his job even before Mel Fraizer was his boss (Tr. 1146, 1147). If the gauge was in the green, the extinguisher was okay, if not he would tell one of the bosses it needed to be refilled (Tr. 1147). Collins stated he had been doing the monthly inspections of fire extinguishers before the OSHA inspection even though he did not start noting the inspection on the attached cards until after the OSHA inspection (Tr. 1147-1148).

Discussion

The cited standard does not require that monthly inspections be documented. Complainant has failed to make a prima facie case. This item is vacated.

Penalty

A combined penalty of $750.00 was proposed for all of the violations enumerated under citation 1, item 3. The violations at 3b, 3d and 3g, are "serious" in that the absence of an adequate emergency response plan, training and adequate emergency lighting could lead to serious injury, up to and including death, in the event of a fire. Over 40 employees have been exposed to the cited hazard since the facility has been operating. Nonetheless the likelihood of an accident was low (Tr. 159, 165, 166, 173, 176-79). Means of egress were available, though not officially designated or illuminated. Most employees knew that they were to evacuate and gather for a head count in the event of a fire (Tr. 176, 422, 425-26). Some employees, however, had never received instruction on any aspect of an emergency action plan; five did not know where the rally point was in case of an emergency (Tr. 176, 425).

A number of the cited items addressing fire hazards were vacated, nevertheless, the proposed combined penalty of $750.00 is appropriate given the gravity of the remaining violations and will be assessed.

Alleged Violation of §1910.101(b)

Serious Citation 1, item 4a alleges:

29 CFR 1910.101(b): Section 3.4.4, Compressed Gas Association Pamphlet P-1-1965, as adopted by 29 CFR 1910.106: Compressed gas cylinder(s) in use were not properly supported to prevent them from being knocked over:

(a) Maintenance shop for the main shed - On or about 9 September 2004, and at times prior thereto, compressed gas cylinders of acetylene, oxygen and compressed air were standing up and not secured from being knocked over.

(b) Dump room area adjacent to the compressor room - On 10 September 2004, a cylinder of argon and a cylinder of carbon dioxide were standing up and not secured from being knocked over.

The cited standard provides:

Compressed gases. The in-plant handling, storage, and utilization of all compressed gases in cylinders, portable tanks, rail tankcars, or motor vehicle cargo tanks shall be in accordance with Compressed Gas Association Pamphlet P-1-1965, which is incorporated by reference as specified in §1910.6.

Facts

Howell testified that an acetylene cylinder, an oxygen cylinder and a compressed air cylinder were stored, unsecured, in the maintenance shop of the Parma facility on September 9, 2004 (Tr. 184, 185, 1365, Ex. C-27, C-28, C-29). On September 10, 2004, these same cylinders were stored, still unsecured, in the dump area along with a cylinder of argon and a cylinder of carbon dioxide (Tr. 187, 189).

Two hazards are associated with cylinders stored standing up and unsecured (Tr. 186). Unsecured cylinders may be knocked over and land on an employee's foot, resulting in a fracture or severe bruising (Tr. 186). The cylinders of compressed air and oxygen weigh about a hundred and seventy-five pounds and could seriously injure the knee, ankle or foot (Tr. 186). In addition, pressurized cylinders can become missiles, traveling up to a quarter of a mile if their heads are severed (Tr. 186-87). Howell had personally investigated an accident where a cylinder blew up and put a four-foot hole in a concrete masonry wall (Tr. 186).

Howell did not test to see how much gas was in each cylinder, but stated OSHA's practice is to assume the cylinders are full (Tr. 447). The cylinders were in plain view in both locations (Tr. 188). Mel Fraizer testified the cylinders have always been sitting around unsecured as they are depicted in Complainant's exhibits (Tr. 1379). Three employees, two of whom Howell personally observed, were affected by the hazard in the maintenance shop; five were affected in the dump area (Tr. 188).

Discussion

As discussed above, Part 1910 applies to the Parma Facility. Section 1910.253 incorporates the Compressed Gas Association (CGA) P-1-1965 pamphlet Safe Handling of Compressed Gasses. CGA P-1-1965 states that gas cylinders must be secured at all times to prevent tipping.

It is undisputed that the gas cylinders were stored in an unsecured manner. J. C. Watson argues that the standard does not apply because the evidence does not show the cited cylinders contained compressed gas at the time of the inspection. However, "compressed gas cylinders are presumed to contain at least enough residual gas to present a hazard unless there is evidence that the cylinders were so empty as to negate the possibility of injury." *Williams Enter. Of Georgia, Inc.*, 7 BNA OSHC 1900, 1903, 1979 CCH OSHD

¶24,003, p. 29,138 (No. 13875, 1979). Because there was no evidence provided to counter the presumption in this case, Respondent's argument fails.

The evidence shows employees had access to the cited cylinders in both the maintenance and dump rooms. Howell observed two people enter and exit the maintenance room while the cylinders were stored there. Five people were affected by the hazard of unsecured cylinders in the dump area (Tr. 188). Moreover, the dump area is located adjacent to the employee restroom. If a cylinder were to fall, sever its head and become a missile, employees in the restroom could be injured (Tr. 1379).

The cylinders were stored, unsecured, in plain view. Where a cited condition is "readily apparent" to anyone in the area, the employer's constructive knowledge is established. *A.L. Baumgartner Construction, Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1002, 1994), quoting (*Hamilton Fixture*, 16 BNA OSHC 1073, 1091, 1993 CCH OSHD ¶30,034, p. 41,182 (No. 88-1720, 1993), *aff'd on other grounds*, No. 93-3615 (6th Cir. July 1, 1994)). In addition, Mel Fraizer, the plant manager, admitted the cylinders were never secured (Tr. 1379). The knowledge, actual or constructive, of an employer's supervisory personnel is imputed to the employer. *Ormet Corp.*, 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991). The violation has been established.

Alleged Violation of §1910.253(b)(4)(iii)

Serious Citation 1, item 4c alleges:

29 CFR 1910.253(b)(4)(iii): Oxygen cylinders in storage were not separated from fuel gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet (6.1 m) or by a noncombustible barrier at least 5 feet (1.5 m) high having a fire-resistance rating of at least one-half hour:

(a) Main shop for the main shed - On or about September 9, 2004 and at times prior thereto, cylinders of acetylene and oxygen were stored adjacent to each other.

The cited standard provides:

(4) *Oxygen storage*... (iii) Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet (6.1 m) or by a noncombustible barrier at least 5 feet (1.5 m) high having a fire-resistance rating of at least one-half hour.

Facts

An oxygen cylinder and an acetylene cylinder were stored within a few feet of each other in the maintenance shop of the Parma shed on September 9, 2004 (Tr. 195; Exh. C-27, C-28). The cylinders were capped, no regulators were attached, and J. C. Watson introduced no evidence suggesting that the tanks were in use (Exh. C-27, C-28). In the event of fire, the acetylene and oxygen, both flammable gases, could be released in the same work area, intensifying the fire condition (Tr. 195, 196).

Three employees worked in the maintenance shop, two of which Howell personally observed (Tr. 196).

Discussion

Part 1910 applies to the Parma facility. Subpart Q Welding, Cutting and Brazing, which includes §1910.253(b)(4)(iii), applies to employers on whose property cutting and welding is to be performed. The Secretary's assertion that the tanks were "in storage" was unrebutted. *See Andrew Catapano Enterprises, Inc.*, 17 BNA OSHC 1776, 1996 CCH OSHD ¶31,180 (Nos. 90-0050; 90-0189; 90-0190; 90-0191; 90-0192; 90-0193; 90-0771; 90-0772; 91-0026, 1996). The cited standard is applicable to the Parma shed by its terms.

It is undisputed that oxygen and acetylene cylinders were stored together within a few feet of each other in the maintenance shop without a firewall between them. The evidence shows at least three employees were exposed to this hazard. As stated above the cylinders were in plain view and the plant manager, Mel Fraizer observed the cylinders stored in this manner. The violation has been established.

Penalty

A combined penalty of $1,250 was proposed for all of the violations enumerated under citation 1, item 4. Items 4b and 4d were vacated by the Secretary. The violations at 4a are "serious" in that falling cylinders could cause fractures or severe bruises. If the cylinder's heads were to be severed they could act as a missile, leading to serious injury. At least seven people were exposed to the cited hazards. J. C. Watson did not take any precautions to secure the cylinders. The likelihood of an accident, however, was low (Tr. 191).

The violation at item 4c is "serious" in that a fire fueled by oxygen and flammable gas could lead to serious injury or death. Three employees were exposed to the cited hazard during the inspection on September 9, 2004 (Tr. 185, 189, 190). Howell stated the probability of an accident was low (Tr. 197). J. C. Watson has not taken any precautions to store the cylinders in separate locations (Tr. 195, 196).

As noted above, items 4b and 4d were vacated. A penalty of $625.00 is appropriate for the remaining two violations and will be assessed.

Alleged Violation of §1910.147(c)(4)(i)

Serious Citation 1, item 5a alleges:

29 CFR 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section:

(a) At the establishment - on or about 20 September 2004, and at times prior thereto, the employer failed to develop specific energy control procedures for equipment with actual or potential stored or residual energy, equipment with multiple energy sources and equipment with energy isolation sources that are not readily identifiable. Equipment requiring specific procedures includes, but is not limited to, the Autoline Conveyor System, the automatic palletizer, and the air compressor.

Section 1910.147 covers:

. . . the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.

The cited standard provides:

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

Facts

J. C. Watson did not produce a written energy control program (Tr. 206). Howell stated there were no lock out procedures in place for the Autoline, the 108 conveyors associated with it, or the palletizer (Tr. 197-198, 200, 1218).

Rather than locking out areas of the Autoline system with a system of physical locks and tags, Chris Fraizer used the computer system to shut down the line (Tr. 200-201). Chris Fraizer could shut down various discrete areas of the line, or use a "stop-all" command to shut down the complete system (Tr. 202).

Howell stated a "key stroke" is not acceptable for lockout purposes because employees performing servicing and maintenance are still exposed to the unexpected energization of the equipment (Tr. 202). The standard requires energy be controlled with a positive disconnect and lock out (Tr. 204, 210). That the Autoline could become energized unexpectedly is demonstrated by Luis Ramirez' testimony that when his arm was caught in the box conveyor, which is part of the Autoline, the conveyor was stopped after he called for help. However, it unexpectedly started again for an extra thirty seconds while he was still under the line, causing the conveyor to continue to roll against his arm (Tr. 67).

Howell testified that the palletizer and air compressor have stored energy in their pneumatics and hydraulics and should be locked out (Tr. 200). No procedures were in place to bleed off air and/or hydraulic

pressure to prevent the release of energy stored in the palletizer and compressor (Tr. 206, 210). The palletizer has its own computer system, so that Chris Fraizer does not monitor or control the palletizer from his console; there is only an emergency stop for the palletizer at his station (Tr. 1278-79, 1313). Howell testified that Mel Fraizer did some maintenance work on the palletizer, such as fixing leaks in the hydraulic line or the air line (Tr. 205). Chris Fraizer or Felipe Lira would work on the palletizer if it malfunctioned or had pneumatic problems, though an electrician would be hired for any electrical problems (Tr. 1231, 1232). Howell testified an employee could be crushed while working inside of the machine if the palletizer became energized (Tr. 205-206).

Mel Fraizer testified J. C. Watson had lockout/tagout procedures (Tr. 1316). The line was to be locked out by 1) getting the key from the operator, 2) shutting off the motor with the computer, 3) shutting the breaker off, 4) locking the panel box, and 5) putting the key back (Tr. 1317-1318). However, he stated that because the computer turned the motors on and off, locking out at the panel box was redundant (Tr. 1318). Mel and Chris Fraizer testified that when an area is shut down by the computer system, it cannot start in any way (Tr. 1278, 1317).

Most of the maintenance work in the Parma facility was done by Felipe Lira, Chris Frazier or Mel Fraizer (Tr. 201, 449). Howell testified that all three were exposed to hazards posed by the Autoline; Mel Fraizer was exposed to the hazard posed by the palletizer. (Tr. 206).

Discussion

Part 1910 applies to the Parma facility. Section 1910.147 covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.

In order to establish the applicability of the cited standard, the Secretary must show that "there is some way in which the particular machine could energize, startup, or release stored energy without sufficient advance warning to the employee." *General Motors Corp.*, 17 BNA OSHC 1217, 1220 (Nos. 91-2973, 91-3116, 1995), *aff'd Reich v. General Motors Corp.*, 89 F.3d 313 (6th Cir. 1996). The record establishes that the Autoline and all the belts associated with it were controlled by a single computer console on the catwalk platform. All or any portion of the line could be activated with a few keystrokes of the computer. Ramirez' uncontradicted testimony shows that the box conveyor, which was stopped after his accident was reported, unexpectedly started up after being shut off. Because the entire line is not visible from the platform (Tr. 649), there is always the possibility that the line, or any portion thereof, could be inadvertently reenergized while maintenance or servicing is being performed.

The Secretary introduced uncontroverted testimony establishing the palletizer and air compressor retained stored energy which could be released, injuring employees.

It is undisputed that J. C. Watson did not have a written energy control plan for any of the energized equipment in the Parma facility. The evidence shows that J. C. Watson had unwritten lock-out procedures, but used the computer system to stop the motors instead of utilizing the procedures or physically locking out the electrical panel. Maintenance in the Parma facility is done by Mel Fraizer, Chris Fraizer and Felipe Lira, all of whom were exposed to the hazard posed by the Autoline's unexpected energization.

Mel Fraizer, the Parma facility manager, knew J. C. Watson did not have a written energy control plan and did not utilize its own unwritten lockout/tagout procedures for equipment subject to unexpected energization or the release of stored energy. His knowledge as a manager is imputed to J. C. Watson.

A serious violation has been established, in that the failure to develop, document and utilize energy control measures can lead to death or permanent disabling injuries (Tr. 206). The combined penalty proposed for items 5a, 5b and 5c is discussed below.

Alleged violation of §1910.147(c)(7)(i)

Serious Citation 1, item 5b alleges:

29 CFR 1910.147(c)(7)(i): The employer did not provide adequate training to ensure that the purpose and function of the energy control program was understood by employees; and/or that employees required the knowledge and skills required for the safe application, usage and removal of energy control devices:

(a) At the establishment - On or about July 31, 2004 and at times prior thereto, employee(s) were not instructed to stop and de-energize equipment such as but not limited to motorized conveyors while performing activities such as but not limited to housekeeping adjacent to and underneath running conveyors.

(b) At the establishment - On or about September 20, 2004 and at times prior thereto, employee(s) performing activities such as but not limited to housekeeping adjacent to an underneath de-energized equipment, such as but not limited to motorized conveyors did not obtain the knowledge and skills to safely apply, use and remove energy control devices; in that, employees depended upon shed managers to lockout for them.

The cited standard provides:

(7) *Training and communication*. (i) The employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees. The training shall include the following:

(a) Each authorized[2] employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.

---

[2] §1910.147(b) defines:
Authorized employee. A person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment.

Facts

Howell testified employees who performed the servicing and the maintenance[3], Chris Frazier, Mel Fraizer and Felipe Lira, as well as those who did the cleaning, Collins and Ramirez were "authorized" employees (Tr. 201, 205, 208-209, 449). Because they were exposed to the hazardous conditions, *i.e.,* the unexpected reenergization of equipment during servicing and maintenance activities they should have been trained when and how to utilize lockout procedures (Tr. 209, 211). He further testified that "affected" employees, *i.e.,* all employees working at the bagging locations and anywhere else in the facility where they might come across equipment that was either locked out or tagged out should have been trained in the purpose of lockout/tagout (Tr. 209). Howell testified that, as J. C. Watson did not have an energy control program, it could not have trained employees in it use or purpose (Tr. 210). The only evidence J. C. Watson introduced to contradict Howell's contention was that as of September 9, 2005, after the accident, Collins had been trained not to clean in or under the conveyors without Chris Frazier locking out for him (Tr. 211).

Discussion

The lockout/tagout standards are found in the general industry standards and cover the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees. As noted in the discussion of item 5a, the standards apply to the Parma facility's Autoline, palletizer and air compressor.

The plain language of the standard does not require employees performing activities other than service and/or maintenance, *i.e.,* housekeeping activities, to perform lockout/tagout when they work in the vicinity of operating equipment. As neither Butch Collins nor Luis Ramirez was shown to be an "authorized" employee, J. C. Watson's failure to train them to lock out the Autoline while cleaning up produce from the floors adjacent to or underneath the conveyors does not constitute a violation of the cited standard.[4]

J. C. Watson goes on to argue that its admittedly authorized employees, *i.e.,* those who performed service and maintenance on conveyor equipment, received adequate training. Respondent relies on Howell's statement that Chris and Mel Fraizer both were "extremely competent" in the operation of the Autoline. Clearly, however, being competent in the Autoline's operation does not equate receiving lockout/tagout

---

[3] 1910.147(b) defines servicing and/or maintenance 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, where the employee may be exposed to the unexpected energization or startup of the equipment or release of hazardous energy.

[4] This judge notes that the Secretary effectively proposed an alternative remedy for the "caught by" hazard to which housekeeping personnel are exposed, when they cited J. C. Watson under the machine guarding standards, which were affirmed at Citation 1, item 7.

training. For instance, the standard states that authorized employees "shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control." 1947(7)(i)(A). As discussed in 5a, Mel Fraizer, an authorized employee, was unaware of any energy controls for the Palletizer. This alone establishes a violation of the cited standard. This judge notes that nothing in the record indicates that Filipe Lira, another authorized employee, was either competent in the operation of the Autoline, *or* trained to utilize lockout/tagout procedures. It is clear from the record that authorized employees were *not* trained to use lockout/tagout procedures, and were expected to rely entirely on Chris Fraizer to shut down the line using his computer console. Insofar as the authorized employees are concerned, a violation has been established.

Though the Secretary introduced evidence relating to affected employees, neither instance of the citation can be construed as referring to them, and that evidence will not be considered. Nonetheless, J. C. Watson's violation of the cited standard has been established in regard to "authorized" employees, and item 5b is affirmed as a "serious" violation. The combined penalty proposed for items 5a, 5b and 5c is discussed below.

Alleged Violation of §1910.147(c)(8)

Serious Citation 1, item 5c alleges

Violation of 1910.147(c)(8): Lockout or tagout was not performed only by the authorized employees who are performing the servicing or maintenance:

(a) At the establishment - On or about September 20, 2004, and at times prior thereto, employee(s) were authorized to perform maintenance activities, such as but not limited to housekeeping adjacent to and underneath de-energized conveyor equipment, when this equipment was not locked out by the employee performing this maintenance activity.

The cited standard provides:

(8) *Energy isolation*. Lockout or tagout shall only be performed only by the authorized employees who are performing the servicing or maintenance.

Facts

It is the accepted practice at J. C. Watson for Chris Fraizer to shut down the Autoline from his computer console for anyone who needed to work on the equipment (Tr. 213-14, 218-19). Maintenance work in the Parma facility was done primarily by Chris Fraizer, Mel Fraizer or Felipe Lira (Tr. 201, 449). Jose Arasco would assist Lira at times (Tr. 455). Mel Frazier sometimes did the lock out and shut down when he was the facility manager (Tr. 1318).

Discussion

As discussed above, the lockout/tagout standard applies to the Parma facility.

The lockout/tagout provisions of §1910.147 do not apply to housekeeping activities. However, the evidence shows that Chris Fraizer, Mel Fraizer and Felipe Lira were authorized employees, as they performed maintenance on the machines in the Parma facility. Chris Fraizer and Mel Fraizer shut down the machines from a computer console when maintenance or servicing was performed. Felipe Lira relied on one of the Fraizers to shut down the Autoline for him when he performed maintenance on the machines; he did not perform his own lockout or tagout. This violation has been established.

Penalty

A combined penalty of $2,500.00 was proposed for all the violations enumerated under citation 1, item 5. J. C. Watson did not have, and did not train its personnel in an energy control program compliant with §1910.147. The record establishes that lockout by keystroke is inadequate to eliminate the possibility of unexpected energization or the release of stored energy. In addition, when someone other than the person performing maintenance or servicing controls the energy source there is a possibility of the servicing employee being caught or injured during an unexpected startup. The gravity of the violations are high in that the Parma facility is a prolific operation with complicated machinery, resulting in a significant probability of an accident occurring (Tr. 206, 219). Moreover an accident could lead to death or permanent disabling injuries (Tr. 219). At least three employees were exposed to the hazardous conditions. The proposed penalty of $2,500.00 is appropriate given the gravity of the violations and is assessed.

Alleged Violation of §1910.178(m)(10)

Serious Citation 1, item 6f alleges:

29 CFR 1910.178(m)(10): Load backrest extension(s) were not used on industrial trucks to minimize the hazard of rearward falling materials:

(a) On September 9, 2004 and at times prior thereto, the Toyota Forklift Truck (model # 42-5F625/Serial # 405FG25-11647) had the load backrest removed.

(b) On September 9, 2004 and at times prior thereto, the Toyota Forklift Truck (model # 42-5F625/Serial # 405FG25-10619) had the load backrest removed.

(c) On September 9, 2004, and at times prior thereto, the Hyster Forklift Truck (model # H50H/serial # D003D7907X) had the load backrest removed.

The cited standard provides:

(m) *Truck operations*. . . . (10) A load backrest extension shall be used whenever necessary to minimize the possibility of the load or part of it from falling rearward.

Facts

It is undisputed that J. C. Watson's industrial trucks (forklifts) were not equipped with load backrest extensions (Tr. 244-45; Exh. C-47, C-48, C-49). The forklifts handle palletized bins of onions measuring 60 inches long, by 48 inches deep and 30-1/2 inches high (Tr. 247; Exh. C-48). The bins are transported two at a time, stacked to 61 inches in height (Tr. 247). The backrest on the cited forklifts are 24 inches tall; the stacked bins exceed the height of the backrests by 37 inches (Tr. 243-46). Howell observed the forklifts continually picking bins of onions out of the storage building, loading them onto the conveyor, and moving pallets of boxed or bagged onions from the Parma facility back into storage (Tr. 248). To place the bins on the conveyor lines or to take the bins out of storage, where they are stacked seven high, the forks are lifted higher than the mast of the forklift (Tr. 247). During the loading and unloading of bins and the stacking of pallets, when the load is raised above the mast, the materials could fall in on the driver (Tr. 245, 248). The only thing stopping a falling load from landing on the operator is the forklift's overhead package guard (Tr. 243-246). Howell testified that the required backrest extension sits on the assembly of the forklift and would prevent the second stacked bin from sliding back onto the operator (Tr. 244). The overhead package guard provides only partial protection for the operator; moreover, there is an opening directly in front of the driver through which materials from a disintegrating bin could fall into the driver's area (Tr. 245, 462, 880-881). Howell observed three employees exposed to the hazard during the inspection (Tr. 246).

John Grim told Howell the backrests had been removed and stored because it was thought they were tearing up the bins (Tr. 244, 245). Mel Fraizer testified that the backrests could have been off the forklifts for a year before the inspection (Tr. 1369).

Discussion

The cited standard is included in Part 1910, Subpart N, Materials Handling and Storage, and is applicable to J. C. Watson's industrial trucks by its terms.

The standard requires a backrest extension to be used whenever necessary to minimize the load or part of it from falling rearward. It is undisputed that the three forklifts cited do not have backrest extensions. The forklifts frequently moved bins two at a time, at which time they were stacked higher than the existing backrest. Bins of onions and pallets of bagged and boxed onions loaded onto the tines of the forklift and unloaded onto conveyors and into storage with the forks extended above the mast. Since a load of two bins exceeds the height of the existing backrests by 37 inches, a backrest extension is necessary to keep the load or portions thereof from falling rearward. Respondent argues the overhead guard was designed for this type of hazard. However, §1910.178(m)(9) requires an overhead package guard *in addition to* the load backrest. That standard provides:

> An overhead guard shall be used as protection against falling objects. It should be noted that an overhead guard is intended to offer protection from the impact of small packages, boxes, bagged material, etc., representative of the job application, but not to withstand the impact of a falling capacity load.

Clearly the standard deems the overhead guard insufficient to abate the cited hazard, *i.e.,* large portions of the load, such as full pallets or bins falling rearward. When a load backrest would minimize the possibility of the load, or part of it falling rearward, such a backrest is required.

Three forklift drivers were observed using forklifts without backrest extensions (Tr. 246). John Grim, the transportation manager, admitted the forklifts originally had backrest extensions but they were taken off (Tr. 244).

The violation has been established.

Penalty

A combined penalty of $1,250.00 was proposed for items enumerated under citation 1, item 6.

The violations of 6f are "serious" in that loads or parts of loads falling on the forklift driver could cause serious injury (Tr. 245). Three employees were repeatedly exposed to the cited hazard, as the drivers were stacking bins and pallets continually throughout each day (Tr. 248). The likelihood of an accident was low (Tr. 246), and the overhead guard provided some protection against falling objects.

As 6a, 6b, 6c, 6d and 6e were withdrawn, the proposed penalty of $1,250.00 is excessive. A penalty of $250.00 is appropriate and will be assessed.

Alleged Violation of §1910.219(c)(4)(i)

Serious Citation 1, item 8 alleges:

29 CFR 1910.219(c)(4)(i): Unguarded projecting shaft end(s) did not present a smooth edge and end; and/or projected more than one half the diameter of the shaft:

(a) Floor side of Dump Area for the Transfer Bins - On or about September 9, 2004, the key way slot with an opening of approximately 5/16th of an inch did no present a smooth edge. In addition, the rotating shaft's diameter was approximately 1 3/4 inches and the shaft projected approximately 1 5/8 inches long.

(b) Grade American Onion Line - On or about September 13, 2004 and at times prior thereto, the rotating shaft end diameter for the onion size roller was approximately 1 1/4 inches and the shaft projected approximately 3 1/2 inches.

(c) Grade American Onion Line - On or about September 13, 2004 and at times prior thereto, the rotating shaft on the right side adjacent to the drive motor had a shaft with a diameter of approximately 1 ½ inches and the shaft projected approximately 4 1/4 inches long.

(e) Main shed taping machine conveyor - On or about September 13, 2004, and at times prior thereto, the rotating shaft end diameter is approximately 1 1/4 inches and the shaft projected approximately 1 1/2 inches long.

The cited standard provides:

(4) *Projecting shaft ends.* (i) Projecting shaft ends shall present a smooth edge and end and shall not project more than one-half the diameter of the shaft unless guarded by nonrotating caps or safety sleeves.

Facts

Respondent does not dispute the existence of the violative conditions as set forth in the citation.

Instance a: The shaft in the dump area for the transfer bins is about six feet off the ground and protrudes farther than half its diameter (Tr. 257-58, 261; Exh. C-60 and C-66). Howell observed five people in the area of the shaft: two forklift operators, Mel Fraizer, Felipe Lira and the dump operator (Tr. 258). The dump operator works primarily on the platform above the shaft and the forklift operators merely drive by the shaft while stacking boxes (Tr. 259). One of the forklift operators got off the forklift in the dump area, but didn't walk next to the shaft (Tr. 478).

Chris Fraizer was not aware of any circumstances where an employee would have to work close enough to the shaft to be exposed to a hazard (Tr. 1253). Howell did not know whether employees had any duties near this shaft (Tr. 478).

Instance b: The cited shaft is depicted in the Secretary's Exhibit C-61 (Tr. 260). This shaft, located on the Grade American Onion Line, is about five feet off the ground and was rotating at the time of the inspection (Tr. 260, 261). Howell testified that anyone could walk directly up to the location (Tr. 479).

Howell observed two employees in the area of the Grade Onion Line shaft, Mel Fraizer and a forklift operator (Tr. 260). Mel Fraizer was standing on the other side of the equipment pictured in C-61, adjusting the jack that determines the height of the brush on the roller (Tr. 260, Ex. C-69). There is a hydraulic jack on each side of the line for this purpose (Tr. 480, Ex. C-69). The jacks are currently adjusted approximately once a month and are normally adjusted while the line is running (Tr. 480, 1255). Chris Fraizer testified he and Mel Fraizer adjust the rollers; no other employees have duties requiring them to be in this area while the machine is operating (Tr. 1254). Mel Fraizer testified that this shaft had only been in the Parma facility for a couple of days; it was a new line that they were testing when the inspection took place (Tr. 1370, 1371).

Instance c: The shaft depicted in Exhibit C-62 is about waist high and is located at corner of the Grade American Onion line near an employee walkway (Tr. 261, 262). Howell observed employees walking within a couple of feet of the shaft (Tr. 483). The employees affected were a forklift driver, Mel Fraizer and four employees walking to their stations at the bagging station, the palletizer or the onion grading line (Tr. 261-262, 482-483).

Instance e: The shaft at issue in this instance is located on the taping machine and is waist high (Tr. 262-63; Exh. C-64). There is a metal railing directly above the shaft and a vertical rail on either side (Tr. 483, 484, Ex. C-64).

Employees using a four to five foot wide path to walk by the area were exposed to the cited hazard (Tr. 484). Howell observed a couple of employees in the area walking past the shaft to get back to the Seal Master or fuel master area (Tr. 263, 484).

Chris Fraizer testified that no employees are assigned duties that expose them to this shaft (Tr. 1258), which is associated with a belt in front of the taping machine. However, bagger operators walk within a foot of the cited shaft to get to their bagging machines (Tr. 1256-57 1289, 1293).

Mel Frazier told Howell, "I know the requirement that it's supposed to not exceed one-half the diameter, and I know we have a whole bunch of them to shorten up here." (Tr. 259). Mel Fraizer's insurance man told him about the standard regarding the shafts (Tr. 1370). Mel Fraizer was aware of the shaft in

instance b; it was one of the shafts he was referring to when he stated some needed to be shortened up (Tr. 261).

The hazard posed is that employees will get clothing or hair wrapped around the shaft. The longer the shaft the harder it is to get away from it (Tr. 258, 260, 262, 263). Howell stated the probability of an accident in each of these instances is low (Tr. 260, 262, 263).

Discussion

Part 1910 subpart O, machinery and machine guarding applies to the Parma facility by its terms.

It is undisputed that the cited shafts project more than one-half the diameter of the shaft. It is also undisputed that the shafts in instance (a) and (c) were unguarded. Respondent argues that the shafts in instances (b) and (e) are guarded by location and design. Respondent also argues that the employees are not exposed to a hazardous condition in any of the instances.

The cited standard prescribes a specific method for guarding projecting shaft ends, *i.e.*, with nonrotating caps or safety sleeves. Guarding by location or design are not permitted under §1910.219(c)(4)(i), and do not constitute a defense to the citation.

To make its prima facie case, the Secretary must prove "that employees have been, are, or will be in zones of danger during either their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces." *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1993 CCH OSHD ¶30,303, p. 38,886, (No. 86-0274, 1993). The zone of danger is determined by the hazard presented by the violative condition, and is normally the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction Co.*, 17 BNA OSHC 1229, 1234, 1995 CCH OSHD ¶30,754 (No. 91-2107, 1995).

The cited standard is intended to prevent employees from getting clothing or hair wrapped around a shaft pulling the employee closer to the shaft and the attendant machinery. If a person is within a foot or so of a shaft, hair or clothing could come in contact with the shaft, resulting in the contemplated harm.

Instance a. There was no evidence showing that employees were or would be within the zone of danger posed by this shaft, and this instance is vacated.

Instance b. The evidence shows Mel Fraizer adjusting the height of a roller brush while standing between the Grade American Onion line and the wall. The hydraulics for the rollers were located immediately adjacent to the rotating shaft (Ex. C-69, C-71). Whether Mel Fraizer was testing a new line or adjusting the roller on an existing line, his clothing could have been caught on the shaft while adjusting the hydraulic jack.

Instance c. The cited shaft was located at waist height on the onion line near the normal route of ingress and egress for employees working at the bagging station, palletizer and onion line. Howell observed the employees within a few feet of the shaft. Employees wearing loose clothing and walking past the onion line could have made contact with the shaft, and so are in the zone of danger.

Instance e. The cited shaft is waist high and is located near the normal route of ingress and egress for employees. The evidence shows employees walk within about a foot of the shaft, putting them in the zone of danger.

Finally, because Mel Fraizer was aware that non-complying shafts were present in the facility, this item has been established as a serious violation.

Penalty

The proposed violation for all of the violations enumerated under citation 1, item 8 was $750.00. Instance (a) was vacated. Mel Fraizer was exposed to the hazard cited at instance (b) at least once during the OSHA inspection (Tr. 1255). Employees are exposed to the hazard cited at instances (c) and (e) on at least a daily basis as they walk to their workstations (Tr. 261-262, 263, 482-483, 484). Nonetheless, Howell stated the probability of an accident in each instance was low (Tr. 260, 262, 263).

A penalty of $500.00 is appropriate for the three instances affirmed, and will be assessed.

Alleged Violation of §1910.219(d)(1)

Serious Citation 1, item 9a alleges:

29 CFR 1910.219(d)(1): Pulley(s) with part(s) seven feet or less from the floor or work platform were not guarded in accordance with the requirements specified in 29 CFR 1910.219(m) and (o):

(a) Main Shed - On or about September 13, 2004, the Sims Manufacturing Company Tape Machine (serial #92187T) has an unguarded pulley under the conveyor.

The cited standard provides:

(d) Pulleys– (1) *Guarding*. Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section. Pulleys serving as balance wheels (e.g., punch presses) on which the point of contact between the belt and the pulley is more than six feet six inches (6 ft. 6 in.) from the floor or platform may be guarded with a disk covering the spokes.

Facts

Howell testified that the cited pulley is located on the taping machine next to a walking path and is about thigh high (Tr. 264, 265; Exh. C-65). Howell observed two employees walking by this pulley (Tr. 265, 486). In addition Parker testified that employees stood in front of this area when they were working (Tr. 801).

Chris Fraizer testified that people do walk within a foot of the conveyor on which this unguarded pulley is located to get to their job at the Peal Sack Master (Tr. 1289). The pulley, however, is located under the conveyor, which sits inside a frame. According to Fraizer, no one would be working close to the pulley (Tr. 1290, 1294, 1295). Parker testified that employees were not required to reach underneath the station into the nip point (Tr. 801). Howell stated that to make contact with the pulley, an employee would have to put a hand through an 8-inch opening and contact the pulley, three inches inside the conveyor frame (Tr. 485, 487). Howell stated there is a remote possibility of contact (Tr. 486).

Discussion

This cited standard governs the guarding of pulleys and applies to the Parma facility by its terms.

As part of its prima facie case the Secretary must show employee access to the violative condition. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994). The evidence shows employees walk about a foot from the line where the cited pulley is located (Tr. 1293). However, the evidence shows that employees had no reason to place their hands within the zone of danger in the course of their normal work routines. "The zone of danger is determined by the hazard presented by the violative condition, and is normally the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Construction Co.*, 17 BNA OSHC 1229, 1234, 1995 CCH OSHD ¶30,754 (No. 91-2107, 1995). In this case the hazard is getting a hand caught in the pulley (Tr. 264). The Secretary's witnesses did not convincingly explain how this could happen. On this record it appears that to catch a hand in the pulley an employee would have to deliberately put his or her hand through an eight-inch opening and at least three inches inside the frame of the conveyor (Tr. 484, 487, 801). The Secretary has not established employees have been, are, or will be exposed to this hazard. Citation 1, item 9a is, therefore, vacated.

Alleged Violation of §1910.219(f)(3)

Serious Citation 1, item 10 alleges:

29 CFR 1910.219(f)(3): Sprocket wheels and chains which were seven feet or less above floor or platforms were not enclosed:

(c) Grade American Onion Line - On or about September 13, 2004, and at times prior thereto, the chain and sprocket drives between the west side of the conveyor and the wall are not guarded.

The cited standard provides:

Sprockets and chains. All sprocket wheels and chains shall be enclosed unless they are more than seven (7) feet above the floor or platform. Where the drive extends over other machine or working

areas, protection against falling shall be provided. This subparagraph does not apply to manually operated sprockets.

Facts

The cited chain and sprocket assembly is approximately chest high and is located on the Grade American onion line near the wall (Tr. 280, 1261; Exh. C-68). During the inspection Howell observed Mel Fraizer climb under the conveyor to get to a hydraulic jack for the brush roller while the chain and sprocket were running (Tr. 281, 490, Exh. C-68, C-69, C-70, C-71). Mel Fraizer testified the machine must be running when he adjusts the jack (Tr. 1338). The jack must be adjusted monthly, during which time, the fingers of the employee performing the service would come within a couple of inches of the motorized chain and sprocket (Tr. 281, 1255, 1260, Ex. C-69).

Though the exposure was for only a few moments, Mel Fraizer or any other employee performing the adjustment could catch his fingers between the chain and sprocket, resulting in amputation of the fingers (Tr. 281). Nonetheless, Howell stated the probability of an accident was low (Tr. 281, 282).

Discussion

The cited standard applies to the Parma facility by its terms.

It is undisputed that the chain and sprocket are not enclosed. However, Respondent argues the chain and sprocket are guarded by location. This argument fails. The jack is adjusted monthly. The fingers of an employee adjusting the jack would come within inches of the chain and pulley, as did Mel Fraizer's during the OSHA inspection. The plant manager, Mel Fraizer, was exposed to the hazard during the OSHA inspection. His knowledge of the cited condition is imputed to J. C. Watson. The violation has been established.

Penalty

The penalty proposed for the violations enumerated under citation 1 item 10 was $1,250.00. The cited violation was "serious." If a finger were to be caught in the chain and sprocket it could result in amputation. Howell observed one person exposed to this hazard. The exposure lasts for only a few minutes and occurs once a month (Tr. 281, 1255). Howell stated the probability of an accident was low (Tr. 281, 282).

Instances (a) and (b) under this item were vacated. A penalty of $400.00 is appropriate for the remaining instance and will be assessed.

Alleged Violation of §1910.304(f)(4)

Serious Citation, item 11e alleges:

29 CFR 1910.304(f)(4) or in the alternative 1910.334(a)(3)(i): The path to ground from circuits, equipment, and enclosures was not permanent and continuous: or in the alternative 1910.334(a)(3)(i): A flexible cord used with grounding type equipment did not contain an electric equipment grounding conductor:

(a) Main Shed Bagging Area north of Conveyor System - On September 9, 2004, and at times prior thereto, the Bagging Machine (model#355/serial #90355109) grounding conductor had been severed.

The cited standard provides:

(f) *Grounding*. . . .(4) *Grounding path*. The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

1910.334(a)(3): *Grounding-type equipment*. (i) A flexible cord used with grounding-type equipment shall contain an equipment grounding conductor.

Facts

Howell testified the grounding conductor for the Hammer bagging machine power cord was completely severed (Tr. 287, 496; Exh. C-73). The hot and neutral conductors were visible, though not damaged (Tr. 287, Ex. C-73). The damaged cord was in plain view in the middle of the work area about three feet north of the bagging machine; employees were walking over and stepping on the cord where it was damaged (Tr. 287-88, 494, 495). An operator was running the machine at the time of the inspection (Tr. 493-95).

Howell testified that when a metal machine is not grounded, an electrical field is created on the outside of the equipment (Tr. 287). He detected an electrical field on the bagger using a tic tracer, which tests for an electrical charge on a machine casing (Tr. 287, 493). Howell stated that were an electrical fault or short to develop in the machine, the absence of a ground would increase the possibility of the operator or an employee contacting the exposed wires receiving an electrical shock up to and including electrocution (Tr. 287-89).

Discussion

The cited standard is found in Subpart S, Electrical, and is applicable to the electrical cords in the Parma facility.

The evidence shows the grounding wire for the Hammer bagging machine power cord was severed. The path to ground on the machine was not continuous, and the standard was violated. The Respondent argues the employees were not exposed to any hazardous condition. However, the evidence shows there was electricity on the case of the machine and an employee was operating the machine at the time of the inspection. In addition, employees were actually walking on the severed power cord. The severed cord and ground wire

were "readily apparent" to anyone in the area, and J. C. Watson's constructive knowledge is established. *A.L. Baumgartner Construction, Inc.*, 16 BNA OSHC 1995, 1993-95 CCH OSHD ¶30,554 (No. 92-1002, 1994). The violation has been established.

Penalty

A combined penalty of $750.00 was proposed for the violations enumerated under Serious citation 1 item 11. Though the amount of electricity found during the inspection was not significant, the type of shock an employee could receive from contact with the energized equipment in the event of a short or other electrical surge could result in death or serious physical harm. The citation is affirmed as a "serious" violation. However, as the other instances under item 11 were vacated, a penalty of $400.00 will be assessed.

Alleged Violation of §1910.305(b)(1)

Serious Citation 1, item 11g alleges:

29 CFR 1910.305(b)(1): Unused openings in boxes, cabinets, or fittings were not effectively closed:

(a) Northwest corner of the Shipping Room- On or about September 9, 2004 and at times prior thereto, knockouts were removed for additional breakers on power panel number 14; thereby, exposing current carrying bus bars.

The cited provision provides:

(b) *Cabinets, boxes, and fittings*–(1) *Conductors entering boxes, cabinets, or fittings*. Conductors entering boxes, cabinets, or fittings shall also be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fittings shall be effectively closed.

Facts

Howell testified three knock-outs were missing from the breaker box located in the northwest corner of the shipping room, one on the left side below the breaker and two on the right side (Tr. 290-91; Exh. C-78). He stated the knock outs are approximately 3/4 of an inch by 1-1/2 inches; the bus bars are located two inches inside the panel (Tr. 292-93). The two bus bars are energized and carry one hundred and twenty volts each (Tr. 291). Howell was told that the lights are turned on and off using this box (Tr. 497). If an employee were to contact the live bus bars he or she would receive an electrical shock (Tr. 291-92).

Mel Fraizer testified there was a regular light switch in the area, and that though employees working in the area would have access to the panel box no employees were responsible for handling any of the equipment in the box (Tr. 1345, 1353). In order for an employee to come into contact with the bus bars he or she would have to stick a finger inside the knock-outs (Tr. 292). Howell stated the probability of an accident was low (Tr. 293).

Discussion

As stated above the cited standard is applicable to the Parma facility.

It is undisputed the breaker box had missing knock-outs, thus the openings in the box were not effectively closed. Employees, however, were not exposed to the condition. The knock-out openings were very small, 1-1/2 inches by 3/4 of an inch, and the live bus bars were two inches inside the panel box. In order to receive a shock an employee would have to deliberately insert his or her fingers into the knock-outs. The Secretary's burden to show employee access to a cited hazard is not satisfied by a demonstration that an employee might deliberately and unforseeably expose him or herself to a hazard inaccessible under normal circumstances. The violation has not been established and this instance is vacated.

Alleged Violation of §1910.305(g)(2)(iii)

Serious Citation 1, item 11j alleges:

29 CFR 1910.305(g)(2)(iii): Flexible cords were not connected to devices and fittings so that tension would not be transmitted to joints or terminal screws:

(a) Main Shed Maintenance Area- On or September 9, 2004, and at times prior thereto, the Millermatic 250 wire feed welder had the electrical power cord's outer sheath was not secured by the plug housing clamp to provide strain relief.

(b) Main Shed Box Area on Mezzanine Floor- On or about September 9, 2004, and at times prior thereto, the Sims Carton Erecting Machine's (serial #CE015) electrical power cord outer sheath was pulled away from the clamp in an attempt to provide strain relief.

The cited standard provides:

(2) *Identification, splices, and terminations*. . . . (iii) Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

Facts

Instance a: Howell testified the strain relief for the welding machine plug had been pulled out of the plug housing, exposing the wiring (Tr. 295; Exh. C-72). If an employee were to tug on the plug the wires could come loose and create a spark or electrical hazard (Tr. 295). Mel Fraizer testified the welding machine was used by Mel Fraizer, Chris Fraizer or Felipe Lira, and was last used over a month before the inspection (Tr. 296). Howell didn't know how long the hazard existed (Tr. 296).

Instance b: Howell testified the outer sheath of the cord for the Sims carton erecting machine had been pulled out of the plug housing and that a grommet that fastens the electrical sheathing onto the Sims casing where the cord enters the machine had been pulled out (Tr. 297, 500; Exh. C-87). He stated if the cord was pulled on, the wires could be exposed (Tr. 297-98). The exposed wires would be live, because the cord would still be plugged into the power source (Tr. 298). An exposed employee could receive a shock (Tr. 299). Howell observed two employees working near the box erecting area (Tr. 299). Mel Fraizer testified he and an electrician looked for this problem after the inspection, but couldn't find the hazard described (Tr. 1343).

Discussion

This cited standard applies to flexible cords and cables in the Parma facility.

Instance a: It is undisputed that the strain relief was not provided. The evidence shows the strain relief for the plug to the welder had come out of the plug housing. However, Mel Fraizer testified, without contradiction, that the welder had not been used for a month. Though the Secretary argues that J. C. Watson should have discovered the cited condition with the exercise of reasonable diligence, she failed to establish how long the cited condition had been in existence or to introduce any evidence regarding J. C. Watson's inspection practices. Because it has not been shown that Respondent knew of or should have discovered the violation in the exercise of reasonable diligence, the violation is vacated.

Instance b: The photographic evidence fails to show strain relief was not provided. Mel Fraizer testified that neither he nor his electrician could locate the cited condition. The Secretary has not shown J. C. Watson knew of the cited condition, nor has the violation been shown to be readily apparent. Because it has not been shown that Respondent, in the exercise of reasonable diligence should have been aware of this violation, instance b is vacated.

Docket No. 05-0175

Alleged Violation of §1910.133(a)(1)

Serious Citation 1, item 1b alleges:

29 CFR 1910.133(a)(1): Protective eye and/or face equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment:

(a) Main shed propane refueling area - On or about 9 September 2004, and at times prior thereto, a pair of dirty an unserviceable goggles were laying on the ground. Employees refueled the propane forklift trucks without wearing eye and face protection.

The cited standard provides:

Eye and face protection. (a) *General requirements.* (1) The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acid or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

Facts

The propane refueling system outside the Parma shed is not a closed system (Tr. 301, Exh. C-97). Forklift tanks have a ten percent relief valve, which allows propane to vaporize off the tank while it is being refueled. The propane storage tanks have a lance that must be opened after the forklift tank is filled to bleed off the gas pressure (Tr. 302, 505). Gas vapors can be seen in Exhibits C-97 and C-98 (Tr. 302, Exh. C-97,

C-98). Howell stated that when the propane vaporizes off the tank, employees may sustain burn injuries to their faces and hands (Tr. 302). The material safety data sheet for this LPG recommends using a leather glove (Tr. 306).

Howell testified that when he first inspected the liquid propane gas (LPG) refueling station on September 9, 2005, there was a dirty, muddy pair of goggles on the ground and a worn-out pair of black gloves in the box next to the LPG station (Tr. 300, 502). When Howell returned to complete the inspection there was a face shield and orange rubber gloves, which provide less protection than leather and are inadequate under the MSDS, in the box (Tr. 300, 306). The box was in plain sight, and Howell was told the equipment was in the same condition the previous season (Tr. 300, 307).

Chris Fraizer stated a pair of latex gloves and goggles are maintained in a cabinet at the LPG refueling station, although he didn't know what condition they may have been in at the time of the inspection (Tr. 1242-43, 1284). During forklift training conducted on the evening of September 9, 2005, the day the OSHA inspection was initiated, employees were told they should wear gloves and eye protection while refueling forklifts (Tr. 300, 301, 306).

J. C. Watson employees told Howell that eye protection and hand protection were not always utilized (Tr. 301). In Exhibit C-96, an employee is shown refueling while not wearing gloves (Tr. 301, Exh. C-96, C-98). After the OSHA CO reminded him to put on his gloves, the same employee removed his face protection before disconnecting the refueling hose (Tr. 305; Exh. C-98).

Discussion

This standard is found in Subpart I, personal protective equipment, of Part 1910 and is applicable to the Parma facility.

The standard states the employer *shall ensure* that each affected employee *uses* appropriate eye or face protection. J. C. Watson knew that eye protection was required while refueling forklifts, and had provided goggles for employee use. The record shows that the goggles were not maintained in serviceable condition, however, and were not always used by employees. The evidence further establishes J. C. Watson knew the goggles were unuseable and so replaced them. Even after J. C. Watson replaced the unuseable goggles with a face shield, employees did not consistently use it. An employee removed the face mask in plain view of the OSHA inspector while disconnecting the hose from the propane fuel pump (Exh. C-98), indicating a longstanding practice.

On this record, this judge concludes that J. C. Watson should have known employees were not consistently wearing eye and face protection while refueling. A "serious" violation has been established. This item has been grouped with item 1c for purposes of penalty assessment.

Alleged Violation of §1910.138(a)

Serious Citation 1, item 1c alleges:

29 CFR 1910.138(a): The employer did no select and require employees to use appropriate hand protection when employees were exposed to hazardous condition(s):

(a) Main shed propane refueling area- On or about 9 September 2004, and at times prior thereto, a black worn out dirty pair of rubber gloves were provided for employee use. Employees refueled forklift trucks without wearing gloves.

The cited standard provides:

Hand protection. (a) *General requirements.* Employers shall select and require employees to use appropriate hand protection when employees' hands are exposed to hazards such as those from skin absorption of harmful substances, severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes.

Discussion

The cited standard is applicable by its terms to the cited conditions. The standard states employers shall *require employees to use* appropriate hand protection. The evidence shows employees did not use appropriate hand protection. The gloves provided to employees prior to September 9, 2005 were worn out. After September 9, 2005 employees were provided with rubber gloves though the material safety data sheet for the LPG recommends using leather gloves. In any event, employees were observed not using any gloves while refueling (Ex. C-96). One employee had actually received several minor burns on his hands (Tr. 304). For that reason, and for the reasons discussed above, J. C. Watson should have known of the violative condition. This violation has been established.

Penalty

Items 1b is "serious" because of the hazard of vapor burns to an exposed employee's face. Howell stated the likelihood of an accident is low (Tr. 305). The probability of burns to the hand, cited in item 1c, is higher than for the face (Tr. 307). One employee had actually received several minor burns on his hands. The proposed combined penalty for the enumerated violations under Citation 1 item 1 is $750.00. Ten employees were exposed to the condition; the condition existed the previous season (Tr. 306, 307). A penalty of $750.00 is appropriate and will be assessed.

ORDER

Docket No. 05-0175

1. Serious Citation 1, items 1b and 1c alleging violations of §§1910.133(a)(1) and 1910.138(a) are AFFIRMED and a penalty of $750.00 is ASSESSED.

Docket No. 05-0176

1. Serious Citation 1, items 2a and 2b alleging violations of §§1910.1910.23(c)(1) and (c)(3) are AFFIRMED and a combined penalty of $625.00 is ASSESSED.

2. Serious Citation 1, item 3b, 3c, 3d, 3e and 3g, alleging violations of §§1910.37(b)(1), (b)(6), and (e), and 1910.38 (b) and (f), are AFFIRMED and a combined penalty of $750.00 is ASSESSED.

3. Serious Citation 1, item 3i alleging violation of §1910.39(d) is VACATED.

4. Serious Citation 1, item 3j alleging violation of §1910.157(e)(2) is VACATED.

5. Serious Citation 1, items 4a and 4c alleging violations of §§1910.101(b), and 1910.253(b)(4)(iii) are AFFIRMED and a combined penalty of $625.00 is ASSESSED.

6. Serious Citation 1, item 5a, 5b and 5c alleging violations of §§1910.147(c)(4)(i), (c)(7)(i) and (c)(8) are AFFIRMED and a combined penalty of $2,500.00 is ASSESSED.

7. Serious Citation 1, item 6f alleging violation of §1910.178(m)(10) is ASSESSED and a penalty of $250.00 is ASSESSED.

8. Serious Citation 1, item 7 alleging violation of §1910.212(a)(1) is AFFIRMED and a penalty of $2,500.00 is ASSESSED.

9. Serious Citation 1, item 8 alleging violation of §1910.219(c)(4)(i) is AFFIRMED and a penalty of $500.00 is ASSESSED.

10. Serious Citation 1, item 9a alleging violation of §1910.219(d)(1) is VACATED.

11. Serious Citation 1, item 10 alleging violation of §1910.219(f)(3) is AFFIRMED and a penalty of $400.00 is ASSESSED.

12. Serious Citation 1, item 11e alleging violation of §1910.304(f)(4) or in the alternative 1910.334 (a)(3)(i) is AFFIRMED and a penalty of $400.00 is ASSESSED.

13. Serious Citation 1, item 11g alleging violation of §1910.305(b)(1) is VACATED.

14. Serious Citation 1, item 11j alleging violation of §1910.305(g)(2)(iii) is VACATED.

/s/
James H. Barkley
Judge, OSHRC

Dated: October 10, 2006