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.	:	OSHRC DOCKET NOS. 04-1734 & 04-1735
	:	
ST. LAWRENCE FOOD CORP., dba PRIMO FOODS,	:	
	:	
Respondent.	:	

Appearances:

Esther D. Curtwright, Esquire
Evanthia Voreadis, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

David P. Antonucci, Esquire
Antonucci Law Firm
Watertown, New York
For the Respondent.

Before: G. Marvin Bober
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted both a health and a safety inspection of the facility of Respondent, St. Lawrence Food Corp., dba Primo Foods ("Respondent," "St. Lawrence" or "Primo"), located in Ogdensburg, New York, from March 11, 2004 to September 3, 2004. As a result, on September 10, 2004, OSHA issued to Respondent two separate Citations and Notification of Penalty; the health citation contained seven serious items, one willful item and one "repeat" item, while the safety citation contained 25 serious

items, one willful item and 3 "other" items.[1] Respondent contested both of the citations, bringing these two matters before the Commission, and the cases were consolidated for trial.[2] The administrative trial in these cases was held August 21 through 24, 2006, and January 8 through 10, 2007. Both parties have submitted post-trial briefs.[3]

The OSHA Inspection

Compliance Officer ("CO") Andrew Palhof and Industrial Hygienist ("IH") Victor Mawbey were assigned to inspect Primo, a kosher dairy, as part of their OSHA office's local emphasis program targeting the food processing industry. Upon arriving at the facility on March 11, 2004, the two OSHA officials met with Deborah Mullaly, who told them that she was the production manager and that Thomas Spencer was the general manager; she also told them that the name of the plant was St. Lawrence Food Corp., dba Primo Foods, that the owner of the plant was Moise Banayan, and that the plant had been operating since November 2003. Ms. Mullaly gave the officials permission to inspect the site, and she, along with Leland Cook, the plant's maintenance supervisor, accompanied the officials during their inspection. (Tr. 303-08, 792-98, 802, 1144, 1163-64, 1174-79, 1569, 1592).

CO Palhof and IH Mawbey returned to the facility the next day and several more times in March, April and June. During the course of their inspection, they asked Ms. Mullaly and Mr. Cook for the facility's health and safety programs; specifically, they requested programs for lockout/tagout ("LOTO"), hazard communication ("HAZCOM"), confined spaces and respiratory protection. However, the plant did not have the requested programs; it had a J.J. Keller manual, a commercial publication that addressed OSHA requirements and explained how to develop programs for those

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[1]The health citation, which was inspection number 306315680, is Docket No. 04-1734, and the safety citation, which was inspection number 306315771, is Docket No. 04-1735.

[2]On November 14, 2005, the undersigned issued a decision and order dismissing both of these matters due to the Secretary's failure to comply with discovery orders. On March 20, 2006, the Commission issued a decision in which it set aside the order of dismissal and remanded the cases to the undersigned for further proceedings. *St. Lawrence Food Corp.*, 21 BNA OSHC 1467, 1472 (Nos. 04-1734 & 04-1735, 2006).

[3]The parties were asked to brief particular evidentiary issues that arose during the trial. The parties have done so. After considering their arguments, my rulings remain as stated at the trial, except as to C-94 and C-95; C-94 and C-95 are admitted, as set out in footnote 13, *infra*.

requirements, and it also had the fall protection and HAZCOM programs of Suprema Specialties ("Suprema"), a prior company that had operated at the site.[4] The OSHA officials also asked to see training records, and they saw sign-in sheets indicating that training in LOTO, HAZCOM, confined spaces and fire extinguishers had been held November 21, 2003. Ms. Mullaly said that Christopher Tehonica from Lewis County Dairy Corp. ("Lewis"), another company Mr. Banayan owned, held the November 2003 training and that he was to conduct another training session at the plant later in March; she also said Mr. Tehonica made walk-through inspections of the plant to look for safety problems. CO Palhof and IH Mawbey knew Mr. Tehonica, as both had inspected Lewis before; they also knew Mr. Spencer, the general manager of both Lewis and Primo, for the same reason. (Tr. 346, 366, 377-79, 415-16, 432, 435-38, 443-44, 507-12, 522-29, 558-59, 568-72, 585, 796-97, 800-04, 1106, 1110-11, 1145, 1184-85, 1198-1200, 1209-13; HC-8, HC-13, R-10).[5]

During their inspection, CO Palhof and IH Mawbey observed many conditions that they considered to be violations. After the inspection was completed, the CO and the IH held a closing conference at the facility on September 3, 2004, to discuss the violations they had found; Ms. Mullaly was present, as were Mr. Cook and Mr. Tehonica. At the conference, Mr. Tehonica attempted to give the OSHA officials additional documentation of the plant's health and safety programs. However, the officials would not accept it as they had been to the facility many times and each time had requested such documentation and it had not been provided; in addition, CO Palhof had tried to involve Mr. Tehonica in the inspection on various occasions, by asking Ms. Mullaly to contact him, but he had not made himself available.[6] (Tr. 1155-58, 1187-96, 1213, 1242-44).

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[4]IH Mawbey made a copy of the J.J. Keller manual's index, which was admitted as HC-8. (Tr. 377-80, 522-26).

[5]In the record, Respondent's exhibits are referred to sometimes as "R" exhibits and other times as "D" exhibits. In this decision, Respondent's exhibits will be referred to as "R" exhibits.

[6]I find that the CO and the IH should have accepted the additional documentation as to the plant's safety and health programs. 29 C.F.R. 1903.7(e) requires the employer, at the closing conference, to be "afforded an opportunity to bring to the attention of the [OSHA inspector] any pertinent information regarding conditions in the workplace." Long-standing precedent holds a governmental body is required to follow its own regulations, rules and procedures. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-68 (1954). *See also Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Accepting the additional documentation, in my opinion, could have made a

Jurisdiction

Primo contends that the Commission does not have jurisdiction over this matter because, at the time of the inspection, it was not engaged in a "business affecting commerce" within the meaning of section 3(3) of the Act and was therefore not an employer as defined by section 3(5) of the Act. Section 3(3) of the Act defines "commerce" as "trade, traffic commerce, transportation, or communication among the several States, or between a State and any place outside thereof...." Section 3(5) of the Act defines "employer" as "a person engaged in a business affecting commerce who has employees..." *See* 29 U.S.C. §§ 652(3) and (5).

Primo makes a separate argument that it was not the employer at the facility at the time of the inspection; that argument is addressed and rejected *infra*. As to the jurisdiction argument, the Commission noted in *Lewis County Dairy Corp.*, 21 BNA OSHC 1070 (No. 03-1533, 2005), a case involving another kosher dairy with the same owner as the one here, that well-settled precedent supported a finding that that dairy was a business affecting interstate commerce.[7] *Id*. at 1071, citing to *U.S. v. Lopez*, 514 U.S. 549, 555-56, 559-60 (1995); *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 119-20 (1942); *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942).

In addition to the foregoing, the record shows that Primo was, in fact, engaged in a business affecting commerce at the time of the inspection. The record establishes that the plant was an older cheese-making facility that had operated under at least two previous names; the plant underwent

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difference in this case; for example, it is possible OSHA might have decided to not cite certain matters or to classify some of the willful items as serious. However, the issue is the appropriate remedy at this juncture. In a different case, I might have decided to dismiss the citations entirely, thus requiring OSHA, in its discretion, to conduct another inspection. Stated another way, OSHA would have been required to "begin the process anew." To "begin the process anew" reminds the undersigned of John Ehrlichman's quote referring to L. Patrick Gray's pending nomination to the position of Director of the F.B.I., that is, "I think we ought to let him hang there. Let him twist slowly, slowly in the wind." However, such a remedy would not be fair to Respondent, which has had to spend time and money defending this matter. The fairer means of resolving this matter for Respondent is to issue a decision based upon the evidence of record.

[7]The employer in *Lewis County Dairy* admitted it was engaged in a business affecting interstate commerce. *Lewis County Dairy*, 21 BNA OSHC at 1070-71.

renovations during the fall of 2003 so that Respondent could reopen it to produce kosher cheese.[8] (Tr. 142, 155-57, 174, 215, 246, 802). The record also establishes that Primo began making cheese sometime in November 2003 and did so from that time on. (Tr. 249-50, 1235-36, 1569-70, 1789-90). Moise Banayan, Primo's owner, testified that no goods, out of state or otherwise, were purchased for the facility until after he bought it on March 23, 2004. (Tr. 714, 718-19, 730-32). Mr. Banayan also testified that all the cheese Primo produced was sold to a distributor, which sold the cheese to retailers in New York City, and that none of the cheese was distributed outside the State of New York. (Tr. 713-14). I do not credit Mr. Banayan's testimony in this regard, for the following reasons.

First, I find it very difficult to believe that an older plant undergoing renovations would not need new equipment, replacement parts for older equipment, and other materials. Second, Leland Cook, the maintenance supervisor who began working at the plant in the fall of 2003 to get it "up and running," testified he purchased parts and materials from other states during that period; further, he faxed information to out-of-state manufacturers to get items he needed and also made long-distance phone calls in that regard.[9] (Tr. 120-23, 139-42, 172-74, 178-79). Third, contrary to the testimony of Mr. Banayan that no goods were purchased until he bought the facility, the Secretary presented several invoices to Mr. Banayan during cross-examination indicating that out-of-state goods were purchased for the facility before March 23, 2004. (Tr. 720-32). Finally, despite Mr. Banayan's testimony that none of the cheese Primo made was distributed outside of the State of New York, documents in the record indicate otherwise. C-106 consists of copies of the documents relating to the working capital grant that Mr. Banayan secured from New York State Urban Development Corporation, dba Empire State Development Corporation ("ESDC"), to assist him in operating the facility.[10] C-106 states on page 43, in the "business plan" discussion, that:

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[8]As a kosher cheese-making facility, the only product Primo produces is kosher cheese.

[9]CO Palhof's testimony as to what he learned about the purchase of out-of-state machine parts and other goods before March 23, 2004, supports Mr. Cook's testimony. (Tr. 1236-41).

[10]C-106 and related document C-107 were admitted into evidence as set out in my order of December 29, 2006, based upon the Secretary's motion in limine seeking the admission of those documents as rebuttal evidence. As the Secretary noted in her motion, there is no rule requiring a plaintiff to identify in advance rebuttal witnesses and documents. *United States v. Tejada*, 956 F.2d 1256, 1267 (2d Cir. 1991).

> SLFC will begin to produce Cheddar Cheese within three months of initial startup. For the first two years the Cheddar Cheese will be shipped to Wisconsin to be processed into American Cheese.

For all of the above reasons, I find that Respondent was engaged in a business affecting commerce within the meaning of the Act at the time of the OSHA inspection. Accordingly, I find that the Commission has jurisdiction over the parties and the proceedings in this matter.

Whether Respondent was the Employer at the Facility

Primo contends it was not the employer at the facility when OSHA discovered the alleged violations. It notes that Moise Banayan, Primo's owner, did not purchase the facility until March 23, 2004, and that almost all of the alleged violations were discovered before that date. It also notes that Thomas Spencer operated the plant from October 1, 2003 until March 23, 2004, with funds provided by Ahava Food Corp. ("Ahava"), another company owned by Moise Banayan; that operation was a trial period to determine if the facility could make a profit. If it did operate at a profit, Mr. Banayan could decide to purchase the facility. Primo asserts that it had no liability for the facility until the purchase date of March 23, 2004.

As Primo notes, Mr. Banayan bought the plant on March 23, 2004, and the citations show OSHA discovered all but two of the alleged violations before March 23, 2004. *See* R-1-4. However, Primo's contention that it had no liability under the Act until it purchased the plant is rejected. As set out *supra*, section 3(5) of the Act defines "employer" as "a person engaged in a business affecting commerce who has employees..." There is no requirement that an employer own the facility in which it operates. Thus, the question is whether Mr. Banayan was operating the facility and had employees at the time of the inspection. The testimony of Mr. Banayan in this regard follows.

Mr. Banayan testified that he is the owner and sole shareholder of Primo, and he discussed the events leading up to his purchasing the facility. Thomas Spencer, the general manager of Lewis,[11]

[11]Mr. Banayan testified Mr. Spencer was the general manager of Lewis until late 2002 or early 2003. Mr. Spencer, however, testified at his deposition that he left his job at Lewis in May 2003 and began his job at Primo in June 2003. Mr. Spencer also said he had worked for Ahava since 2000 and that Mr. Banayan was his supervisor. (Tr. 702-03; C-110, pp. 4-5, 8-15, 18-19). Although Primo disputed the admissibility of Mr. Spencer's deposition at the trial and in its post-hearing brief, I find the Secretary's assertions as to the admissibility of the deposition, as set out in her post-trial brief, convincing. C-110 accordingly remains in evidence.

asked him in the spring of 2003 if he would be interested in buying the plant in Ogdensburg; Allied Federated Co-op ("the Co-op") had been operating the plant but had had financial difficulties and had shut it down, resulting in the City of Ogdensburg ("the City") having a lien on the property, and the City wanted to sell the property.[12] Mr. Banayan met with the City's manager, after which the City developed a proposal to purchase the land and the building. Mr. Spencer met with the Co-op and reached an agreement; pursuant to the terms of the written agreement with the Co-op, Mr. Banayan would invest $150,000.00 and pay Mr. Spencer $9,000.00 to operate the plant for 90 days, for the benefit of the Co-op. Thereafter, Mr. Banayan would decide whether to purchase the facility if it could operate at a profit. The $150,000.00 Mr. Banayan invested, plus the $9,000.00 for Mr. Spencer, came from Ahava, another business Mr. Banayan owned, which bought and distributed the kosher cheese and other kosher products Lewis made; according to Mr. Banayan, Lewis was "maxed out" in its cheese-making capability and Ahava needed another source of kosher cheese. Sometime during the summer of 2003, Mr. Banayan formed St. Lawrence Food Corp. in anticipation of purchasing the facility. (Tr. 700-12, 718-19, 742-47, 758-59, 773-74, 781-87).

Mr. Spencer and the Co-op operated the facility from October 1, 2003, to March 23, 2004, at which time Mr. Banayan's company, St. Lawrence Food Corp., bought the facility and real estate from the City and the plant equipment from the Co-op. Mr. Banayan said that although the agreement had been for 90 days, there were issues to work out, and he did not decide to buy the plant until about a week before March 23, 2004; Mr. Spencer continued to run the plant with the Co-op after the 90-day period, by verbal agreement. Mr. Banayan also said that Mr. Spencer continued to operate the plant as its general manager after March 23, 2004, and that he did so until late 2004 or early 2005, when he became ill; Mr. Spencer died sometime during the summer of 2005. (Tr. 710-16, 758-61, 774-75, 785-86).

Mr. Banayan was adamant that no one who was "officially a member of St. Lawrence" owned or operated the facility until March 23, 2004. He said Mr. Spencer handled the day-to-day operations of the plant during that time; he also said the Co-op was very involved in running the plant and decided when cheese would be made for the first 75 to 80 days of the 90-day period. Mr. Banayan

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[12]The Co-op, which reopened the facility after Suprema had closed it, operated the plant under the name Ogdensburg Cheese. (Tr. 274).

agreed that invoices dated March 9, March 17 and March 18, 2004, shown to him during cross-examination, indicated businesses were billing St. Lawrence for goods provided, and he explained that St. Lawrence was paying the bills with the $150,000.00 investment. He further agreed that a payroll record for the week ending November 17, 2003, also shown to him during cross-examination, reflected a number of employees on the payroll and St. Lawrence as the employer; he explained, again, that St. Lawrence was paying the plant's expenses, and he said that a company named "Paychecks" prepared the payroll. Mr. Banayan was aware Ms. Mullaly had told the OSHA officials that the company was operating as St. Lawrence Food Corp., dba Primo Foods, as he saw a copy of her signed statement. He testified, however, that she did not know of his business arrangements and that, in any case, he was not liable for the plant until he purchased it and began operating it. He also testified that when he received the citations, he called OSHA and explained that the Co-op, not St. Lawrence, should have been cited. (Tr. 720-40, 747-53, 758-61, 764-72, 776-80).

I do not find Mr. Banayan's testimony credible because it is not supported by the rest of the record. Other than his testimony, there is no evidence that the Co-op was involved in operating the plant from October 1, 2003 until March 23, 2004, and while he indicated he had a copy of the agreement with the Co-op, it was never offered into evidence to support his testimony. (Tr. 758). In any case, I find it difficult to believe that, upon investing $150,000.00 in the facility in anticipation of buying it, Mr. Banayan would allow the Co-op to dictate when cheese would be made; that the Co-op would control this aspect of the business is also inconsistent with the statement set out in the "business plan" for Primo in C-106, noted in the jurisdiction discussion, *supra*.

Besides the above, when CO Palhof and IH Mawbey first met with Ms. Mullaly, the production manager, she said there had been a prior cheese manufacturer at the plant but mentioned nothing about the Co-op still operating the facility. She stated the name of the company was St. Lawrence Food Corp., dba Primo Foods, that Mr. Banayan was the owner, and that Mr. Spencer was the general manager; she also signed a statement to that effect. Mr. Cook, the maintenance supervisor, provided the same information, and he also signed a statement similar to that of Ms. Mullaly.[13] (Tr. 148, 307-08, 797-98, 802-04, 1177-79, 1592). Ms. Mullaly and Mr. Cook had worked

[13]The statements of Ms. Mullaly and Mr. Cook, offered as C-94 and C-95, were excluded and were made Offers of Proof 3 and 2, respectively. (Tr. 1049-82). Upon reflection, these two

for the Co-op in positions similar to those they had at Primo, and it is reasonable to assume they would have mentioned the Co-op if it still was operating the plant at the time of the inspection.[14] (Tr. 59, 155-58, 275, 659-60). In addition, since he was given a different business name when he was assigned to inspect the facility, CO Palhof testified he had to find out the exact company name.[15] He therefore asked Ms. Mullaly for the facility's stationery, which showed the same name she had given him, and she also gave him a purchase requisition, dated January 27, 2004, showing the facility's name as Primo Foods; other documents he saw during the inspection, such as training records and injury reports, also showed the plant's name as either Primo Foods or St. Lawrence Food.[16] (Tr. 1164, 1171-79). Finally, Edward Ayers, a former service manager with Basic Chemical Solutions ("BCS"), the company that sold chemicals to the facility, testified about C-40 and C-38, records of service calls he made to the plant on December 23, 2003 and February 2, 2004; these records show the facility's name as St. Lawrence Food and Primo Foods, respectively. (Tr. 259, 263-72).

The foregoing, along with the payroll record and invoices noted in Mr. Banayan's testimony, *supra*, convinces me that, even though he did not yet own it, Mr. Banayan began operating the plant with employees, with Mr. Spencer as the general manager, during the fall of 2003 and continued to do so through the period of the inspection. That Mr. Banayan was operating the facility then is also supported by the testimony of CO Palhof that Ms. Mullaly said she was in telephone contact with Mr. Banayan over ten times a day and that he visited the plant at least monthly. (Tr. 1178; C-94).

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exhibits should have been admitted under Federal Rule of Evidence 801(d)(2)(D) and *Regina Constr. Co.*, 15 BNA OSHC 1044, 1048 (No. 87-1309, 1991). C-94 and C-95 are thus admitted, with one exception. In C-94 and C-95, Ms. Mullaly and Mr. Cook both stated that "Primo Foods is owned and directed by Ahava Food Corporation in Brooklyn NY." I find that this particular statement was not within the scope of employment of Ms. Mullaly and Mr. Cook; I further find the Secretary made no attempt to lay a foundation in this regard. *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 816-17 (2d Cir. 1983). This particular statement is therefore excluded.

[14]Mr. Cook and Ms. Mullaly had also both worked at Suprema. (Tr. 157, 659-60).

[15]CO Palhof believed the name was Saputo Cheese, but he then indicated that might not have been the name he was given. (Tr. 1164).

[16]CO Palhof also testified about the employee records he had received from Ms. Mullaly showing the employees' names, addresses and job tasks. (Tr. 1586).

There is a further reason for finding Primo was the employer at the facility at the time of the inspection. As noted above, C-106 contains the documents relating to the grant that Mr. Banayan obtained from ESDC to assist him in running Primo. Page 1 of C-106 states the grant agreement "includes all exhibits and attachments hereto" and that ESDC approved the agreement on November 20, 2003. Page 8 of C-106 states the grant agreement is "entered into as of the latest date written below," and, below that statement, are the signatures of the parties; the ESDC representative signed the agreement February 23, 2004, and Mr. Spencer, the St. Lawrence representative, signed it March 1, 2004. It is clear from the agreement that a primary reason for providing the grant was to help create jobs. *See* C-106, pp. 2, 9, 17. It is also clear that Primo was required to meet certain employment goals each year and to report the number of employees it had each year during the term of the agreement. *Id*. Primo's employment report in the agreement is Exhibit H, on page 25 of C-106. That report, which Mr. Banayan signed March 1, 2004, as president of Primo, shows the facility had 29 employees as of December 31, 2003 and 34 employees as of March 1, 2004.[17] On the basis of Exhibit H, which Mr. Banayan signed subject to being in default of the grant agreement if the information was false, I find that Respondent was an employer subject to the Act at the time of the inspection.

The Health Citation Items

Serious Citation 1, Item 1

This item alleges a violation of section 5(a)(1) of the Act, the general duty clause, in that, in the ammonia compressor room, a compressor discharge accumulator did not have a pressure relief device. To prove a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or its industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious

[17]While another part of the agreement contains a form showing "zero" employees at the project site, Mr. Spencer signed that form on September 17, 2003, which was apparently before Primo began operating at the site. *See* C-106, pp. 29, 32.

physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard.[18] *See, e.g.*, *Industrial Glass*, 15 BNA OSHC 1594, 1597 (No. 88-348, 1992).

IH Mawbey testified that, as he was inspecting the ammonia refrigeration system, he noticed a compressor discharge accumulator without a pressure relief valve; he further testified that without such a valve, the vessel could become over-pressurized and there could be a catastrophic failure. The IH identified HC-1 as a photograph of the vessel showing it had no pressure relief valve on it.[19] He identified HC-2 as a NIOSH data sheet for ammonia, setting out the hazards of ammonia exposure; he said the ammonia used in refrigeration systems is anhydrous ammonia, which is 100 percent ammonia, and that the part of the facility's system storing the ammonia was labeled "anhydrous ammonia." The IH identified HC-3 as ANSI standard B9.1-1971, the safety code for mechanical refrigeration; he noted that section 10.1 of the standard requires pressure vessels in refrigerating systems to be protected by pressure relief devices.[20] IH Mawbey stated that two maintenance employees, Mr. Cook and Brian Wing, were exposed to the hazard of an ammonia release because they worked in that area on a frequent basis; he further stated that the vessel's failure could cause an explosion as well as the release of 500 pounds of ammonia, either of which could cause serious physical harm or death. (Tr. 311-14, 317-25, 337-44, 475-77, 789-90).

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[18]As to industry recognition of the hazard, the undersigned requested, at the end of the trial, that Respondent address in its post-trial brief whether kosher cheese-making is a separate industry from non-kosher cheese-making. (Tr. 1819-20). From the materials that Respondent submitted with its brief, and from my own research into this matter, it is my opinion that the kosher cheese-making industry is a separate industry. Regardless, none of the alleged section 5(a)(1) violations in this case concerns the kosher certification of the ingredients used or the supervision of the kosher aspects of the production process. Accordingly, that Primo is a kosher plant does not affect the Secretary's burden of proving industry recognition; that is, the "industry recognition" element is the same, whether the facility is kosher or non-kosher.

[19]The IH said that it appeared from HC-1 that the port at the top of the vessel had had a relief valve on it that had been removed and replaced with a dead-end valve. (Tr. 479-81).

[20]The IH said he used the 1971 ANSI standard because Mr. Cook, the maintenance supervisor, told him the refrigeration system was installed in the seventies; Mr. Cook also told him he knew about the ANSI standard but did not have a copy of it. (Tr. 331-33, 345-46).

In view of IH Mawbey's testimony, which Respondent did not rebut, the Secretary has met her burden of proving the alleged violation of section 5(a)(1) of the Act, the general duty clause.[21] Item 1 is therefore affirmed as a serious violation.

The Secretary has proposed a penalty of $2,000.00 for this item. In assessing penalties, the Commission is required to give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* 29 U.S.C. § 17(j). IH Mawbey testified that this item had high gravity, in that the cited condition could cause death or serious injury, resulting in an unadjusted penalty of $2,500.00. He further testified that while a 20 percent reduction was given because the employer had under 250 employees, resulting in the proposed penalty of $2,000.00, no reductions were given for history or good faith. The IH explained that Lewis, a company related to Primo in that both had the same owner, had a history of serious violations within the past three years; he also explained that a reduction for good faith was given in situations in which the employer had good health and safety programs and was proactive in health and safety. (Tr. 338-42, 590-96).

I agree with the IH as to the gravity of this item and for not giving a reduction for good faith.[22] However, I disagree with his not giving a reduction for history; I also disagree with his not giving a greater reduction for the employer's size. In the last item of the health citation, that is, Item 1 of Repeat Citation 3, set out *infra*, I found it was inappropriate to cite this employer for a repeat violation based on a similar previous violation at Lewis. Following that logic, I find it is inappropriate to use the history of Lewis to calculate the penalties in this case. I further find that it is also inappropriate to use the total number of employees in all the facilities Mr. Banayan owned to calculate the penalties in this case; rather, only the total number of employees at Primo at the time of the inspection should be used. (Tr. 1352-54). The record shows that at the time of the inspection, Primo had approximately 35 employees. (Tr. 1353, 1586). The record also shows that if OSHA had used that number to calculate the penalties in this case, a 40 percent reduction for size would have been given; in addition,

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[21]Mr. Cook testified that he did not know the cited vessel did not have a pressure relief valve or that one was required. (Tr. 136). However, the Secretary has shown, through HC-3, the ANSI standard, industry recognition of the cited hazard.

[22]The record in this case shows that Primo did not have the required health and safety programs and that it was not proactive in regard to health and safety.

if OSHA had not used the history of Lewis, Primo would have received a 10 percent reduction for history. (Tr. 593-96, 1353-57). Applying these two reductions to the unadjusted penalty of $2,500.00 results in a penalty of $1,250.00.[23] I find this penalty appropriate. It is accordingly assessed.

Serious Citation 1, Item 2

Item 2a alleges a violation of 29 C.F.R. 1910.134(c)(1), which states in pertinent part that:

> In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures.

Item 2b alleges a violation of 29 C.F.R. 1910.134(e)(1), which provides in pertinent part that:

> The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace.

Item 2c alleges a violation of 29 C.F.R. 1910.134(f)(2), which states as follows:

> The employer shall ensure that an employee using a tight-fitting facepiece respirator is fit tested prior to initial use of the respirator, whenever a different respirator facepiece (size, style, model or make) is used, and at least annually thereafter.

IH Mawbey testified that Mr. Cook told him that he and his maintenance staff used full-face negative pressure respirators when they repaired leaks of and drained the oil pots in the anhydrous ammonia refrigeration system; Mr. Cook also said that repairs of the system took place about once a week. The IH further testified that these duties exposed Mr. Cook, Mr. Wing and other maintenance employees to anhydrous ammonia, a hazardous air contaminant, which could result in serious injury. The IH noted that while the J.J. Keller manual at the site outlined what was needed for a respiratory protection program, it did not contain the necessary details required by the standard; it did not address specific hazards employees were exposed to and anticipated levels of exposure, the respirators to be used and how to maintain them, and the medical evaluations required before the respirators were used. The IH also noted he learned from Mr. Cook and Ms. Mullaly, the production manager, that medical evaluations and fit tests were not done. (Tr. 346-55, 485-95).

To prove a violation of a specific OSHA standard, the Secretary must show that (1) the cited standard applies, (2) the terms of the standard were not met, (3) employees had access to the violative

[23]These same reductions will be used in calculating all of the penalties in this case.

condition, and (4) the employer knew, or could have known with the exercise of reasonable diligence, of the violative condition. *Astra Pharmacentical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). In view of the testimony of IH Mawbey, which Respondent did not rebut, the Secretary has shown the alleged violations, including the employer knowledge element; Primo knew or should have known of the violations because its employees were using respirators and because of the J.J. Keller manual at the site. The Secretary has also shown that the violations were serious. Items 2a through 2c are affirmed as serious violations.

The Secretary has proposed a total penalty of $2,000.00 for Items 2a through 2c. IH Mawbey testified that the gravity of the violations was high and that the unadjusted penalty was $2,500.00. (Tr. 355). Applying the 50 percent reduction indicated above to $2,500.00 results in a penalty of $1,250.00. I find this penalty appropriate, and it is consequently assessed.

Serious Citation 1, Item 3

Item 3a(a) alleges a violation of 29 C.F.R. 1910.146(c)(2), which provides that:[24]

> If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.

IH Mawbey testified that he saw two culture tanks at the facility that were permit-required confined spaces that were not labeled as such.[25] The tanks were stainless steel vessels used to develop biological cultures, which could create oxygen-deficient atmospheres; the tanks also had mechanical agitators in them, which could cause blunt force trauma injuries if they were turned on when employees were inside the tanks. The IH identified HC-4 as a photograph of the two cited tanks in the culture room and HC-7 as copies of Primo's permit forms showing employees who had entered tanks.[26] He said the hazards in the plant's culture and milk tanks were the mechanical equipment in

[24]At the trial, the Secretary withdrew Item 3a(b) and Item 3b, leaving only Item 3a(a) for resolution. (Tr. 360-61, 366-68). Item 3a(b) alleged a second instance of violation of 29 C.F.R. 1910.146(c)(2), and Item 3b alleged a violation of 29 C.F.R. 1910.146(c)(4).

[25]A permit-required confined space is a confined space having "a potential to contain a hazardous atmosphere" or "any other recognized serious safety or health hazard." *See* 29 C.F.R. 1910.146(b).

[26]The forms used were those of Suprema, a previous employer at the site. (Tr. 510).

them and the potential for hazardous atmospheres.[27] He noted that the approximately 18 other confined space tanks in the facility were labeled as required; he also noted that Ms. Mullaly was with him when he saw the cited tanks and did not point out any signs to him. IH Mawbey said that Ms. Mullaly provided him, during his inspection, with H-6 and H-8; H-6 was entitled "Permit Confined Spaces for Industry Final Rule Abstract," and HC-8 was the J.J. Keller manual index.[28] IH Mawbey also said that not labeling the tanks as required could result in serious physical injury or death. (Tr. 357-61, 368-82, 390-91, 495-97, 506-07, 520-26).

Christopher Tehonica, the safety coordinator from Lewis who gave safety training and did walk-through inspections at Primo, testified the tanks in HC-4 were labeled. (Tr. 1693-94). However, his testimony is not credited. First, Ms. Mullaly was with IH Mawbey when he saw the unlabeled tanks, and she did not point out any signs to him when he saw the tanks. Second, I observed the demeanor of IH Mawbey and Mr. Tehonica as they testified, and while I found the IH to be a credible and convincing witness, I found Mr. Tehonica to be a less than reliable witness. Third, much of Mr. Tehonica's testimony about the cited conditions in this case was simply not believable. For example, in Item 4d of Serious Citation 1, *infra*, the IH testified that both Ms. Mullaly and Mr. Cook told him there was no testing equipment to monitor tanks' atmospheres before entries; he also testified the entry permits Primo used did not mention testing the tanks' atmospheres. (Tr. 383-85, 510). Despite this evidence, Mr. Tehonica testified there was an air monitor at the plant. (Tr. 1694). And, in Item 6 of Serious Citation 1, IH Mawbey testified that when he asked about emergency rescues from confined spaces, Ms. Mullaly provided no in-house procedure and told him that she had not contacted the local fire department about its providing rescue services; the IH also went to the local fire station, where he learned that Primo had not in fact contacted the station. (Tr. 393-96, 530-34, 580-83). Mr. Tehonica nonetheless testified that Ms. Mullaly had had the local fire department visit the plant to show it where the confined spaces were in case of an emergency. (Tr. 1696-97). There are many other

[27]HC-7 shows that various employees, including Mr. Cook, entered milk and starter tanks to perform repair and cleaning work, and Mr. Cook himself so testified. (Tr. 137).

[28]The IH said that when Ms. Mullaly was asked for programs, HC-6 and HC-8 were among the items she provided. He also said, as to HC-8, that the manual addressed the confined space standard requirements. (Tr. 361, 376-80, 520-26).

similar examples of Mr. Tehonica's testimony set out in this decision, *infra*, and for this and the other reasons noted above, Mr. Tehonica's testimony will not be credited when it conflicts with other more persuasive evidence in the record.

Based on the testimony of IH Mawbey, which Respondent did not rebut, the Secretary has established the alleged violation, including the employer knowledge element; Primo knew or should have known of all of the confined space violations in this case due to the J.J. Keller manual at the site and the fact that its employees were entering confined spaces. The Secretary has also established that the violation was serious. This item is thus affirmed as a serious violation. The proposed penalty for this item is $2,000.00. IH Mawbey testified that the gravity of this item was high and that the unadjusted penalty was $2,500.00. (Tr. 368-69). Applying a 50 percent reduction to $2,500.00 results in a penalty of $1,250.00. This penalty is appropriate and is therefore assessed.

Serious Citation 1, Item 4

Item 4a alleges a violation of 29 C.F.R. 1910.146(d)(2), which requires the employer to "[i]dentify and evaluate the hazards of permit spaces before employees enter them." Item 4b alleges a violation of 29 C.F.R. 1910.146(d)(3), which requires the employer to "[d]evelop and implement the means, procedures, and practices necessary for safe permit space entry operations." Item 4d[29] alleges a violation of 29 C.F.R. 1910.146(d)(4)(i), which requires the employer to provide, maintain and ensure the proper use of "[t]esting and monitoring equipment." Item 4e[30] alleges a violation of 29 C.F.R. 1910.146(d)(4)(ix), which requires the employer to provide, maintain and ensure the proper use of "[a]ny other equipment necessary for safe entry into and rescue from permit spaces."

IH Mawbey testified that employees entered the milk and culture tanks frequently and that the facility had not identified or evaluated the hazards of the tanks and also had not developed procedures and practices for safe entries; in particular, the plant had no equipment to test the atmosphere of the tanks for oxygen deficiency before entries, and harnesses and life lines for entries into vertical tanks

[29]At the trial, the Secretary withdrew Item 4c, which alleged a violation of 29 C.F.R. 1910.146(d)(3)(i). (Tr. 270).

[30]The citation shows the date of this violation as January 21, 2004. At the trial, the parties stipulated that the alleged violation occurred on March 11, 2004. (Tr. 1594-95).

were not used to effect employee rescue without someone else having to enter the tank.[31] The IH asked Ms. Mullaly and Mr. Cook if there was any testing equipment; they said there was not, and the IH noted that the permit forms in HC-7 did not list testing or monitoring the atmosphere as one of the requirements. The IH further noted that page 16 of HC-7 indicated a vertical entry and that "NA" was checked in the harness and lifeline columns. IH Mawbey said Primo's noncompliance with the cited standards could have resulted in serious physical injury or death. (Tr. 369-76, 381-86, 498-507, 510).

In view of IH Mawbey's testimony, which Respondent has not rebutted, the Secretary has demonstrated the alleged violations, including the employer knowledge element.[32] She has also demonstrated the violations were serious. Items 4a, 4b, 4d and 4e are thus affirmed as serious. The total proposed penalty for Item 4 is $4,000.00. The unadjusted penalty was $5,000.00, and the IH indicated the gravity of the violations was high. (Tr. 381-82). Due to the 50 percent reduction to which the employer is entitled, a penalty of $2,500.00 is appropriate and is therefore assessed.

Serious Citation 1, Item 5

This item alleges a violation of 29 C.F.R. 1910.146(g)(1), which states that:

> The employer shall provide training so that all employees whose work is regulated by this section acquire the understanding, knowledge, and skills necessary for the safe performance of the duties assigned under this section.

IH Mawbey testified there were about 20 tanks in the plant that were permit-required confined spaces, that employees entered the tanks often to clean them and make repairs, and that when he asked Ms. Mullaly for records of confined space training, none were provided; further, the IH asked Mr. Cook and Paul Pratt, two employees who entered the tanks, if they had had confined space training and both said they had not. The IH also testified the tanks were hazardous, as they had mechanical agitators in them as well as the potential for oxygen deficiency; training should have included air monitoring of the tanks, wearing personal protective equipment when needed, and following proper

[31]The IH said the agitators in the tanks were also a hazard; if they were turned on while employees were in the tanks, they could cause serious injuries. (Tr. 372, 380, 390-91, 506-07).

[32]Mr. Tehonica testified there was an air monitor at the facility. (Tr. 1694). However, in light of my credibility findings in Item 3, *supra*, this testimony is not credited.

procedures in case of emergency. IH Mawbey said the failure to provide employees with confined space training could have resulted in serious injury or death. (Tr. 386-93, 495-96, 526-28).

Mr. Tehonica testified he gave confined space training at the plant on November 21, 2003, and on March 29, 2004. (Tr. 1617, 1620,1634-35, 1645-46,1695, 1782-83). CO Palhof, contrary to IH Mawbey, testified that when they asked Ms. Mullaly for training records, confined space training was among the records she showed them. (Tr. 907,1200). Further, Brian Wing and Larry Gauthier, two employees who began working at the facility in the fall of 2003, both indicated that training in confined spaces was given to workers who needed it shortly after they (Mr. Wing and Mr. Gauthier) started working at the plant. (Tr. 210, 216, 226-27, 245-50). Mr. Cook, however, testified he had no confined space training until after the OSHA inspection and indicated that training was on March 29, 2004. (Tr. 136-37, 171-72). As noted in Item 3, I found IH Mawbey to be a credible and convincing witness.[33] I likewise observed the demeanor of Mr. Cook on the witness stand, and I also found him credible and convincing. Further, Mr. Cook's testimony was in general consistent with what he told the IH during the inspection. Based on the testimony of IH Mawbey and Mr. Cook, and on my findings as to their credibility, I conclude that while Mr. Tehonica gave confined space training to some employees on November 21, 2003, Mr. Cook and Mr. Pratt did not have that training until March 29, 2004, when Mr. Tehonica gave further training.[34] I also conclude that the Secretary has

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[33]Although IH Mawbey's testimony about confined space training conflicted with that of CO Palhof, I conclude the IH simply did not recall all of the training records he and the CO saw.

[34]IH Mawbey did not mention any additional training at the facility, and CO Palhof said there was no training after March 12, 2004. (Tr. 1222-23). The CO then said, however, that Ms. Mullaly told him Mr. Tehonica had given some more training in late March 2004. (Tr. 1531). It would appear that the CO's statement that there had been no further training related to certain employees who told him that they had not had specific types of training. (Tr. 899-901, 909-12, 933-37, 1037-39, 1115-23, 1222-23, 1499-1500). In any case, since there is evidence besides Mr. Tehonica's testimony that he gave training at the facility on November 21, 2003 and March 29, 2004, I find both of those training sessions occurred. (Tr. 136-37, 171-72, 437-38, 444, 528-29, 803, 907, 1110, 1145, 1184-85, 1199-1200, 1531; C-43, R-10-11). I further find the IH and the CO did not see any documentation of the March 29 training because, as set out in the background discussion, they did not accept the additional safety materials Mr. Tehonica tried to give them at the closing conference. Finally, although not all of the sign-in sheets for the two training sessions are in the record, I find that the IH and the CO saw sign-in sheets for the training CO Palhof mentioned, including confined space training. (Tr. 1200). *See also* C-43, R-10-11.

shown the alleged violation, including the knowledge element, and that the violation was serious. Item 5 is therefore affirmed as a serious violation. The proposed penalty for this item is $4,000.00. IH Mawbey testified that the unadjusted penalty was $5,000.00 and that the gravity of the violation was high. (Tr. 390-91). Applying a 50 percent reduction to $5,000.00 results in a penalty of $2,500.00. This penalty is appropriate and is accordingly assessed.

Serious Citation 1, Item 6

Item 6a alleges a violation of 29 C.F.R. 1910.146(d)(9), which requires the employer to:

> Develop and implement procedures for summoning rescue and emergency services, for rescuing entrants from permit spaces, for providing necessary emergency services to rescued employees, and for preventing unauthorized personnel from attempting a rescue.

Item 6b alleges a violation of 29 C.F.R. 1910.146(k)(1)(iv), which requires the employer to:

> Inform each rescue team or service of the hazards they may confront when called on to perform rescue at the site.

IH Mawbey testified that when he asked Ms. Mullaly for procedures for emergency services and rescues from confined spaces, none was produced. He further testified that when an employer does not have its own on-site rescue team, the employer must arrange for an outside source, such as the local fire department, to provide rescue services in case of an emergency; the employer must either inform the outside source of the types of rescues it could be asked to perform or invite the outside source to the facility so it can see for itself the rescue operations it could be asked to undertake. Ms. Mullaly told the IH she had not contacted the local fire department; further, the IH himself went to the local fire department, where he learned it had had no contact with Primo since the plant began operating. IH Mawbey stated that Primo's failure to have emergency and rescue procedures in place could have resulted in serious injury or death. (Tr. 393-96, 530-34, 580-83).

In view of IH Mawbey's testimony, which Respondent did not rebut, the Secretary has proved the alleged violations, including the employer knowledge element.[35] She has also proved that the violations were serious. Items 6a and 6b are therefore affirmed as serious. The proposed penalty for

[35]Mr. Tehonica testified Ms. Mullaly had had the local fire department visit Primo to show it where the confined spaces were in case of an emergency. (Tr. 1696-97). Mr. Tehonica's testimony is not credited, however, for the reasons set out in Item 3, *supra.*

Item 6 is $4,000.00. IH Mawbey testified that the unadjusted penalty was $5,000.00 and that the gravity of the violations was high. (Tr. 396-97). In view of the 50 percent reduction to which the employer is entitled, a penalty of $2,500.00 is appropriate and is consequently assessed.

Serious Citation 1, Item 7

Item 7 alleges a violation of 29 C.F.R. 1910.169(b)(3)(i), which states that:

> Every air receiver shall be equipped with an indicating pressure gage (so located as to be readily visible) and with one or more spring-loaded safety valves. The total relieving capacity of such safety valves shall be such as to prevent pressure in the receiver from exceeding the maximum allowable working pressure of the receiver by more than 10 percent.

IH Mawbey testified that he saw an air compressor receiver in the maintenance area that did not have a pressure relief safety valve; he identified HC-9 as a photograph of the receiver and Mr. Cook, and he noted that the receiver, which supplied compressed air to the plant, was operational. He further testified that the receiver was a pressure vessel and that if its maximum pressure was exceeded the vessel could fail; if it failed catastrophically, it could explode and send shrapnel flying throughout the area. The IH explained that a spring-loaded safety valve automatically opens when a vessel's pressure is exceeded, thereby preventing the vessel from being over-pressurized; he also explained that the yellow plug at the top of the receiver, shown in HC-9, was where a safety valve would normally be located. The IH stated that Mr. Cook was in the area daily and that the safety valve requirement on air compressors is common knowledge in the industry. (Tr. 398-408, 535-45).

In light of IH Mawbey's testimony, which Respondent has not rebutted, the Secretary has established the alleged violation, including employer knowledge; the cited condition was in plain view, and Mr. Cook, as the maintenance supervisor, should have been aware of it. (Tr. 538). The Secretary has also shown the violation was serious, in that, if the cited vessel exploded, employees in the area could be seriously injured or killed. (Tr. 408-09). Item 7 is affirmed as a serious violation. The proposed penalty for this item is $2,000.00. The unadjusted penalty for this item was $2,500.00, and IH Mawbey indicated the gravity of the condition was high. (Tr. 409). Applying a 50 percent reduction to $2,500.00 results in a penalty of $1,250.00. This penalty is appropriate and is assessed.

Willful Citation 2, Item 1

This item alleges a violation of 29 C.F.R. 1910.1200(h)(1), which provides that:

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

IH Mawbey testified that four employees, Terry Gemmill, Kenneth Kendall, Paul Pratt and Robert James, used chemicals to clean equipment at the plant; two such chemicals were phosphoric acid and sodium hydroxide, and the IH, after identifying HC-10 and HC-11 as the material safety data sheets ("MSDS's") Ms. Mullaly gave him for the chemicals, indicated they could cause eye and skin damage if contacted and lung damage if inhaled. The IH asked Ms. Mullaly about a HAZCOM program, and she showed him HC-13, the HAZCOM program of Suprema, a prior employer at the facility; HC-8, the J.J. Keller manual, also addressed HAZCOM training requirements.[36] The IH also saw HC-17, injury logs showing two instances of eye injury, one in December 2003 and the other in January 2004, when Mr. Gemmill was cleaning without goggles and caustic splashed in his eyes. Finally, the IH saw service call records of Primo's chemical supplier indicating there were new hires who needed training. IH Mawbey said he asked the four employees if they had had any training in the chemicals they worked with, and they told him they had not. He also said the only training records Ms. Mullaly gave him were from October 2003, and she told him Mr. Tehonica was going to give training later in March 2004. (Tr. 410-32, 436-38, 550-54, 583).

Mr. Tehonica testified he held training at the facility on November 21, 2003 and March 29, 2004, and that both sessions included HAZCOM; he said his HAZCOM training included filmstrips and discussing MSDS's and personal protective equipment ("PPE"). (Tr. 1617-20,1634-35, 1645-46, 1679-81, 1698, 1782-83). Mr. Cook testified he recalled no training in the fall of 2003 but did recall Mr. Ayers, the BCS representative who supplied the plant's chemicals, giving him some chemical training paperwork at the end of 2003 or the beginning of 2004. Mr. Cook said the training he recalled took place shortly after OSHA's arrival, and he indicated that it was on March 29, 2004. (Tr. 123-24, 171-72). Brian Wing, a maintenance employee, testified he had chemical training shortly after being hired in October 2003, and he indicated everyone was required to be there; Mr. Wing said that after that first training, more training was held for new hires. (Tr. 210-12, 225-26). Larry Gauthier, who

[36]The IH noted that using Suprema's documents was inappropriate because they did not reflect conditions at the plant at the time of the inspection. (Tr. 510-12).

started working in the plant in November 2003 as a mixer/molder, testified he had chemical training shortly after being hired; Mr. Ayers or Mr. Tehonica gave the training. (Tr. 245-50).

Edward Ayers, now Primo's operations director, was a service manager of BCS, the company that sold chemicals to Primo, at the time of the inspection.[37] Mr. Ayers testified he began to supply chemicals like caustics and acids to the plant in October or November of 2003, that he went to the plant at least monthly, and that C-38-41 were records of his service calls on February 2, 2004, March 29, 2004, December 23, 2003, and June 15, 2004; copies of those reports went to Ms. Mullaly, Mr. Spencer, and Mr. Banayan. Mr. Ayers stated that giving training in the chemicals he sold was part of his job, and he agreed that C-38-40 all noted there were new employees at the plant who had not had chemical training and that such training should be scheduled as soon as possible; he also agreed that based on those notes, he had not given group training on those particular visits. He further stated he had given group chemical training in October or November of 2003 and that he gave individual training on each of his visits; his training included information about MSDS's in general, the hazards of the categories of chemicals employees used, and PPE use. Mr. Ayers said his training was an ongoing process due to new hires who were starting, but he knew of no specific workers who were not trained. He also said the training he gave did not meet OSHA HAZCOM requirements and that on July 1, 2004, he gave expanded training at the plant that met those requirements. (Tr. 259-60, 263, 266-74, 278-80, 284-86, 289, 603-13, 632-44, 647-50, 666-71, 684-85, 691-95).

I credit Mr. Tehonica's testimony that he gave HAZCOM training at Primo on November 21, 2003 and March 29, 2004; the testimony of Mr. Cook supports a finding that the March 2003 training took place, and the testimony of IH Mawbey and CO Palhof supports Mr. Tehonica's testimony about the November 2003 training.[38] (Tr. 136-37, 171-72, 437-38, 444, 528-29, 803, 1110, 1145, 1184-85, 1199-1200). I also credit Mr. Ayers' testimony that he gave group chemical training in October or November of 2003, particularly since it is bolstered by the testimony of Messrs. Cook, Wing and

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[37]Mr. Ayers said he had serviced the plant since 1994 and given chemical training when the plant was owned by the Co-op. (Tr. 274, 663).

[38]CO Palhof specifically testified that the records Ms. Mullaly showed them for the November 2003 training included HAZCOM training. (Tr. 907, 1198-1200). Also, *see* footnote 34, *supra,* wherein I found that the record showed that the two training sessions in fact occurred.

Gauthier. (Tr. 123-24, 210-12, 225-26, 245-50). However, Mr. Ayers himself admitted his training did not meet OSHA's HAZCOM requirements, and CO Palhof explained that this was because his training did not include chemicals BCS did not supply, such as fuel oil, ammonia, oxygen and nitrogen.(Tr. 644, 1395-98). CO Palhof also testified that Mr. Tehonica's November 2003 HAZCOM training was inadequate; he interviewed Messrs. Gemmill, Kendall and Pratt, as well as another employee, Chris Abar, and they all told him they had not had training in the chemicals they used or in the PPE to wear to protect themselves.[39] (Tr. 900-07, 914-16, 1120, 1200, 1372-78). I observed the demeanor of CO Palhof on the stand, and I found him a credible and convincing witness. Based on this finding, and on my prior credibility finding as to IH Mawbey, I find that the four employees the IH spoke to, and Mr. Abar, had not had any chemical training before the inspection.[40] In view of the record, I conclude the Secretary has shown the alleged violation, including the knowledge element.

This citation item has been classified as a willful violation. To prove a willful violation, the Secretary must show it was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *See, e.g., Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987), and cases cited therein. As *Williams* further explains:

> A willful violation is differentiated by a heightened awareness – of the illegality of the conduct or conditions – and by a state of mind – conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a

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[39]The CO's testimony in this regard related to Item 9 of the safety citation, which alleged that Primo had not trained employees in PPE use; that item has been affirmed, as set out *infra*. The CO noted that none of the employees he spoke to about chemical training had attended the November 21, 2003 session as they were hired after that date; Mr. Gemmill and Mr. Pratt, for example, were hired in December 2003. (Tr. 897-907, 914-16, 1120-21,1368-78).

[40]In so concluding, I have noted Mr. Ayers' testimony that Mr. Pratt was at the fall 2003 group training. (Tr. 678-79). I do not credit that testimony, in light of footnote 39, *supra.*

hazard, even though the employer's efforts are not entirely effective or complete. *Id.* at 1256-57. (Citations omitted).

The evidence set out above establishes that five employees who required HAZCOM training were not provided with any training in the chemicals they worked with before the inspection began; the record also indicates that three of the five employees attended HAZCOM training on March 29, 2004, Mr. Tehonica's second training session, while two did not.[41] The evidence further establishes Primo had knowledge of the HAZCOM training requirement. Ms. Mullaly, the production supervisor, showed IH Mawbey HC-10-11, the MSDS's for two of the cleaning chemicals at the site. She also showed him HC-13, the HAZCOM program of Suprema, a previous employer at the site, and HC-8, the J.J. Keller manual, which addressed the HAZCOM training requirements; the IH also saw HC-17, the reports showing that Mr. Gemmill had had two instances of eye injuries from chemical splashes when he was not wearing goggles.[42] In addition, Ms. Mullaly, Mr. Spencer and Mr. Banayan all received copies of C-38-40, Mr. Ayers' service call reports from December 2003 and January and March 2004; C-38-40 all stated that there were new employees at the facility who had not had chemical training and that such training needed to be scheduled as soon as possible.

Besides the above, IH Mawbey testified he spoke to Mr. Spencer when he conducted a prior inspection of Lewis, another facility Mr. Banayan owned; Mr. Spencer, the general manager of Lewis then, acknowledged to the IH that employees should be trained under the HAZCOM standard, and

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[41]The only documents showing training at the facility on March 29, 2004, are certificates reflecting forklift training and a sign-in sheet reflecting LOTO training. Regardless, based on the evidence of record set out *supra*, I conclude that Mr. Tehonica's second training session included HAZCOM training. I also conclude that, since the LOTO sign-in sheet for the March 29 training shows that Mr. Abar, Mr. Kendall and Mr. Pratt were at that training, they more than likely also were at the HAZCOM training. The other two employees, Mr. James and Mr. Gemmill, are not shown on the sign-in sheet, and I find that they did not attend the training that day. The record indicates Mr. James may have left the plant by then, but Mr. Gemmill, who had had two injuries related to chemicals, was still working at the facility and did not attend the March 29 training. (Tr. 1120, 1378, 1411). Further, while Mr. James is shown on the LOTO sheet for the November 21, 2003 training, I find he was not at the HAZCOM training that day due to the IH's testimony.

[42]C-42, another report of Mr. Gemmill's December 23, 2003 injury, states in the section entitled "preventative action" that "[n]ew goggles were ordered ... and another safety training course on chemicals will be given." (Tr. 915-16).

Mr. Spencer was the general manager of Primo at the time of the subject inspection. (Tr. 305, 432-35, 443-44, 558-59). CO Palhof also testified he dealt with Mr. Spencer during a previous inspection of Lewis he participated in with another CO from his office. CO Palhof further testified he spoke to Mr. Spencer at Primo on March 25, 2004, and told him that he wanted to discuss the violations that had been found. Mr. Spencer said he and Mr. Tehonica had set up the entire safety program and had trained all the employees; he also said he and Mr. Tehonica had fixed all kinds of problems and that it was a very safe facility. The CO told him there were some very serious hazards in the plant, and Mr. Spencer replied that they had just bought the facility, that they were trying to get it up and running, and that they hadn't been able to get it completely into compliance. When asked why the problems were not fixed before beginning operation, Mr. Spencer said they couldn't do that; the plant was big, everything couldn't be fixed overnight, and OSHA needed to give new companies a grace period so they could get into compliance. Mr. Spencer also said, upon learning of the alleged hazards, that there was no incentive to fix them if he was going to be cited anyway. (Tr. 796-97, 1144, 1228-33).

The foregoing convinces me the violation was willful. Mr. Spencer, the general manager of Lewis during a previous inspection of that facility, knew of the HAZCOM requirements then and yet, as general manager of Primo, he did not ensure that all employees who used chemicals at that plant were trained in the hazards of those chemicals. He and Ms. Mullaly were also on notice of the need for HAZCOM training due to the Suprema HAZCOM program and the J.J. Keller manual; further, they knew that new hires needed training in light of Mr. Ayers' service call reports and the injury reports relating to Mr. Gemmill. I find, therefore, that both Mr. Spencer and Ms. Mullaly had knowledge of the requirements of the standard and consciously disregarded the standard; their knowledge, as supervisors at the facility, is imputable to Primo. I also find that Mr. Spencer exhibited plain indifference to employee safety, based on his statements to the CO.

Finally, I find that the willful classification is supported by Primo's overall approach to safety. First, I note that nearly all of the numerous violations in this matter have been affirmed, including additional willful violations. Second, I note that despite Mr. Tehonica's testimony that R-7, Primo's employee safety manual, was available for use in November 2003, it is clear from the record that R-7 was not available during March 2004, when the bulk of the inspection took place. (Tr. 27-30, 36-38, 568-69, 801, 1211-14, 1609, 1662-63, 1669-70, 1797-98). This conclusion is bolstered by the fact that

when the IH and the CO asked Ms. Mullaly for safety programs she never offered them R-7 or anything like R-7; it is also bolstered by the testimony of CO Palhof that when Mr. Tehonica attempted to give them more safety materials at the closing conference, on September 3, 2004, he and the IH would not accept them due to the many times they had requested such materials during the inspection. (Tr. 377-79, 415-16, 510-12, 522-26, 571-72, 585, 800-04, 1106-11, 1155-58, 1198-1200, 1209-13, 1242-44). And third, I note there was no safety coordinator or other safety person at the site at the time of the inspection. Ms. Mullaly told the CO that Nadine Irving had been the safety person in November 2003, that Robert James had next taken over the job but had left after a couple of months, and that there was no one in the job at that time; she stated they had had problems keeping a safety person at the plant and that they were considering appointing Paul Pratt as the new safety person.[43] Ms. Mullaly further stated that Mr. Tehonica had been to the facility to hold safety training and to conduct walk-through inspections. (Tr. 444, 528, 1144-45, 1184-86).

Based on the evidence of record, this citation item is affirmed as a willful violation. IH Mawbey testified the cited condition was serious, in that injuries up to blindness could have occurred. He also testified that the condition was of medium gravity and that the unadjusted penalty for this item was $55,000.00, resulting in a proposed penalty of $49,500.00. (Tr. 438-39, 561-63). Applying a 50 percent reduction to the unadjusted penalty results in a penalty of $27,500.00. I find this penalty appropriate, and it is accordingly assessed.

Repeat Citation 3, Item 1

This item alleges a violation of 29 C.F.R. 1910.95(c)(1), which states that:

> The employer shall administer a continuing, effective hearing conservation program, as described in paragraphs (c) through (o) of this section whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A scale (slow response) or, equivalently, a dose of fifty percent. For purposes of the hearing conservation program, employee noise exposures shall be computed in accordance with appendix A and Table G-16a, and without regard to any attenuation provided by the use of personal protective equipment.

[43]Mr. Tehonica testified that Ms. Irving was still the safety coordinator at the time of the inspection. (Tr. 78, 1628, 1659, 1781, 1798). His testimony is not credited, however, in light of the testimony of CO Palhof.

IH Mawbey testified that after noticing noise in the whey plant area, he conducted a noise survey; he did this by attaching a dosimeter to the collar of Edward Mashaw, the whey plant operator, who was working in the area.[44] The IH identified HC-20 as the report of the noise levels he obtained from the dosimeter, and he noted that both levels recorded, 173 and 161, exceeded the permissible exposure level of the standard; the 161 level, in fact, was an 8-hour time-weighted average of 93.4 decibels. IH Mawbey also testified he asked Ms. Mullaly about a noise program and that she gave him no documents in response. Further, Mr. Mashaw told him he had had no training in hearing loss and hearing protection; however, there was a box of ear plugs in the area, and a sign requiring their use, and Mr. Mashaw was wearing ear plugs.[45] The IH said that the ear plugs and the sign were not the equivalent of an effective program under the standard; such a program requires training employees in the noise levels they are exposed to, the effect of noise on hearing, the hearing protection they should use, and audiometric testing of employees. (Tr. 442, 445-57, 461-65, 564-67).

Mr. Tehonica testified that he did not know if there was a noise-monitoring policy at Primo but that he had addressed hearing protection in his training and had told Nadine Irving workers had to have ear protection in areas with noise levels over 85 decibels.[46] (Tr. 1701-02, 1777).

As noted above, IH Mawbey testified that Ms. Mullaly gave him no documents when he asked her about a noise program and that Mr. Mashaw told him he had had no training in hearing loss and hearing protection; the IH also testified that providing ear plugs and requiring their use does not meet the standard. (Tr. 457, 462-63, 565). IH's Mawbey's testimony is credited, and I find the Secretary has met her burden of showing the alleged violation, including knowledge. This item is affirmed.

This item has been classified as a repeat violation. To prove a violation is repeated, the Secretary must show that, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC

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[44]A dosimeter is an instrument that records noise levels over a period of time and then integrates them to come up with an average noise level over the entire shift. (Tr. 445).

[45]IH Mawbey said the plugs were sufficient to keep the noise at a safe level. (Tr. 566).

[46]Mr. Tehonica also testified that he believed the ear protection requirement was set out in Primo's safety manual. That requirement does, in fact, appear in Primo's safety manual. *See* R-7, p. 15. However, as found *supra*, R-7 was not available at the time of the inspection.

1061, 1063-64 (No. 16183, 1979). IH Mawbey testified that in 2003, Lewis was cited for a violation of the same standard at issue here; that citation settled and became a final order on June 20, 2003. The IH also testified that Primo and Lewis were interrelated as Moise Banayan owned both facilities and Thomas Spencer, Primo's general manager at the time of the subject inspection, was the general manager of Lewis during the 2003 inspection; Mr. Spencer, in fact, signed an abatement certification in July 2003 verifying that Lewis had abated the cited conditions. (Tr. 442-44, 458-59).

The Secretary contends that Lewis and Primo should be considered the same employer under the Commission's "single employer doctrine." That doctrine holds that when two business entities have a common work site, a common president or management, and a close interrelation and integration of operations, the entities will be treated as a single employer under the Act. *Advance Specialty Co.*, 3 BNA OSHC 2072, 2075-76 (No. 2279, 1976). The Commission has upheld the doctrine in later cases. *C.T. Taylor Co.*, 20 BNA OSHC 1083 (Nos. 94-3241 & 94-3327); *Vergona Crane Co.*, 15 BNA OSHC 1782 (No. 88-1745, 1992); *Trinity Indus., Inc.* 9 BNA OSHC 1515 (No. 77-39, 1981). However, the Commission has never applied the doctrine to treat two separately incorporated entities as one for repeat violation purposes, and I am unwilling to do so in this case. The Secretary's contention that this violation was repeated is rejected.

I find that the violation was serious, in that hearing loss can occur, even with ear protection, if employees are not trained and do not properly use the protection; further, without audiometric testing, the employer will not know if its hearing protection program is effective. This item is thus affirmed as serious. The proposed penalty for this item is $3,200.00, based on the repeat classification. The IH testified that this item was of medium gravity, and, in light of my previous findings, the employer is entitled to a 50 percent reduction. I conclude that a penalty of $1,000.00 is appropriate for this item. A penalty of $1,000.00 is consequently assessed.

The Safety Citation Items

Serious Citation 1, Item 1

This item alleges three instances of violation of section 5(a)(1) of the Act. Instance a alleges overhead hoists in the facility were not being inspected as required. Instance b alleges that a hoist in the maintenance shop had a damaged safety latch on its lifting hook. Instance c alleges that two hoists in the brine room had below-the-hook lifting devices that had no rated load capacity markings.

CO Palhof observed an overhead hoist in the maintenance shop with a damaged component on its safety latch, and he also observed two overhead hoists in the brine room with no rating capacity showing on their below-the-hook lifting devices; the first hoist was used in maintenance activities, and the two latter hoists were used to lift metal cheese baskets. The CO spoke to Mr. Cook, who told him the hoists had not been inspected; Mr. Cook also told him that when Suprema owned the facility there were inspection sheets for the hoists. C-1-4 are photographs the CO took of the cited conditions; C-1 shows the hoist with the damaged safety latch, C-2 shows the cheese baskets, C-3 shows one of the lifting devices used to lift the baskets, and C-4 shows the lifting operation involving the baskets.[47] CO Palhof identified C-5 as the ANSI standard for overhead hoists, which, in section 16-2.1.1(b), requires monthly inspections of overhead hoists.[48] CO Palhof also identified C-6 as the ANSI standard for below-the-hook lifting devices, which, in section 20-1.2.1(a), requires visible markings on lifting devices showing their rated loads. (Tr. 804-12, 815- 21, 1273-87).

To prove a violation of section 5(a)(1), the Secretary must show that: (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or its industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *Industrial Glass*, 15 BNA OSHC 1594, 1597 (No. 88-348, 1992). I find that the CO's testimony, together with C-1-6, establishes all three instances of the alleged violation.[49] The cited conditions clearly presented a hazard, and that an overhead hoist failing and a load falling could cause serious injury is apparent. Mr. Cook, the maintenance supervisor, was aware of the need to inspect the hoists, and C-5-6 establish industry recognition of the cited hazards. In addition, the abatement methods are evident:

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[47]The CO said C-1 showed that the safety latch did not close as required; he also said that the workers exposed to the hoists included Messrs. Cook, Wing and Phelps. (Tr. 807-08).

[48]C-5, section 16-1.2.9, also sets out the requirements for hooks and latches.

[49]Mr. Tehonica testified the safety latch worked when he was there in November 2003 and that Mr. Cook told him he replaced the latch after OSHA advised him it was not working; he also testified that Mr. Cook had told him that the lifting devices had all been rated previously. (Tr. 1703-05). However, this testimony, even if true, does not rebut the Secretary's evidence.

inspect the hoists, replace the faulty safety latch, and mark the lifting devices with their rated loads. Item 1 is affirmed as a serious violation of section 5(a)(1) of the Act.

The Secretary has proposed a penalty of $2,000.00 for this item. CO Palhof testified that the gravity of this citation item was high and that the unadjusted penalty for this item was $2,500.00. (Tr. 823-24). Applying a 50 percent reduction to $2,500.00 results in a penalty of $1,250.00. I find this penalty to be appropriate, and it is therefore assessed.

Serious Citation 1, Item 2

This item alleges a section 5(a)(1) violation, in that anchorage supports for fall arrest systems had not been rated. CO Palhof testified that in the in-feed department, when a milk truck arrived, an employee was required to get on top of the milk truck and connect his body harness to a lanyard that was in turn attached to one of the two anchored support systems located on a trolley railing on the ceiling; he further testified that Mr. Abar and Mr. Pratt were the two employees who did this work and that C-9, one of his photographs, showed Mr. Abar tied off to one of the systems. The CO said Ms. Mullaly showed him C-11, instructions for the Rose harnesses used at the site; C-11 states, in section 6.2.3, that anchorages must support at least 3,600 pounds if certified and 5,000 if not certified. The CO also said that C-10, the ANSI standard covering personal fall arrest systems, has the same requirement, in section 7.2.3.[50] CO Palhof noted that the systems at the site had not been certified, based on what Mr. Cook and Mr. Spencer told him; neither knew if the systems were rated or adequate. CO Palhof also noted that if a system failed, it could result in the employee falling and the anchorage system coming down on top of the employee. (Tr. 826-38, 931-33, 1287-92).

I find that the Secretary has met her burden of showing the elements of a 5(a)(1) violation, as set out in the preceding discussion; that is, the cited condition presented a hazard that could have caused death or serious physical harm, the employer or its industry recognized the hazard, and there was a feasible means of abating the hazard. This item is therefore affirmed.[51] A penalty of $2,000.00

[50]The CO indicated that because there were two anchorage systems, they would have to be able to withstand 10,000 pounds if two people used both at the same time. (Tr. 1287-90).

[51]In affirming this item, I have considered the testimony of Mr. Tehonica that Mr. Spencer told him the anchorage system had been rated under the previous ownership. (Tr. 1708-09). This testimony is not credited, for the reasons set out *supra* in this decision.

has been proposed for this item. The CO testified that the gravity of this item was high and that the unadjusted penalty was $2,500.00. (Tr. 838-40). Due to the 50 percent reduction to which the employer is entitled, a penalty of $1,250.00 is appropriate and is consequently assessed.

Serious Citation 1, Item 3

Item 3 alleges a violation of 29 C.F.R. 1910.23(c)(1), which states in pertinent part as follows:

> Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing ... on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder.

CO Palhof testified about four different conditions he observed. The first, in the in-feed department, was a crossover walkway that did not have adequate railings; C-12-14, his photographs of the condition, show that in some areas the walkway had chains for a top rail but no mid-rails and in other areas no rails at all.[52] The second, in the well room, was a stair platform with a top rail but no mid-rail; C-15 is his photograph showing that condition. The third, in the cardboard mezzanine, was a platform that had chains as top and mid-rails, as shown in C-16-17; however, the top and mid-chains were 28 and 12 inches, respectively, from the platform floor, rather than the 42 and 21 inches they should have been from the platform floor. The fourth, in the WPC room, was a walkway with openings along it, as shown in C-18-19; there were chains to put across the openings, but the chains were not in place when the CO saw the walkway. The CO identified the employees who used the WPC room walkway as Messrs. Cook, Mashaw and Wing. He said he spoke to Mr. Cook about the cited conditions, and Mr. Cook told him he was aware that railings were required. He also said Ms. Mullaly showed him C-21, Suprema's fall protection plan, which stated that guardrails were in place on platforms and that platforms met OSHA safety specifications. (Tr. 841-53, 1297-1317).

Based on the CO's testimony, I find the Secretary has met her burden of establishing that the cited instances violated the cited standard. She has also established the cited conditions were serious,

[52]The CO noted that while C-13 shows an individual on the walkway wearing a safety harness, that individual was not tied off at the time. (Tr. 847).

in light of the CO's testimony that falls from the subject platforms, which were over 4 feet high, could have caused serious injury or death. (Tr. 860). Item 4 is affirmed as a serious violation.[53]

The Secretary has proposed a penalty of $4,000.00 for this item. The CO testified that the gravity of this item was high and that the unadjusted penalty was $5,000.00. (Tr. 860). In view of the 50 percent reduction to be applied to the unadjusted penalty, I conclude that a penalty of $2,500.00 is appropriate. A penalty of $2,500.00 is thus assessed.

Serious Citation 1, Item 4

Item 4 alleges a violation of 29 C.F.R. 1910.24(h), which requires standard railings to be provided on the open sides of all exposed stairways and stair platforms.

The CO testified about two conditions he observed. The first was the stairway from the compactor room to the cardboard mezzanine, which had 14 risers and did not have mid-rails; the stairway platform was 12 feet from the floor, and C-23 shows the stairway with top rails on both sides and no mid-rails. The second was the stairway to the crossover walkway in the in-feed department; that stairway, shown in C-24, had 6 risers, was 5 feet 4 inches high, and did not have a standard railing on the right side. The CO identified the employees exposed to these conditions as Messrs. Abar, Cook, Pratt and Wing, as well as John Miller. The CO said Mr. Cook told him he was aware the stairways required railings; in addition, he said that C-21, the Suprema fall protection plan, also stated the requirements for stairs and railings. (Tr. 861-66, 1318-22).

In view of the above, which Respondent has not rebutted, the Secretary has shown the alleged violative conditions. The cited conditions are properly characterized as serious, in that falls from heights clearly could cause serious injuries. The alleged violation is affirmed. The Secretary has proposed a penalty of $1,600.00. The CO testified the cited conditions were of medium gravity and that the unadjusted penalty was $2,000.00. (Tr. 867-68). Applying the 50 percent reduction to $2,000.00 results in a penalty of $1,000.00. This penalty is appropriate and is assessed.

Serious Citation 1, Item 5

Item 5a alleges a violation of 29 C.F.R. 1910.28(a)(13), which prohibits scaffold planks from extending less than 6 inches and more than 18 inches over their end supports. Item 5b alleges a

[53]I have considered and rejected Mr. Tehonica's testimony to the effect that the cited conditions were not violations, due to my previous findings. (Tr. 1699-1701, 1709-13, 1787).

violation of 29 C.F.R. 1910.28(d)(12), which requires tubular welded frame scaffolds to be erected by competent and experienced personnel.

CO Palhof testified that on March 11, 2004, he saw Mr. Cook and Mr. Wing on a fabricated frame scaffold set up on the side of an oil tank; the employees were replacing a steam line on the tank, and the scaffold had been set up to access the tank. He identified C-25 as his photograph of the scaffold and Mr. Wing as the employee in C-25.[54] CO Palhof further testified that on March 18, 2004, he saw Mr. Cook and Mr. Wing climbing down the same scaffold, which was in the same condition as he had seen it on March 11; he identified C-26 as his photograph of the scaffold on March 18. He noted that a scaffold plank, which he measured from the ground, overhung the end frame by 30 inches. He also noted the scaffold had no base plates and was missing pins, which could have caused it to pull apart; in addition, the scaffold was not fully planked, it had a makeshift tube and coupler attachment, and the second tier was on backwards, resulting in the ladder not going up continuously on the same side of the scaffold. The CO spoke to Mr. Cook and Mr. Wing about the scaffold, and he learned that Mr. Wing had erected it. (Tr. 868-77, 1325-33).

Mr. Wing testified the OSHA officials had seen him up on the oil tank but that he had used a ladder to access the tank and not the scaffold; he and another worker erected the scaffold, but he himself never used it. Mr. Wing also testified that he had erected scaffolds previously on construction sites but that he had never had any formal training in scaffold erection. (Tr. 216-20, 232-35, 239-41). Mr. Tehonica, on the other hand, testified that while he never saw the scaffold in use, he spoke to Mr. Wing about it after Primo was cited; Mr. Wing said he took a "shortcut" to erect it because he thought it would hold him properly for the short amount of time he would be on it. (Tr. 1718-19).

Based on the testimony of CO Palhof, which is supported by that of Mr. Tehonica, I find the CO observed both Mr. Cook and Mr. Wing on the scaffold on March 11 and 18, 2004. I further find that, in light of the CO's testimony, the Secretary has shown the alleged violations. She has also shown the violations were serious; the CO testified the scaffold's condition could have caused the

[54]The CO initially testified Mr. Abar was the employee in C-25, but he later testified it was Mr. Wing. (Tr. 870-71, 876. 1330-32). In addition, the CO's testimony about Item 8, *infra*, makes it clear the tank in that item was the same as the tank in this item, and he identified Mr. Cook and Mr. Wing as the two persons on the tank in the Item 8 discussion. (Tr. 1362-67).

employees to fall and be seriously injured. (Tr. 877). Item 5 is therefore affirmed. A total penalty of $2,000.00 was proposed for this item. The CO testified that the gravity of this item was high and that the unadjusted penalty was $2,500.00. (Tr. 877). Applying the 50 percent reduction the employer is entitled to results in a penalty of $1,250.00. This penalty is appropriate and is assessed.

Serious Citation 1, Item 6

Item 6 alleges a violation of 29 C.F.R. 1910.37(a)(3), which requires exit routes to be "free and unobstructed" and prohibits placing materials or equipment "either permanently or temporarily, within the exit route." The CO testified he saw a designated exit in the maintenance loading dock area that was obstructed by stored pipes, boxes and other items; he further testified that employees accessing the exit could trip, or, in case of a fire, the items could obstruct immediate access to the exit. The CO identified C-27 as his photograph of the condition on March 11, 2004. He said he returned to the plant in June and saw the same items as well as additional items in the same area; he also said the exposed employees were Messrs. Cook, Hurlburt, Mashaw and Wing and that Mr. Cook told him the items were being stored there until they were needed. (Tr. 880-84,1333-40).

In view of the foregoing, I find that the Secretary has met her burden of proving the alleged violation, including the serious classification; the CO testified the violation was serious, in that sprained ankles or smoke inhalation could occur as employees tried to get to the exit. (Tr. 884). This item is accordingly affirmed as a serious violation.[55] A penalty of $1,200.00 has been proposed for this item. The CO testified the gravity of the violation was low and that the unadjusted penalty was $1,500.00. *Id.* Based upon the 50 percent reduction in penalty to which the employer is entitled, I conclude a penalty of $750.00 is appropriate; that penalty is consequently assessed.

Serious Citation 1, Item 7

Item 7 alleges a violation of 29 C.F.R. 1910.101(b), which states as follows:

> The in-plant handling, storage, and utilization of all compressed gases in cylinders ... shall be in accordance with Compressed Gas Association Pamphlet P-1-1965, which is incorporated by reference as specified in § 1910.6.

[55]In affirming this item, I have considered and rejected Mr. Tehonica's testimony, to the effect that the exit was not obstructed and that there was another nearby exit, on the basis of my credibility findings in this case, *supra.* (Tr. 1719-22).

CO Palhof observed unsecured gas cylinders in three areas, that is, the boiler room, where he saw five anhydrous ammonia cylinders, the maintenance loading dock, where he saw three oxygen cylinders, and the slicing room, where he saw a nitrogen cylinder. The CO testified the conditions were serious; an unsecured tank can fall over and harm an employee, or, if a tank falls over and its valve stem breaks, it can "take off like a rocket." He further testified tanks must be secured whether empty or full and whether in use or not. The CO identified C-29-32 as his photographs of the conditions, and he said the oxygen cylinders in the maintenance loading dock area were next to the exit cited in Item 6; he also said the nitrogen cylinder in the slicing room was being used to supply a packaging machine. The CO also identified C-28 as the Compressed Gas Association Pamphlet, which requires gas cylinders to be secured. The CO spoke to Mr. Cook, who indicated the cylinders were being stored where the CO saw them because there was not much storage space in the plant; Mr. Cook also knew the cylinders needed to be secured. The CO noted that the employees exposed to the cylinders were Messrs. Cook, Hurlburt, Mashaw and Wing. (Tr. 885-90, 1340-45).

Based on the CO's testimony, which Respondent has not rebutted, the Secretary has shown the alleged violation, including the serious classification; the CO said the most likely injury would be a simple fracture from a tank falling over.[56] (Tr. 891). Item 7 is affirmed as serious. A penalty of $1,600.00 has been proposed for this item. The CO testified the unadjusted penalty was $2,000.00 and that the gravity of this item was medium. (Tr. 891-92). Applying a 50 percent reduction to $2,000.00 results in a penalty of $1,000.00. This penalty is appropriate and is therefore assessed.

Serious Citation 1, Item 8

Item 8 alleges a violation of 29 C.F.R. 1910.132(a), which requires protective equipment to be provided and used "wherever it is necessary by reason of hazards ... capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

The CO observed two employees, Mr. Cook and Mr. Wing, working on top of an oil tank that was about 12 feet high without wearing any fall protection. The CO identified C-34 and C-35 as his

[56]Mr. Tehonica testified the ammonia tanks were empty; however, the CO testified those tanks were full, based on his observing the tags on them. Mr. Tehonica also testified empty tanks are less of a hazard, but he conceded an empty tank falling over could injure a foot. Finally, Mr. Tehonica testified the facility's practice is to secure the tanks with chains. (Tr. 1341, 1722-25). Due to the CO's testimony, and my credibility findings, Mr. Tehonica's testimony is not credited.

photographs of the condition. He noted there was a pipe on top of the tank and that the top of the tank was not flat, making a fall more likely; he also noted that abating the condition could have been utilizing harnesses or having a fixed platform around the tank. The CO spoke to Mr. Spencer about the condition, who said that Primo could not be expected to put a full fall protection system in place when employees were only up on the oil tank for a short time. (Tr. 892-94, 1361-67).

Mr. Tehonica testified the employees' behavior in C-34 and C-35 was "absolutely not" in compliance with Primo's fall prevention policy. (Tr. 1726). However, this testimony does not rebut that of the CO, which clearly establishes the alleged violation.[57] This item is therefore affirmed, and the violation was serious, in light of the CO's statement that a fall of 12 feet could result in serious injury or death. (Tr. 892, 896). The Secretary has proposed a penalty of $4,000.00 for this item. CO Palhof testified that the cited condition was rated as having high gravity and that the unadjusted penalty was $5,000.00. (Tr. 895-97). In view of the 50 percent reduction to be applied to the unadjusted penalty, a penalty of $2,500.00 is appropriate and is accordingly assessed.

Serious Citation 1, Item 9

This item alleges a violation of 29 C.F.R. 1910.132(f)(1), which requires the employer to "provide training to each employee who is required ... to use PPE." Instance a alleges that employees required to work on top of a tank trailer were not trained in the use of a lanyard/harness system. Instance b alleges that employees required to use cleaning chemicals such as acid sanitizer and caustic blend were not trained in the use of goggles, face shields, aprons and gloves.

As to Instance a, CO Palhof testified that in the in-feed department, he saw an employee, Mr. Abar, on top of a milk tank trailer, as shown in C-36-37, the CO's photographs of the condition. Mr. Abar was wearing a harness and lanyard, but the harness was not tight enough and Mr. Abar could have fallen out of it; in addition, the lanyard was attached to the front of the harness instead of the back, and Mr. Abar could have been seriously injured if he had fallen. The CO also testified that he spoke to Mr. Pratt and Mr. Wing; Mr. Pratt said he regularly got up on the milk tanks and had had no training in how to wear the harness properly, and Mr. Wing said he wanted to know what he needed to do to protect himself when he was on a tank and asked if he (the CO) could show him how to wear

[57]I find Mr. Spencer's statement to the CO shows Primo's knowledge of the condition.

the harness properly. When the CO spoke to Ms. Mullaly, he learned she had given the fall protection to the employees, but when he asked about training, she gave him no documentation of any training in fall protection; however, she did show him literature for the harnesses, which addressed how to use them properly, and the fall protection plan of Suprema. (Tr. 897-900, 1218, 1368-72).

Mr. Tehonica testified that his training at the facility included fall protection. (Tr. 1713-16). However, Mr. Cook testified that, to his knowledge, no one was trained in using fall protection at the plant before the inspection, and Mr. Wing testified Mr. Tehonica's training in fall protection occurred after the inspection. (Tr. 131-32, 175, 196, 222). Moreover, in view of what employees told the CO and Ms. Mullaly's failure to give the CO any documents showing fall protection training at the plant, and my credibility findings in this case, I credit the testimony of CO Palhof.[58] I find, therefore, that the Secretary has established the alleged violation. Instance a of this item is affirmed.

As to Instance b, Willful Citation 2 of the health citation, set out *supra*, establishes that Primo did not train several employees, including Messrs. Abar, Gemmill, Kendall, James and Pratt, in the hazards of the cleaning chemicals they used, such as acids and caustics, or in the PPE to wear to protect themselves when they used the chemicals. The evidence relating to that item shows the applicability of the standard cited in this item, that the standard was violated, that employees were exposed to the cited condition, and that the employer had knowledge of the violative condition. That evidence also shows the violation was serious. Instance b of this item is also affirmed.

Based on the foregoing, the Secretary has shown both of the violative instances. She has also shown the serious nature of the violations; failing to wear PPE when working with chemicals could cause severe chemical burns or blindness, and falls from a milk tank, if an employee was not wearing fall protection correctly, could cause serious injury. (Tr. 899, 908, 1218). Item 9 is affirmed as serious. The CO testified the gravity of the cited conditions was high and that the unadjusted penalty was $2,500.00. (Tr. 907-08). Applying the 50 percent reduction to the unadjusted penalty results in a penalty of $1,250.00. This penalty is appropriate and is consequently assessed.

Serious Citation 1, Item 10

This item alleges a violation of 29 C.F.R. 1910.(g)(1), which provides as follows:

[58]CO Palhof specifically testified that to the best of his recollection, Ms. Mullaly provided him with no training sheets or sign-in logs for training in fall protection. (Tr. 1369).

> Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

CO Palhof testified that Mr. Cook and Ms. Mullaly told him that all employees were expected to be able to use fire extinguishers to put out fires at the plant. The CO noted there were a number of fire extinguishers in the facility, and that activities such as welding were taking place, and that while the November 21, 2003 training had included fire extinguisher use, not all employees were at that training; those employees included Messrs. Abar, Cook, Hurlburt, Kendall, Mashaw and Miller, and Mr. Cook said he knew not all employees were trained.[59] The CO also noted that the hazard of not providing fire extinguisher training was that an employee might not know what an incipient-stage fire was and attempt to put out a larger fire when he should be evacuating. (Tr. 908-13, 1399-1403).

Based on the CO's testimony, which Respondent has not rebutted, the Secretary has shown the alleged violation, including the serious classification; CO Palhof testified that the injuries likely to occur from a lack of training would be moderate burns and smoke inhalation.[60] (Tr. 914, 1402). Item 10 is affirmed as a serious violation. A penalty of $1,600.00 is proposed for this item. The CO testified that he rated the cited condition as having medium gravity and that the unadjusted penalty for this item was $2,000.00. (Tr. 914). Applying the 50 percent reduction to $2,000.00 results in a penalty of $1,000.00. I find this penalty to be appropriate. It is therefore assessed.

Serious Citation 1, Item 11

Item 11a alleges a violation of 29 C.F.R. 1910.178(l)(1)(i), which states that:[61]

> The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).

Item 11b alleges a violation of 29 C.F.R. 1910.178(l)(6), which states that:

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[59]The CO said he determined those employees were not at the training through employee interviews and by comparing the employee list he received with the training log. (Tr. 910, C-43).

[60]Mr. Tehonica testified about the training he gave, but Primo presented nothing to show the employees the CO noted had been trained as required prior to the inspection.. (Tr. 1731-33).

[61]This item initially alleged a violation of 29 C.F.R. 1910.178(l); the complaint amended the citation to allege a violation of the standard noted above. (Tr. 933).

> The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

The CO testified that employees who used the two forklifts at the plant, a Clark and a Toyota, had not been trained or evaluated in operating the forklifts. He spoke to Messrs. Cook, Gauthier, Miller and Wing, all of whom told him they used the forklifts and had not been trained in operating them. He also spoke to Mr. Cook, who stated that Mr. Tehonica had not had time to return to the facility to train the employees but that he (Mr. Tehonica) planned to do so in the future; in addition, the CO spoke to Mr. James, one of the prior safety persons at the facility, who stated he had been trying to train the employees in operating the forklifts but that that had not come about. CO Palhof said that Primo had knowledge of the need to train the employees based on the J.J. Keller manual Ms. Mullaly showed him, which had a guide for forklift training. (Tr. 933-37, 1405-20).

The CO's testimony, which Respondent has not rebutted, shows that the employees who used the forklifts at the time of the inspection had not been trained or evaluated in operating the forklifts.[62] The Secretary has thus demonstrated the alleged violations. She has also demonstrated the violations were serious; the CO testified that fractures could result if an operator did not know a forklift's capacity and tipped the forklift over.[63] (Tr. 938, 1417-19). This item is accordingly affirmed as serious. The Secretary has proposed a total penalty of $1,600.00 for Item 11. The CO testified that

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[62]Mr. Tehonica testified he gave forklift training on November 21, 2003, and on March 29, 2004; he identified R-11 as the certificates he signed for the six employees he trained on March 29, 2004. (Tr. 1619, 1635, 1782-83, 1792-93). Mr. Tehonica's testimony about giving forklift training in November 2003 is not credited, due to my credibility findings in this matter, and Mr. Cook specifically testified that Mr. Tehonica did not give forklift training until after the OSHA inspection. (Tr. 134, 198, 203). Mr. Wing testified that he had forklift training before the inspection, but, as R-11 shows he had forklift training on March 29, 2004, I find he was mistaken about when his training occurred. (Tr. 211-12, 225-26). Larry Gauthier testified that he had never operated a forklift for Primo. (Tr. 248). R-11 shows that Larry Gray, and not Mr. Gauthier, had forklift training on March 29, 2004. Based on R-11 and Mr. Gauthier's testimony, I conclude the CO mistakenly wrote down Mr. Gauthier's name as to this item and as to Item 12, *infra*.

[63]*See also* Item 3 of Other Citation 3, *infra*, wherein the CO testified that the Clark forklift did not have a nameplate, which would have shown its lifting capacity, and that none of the employees he spoke to knew that forklift's lifting capacity.

the gravity of this item was medium and that the unadjusted penalty was $2,000.00. (Tr. 937). I conclude that a total penalty of $1,000.00 is appropriate for this item, due to the 50 percent reduction to which the employer is entitled, and a penalty of $1,000.00 is therefore assessed.

Serious Citation 1, Item 12

This item alleges a violation of 29 C.F.R. 1910.178(p)(1), which provides as follows:

> If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

CO Palhof testified he told Mr. Cook he wanted to test the parking break of the Clark forklift, and he watched as Mr. Cook drove the lift up a ramp; Mr. Cook then stopped and pulled the break lever, at which point the forklift began to roll back, and Mr. Cook stated "the parking brake doesn't work." The CO identified C-45 and C-46 as photographs of the forklift and ramp, respectively; he also identified the employees who used the forklift as Messrs Cook, Gauthier, Miller and Wing. The CO said he spoke to Mr. James, a former safety person at the facility, who told him the parking brake on the Clark forklift was not working when he was at the plant. (Tr. 938-41, 1419-22).

The CO's testimony, which Respondent has not rebutted, establishes the alleged violation.[64] The CO's testimony also shows the violation was serious; the CO stated that the cited condition could result in fractures. (Tr. 942). This item is therefore affirmed as a serious violation. A penalty of $1,600.00 is proposed for this item. The CO testified that this item was of medium gravity and that the unadjusted penalty was $2,000.00. (Tr. 942). Applying the 50 percent reduction to $2,000.00 results in a penalty of $1,000.00. This penalty is appropriate and is consequently assessed.

Serious Citation 1, Item 13

Item 13 alleges a violation of 29 C.F.R. 1910.212(a)(1), which provides that:[65]

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[64]Mr. Tehonica said he took the Clark forklift out of service in late February 2004 as the brakes did not work; he also said Mr. Cook operated the lift because the CO had wanted to know if the parking brake worked and that Mr. Cook had told him that he had told the CO they did not use the forklift. (Tr. 1648-49, 1733-34, 1799-1800). CO Palhof, however, specifically testified that Mr. Cook told him the forklift was in use and that employees preferred to use it as it could lift heavier objects. (Tr. 939-41). I credit CO Palhof's testimony over that of Mr. Tehonica.

[65]The Secretary's complaint amended this item to allege, in the alternative, a violation of section 5(a)(1) of the Act. (Tr. 942-43). However, since I am affirming this item as a violation of

> 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.

The CO testified that there was a model 400A Ridgid pipe threader machine in the plant that did not have a constant pressure pedal switch. He explained that the machine had an unguarded rotating chuck and that if an operator became entangled in the chuck or the pipe and could not turn off the machine he could be pulled into it and crushed; he further explained that with a constant pressure pedal switch, the machine turns off automatically when the operator takes his foot off the pedal. CO Palhof said Mr. Cook told him maintenance employees used the machine daily. He also said that Ridge Tool Company, the manufacturer, had issued C-49, a notice, captioned "Important Footswitch Safety Notice," advising that its Ridgid threading machines, including the 400A model, should have foot switches for the "operational convenience and safety of the operator;" the notice also advised that the foot switches could protect operators from serious injury or death.[66] The CO stated that he obtained C-49 from his office; he further stated that Mr. Spencer told him that he knew the machine did not have the required foot switch and that he had a hard time getting parts for the machine due to its age. (Tr. 943-45, 951, 955-60, 1423-33).

Based on the CO's testimony, the Secretary has shown the alleged violation, including the employer knowledge element, in light of Mr. Spencer's statement to the CO.[67] She has also shown the violation was serious, in view of C-49 and the CO's testimony. (Tr. 945-46). This item is affirmed as serious. The CO testified he rated this item as having high gravity and that the unadjusted penalty

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29 C.F.R. 1910.212(a)(1), the alleged violation of section 5(a)(1) is vacated. (Tr. 942-43).

[66]C-49 states that machines made after January 1, 1975, were equipped with foot switches and that machines made before that time were not but that Ridge would provide and install a foot switch on any such machine at no charge.

[67]Mr. Tehonica testified that he took the machine out of service in late 2003 and told employees not to use it; he also testified that he learned, after the citations were issued, that it was still being used and that Mr. Cook had put it back in service. (Tr. 1734-36). Mr. Tehonica's testimony is not credited, for the reasons given *supra* in this decision.

was $2,500.00. (Tr. 962-63). Due to the 50 percent reduction to which the employer is entitled, a penalty of $1,250.00 is appropriate and is accordingly assessed.

Serious Citation 1, Item 14

Item 14 alleges a violation of 29 C.F.R. 1910.212(a)(5), which states as follows:

> When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half (½) inch.

CO Palhof testified that an operating exhaust fan in the CIP department had unguarded blades; he measured the bottom of the fan to be 6 feet from the floor. He identified C-50 as his photograph of the fan, and he said that Mr. Abar and Mr. Pratt sometimes had to adjust the pump that was adjacent to the fan blades, at which time they could contact the blades. CO Palhof further testified that an exhaust fan in the WPC department had inadequately guarded blades. He identified C-51 and C-52 as his photographs of that fan, and he said there were two problems with the guard; the openings were too wide and employees could get their fingers through them, and in some areas the guard was damaged and the openings were even larger.[68] Mr. Cook told the CO he was aware the fan blades in C-50 were not guarded; in addition, while Ms. Mullaly initially advised the CO the other fan was not used, she was with the CO later when he saw it operating, and she told him employees were using it to move the air in that area due to the warm temperature. (Tr. 963-69, 1434-1438).

In view of the CO's testimony, which Respondent has not rebutted, the Secretary has proved the alleged violation.[69] She has also proved the serious classification of the violation; the CO testified that fingers contacting the operating fan blades could be amputated. (Tr. 970). This item is affirmed. The proposed penalty for this item is $2,000.00. The CO testified the gravity of the cited conditions was high and that the unadjusted penalty was $2,500.00. (Tr. 970). Due to the 50 percent reduction to be applied in this matter, a penalty of $1,250.00 is appropriate and is assessed.

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[68]The CO said that C-52 showed his measurement of the openings. (Tr. 967).

[69]Mr. Tehonica testified the fan in C-50 was 16 feet above the floor, based on his asking a Primo employee to measure it; he also testified he had told Mr. Cook and Ms. Mullaly to have the fan in C-51 removed from the plant. (Tr. 1741-43). Mr. Tehonica's testimony is not credited.

Serious Citation 1, Item 15

This item alleges a violation of 29 C.F.R. 1910.215(b)(9), which covers abrasive wheel machinery; the standard prohibits the distance between the abrasive wheel periphery and the adjustable tongue or the end of the peripheral member at the top from exceeding one-fourth inch.

CO Palhof testified he saw two abrasive grinding machines in the maintenance shop that had tongue guards that were out of adjustment; the guards on both sides of one, a Baldor, were a half inch from the wheels, while the guard on the right side of the other, a Wissota, was 7/8 of an inch from the wheel.[70] The CO identified C-53 as his photograph of the two machines and C-54 as a general drawing of an abrasive grinding machine showing the required safeguards, including the one-fourth-inch maximum distance between the tongue guards and the wheels. He said that when an abrasive grinding machine is used the wheel shrinks in size and the guard needs to be adjusted so the opening between the wheel and the guard never exceeds one-fourth inch. He also said that not maintaining that distance can cause severe lacerations if the wheel disintegrates and pieces fly out and strike the operator. The CO stated that Mr. Cook told him that maintenance employees used the cited machines and that he was aware of the one-fourth-inch requirement. (Tr. 970-72, 975-83, 1439-47).

Mr. Tehonica testified he had adjusted the guards on the cited machines to one-fourth of an inch from the wheels when he was at the facility in November 2003. He further testified that he had never seen a wheel on such a machine disintegrate and that he did not believe the grinders were used very often. (Tr. 1743-44). This testimony does not rebut that of the CO, and I find that the Secretary has met her burden of showing the alleged violation and its serious nature. Item 15 is affirmed. The proposed penalty for this item is $1,600.00. The CO testified the gravity of this item was medium and that the unadjusted penalty was $2,000.00. (Tr. 983-84). Applying a 50 percent reduction to $2,000.00 results in a penalty of $1,000.00. This penalty is appropriate and is therefore assessed.

Serious Citation 1, Item 17[71]

Item 17 alleges a violation of 29 C.F.R. 1910.219(c)(4)(i). The standard provides that:

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[70]The CO testified that he measured the guard openings. (Tr. 980-81).

[71]The Secretary withdrew Item 16 at the trial; that item alleged four instances of violation of 29 C.F.R. 1910.219(c)(2)(i). (Tr. 984).

> 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.

The CO testified that he observed two tanks in the WPC department that had agitator motors with protruding shaft ends; based on his measurement of one of the shafts, the shaft ends protruded 2.25 inches and the diameter of the shafts was 2.50 inches. The CO identified C-62 as his photograph of one of the shaft ends, and he said the shafts were about 4 feet from the floor; he also said that the hazard of the condition was that a worker could be entangled in the shaft while it was spinning. He explained there was a gauge just below the shaft, which would spin at a very fast speed, and that a worker would need to read the gauge at least weekly, at which time he would be exposed to the hazard; Mr. Cook and Mr. Mashaw were the two employees exposed to the hazard. He also explained that getting entangled in the shaft end could result in a fracture. (Tr. 984-90, 1448-53).

CO Palhof's testimony, which Respondent did not rebut, establishes the alleged violation; although the CO did not address the employer's knowledge of the condition, I conclude it is one Mr. Cook should have known of, particularly since he was one of the employees who read the gauge below the shaft.[72] The CO's testimony also establishes the serious nature of the condition, and this item is affirmed. The proposed penalty for this item is $1,600.00. The CO testified this item was of medium gravity and that the unadjusted penalty was $2,000.00. (Tr. 989-90). Applying a 50 percent reduction to $2,000.00 results in a penalty of $1,000.00. This penalty is appropriate and is assessed.

Serious Citation 1, Item 18

Item 18a alleges a violation of 29 C.F.R. 1910.219(d)(1), which requires pulleys with parts 7 feet or less from the floor or working platform to be guarded. Item 18b alleges a violation of 29 C.F.R. 1910.219(e)(3)(i), which requires vertical and inclined belts to be enclosed by guards.

CO Palhof testified he observed an exhaust fan in the CIP department that had an upper and a lower pulley with a belt; the pulleys and belt were not guarded, and the lower pulley was about 6

[72]Mr. Tehonica testified that R-9 shows the same equipment as that in C-62; he further testified that R-9 depicts an equipment part below the shaft that protrudes out further than the shaft. (Tr. 1747-48). I find that this testimony, even if true, does not rebut that of the CO.

feet from the floor.[73] He identified C-63 as his photograph of the pulleys and belt. He said the places where the belt wrapped around the pulleys, which he marked with blue stickers on C-63, created ingoing nip points. He also said employees could get their hands into the lower nip point as there was a pump just below the lower pulley, also shown in C-63, that occasionally needed adjustment, and he stated the lower pulley needed to be fully enclosed. Mr. Cook and Ms. Mullaly told the CO that Mr. Abar and Mr. Pratt were the two employees who adjusted the pump. (Tr. 991-96, 1454-59).

Based on the CO's testimony, the Secretary has shown the alleged violations, including the knowledge element, as Mr. Cook and Ms. Mullaly both knew that two employees adjusted the pump that was directly below the lower pulley. The Secretary has also shown the violations were serious; the CO testified that if an employee caught a hand in the pulley it could cause severe crushing or amputation of fingers. (Tr. 997). Item 18 is thus affirmed as serious. The total proposed penalty for this item is $2,000.00. The CO testified the gravity of this item was high and that the unadjusted penalty was $2,500.00. (Tr. 997). In view of the 50 percent reduction to which the employer is entitled, a penalty of $1,250.00 is appropriate. A penalty of $1,250.00 is accordingly assessed.

Serious Citation 1, Item 19

This item alleges a violation of 29 C.F.R. 1910.242(b), which prohibits the use of compressed air for cleaning purposes unless it is reduced to less than 30 p.s.i.

The CO testified that in the maintenance shop, he observed a compressed air gun that was used for cleaning metal chips and other debris off of tables and equipment; he measured the gun's pressure with a JEM air pressure gauge and found it was 70 p.s.i., and he identified C-64 as his photograph of the gun showing it did not have a tip reducer on it. The CO noted that Mr. Cook told him employees used the gun on a regular basis for cleaning and that he knew the gun was required to have a tip reducer; the exposed employees were Mr. Cook, Mr. Wing, and two other maintenance workers. The CO also noted that the gun had a spot on it indicating it had once had a tip reducer, and he said that if the gun were to contact an employee's skin the resulting injuries could be bruises, lacerations or even an embolism. (Tr. 997-1000, 1459-66).

[73]The record shows the exhaust fan was also cited in Item 14, *supra*. (Tr. 1454; C-50).

Based on the foregoing, which Respondent has not rebutted, the Secretary has met her burden of showing the alleged violation; she has also shown the serious classification of this item.[74] (Tr. 1000, 1459-61). Item 19 is therefore affirmed as serious. The CO testified that this item had low gravity and that the unadjusted penalty was $1,500.00. Due to the 50 percent reduction to be applied, a penalty of $750.00 is appropriate and is assessed.

Serious Citation 1, Item 20

Item 20 alleges a violation of 29 C.F.R. 1910.303(f), which states, in relevant part, that:

> Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident.

CO Palhof testified that in the chemical hall vault, approximately 18 circuits were not marked or labeled to indicate what they controlled, and he identified C-65 as his photograph of the condition. He further testified that the circuits were live; they were in the "on" position, he tested them with an electrical sensor, which indicated they had power going to them, and Mr. Cook told him the circuits were live. Mr. Cook also told him that new wiring was being run throughout the facility and that he and two other employees, Wayne Hurlburt and Richard Ludic, were doing that work. The CO said the employees running the wiring were exposed to the hazard of live electrical current because they would not be able to turn off the appropriate circuit if it was not marked or labeled. The CO also said Mr. Cook told him that while he and the other employees were labeling the circuits once they knew what they powered, there were still many that were not labeled. (Tr. 1001-06, 1475-76).

In view of the CO's testimony, the Secretary has established the alleged violation; she has also established the violation was serious, based on the CO's testimony that the employees running the wiring were exposed to the hazard of live electrical current. (Tr. 1006). This item is therefore affirmed as a serious violation. The Secretary has proposed a penalty of $1,200.00. The CO testified that he considered this item to have low gravity and that the unadjusted penalty was $1,500.00. (Tr. 1006-07). Applying a 50 percent reduction to $1,500.00 results in a penalty of $750.00. I find this penalty appropriate, and it is accordingly assessed.

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[74]Mr. Tehonica's testimony actually supports the alleged violation; he testified that he measured the pressure of the gun in November 2003, that it was too high, and that he told Mr. Cook it needed to be at 30 p.s.i. or lower. (Tr. 1748-49).

Serious Citation 1, Item 21

Item 21 alleges a violation of 29 C.F.R. 1910.303(g)(2)(i), which requires live parts of electric equipment operating at 50 volts or more to be guarded against accidental contact by approved cabinets or other forms of approved enclosures.

The CO testified he observed five instances of exposed live parts in the plant: (a) in the infeed department, an electrical panel board had a circuit breaker missing, (b) in the curd room vault, an electrical panel board (PP-3A), had two circuit breakers missing, (c) in the curd room vault, an electrical panel board (MCC-3) had a cover plate missing, (d) in the boiler room, an electrical panel board (MDP-1A) had three circuit breakers missing, and (e) in the ammonia supply department, ammonia pressure switches had two cover plates missing. The CO identified the photographs he took depicting the cited conditions; C-66 through C-69 show instances (a) through (d), respectively, and C-71 and C-72 show instance (e). He also identified the employees exposed to the cited conditions as Messrs. Abar, Cook and Pratt in (a), Messrs. Cook, Hurlburt and McAllister in (b), Messrs. Cook and McAllister in (c), and Messrs. Cook and Hurlburt in (d) and (e).[75] CO Palhof said that all of the conditions resulted in exposed parts and that he tested the parts with an electrical sensor, as shown in C-66-72, to determine they were live; he also said that the conditions could have caused serious burns or death if employees had contacted the parts. (Tr. 1007-19, 1466-74).

The Secretary has demonstrated the alleged violative conditions, in light of the CO's testimony, including the knowledge element; the CO testified that Mr. Cook told him that he knew that circuit breaker panels are required to be guarded and that he also knew that certain ones were not guarded. (Tr. 1018-19). Based on the record, this item is affirmed as a serious violation. A penalty of $2,000.00 has been proposed for this item. The CO testified that he rated this item as having high gravity and that the unadjusted penalty for this item was $2,500.00. (Tr. 1019-20). Applying the 50 percent reduction to which the employer is entitled, I conclude that a penalty of $1,250.00 is appropriate for this item. A penalty of $1,250.00 is thus assessed.

[75]The CO testified that Mr. Cook told him of the specific employees who were exposed to the cited hazards due to their work in those areas. (Tr. 1018).

Serious Citation 1, Item 22

This item alleges a violation of 29 C.F.R. 1910.304(f)(4), which requires the path to ground from circuits, equipment and enclosures to be permanent and continuous.

CO Palhof testified there was ungrounded equipment in three locations in the plant: a circuit breaker panel box in the well room, a Doran model 7000 scale in the pasteurizer room, and a metal conduit near the shrink tunnel in the bagging room. The CO said that C-73 through C-77 were his photographs of the cited conditions; C-73 shows the circuit breaker box, C-74-75 show the scale, and C-76-77 show the metal conduit. The CO also said the cited conditions were hazardous; specifically, if there was any stray electrical current and an employee touched the ungrounded equipment, the employee could be electrocuted. CO Palhof determined the cited equipment was live and ungrounded by using an electrical sensor. He further determined, by speaking to employees, that Mr. Cook and Mr. Hurlburt were the two employees exposed to the circuit breaker box, that Dominick Melillo was exposed to the scale, and that John Miller and Eric Moody were exposed to the metal conduit. Mr. Cook told the CO that he was aware of the grounding requirements and that he knew that ungrounded equipment could cause serious physical harm or death. (Tr. 1022-29, 1487-95).

Based on the CO's testimony, the Secretary has shown the alleged violative conditions; she has also shown the conditions were serious hazards. This item is affirmed as a serious violation. A penalty of $2,000.00 has been proposed for this item. The CO testified he rated the gravity of this item as high and that the unadjusted penalty was $2,500.00. (Tr. 1031). Due to the 50 percent reduction to which the employer is entitled, a penalty of $1,250.00 is appropriate and is assessed.

Serious Citation 1, Item 23

This item alleges a violation of 29 C.F.R. 1910.305(b)(1), which requires, in relevant part, that unused openings in cabinets, boxes and fittings be effectively closed.

The CO testified that in two areas, he saw openings, or "knockouts," on the sides of electrical equipment that were not closed; the first, in the cardboard mezzanine area, was an unused opening on the side of a circuit breaker panel, as shown in C-79, and the second, in the package and storage area, was an unused opening on the side of a junction box, as shown in C-80. The CO stated that the openings had live parts in them as he tested them with an electrical sensor. He also stated that the openings were hazards because employees could have contacted the energized parts and been

seriously burned or electrocuted; C-79 shows a light switch in the "on" position that is 12 inches from the cited opening, and Mr. Cook indicated employees had to be in that area at times to reset tripped breakers, and C-80 shows a fire extinguisher directly below the cited opening. Mr. Cook told the CO that he and Mr. Wing had worked in the area depicted in C-79 and that he and John Miller had worked in the area depicted in C-80. (Tr. 1031-37, 1495-99).

The CO's testimony establishes the cited conditions, including the knowledge element, in that Mr. Cook knew or should have known of the conditions; his testimony also establishes the serious nature of the conditions. Item 23 is thus affirmed as a serious violation. A penalty of $2,000.00 has been proposed for this item. The CO testified that the gravity of this item was high and that the unadjusted penalty was $2,500.00. (Tr. 1037). In view of the 50 percent reduction to be applied in this matter, a penalty of $1,250.00 is appropriate and is consequently assessed.

Serious Citation 1, Item 24

Item 24a alleges a violation of 29 C.F.R. 1910.332(b)(1), which provides as follows:

> Employees shall be trained in and familiar with the safety-related work practices required by §§ 1910.331 through 1910.335 that pertain to their respective job assignments.

Item 24b alleges a violation of 29 C.F.R. 1910.333(b)(2)(i), which states that:

> The employer shall maintain a written copy of the procedures outlined in paragraph (b)(2) and shall make it available for inspection by employees and by the Assistant Secretary of Labor and his or her authorized representatives.[76]

CO Palhof testified that through speaking with employees, including Mr. Cook, he learned that Messrs. Cook, Gray, Hurlburt, Ludic and Wing were doing electrical work at the plant without proper training; Mr. Cook said there had not been time to train the employees, and Mr. Spencer said that employees did not always wire things correctly and that he sometimes had to draw sketches or diagrams to help them wire equipment properly. The CO agreed that Mr. Spencer was an engineer and that Mr. Cook and Mr. Hurlburt had indicated they had had electrical training elsewhere; however, the other employees he spoke with indicated no such training, and the CO concluded, based

[76]Paragraph (b)(2) addresses the locking out or tagging of circuits energizing electrical parts that have been de-energized and to which employees are exposed.

on the electrical violations he observed, that employees were not properly trained.[77] The CO further testified that he also learned Primo had no written procedures for the electrical work employees were doing that would protect them from circuits that were or could become energized; Mr. Cook and Ms. Mullaly told the CO there were no such procedures. (Tr. 1037-41, 1477-78, 1499-1505).

In light of the CO's testimony, and the other electrical violations that have been affirmed in this case, I conclude the Secretary has proved the alleged violations.[78] I also conclude she has proved the violations were serious, as the employees performing electrical work were exposed to the hazard of serious burns or electrocution. (Tr.1041-42). Item 24 is therefore affirmed as serious. A total penalty of $2,000.00 has been proposed for Item 24. The CO testified that this item had high gravity and that the unadjusted penalty was $2,500.00. (Tr. 1042). Applying a 50 percent reduction to $2,500.00 results in a penalty of $1,250.00. I find this penalty appropriate. It is accordingly assessed.

Serious Citation 1, Item 25

Item 25 alleges a violation of 29 C.F.R. 1926.404(b)(1)(i), which requires the employer to use either ground fault circuit interrupters or an assured equipment grounding conductor program to protect employees on construction sites.

CO Palhof testified that a new section, the slicing room, was being constructed at the facility and that he observed a Milwaukee drill being powered through an extension cord in the construction area; the construction work could have damaged the cord, and if an employee had contacted the energized cord and no ground fault circuit interrupter ("GFCI") was in use the employee could have been electrocuted. The CO said that he tested the cord and found there was no GFCI and that C-81, his photograph of the condition, shows a scissor lift inches from the cord. He also said that the scissor lift had been in use, due to its elevated position, and that Mr. Cook told him Mr. Hurlburt had been using the drill attached to the cord; Mr. Cook and Mr. Wing had also been working in the area. Mr. Cook agreed with the CO that a GFCI should have been used. (Tr. 1042-46, 1507-15).

[77]Mr. Tehonica testified that Mr. Hurlburt was a certified electrician and that Mr. Cook had received electrical training in the Navy. (Tr. 1751-52).

[78]The testimony of Mr. Cook supports that of the CO; Mr. Cook said the employees doing electrical work were not all qualified to do so and had not been trained. (Tr. 142-43,190-92).

The Secretary has demonstrated the alleged violation, based on the CO's testimony, and she has also demonstrated that the violation was serious.[79] This item is consequently affirmed as serious. A penalty of $2,000.00 is proposed for this item. The CO testified that this item had high gravity and that the unadjusted penalty was $2,500.00. (Tr. 1046-47). Due to the 50 percent reduction to which the employer is entitled, a penalty of $1,250.00 is appropriate and is therefore assessed.

Willful Citation 2, Item 1

Willful Citation 2 alleges three violations of OSHA's LOTO standard. Item 1a alleges a violation of 29 C.F.R. 1910.147(c)(4)(i), which provides as follows:

> 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.

Item 1b alleges a violation of 29 C.F.R. 1910.147(c)(7)(i), which states that:

> 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.

Item 1c alleges a violation of 29 C.F.R. 1910.147(c)(5)(i), which provides that:

> Locks, tags, chains, wedges, key blocks, adapter pins, self-locking fasteners, or other hardware shall be provided by the employer for isolating, securing or blocking of machines or equipment from energy sources.

CO Palhof testified that there were various pieces of equipment at the plant that used multiple energy sources, that employees cleaned and worked on the equipment, which exposed them to serious injury or death, and that Primo was required to have LOTO procedures for the equipment. One such machine was a cooker/dicer/molder ("CDM"), into which employees put cheese that was diced by augers, cooked at about 155 degrees, and then put into molds; C-82-83 and C-86-88 are the CO's photographs of various parts of the CDM. The CDM had three energy sources, heat, electric and air, all of which should have been locked out when employees worked on the CDM. The electricity, which powered the CDM and heated the water in it, could have been turned off and locked out at the two disconnects behind the machine, shown in C-87, and the compressed air to the CDM could have been shut off by turning off the valve supplying the air and locking it out. The CO spoke to Mr. Abar and

[79]Mr. Tehonica's testimony about the work taking place in the slicing room supports the CO's statement that construction work was being done in that area. (Tr. 1754-56).

Mr. Gemmill, who were cleaners; they cleaned the CDM by turning it off, taking it apart manually and using a plastic spatula to reach in and pull chunks of cheese out of the augers and other parts of the machine. The CO also spoke to Mr. Gauthier and Bill Brown, production employees who, at the end of the day, took the CDM apart in preparation for the cleaners. None of these employees locked out the CDM, and the CO noted that if the machine began operating when they were taking it apart or cleaning it they could have been pulled into the augers and seriously injured or killed. (Tr. 1092-1105, 1115-18, 1516-19, 1522-23, 1555-59).

CO Palhof described two other machines that used multiple sources of energy, a separator, which spun at a very high speed to separate milk from whey, and a heat shrink tunnel, which used heat to shrink-wrap product. The separator, shown in C-84-85, used electricity, water and air, and the shrink tunnel, shown in C-89, used heat and electricity. The CO said these energy sources should have been turned off and locked out before the machines were worked on; not locking out the separator could be fatal, and not locking out the shrink tunnel could cause serious burn injuries. The CO also said he spoke to Mr. Cook, who told him he had taken the separator apart to work on it and that the separator had not been completely locked out when he did so. (Tr. 1097-98, 1105, 1522-26, 1559-61).

The CO asked Mr. Cook and Ms. Mullaly if Primo had a LOTO program and procedures, and they told him it did not.[80] The CO also asked about LOTO training, and Ms. Mullaly showed him the sign-in sheet for the LOTO training Mr. Tehonica gave on November 21, 2003. When the CO spoke to employees about the training, however, he learned it was inadequate as employees were not trained in the specifics of the machines they worked on; in addition, there were workers who were hired after the November training, and they had had no LOTO training.[81] Mr. Abar and Mr. Gemmill said they had not attended the November training, and although Mr. Brown and Mr. Gauthier were at that training they were not locking out the CDM when they took it apart. Several other employees, including Mr. Kendall and Mr. Pratt, also said they were not at the November training. Mr. Kendall,

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[80]The CO testified that although Ms. Mullaly showed him the J.J. Keller manual, which addressed how to set up a LOTO program and comply with OSHA's LOTO requirements, that manual was instructional only and was not an actual program. (Tr. 1111, 1122-23, 1535-36).

[81]Mr. Cook and Ms. Mullaly both indicated that Mr. Tehonica had not had time to return to the facility to do further training. (Tr. 1121-22).

a cleaner, was exposed to moving parts of machines when he cleaned them, and he told the CO he had never heard of lockout/tagout; Mr. Pratt entered tanks to clean them, and some of them had agitators inside which were not locked out and which, if turned on when someone was inside, could have caused serious injury. (Tr. 1104-06, 1110-23, 1270-71, 1528-30, 1548, 1561, 1564-65).

The CO further testified there were insufficient locks at the plant. He observed a LOTO cabinet at the plant, but when he looked in it he saw several pieces of isolation equipment but no locks and no breaker isolation devices; C-98 is his photograph of the cabinet. Mr. Cook told him he and his electrician, Mr. Hunter, each had one lock they had brought from home and that there were no other locks in the facility; the other workers the CO spoke to confirmed this was so.[82] The CO noted the CDM alone required at least two locks if one person was working on it and four if two people were working on it.[83] He also noted there were about seven maintenance employees who needed locks when they worked on equipment and several other employees who needed locks when they cleaned machines or took them apart; also, any employee who worked on electrical wiring would need a breaker isolating device, which goes on a circuit breaker to hold it open and requires a lock so the breaker cannot be turned back on when being worked on. The CO told Mr. Cook and Ms. Mullaly during each visit that Primo needed to buy locks and develop a LOTO program, and on April 22, 2004, Ms. Mullaly told him they had bought ten locks; however, Mr. Cook told him the locks were only for his maintenance employees, that they had not "gotten around to" ordering more locks, and that he would give one of the locks to the cleaners. There were still no breaker isolating devices. (Tr. 1123-36, 1520, 1540-46).

Mr. Wing, a maintenance employee, worked on machines at the facility. He indicated he went to the November 2003 LOTO training and that the next day Mr. Cook showed him and others how to shut down and lock out, and put identifying tags on, the machines they worked on. However, Mr. Wing was not given a lock, and, until he bought his own, he would borrow a lock from another maintenance

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[82]The CO said Mr. Cook told him he sometimes used tags if he did not have enough locks; Mr. Cook also told him, after the CO noticed some tags on equipment, that he directed employees to put tags on machines they were working on when he found out OSHA was there. (Tr. 1527-28, 1543).

[83]On cross-examination, the CO said the CDM would actually require six locks if two people were working on it because of its three energy sources. (Tr. 1541-42).

employee when he needed to lock out equipment; after the OSHA inspection, Primo bought locks for the employees.[84] (Tr. 210-15, 227-29; R-10). Mr. Gauthier, the production employee noted above, worked on the CDM and had done so for many years under the plant's prior ownership.[85] He indicated he attended the November 2003 LOTO training but that there were no locks until after the OSHA inspection, when maintenance provided some locks to the production area. Before he had locks, Mr. Gauthier would shut off the breaker to the CDM to take it apart or to remove cheese, and he would watch others in the area to make sure no one turned the CDM back on; the CDM had to be turned back on and the augers running for the chemical cleaning process, but he did not put his hands in the machine while it was running. (Tr. 245-47, 250-57; R-10).

Mr. Cook testified he had no LOTO instructions or training until after the OSHA inspection and that to his knowledge there had been no LOTO training at Primo before that time; further, there were no written procedures as to how to isolate energy sources on equipment before OSHA arrived.[86] He worked on equipment at the plant and used his own personal locks for doing so, and he said the five locks at the site when OSHA arrived were insufficient to lock out the various types of equipment.[87] He also said employees did not lock out equipment to clean it and that there were no locks for them to do so. Mr. Cook stated that the CDM, the separator and the shrink tunnel required locking out before maintenance work, that some employees did not lock out these machines before working on them, and that he himself had worked on the CDM and the separator without locking out all the power sources. He also stated that maintenance staff were provided with locks shortly after OSHA's arrival and that the cleaning employees were also given locks. Mr. Cook noted that before receiving the additional

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[84]Mr. Wing said there were some locks in the maintenance shop but the locks did not have keys. He also said he sometimes used a "zip-tie," a plastic tag that could not be taken off unless it was cut off, to lock out equipment a lock would not fit on; in addition, when machinery was turned off, he put a "danger tag" on it and kept others away from it. (Tr. 213-15, 236-38).

[85]Mr. Gauthier said he had locked out the CDM under the previous owners. (Tr. 257).

[86]Mr. Cook had been trained in LOTO by the previous employers at the site. (Tr. 158-59).

[87]Mr. Cook indicated that two of the locks were his and that the other three were locks another employee, Dominick Melillo, had brought in from a prior company; he also indicated there were no breaker isolation devices at the plant. (Tr. 130, 176, 198).

locks, he and the employees he supervised worked as safely as they could by locking equipment out or by cutting off the power source.(Tr. 124-31, 135-36, 162-65, 171-72, 176, 198).

Mr. Tehonica testified that he held LOTO training at the facility on November 21, 2003.[88] His training included going over Primo's LOTO policy and showing LOTO filmstrips, and, as he was not familiar with the machinery at Primo, he asked Mr. Cook to take the maintenance staff around and show them how to lock out the equipment.[89] Mr. Tehonica said that Primo had "a procedure for each piece of equipment to lock it out, tag it out."[90] He also said the policy was for only maintenance staff to lock out equipment, as they repaired the equipment and he did not want operators putting their hands in machinery; he indicated, however, that employees who cleaned machines at night also had to lock out equipment. Mr. Tehonica noted that Primo had a cabinet with LOTO equipment in it in November 2003, and while he first said he did not know, he then said there were probably six to eight locks at the plant then; he told Nadine Irving to order more, and on March 29, 2004, he saw employee Wallace Hunter at the plant and noticed he had red and blue locks on his belt rather than the black locks he had worn earlier. Mr. Tehonica later testified he counted eight locks in the maintenance area around the beginning of March 2004; later still, he testified there were nine locks available at the plant on March 29, 2004, and he discussed R-6, an invoice showing that eight locks were shipped to the facility on March 25, 2004. Near the end of his testimony, Mr. Tehonica denied having told anyone at Primo to order more locks. (Tr. 42, 47-56, 59, 88-89, 1617-22, 1634-45, 1685, 1770, 1773-74, 1788-91).

It is clear from the above that the testimony of the witnesses as to the LOTO training that took place and the number of locks at the facility was not consistent. I have already found that Mr. Tehonica held two training sessions at the plant, on November 21, 2003, and on March 29, 2004, and that both included LOTO training. Mr. Tehonica's testimony in this regard is thus credited, as it is supported by other evidence in the record. However, Mr. Tehonica's other testimony, as set out *supra*, is not

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[88]Mr. Tehonica also held LOTO training on March 29, 2004. *See* footnote 34; R-10.

[89]Mr. Tehonica said he also had Mr. Cook take him around and show him how to isolate and lock out the equipment. (Tr. 1759-64).

[90]Mr. Tehonica indicated he had found Suprema's LOTO procedures for the equipment at the plant and had given them to Mr. Spencer to put in the manual that he was developing; he also indicated the procedures were in R-7, Primo's safety manual, from pages 5 to 10. (Tr. 1764-65).

credited, as it is not supported by the record; it is also internally inconsistent. For example, his testimony indicating there was a written LOTO policy and a procedure for each piece of equipment in the plant is contrary to what Mr. Cook and Ms. Mullaly told the CO.[91] (Tr. 1617-18,1635-36, 1685, 1764-65). Further, his testimony about the locks at the plant is not credible on its face. He first said he had told Ms. Irving to order more locks in November 2003, but later said he had not asked anyone at the facility to order more locks. (Tr. 54, 1770, 1788-89). In addition, his testimony indicated the plant had six to eight locks in November 2003 and nine locks on March 29, 2004, despite the fact that eight locks were shipped on March 25, 2004, as shown by R-6, the invoice noted above; Mr. Tehonica also indicated he saw some of the new locks on March 29, 2004. (Tr. 53-55, 1622, 1638-39). If there were six to eight locks in November 2003 and eight more were received in late March 2004, then there should have been 14 to 16 locks at the plant on March 29, 2004.

Although largely in agreement with the CO's testimony, certain of Mr. Cook's testimony also requires scrutiny. Mr. Cook testified he recalled no training at Primo until the session on March 29, 2004, despite R-10, the sign-in sheet showing LOTO training at the plant on November 21, 2003, and employee testimony that they attended that training. (Tr. 124-25, 171-72, 211-12, 226-27, 249-50). However, Mr. Cook's name is not on R-10, and Mr. Tehonica himself indicated Mr. Cook was not at that training. (Tr. 87, 1617-18). It would thus appear that Mr. Cook did not recall that training session as he was not there. Further, Mr. Cook's statement to the CO that there were only two locks at the facility was contrary to his trial testimony that there were five locks at the time of the inspection. C-95, Mr. Cook's written statement dated March 12, 2004, states there were only two locks for lockout at the facility. Mr. Cook left Primo around November 2004, and his trial testimony was almost two years later.[92] (Tr. 120, 1624). Because his statement in C-95 was made at the time of the inspection, when

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[91]Mr. Tehonica's suggestion that R-7, which does in fact contain LOTO procedures for equipment, existed at the time of the inspection, has been rejected *supra*. *See* page 25. Further, C-94 and C-95, the written statements of Ms. Mullaly and Mr. Cook of March 12, 2004, both state that Primo did not have a documented LOTO program at that time.

[92]The record indicates that Mr. Cook was "laid off" or "let go," and Mr. Cook and Mr. Tehonica gave very different reasons as to why he left. (Tr. 120, 153-54, 1624). Mr. Tehonica testified to the effect that Mr. Cook had not been a trustworthy employee and that he was very angry for being let go. (Tr. 1624). However, I have already found Mr. Cook a credible witness,

he was still at Primo, I conclude it is more reliable than his trial testimony. Consequently, I find there were two locks for lockout at the plant at the time of the OSHA inspection.

I also find that Mr. Tehonica's testimony, that Mr. Cook took the maintenance employees around after the first LOTO training to show them how to lock out the equipment, is not credible. C-94 and C-95, the written statements of Ms. Mullaly and Mr. Cook, both state that Mr. Tehonica planned to train an employee at Primo in LOTO who would then train the rest of the employees. While I note that Mr. Wing also testified that Mr. Cook showed him and others how to lock out the equipment after the first LOTO training session, I conclude that this activity occurred after the second training session and that Mr. Wing was simply mistaken about when it took place.

One final part of Mr. Tehonica's testimony must be addressed. Mr. Tehonica testified, contrary to the CO, that the CDM did not need to be locked out during cleaning. (Tr. 1636-37). However, it is clear the CO meant by cleaning the process of taking the CDM apart and using a plastic spatula to remove chunks of cheese from the augers and other parts. (Tr. 1102, 1115, 1558). Mr. Tehonica, on the other hand, meant the chemical cleaning process, which requires the CDM to be turned on and the augers running. (Tr. 1636-37, 1786-87). Mr. Gauthier's testimony indicated the difference between the chemical cleaning process, which does not require an operator's hands to be in the machine, and the removal of cheese from inside the machine, which does; in addition, Mr. Gauthier testified he had locked out the CDC under the prior ownership. (Tr. 251-57). In view of the record, I conclude the CDC required locking out when it was being worked on or when employees took it apart and reached into it to remove cheese. I further conclude that the other machines the CO testified about, such as the separator and the shrink tunnel, also required locking out when employees worked on them.

Based on the foregoing, I find that the Secretary has shown that Primo was in violation of all three of the cited standards; that is, she has shown that procedures were not developed, documented and utilized for the control of potentially hazardous energy, that training was not provided to ensure that employees understood the energy control program and had the knowledge and skills to safely apply, use and remove the energy controls, and that locks and other hardware were not provided to

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supra, and I attribute any inconsistencies between what he told the CO and his trial testimony to be due to the passage of time rather than animosity towards Primo.

isolate equipment from energy sources.[93] The Secretary has also shown the violations were serious, as they could have resulted in death or serious injuries. (Tr. 1147, 1555-61).

Turning to the willful classification of this citation, the Secretary, to prove a violation was willful, must show it was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *See, e.g., Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987), and cases cited therein.[94]

CO Palhof testified the violations in this case were willful. Mr. Cook and Ms. Mullaly, the maintenance supervisor and the production manager, respectively, told him they were aware employees were working on and cleaning equipment without using lockout/tagout; they were also aware Primo did not have a LOTO program.[95] The CO stated that Mr. Cook told him that the other cheese companies he had worked for at the plant had required the lockout/tagout of equipment; Mr. Cook also told him the focus was on getting the plant "up and running" rather than safety and that Mr. Banayan, the owner, had put a lot of pressure on him to get the plant operating. The CO noted that during the inspection he had spoken to Mr. Spencer, Primo's general manager and previously the general manager of Lewis, another dairy owned by Mr. Banayan; Mr. Spencer also said that they were trying to get the facility "up and running." Mr. Spencer told the CO that the machines at Primo were not as complex as those at Lewis, that Primo did not need a detailed program like Lewis had, and that Primo had a "generic" LOTO program that involved flipping the switch on a machine and then putting a tag on it. In addition, Mr. Spencer told the CO that they had inherited all the problems from the previous company and that OSHA needed to give new companies a grace period to get into compliance. (Tr. 1136-38, 1143-44, 1228-29, 1249).

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[93]Although the record shows that employees sometimes used tags on equipment, the CO made it clear that tags must be used in such a way as to provide protection as stringent as a lock would provide. (Tr. 1250-51). There is no evidence that such was the case at Primo.

[94]A longer excerpt from *Williams*, that more fully explains the elements of a willful violation, is set out on pages 23-24 of this decision.

[95]As noted in footnote 80, *supra*, the CO said Ms. Mullaly showed him the J.J. Keller manual, which addressed how to set up a LOTO program and how to comply with the LOTO requirements. HC-8, the index for that manual, sets out the specific LOTO topics covered.

The foregoing shows that Primo's supervisors were aware of the cited standards and that the facility was not complying with those standards. However, there is further evidence of Mr. Spencer's knowledge of the standards. The CO identified C-96, C-97 and C-99 as copies of citation items issued to Lewis in 2003, and he noted that he had participated in that inspection as a CO. (Tr. 1145-46). C-96, C-97 and C-99 show Lewis was cited July 28, 2003, for violations of 29 C.F.R. §§ 1910.147(c)(4)(i), (c)(7)(i) and (c)(5)(i), respectively, which are the same standards at issue here. Mr. Spencer was the general manager of Lewis during the 2003 inspection, which ended on July 25, 2003. Although Mr. Spencer evidently left his position with Lewis in May 2003, he continued to be involved with the facility; in fact, he signed a certification on July 31, 2003, verifying that Lewis had abated the cited conditions. (Tr. 15, 84-85, 442-44, 458-59; C-110, pp. 4-7, 10-11, 18-19). I find that Mr. Spencer was aware of the citations issued to Lewis in July 2003 and that he was aware of the cited standards' requirements well before Primo began operating in the fall of 2003. Moreover, as the general manager of Primo, Mr. Spencer was clearly in a position that required him to ensure that the facility complied with OSHA standards, and, in particular, the LOTO standards cited in this matter.

As noted *supra*, a supervisor's knowledge of the requirements of a particular OSHA standard is imputable to the employer. Here, the record shows that Primo's three supervisors, that is, Mr. Spencer, Ms. Mullaly and Mr. Cook, all had knowledge of the cited standards; they also knew that the facility was not complying with those standards. Their knowledge is imputable to Primo. Based on their knowledge, and especially on Mr. Spencer's knowledge, I find that Primo acted "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety."[96] Item 1 of Willful Citation 2 is accordingly affirmed as willful.

The Secretary has proposed a penalty of $63,000.00 for this citation item. The CO testified that the gravity of this item was high and that the unadjusted penalty was $70,000.00. (Tr. 1147). In view of the 50 percent penalty reduction to which the employer is entitled, I conclude that a penalty of $35,000.00 is appropriate for this item. A penalty of $35,000.00 is consequently assessed.

[96]My finding that Primo acted with "plain indifference to employee safety" is based on the evidence set out on pages 25-26 in the discussion as to Willful Citation 2 of the health citation.

Other Citation 3, Item 1

Item 1a alleges a violation of 29 C.F.R. 1904.29(a), which requires the employer to use the OSHA 300, 300-A and 301 forms, or equivalent forms, for recordable injuries and illnesses. The CO testified that an employee at the plant, Mike Wells, had sustained chemical burns and was treated at the emergency room; Primo was required to complete a 301 form, called the "Injury and Illness Incident Report," or an equivalent form, but did not do so. (Tr. 1148-49).

Item 1b alleges a violation of 29 C.F.R. 1904.32(b)(2), which requires the employer to complete an annual summary from the information on the OSHA 300 form, which is the "Log of Work-Related Injuries and Illnesses." The CO testified that Primo failed to record the injury involving Mr. Wells on the OSHA 300 form. (Tr. 1150).

The CO's testimony, which was not rebutted, shows the alleged violations, including the other-than-serious classification.[97] (Tr. 1151). These items are thus affirmed. A penalty of $800.00 has been proposed for Item 1. The CO said the unadjusted penalty was $1,000.00. *Id.* Applying a 50 percent reduction to $1,000.00 results in a penalty of $500.00. This penalty is appropriate and is assessed.

Other Citation 3, Item 2

This item alleges a violation of 29 C.F.R. 1910.22(c), which requires covers and/or guardrails to be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc. The CO testified a slicing machine was being set up in the slicing room and there was a floor drain next to the machine that did not have a cover; Mr. Wing, the employee working in the area, was walking around and/or over the drain and was exposed to injury. The CO identified C-102 as his photograph of the condition, which he classified as an other-than-serious violation as it existed for a short period of time and the most likely injury would have been a sprained ankle. (Tr. 1151-53, 1568-69). The CO's testimony demonstrates the alleged violation, and this item is therefore affirmed as an other-than-serious violation. No penalty was proposed for this item, and none is assessed.

Other Citation 3, Item 3

This item alleges a violation of 29 C.F.R. 1910.178(a)(6), which requires forklift users to ensure that all nameplates and markings are in place and are maintained in a legible condition. The CO

[97]Mr. Tehonica testified that the policy at Primo was to maintain the 300 log and to put all injuries on the log; however, his testimony does not rebut that of CO Palhof. (Tr. 1771-72).

testified that a Clark forklift at the site did not have a nameplate on it; the nameplate would have had the forklift's lifting capacity on it, and the employees he spoke to had no idea what its lifting capacity was. The CO said Messrs. Cook, Miller and Wing were the employees who used the forklift, and he indicated that using the lift without knowing its capacity could have caused an accident. (Tr. 1153-55). The CO's testimony establishes the alleged violation, and this item is accordingly affirmed as an other-than-serious violation. No penalty was proposed, and none is assessed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that the citation items in this case, as set out *supra*, are AFFIRMED as issued, with the following exceptions:

1. Items 3a(b) and 3b of Serious Citation 1 of Docket No. 04-1734, alleging violations of 29 C.F.R. 1910.146(c)(2) and 29 C.F.R. 1910.146(c)(4), respectively, are VACATED.

2. Item 4c of Serious Citation 1 of Docket No. 04-1734, alleging a violation of 29 C.F.R. 1910.146(d)(3)(i), is VACATED.

3. Item 1 of Repeat Citation 3 of Docket No. 04-1734, alleging a violation of 29 C.F.R. 1910.95(c)(1), is AFFIRMED as a serious violation.

4. Item 11a of Serious Citation 1 of Docket No. 04-1735, alleging, as amended, a violation of 29 C.F.R. 1910.178(l)(1)(i), is AFFIRMED.

5. Item 16 of Serious Citation 1 of Docket No. 04-1735, alleging a violation of 29 C.F.R. 1910.219(c)(2)(i), is VACATED.

A total penalty of $82,750.00 is assessed for all of the affirmed violations in this matter.

/s/

G. MARVIN BOBER
Judge, OSHRC

Dated: September 7, 2007
Washington, D.C.