United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BIG CAT, INC. d/b/a THE REX, Respondent.	OSHRC Docket No. 13-1774

Appearances:

Bryan Kaufman, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado,
For Complainant

Peter T. Stanley, Esq., Attorney for Respondent, Billings, Montana,
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Big Cat, Inc. ("Respondent") on June 3, 2013, at Respondent's worksite in Billings, Montana. As a result, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging four serious violations with a proposed penalty of $14,000.00. Respondent timely contested the Citation.

The trial took place on April 2–3, 2014, in Billings, Montana. Two witnesses testified at trial: (1) Gregory Wynn, OSHA Compliance Safety and Health Officer ("CSHO"), and (3) Pam Listoe, manager of Respondent. After reviewing the parties' arguments and the record, the Court issues the following Decision and Order.

II. Stipulations[1]

The parties stipulated to the following:

1. The Administrative Law Judge has subject matter and personal jurisdiction over the dispute in this case and over Respondent.

2. Respondent was at all pertinent times a Montana corporation engaged in the restaurant business. Respondent's activities affected interstate commerce at all pertinent times. Respondent had employees at all pertinent times.

3. The Secretary employs Gregory Wynn as a Compliance Safety and Health Officer for the Occupational Safety and Health Administration ("OSHA"), assigned to OSHA's Billings, Montana Area Office. He served in that position and was an authorized representative of the Secretary at all pertinent times.

4. All of the Secretary's exhibits contained in the Secretary's exhibit binder are authentic.

III. Jurisdiction

Although not explicitly stated in the parties' *Joint Stipulations*, the parties have, in effect, stipulated that the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). (Ex. J-1). Further, the parties also stipulated that, at all times relevant to this matter, Respondent was an employer engaged in a business

1. The parties' stipulations can be found in the parties' *Joint Stipulations*, which was filed with the Court on the day of trial. The Court will hereinafter refer to the parties' stipulations as Ex. J-1.

affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

IV. Factual Background

On May 16, 2013, Complainant received a complaint regarding alleged hazards at Respondent's worksite. (Ex. C-4 at 10). The complaint alleged Respondent did not have a Hazardous Communication Program, did not provide an eyewash station,[2] and did not provide proper personal protective equipment (PPE) for its employees to wear while handling chemicals. (*Id.*). The next day, Complainant sent Respondent a letter indicating it had received a complaint and requesting Respondent investigate the allegations made and provide Complainant with the results of its investigation. (*Id.*). The letter also indicated that consultation and compliance services were available through OSHA, the State of Montana, and private consultation services. (*Id.*). Respondent sent a letter back to OSHA stating that it had corrected the identified problems. (Ex. C-4).

Shortly after receiving Respondent's letter, Complainant received notice from an employee disputing the hazards had been corrected. (Tr. 29–30). In response, Complainant sent CSHO Wynn to inspect Respondent's worksite on June 3, 2013. As a result of CSHO Wynn's inspection, Complainant issued a four-item Citation to Respondent. Each of the Citation items is discussed below.

V. Applicable Law

To establish a violation of an OSHA standard, Complainant must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of the standard;

2. Although Respondent did not have a permanent eyewash station in place, CSHO Wynn was satisfied with the presence of multiple sinks in close proximity to the chemicals in question. Accordingly, no citation was issued for this part of the complaint. Nevertheless, Respondent had a permanent eyewash station installed.

(3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Id.*

VI. Discussion

Prior to addressing the specific Citation items at issue in this case, the Court must address a preliminary matter raised by the parties at the outset of the trial. During the pretrial conference, which was held on March 11, 2014, Complainant moved to amend the pleadings in Citation 1, Items 1 and 2, to include the word "not" in the narrative portion of the allegations.[3] According to Respondent, the narratives, as originally stated, do not allege a violation of the standards at issue. Because the motion to amend was raised late in the proceedings, Respondent claims that the motion was untimely and that the Citation items should be dismissed. Conversely, Complainant contends that the failure was merely typographical and that Respondent will not suffer prejudice if the amendment is allowed.

3. Counsel for Complainant restated his motion on the record in the above-captioned proceeding. (Tr. 10–11). The original narrative in both Citation items 1 and 2 state that employees "were protected" from hand and eye injuries. (Ex. C-1 at 1–2). The proposed amendment would simply add the word "not" in between "were" and "protected".

According to Federal Rule of Civil Procedure 15(b)(1):

> If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

Fed. R. Civ. P. 15(b)(1). "Motions to amend should be granted freely if the non-moving party will not be prejudiced in preparing or presenting his case." *Structural Painting Corp.*, 7 BNA OSHC 1682 (No. 15,450, 1979); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that leave to amend shall be freely given in the absence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [or] futility of the amendment").

The key issue in any motion to amend is whether the opposing party will be prejudiced thereby. *Structural Painting Corp.*, 7 BNA OSHC 1682, *supra*. In this instance, although Respondent is technically correct that the narrative does not allege a violation of the Act, the Court does not find the amendment proposed by Complainant is untimely, nor does the Court find Respondent will be prejudiced by the proposed amendment.

The primary allegation in the Citation items is that Respondent failed to provide adequate hand and eye protection in violation of §§ 1910.133(a)(1) and 1910.138(a). (Ex. C-1). In fact, the first sentence in each Citation item specifically alleges Respondent violated the aforementioned standards. The opening sentence of Citation 1, Item 1 alleges that "[p]rotective eye equipment *was not required* where there was a reasonable probability of injury that could be prevented by such equipment." (*Id.*). Similarly, Citation 1, Item 2 alleges that the "employer *did not* select and require employee(s) to use appropriate hand protection . . . ." (*Id.*). Although the

narrative portions of the allegations—which lay out the manner in which the standards were violated—are inconsistent with the primary allegation that the standards at issue were violated, the Court finds these are nothing more than typographical errors.

This is not a case where Respondent could have been mistaken as to the nature of Complainant's allegations such that a legitimate claim of fair notice could be raised; rather, the allegations, read as a whole, clearly indicate that Complainant seeks to charge Respondent with a failure to comply with the cited standards. The addition of a single word, "not", renders the Citation internally consistent but does not alter the fundamental message, nor does such a change prejudice Respondent. Accordingly, Complainant's motion to amend is GRANTED.[4]

A. Citation 1, Item 1
B. Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1910.133(a)(1): Protective eye equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment:
>
> a) Kitchen area: On June 3, 2013 and at times prior, employees were [not] protected from eye injuries by being provided with and required to wear eye protection while using corrosive cleaning and sanitizing products including but not limited to "EcoLab CBC Plus" which is corrosive and the MSDS states that chemical splash goggles are required when using.

The cited standard provides:

> The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

29 C.F.R. § 1910.133(a)(1).

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

4. In light of the foregoing ruling, and for the purposes of clarity, the Court has taken the liberty of including the bracketed term "[not]" in the narrative portion of Citation 1, Items 1 and 2.

> 29 CFR 1910.138(a): The employer did not select and require employee(s) to use appropriate hand protection when employees' hands were exposed to hazards such as those from skin absorption of harmful substances; severe cuts or lacerations; severe abrasion; punctures; chemical burns; thermal burns; and harmful temperature extremes:
>
> a) Kitchen area: On June 3, 2013 and at times prior, employees were [not] protected from hand injuries by being provided with and required to wear the correct protection while using corrosive cleaning and sanitizing products including but not limited to "EcoLab CBC Plus" which is corrosive and the MSDS states that chemical impervious gloves are required when using. The employer provided food service grade latex gloves.
>
> The cited standard provides:
>
> General requirements. Employers shall select and require employees to use appropriate hand protection when employees' hands are exposed to hazards such as those from skin absorption of harmful substances; severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes.

29 C.F.R. § 1910.138(a).

During the course of his inspection, CSHO Wynn discovered Respondent was in possession of a number of different chemicals that, according to their MSDS sheets, required the use of chemical splash goggles and/or chemical-impervious gloves. (Ex. C-9A to C-9K). The specific chemicals that required the use of splash goggles were: CBC Plus toilet cleaner, Reliance Ultra Disinfectant Bleach, Oasis 115XP floor cleaner, Keystone Liquid Dishmachine Detergent, Keystone Sanitizer, Keystone Fryer & Grill Cleaner, 66 Heavy Duty Alkaline Bathroom Cleaner and Disinfectant, and Keystone Crème Cleanser. (*Id.*). With the exception of a couple of the foregoing, many of the chemicals also required the use of chemical-impervious gloves. CSHO Wynn further discovered Respondent did not supply its employees with chemical splash goggles or chemical-impervious gloves; rather, Respondent only supplied its employees with Sysco latex food preparation gloves. (Tr. 67; Ex. C-7 at 15). According to a Sysco

representative, the latex gloves were solely intended for food preparation and were designed to prevent the transmission of germs. (Tr. 68–69).

Many of the chemicals used at Respondent's workplace were not often handled in their original form as sold to Respondent; rather, they were plugged into a dilution system for later use. (Tr. 77, 79–81, 83–85). In that regard, the employees' exposure to full-strength chemicals was typically limited to those times when the supply reservoir for a particular chemical needed to be replaced. (Tr. 339). On such occasions an employee would procure a new container of chemicals from the basement storage; remove the tube (or probe) from the empty bottle of chemicals; and replace the probe into the new bottle. (Tr. 332). According to the testimony of CSHO Wynn and Ms. Listoe, this process could occur once or twice per day and would take less than a minute to perform. (Tr. 336). Notwithstanding such limited exposure, one of Respondent's employees had some of the concentrated Keystone Liquid Dishmachine Detergent splash into his eyes while he was replacing the bottle. (Tr. 110, 113). The employee used a nearby sink to flush out his eyes and was taken to a medical facility for treatment. (Tr. 113). He did not suffer any long-term damage to his eyes. (Tr. 358).

The only chemical discussed at any length that was intended to be handled as sold was the CBC Plus toilet cleaner, which, according to its MSDS, required splash goggles and gloves during use. (Ex. C-9A). According to CSHO Wynn, this product was applied directly to the toilet bowl, which was then scrubbed with a brush. (Tr. 235). Respondent did not have any documented injuries related to the use of the CBC Plus.

According to the Commission, section 1910.133(a)(1) "is so broadly worded that it is appropriate to apply the reasonable person test in assessing compliance with the standard." *Atlantic Battery Co., Inc.*, 16 BNA OSHC 2131 (No. 90-1746, 1994). Thus, personal protective

equipment, such as eye protection, is required only "if a reasonable person familiar with the circumstances surrounding an allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment." *Id.* (citing *Philadelphia, Bethlehem & New England R.R.*, 11 BNA OSHC 1345, 1346 (No. 77-2200, 1983)). As noted by Judge Yetman in *Buffets, Inc.*, 2004 WL 2218385 (No. 03-2097, 2004), "The wording of § 1910.138(a) tracks that of § 1910.133(a)(1), and must be read in the same way." The Court agrees with the analysis of Judge Yetman and will apply the same reasonable person test to both of the aforementioned citation items.

The Court finds that the standards apply and were violated. In both citation items, employees handled chemicals that, according to their respective MSDS sheets, presented a hazard to both the eyes and hands. That fact alone establishes that the standards apply. Further, the Court finds a reasonable employer faced with this set of circumstances would recognize a hazard warranting the use of chemical splash goggles and chemical-impervious gloves. Respondent was in possession of MSDS sheets indicating the proper handling of the subject chemicals, as well as appropriate PPE, which included chemical splash goggles and chemical-impervious gloves. (Ex. C-9A to C-9K). It is reasonable to expect an employer in Respondent's position would review the MSDS sheets for each of the chemicals they keep onsite in order to ensure their employees are properly protected against potential hazards.[5] Further, Respondent was specifically aware of the hazards associated with replacing chemicals in the dilution system, because one of its own employees had to be taken to the hospital as a result of concentrated dishwashing detergent being splashed into his eyes as he changed out chemicals. (Tr. 113).

5. Ms. Listoe testified that she had read at the MSDS sheets prior to the inspection but that she had not read each and every one of them. (Tr. 359).

The hazards were not limited to replacing chemicals in the dilution system. As noted by CSHO Wynn, Respondent utilized a toilet bowl cleaner, known as EcoLab's CBC Plus, the MSDS for which indicated that it causes "severe skin burns and eye damage" and recommended both chemical splash goggles and chemical-resistant, impervious gloves. (Ex. C-9A). According to Respondent, employees were not given either form of PPE when cleaning the toilets. (Tr. 334). Rather, Respondent claims that, because the cleaner is applied with a brush, the possibility of hazardous exposure to the chemical is remote, so only latex gloves were provided. (Tr. 334).

In response to the foregoing, Respondent proffers two primary arguments. First, it claims that it provided hand protection by supplying its employees with Sysco brand latex gloves. As noted above, however, CSHO Wynn testified that a Sysco representative told him these gloves were only designed for food preparation and the prevention of germ transmission.[6] No evidence was tendered to show the latex gloves were impervious to chemicals. Because the MSDS requires the use of chemical-resistant, impervious gloves, the Court finds that Respondent's attempts at compliance fall short of what a reasonable employer would do in this situation.

Secondly, Respondent cites Judge Yetman's decision in *Buffets, Inc.*, 2004 WL 2218385, for the proposition that limited, incidental contact with chemicals being connected to and removed from a dilution system does not *per se* require the use of PPE. In that case, however, Judge Yetman was persuaded by the fact that the Secretary could not show that "the employees handling the containers are actually exposed to the concentrated chemicals inside them." 2004 WL 2218385 at *4. Thus he concluded that the MSDS did not necessarily require the use of

6. Complainant introduced two separate documents regarding proper glove selection. (Ex. C-10A & C-10B). The Court accords these documents little weight—neither document was recognized by any witness as authoritative in this arena.

PPE. *Id.* In this case Complainant was able to show employees had been exposed to the concentrated chemicals in the containers. Specifically, Complainant introduced uncontroverted evidence that one of Respondent's dishwashers had to receive medical care due to concentrated dishwashing liquid having been splashed in his eyes during the replacement of one of the chemical containers. Because Complainant was able to illustrate the existence of a hazard, the Court finds that employees were exposed to a sufficient degree to warrant the need for chemical splash goggles and chemical-resistant, impervious gloves as recommended by the MSDS. Accordingly, the Court finds that the terms of the standard were violated.

The foregoing analysis also applies with equal force to the question of whether Respondent's employees were exposed to the hazardous condition. Employees would periodically change out the chemicals in the dilution system approximately once or twice per day. Although the amount of time spent changing out chemical containers was relatively minor, the accident involving the dishwasher illustrates what can happen in a short period of time. Ms. Listoe also described in her testimony the process for cleaning toilets, which involved a scrub brush as the only tool that separated the employee from direct contact with the chemicals. (Tr. 334). CSHO Wynn testified that, as with the dilution system, there was a distinct possibility the toilet bowl cleaner could be flicked or sprayed into the eyes or onto the skin during scrubbing or while pouring the chemical into the toilet. (Tr. 75, 235). Based on the foregoing, the Court finds that Respondent's employees were exposed to hazardous chemicals while changing containers and while they cleaned the bathroom.

The Court also finds that Respondent knew, or with the exercise of reasonable diligence could have known, of the violative condition. First, Respondent had in its possession multiple MSDS sheets indicating the type of PPE that was required when handling each chemical. This

alone is sufficient to establish that Respondent, with the exercise of reasonable diligence, could have known of the violative condition—reasonable diligence in this scenario only required reading the MSDS sheets and being generally knowledgeable about the types of chemicals that were in use at their workplace. Second, Respondent made an attempt, albeit incomplete, to mitigate exposure by providing the Sysco food-service latex gloves. Such an action, at the very least, illustrates recognition of a hazard warranting the use of PPE. Finally, prior to the inspection in this case, one of Respondent's employees was injured while changing chemical containers attached to the dilution station. This constitutes direct knowledge of the hazard.

The violation was properly characterized as serious. As noted above, CSHO Wynn testified, as also indicated by the MSDS sheets for many of the chemicals at issue, that exposure to the chemicals can cause "serious eye damage", "severe skin burns", and, in some cases, "may cause severe and permanent damage". (Tr. 94–135; Ex. C-9A, C-9F, C-9G, C-9H, C-9K). In light of the potential injuries that can result from exposure to the subject chemicals, the Court finds that Citation 1, Items 1 and 2 are properly classified as serious.

C. Citation 1, Item 3

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 CFR 1910.303(b)(2): Listed or labeled electrical equipment was not used or installed in accordance with instructions included in the listing or labeling:
>
> a) Kitchen area: On June 3, 2013 and at times prior, employees were exposed to fire and shock hazards from overloading a relocatable power tap used to energize a "True Manufacturing" food preparation table/refrigerator. Relocatable power taps are only listed to be used for low ampere devices such as computers and their peripherals.

The cited standard provides:

> *Installation and use*. Listed or labeled equipment shall be installed and used in accordance with any instructions included in the listing or labeling.

29 C.F.R. § 1910.303(b)(2).

As he made his way through the kitchen, CSHO Wynn observed a refrigerator/prep station plugged into a power strip (also known as a relocatable power tap, or RPT) that was zip-tied to part of a food preparation station. (Ex. C-7 at 28). According to CSHO Wynn, the RPT was neither installed nor used in accordance with the instructions included in the RPT's listing or labeling, because the power load of the refrigerator exceeded the capacity of the RPT. He concluded that Respondent violated the standard.

The terms "listed" and "labeled" are defined in the following manner:

> *Labeled*. Equipment is "labeled" if there is attached to it a label, symbol, or other identifying mark of a nationally recognized laboratory:
>
> (1) That makes periodic inspections of the production of such equipment, and
>
> (2) Whose labeling indicates compliance with nationally recognized standards or tests to determine safe use in a specified manner.
>
> *Listed*. Equipment is "listed" if it is of a kind mentioned in a list that:
>
> (1) Is published by a nationally recognized laboratory that makes periodic inspection of the production of such equipment, and
>
> (2) States that such equipment meets nationally recognized standards or has been tested and found safe for use in a specified manner.

29 C.F.R. § 1910.399. The RPT at issue is labeled and listed by Underwriters Laboratories ("UL"), which is a nationally recognized testing laboratory. (Tr. 149–53; Exs. C-7 at 29, C-11A, C-11B, C-12). CSHO Wynn testified that the RPT was rated for 250 V AC or less, and 20 amps or less; however, he said that he did not know what the power load of the refrigerator was. (Tr. 153, 243).

In support of its allegations, Complainant introduced into evidence the *2008 Guide Information for Electrical Equipment*, also known as the *White Book*. (Ex. C-11A). According to the *White Book*, an RPT rated similarly to the one at issue is "intended for indoor use as

relocatable multiple outlet extensions of a single branch circuit to supply laboratory equipment, home workshops, home movie lighting controls, musical instrumentation, and to provide outlet receptacles for computers, audio and video equipment, and other equipment." (Ex. C-11A). The *White Book* also states that RPTs are "not intended to be permanently secured to building structures, tables, work benches, or similar structures . . . ." (*Id.*).[7] Complainant also introduced an interpretive letter, dated November 18, 2002, which states:

> Power strips are designed for use with a number of low-powered loads, such as computers, peripherals, or audio/video components. Power loads are addressed by 29 CFR § 1910.304(b)(2), *Outlet devices: "Outlet devices shall have an ampere rating not less than the load to be served."* Power strips are not designed for high power loads such as space heaters, refrigerators, and microwave ovens, which can easily exceed the recommended ampere ratings on many power strips.

(Ex. C-12). With respect to this document, Complainant places significant emphasis on the last sentence, which states that RPTs are not designed for high power loads, such as a refrigerator, because such equipment can "easily exceed" the recommended ampere rating on *many*, but not all, power strips. (*Id.*).

Although the foregoing gives the impression that the RPT was not being used in accordance with the instructions included in the labeling or listing, the Court is not convinced Complainant has proved a violation of the standard. The *White Book* does not specifically say that a refrigerator cannot be plugged into an RPT. (Ex. C-11A). In fact, although it lists a number of pieces of equipment that a 250 V, 20 amp rated RPT is intended for, that list is not exhaustive, as it also includes the non-specific term "other equipment". (*Id.*). Thus, Complainant's conclusion rests almost entirely upon the interpretive letter's statement that RPTs are not designed for refrigerators. (Ex. C-12). The problem, however, is that very little evidence

7. An additional document, entitled *UL 1363 Standard for Safety: Relocatable Power Taps*, reiterates and clarifies this requirements by stating that an RPT may be provided with a means for *temporary* mounting, but that a tool shall not be required to dismount it. (Ex. C-11B at 20).

was introduced regarding the refrigerator itself. Complainant failed to introduce evidence establishing the power load of this refrigerator, which is an essential component of the equation. Complainant's conclusion rests on the presumption that the power load of this refrigerator exceeded the maximum capacity of the RPT. This presumption, in turn, is predicated on a statement in an interpretive letter issued 12 years ago, which only states that refrigerators and the like can exceed the ampere ratings on "many" power strips, not all of them. With one minor exception, which will be discussed *infra*, Complainant's argument is that the RPT was not used in accordance with its labeling or listing instructions because the refrigerator exceeded the power load of the RPT. Without knowing the power load of this particular refrigerator, the Court is not willing to make the same presumption as Complainant. Accordingly, he Court finds Complainant did not prove Respondent failed to comply with the terms of the standard.

In addition, Complainant also alleges Respondent violated the standard by permanently affixing the RPT to the food prep station with a zip tie, which CSHO Wynn testified could only be removed with a tool, in violation of Section 8.1 of the *UL 1363 Standard for Safety*. Again, the Court is not convinced. First, although it is likely that a person would simply use scissors or the like to remove the zip tie, it has not been clearly established one is required. Not all zip ties are single use, and some can be undone without resorting to the use of a cutting tool. It is unclear to the Court whether the zip tie in question required a tool for removal. Secondly, and for essentially the same reason, the Court does not find that the use of a zip tie constitutes a "permanent" fixture.

Based on the foregoing, the Court finds Complainant failed to prove its *prima facie* case. Accordingly, Citation 1, Item 3 is VACATED.

D. Citation 1, Item 4

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 CFR 1910.1200(e)(1): The employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in the 29 CFR 1910.1200(f), (g), and (h) will be met:
>
> a) Kitchen area: On June 3, 2013 and at times prior, employees were exposed to corrosive chemicals used to clean and sanitize the work area including but not limited to "EcoLab CBC Plus". The employer did not have a hazard communication program that addresses labeling and warnings, safety data sheets and employee information and training.

The cited standard provides:

> Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met . . . .

29 C.F.R. § 1910.1200(e)(1).

After confirming the presence of hazardous chemicals, CSHO Wynn discovered that Respondent did not have a written hazard communications program (Hazcom). (Tr. 48, 176). Although Respondent had certain elements of a hazcom program in place—MSDS and instructions regarding the use of protective gloves—such elements were only a small part of a proper hazcom program. According to Section 1910.1200(e)(1), a hazcom program must, at a minimum, describe how the criteria in 1910.1200(f), (g), and (h)—requirements for labeling, MSDS, and training—will be met. CSHO Wynn did not discover the manifest presence of anything approaching a comprehensive written plan addressing each of those criteria at Respondent's worksite. Respondent contends that it had provided a written safety plan. However, merely responding to Complainant's pre-inspection inquiry by "showing that the employees had been informed of the location of all MSDS and about the availability of

equipment" does not equate to having a hazcom program in compliance with Section 1910.1200(e)(1). (Resp't Br. at 4).

The Court finds that the standard applies and was violated. According to the standard's preamble, "The standard . . . limits hazard communication duties to those chemicals to which employees are exposed under normal conditions of use or in foreseeable emergencies. Furthermore, employers must train their employees regarding the risks involved in the particular exposure situation in their work areas." 48 Fed. Reg. 53,280, 53,295 (1983). As discussed above with respect to Citation 1, Items 1 and 2, there are a number of chemicals to which Respondent's employees are exposed under normal working conditions. Thus, the standard applies. Further, through CSHO Wynn's inspection, and Ms. Listoe's own admission, Respondent did not develop, implement, or maintain a hazcom program. Although it implemented certain components of a program, such as having MSDS sheets onsite and directing its employees to use gloves for certain operations, there was no comprehensive program that met the requirements of the standard. Thus, the terms of the standard were violated.

The Court also finds Respondent's employees were exposed to the hazard. Again, as discussed above with respect to the PPE requirements for the handling of hazardous chemicals, Respondent's employees were repeatedly exposed to hazardous chemicals without a clearly defined and thoroughly communicated hazcom program.

Respondent also knew, or with the exercise of reasonable diligence could have known, of the violation. The responsibility for creating, maintaining, and implementing a hazcom program resides with Respondent and its management team. *Revoli Const. Co.*, 19 BNA OSHC 1682 (No. 00-0315, 2001) (holding that actions and knowledge of supervisory personnel are generally

imputed to their employers). Although Respondent had taken some steps toward the creation of a hazcom program, the program fell quite short of what is required by the standard.

Finally, for the same reasons discussed with respect to Citation 1, Items 1 and 2, the Court finds that the violation was serious.

VII. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g., Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1995).

Complainant assessed a $5,000.00 penalty for each of the foregoing violations.[8] This assessment was based on the following findings: (1) Respondent is a medium-sized company, ranging between 26 and 100 employees; (2) the gravity of the violations was moderate, because the severity of the violations was high but the probability was lesser; (3) Respondent was not given a reduction for history because it had not been inspected in the previous 5 years; and (4)

8. Because the Court concluded that Complainant has failed to prove a *prima facie* violation of Citation 1, Item 3, this discussion is limited to the remaining Citation items.

Respondent was not given a good-faith reduction because it did not have an effective safety and health program, nor a hazcom program. (Exs. C-4, C-5, C-13).

With respect to Citation 1, Items 1 and 2, the Court agrees that the probability of an accident was low; however, the Court also finds that the potential severity was, at most, medium. Respondent's employees were exposed to hazardous chemicals infrequently while performing their work. When one of its employees suffered injury, sufficient steps were in place to avoid long-term damage and significant probability of lasting injury was not established. The chemicals to which Respondent's employees were exposed were typically in diluted form. Exposure to chemicals in full-strength or concentrated form was rare. Although Respondent provided its employees with gloves that were not chemically impervious, as required by the MSDS, it is clear that some attempts at protection were made.

In light of the very low probability of injury, and in consideration of Respondent's attempts, albeit modest, to comply with industry standards, the Court finds that a penalty of $500.00 per Citation item is appropriate.

With respect to Citation 1, Item 4, the Court reiterates its gravity findings discussed immediately above. However, because the failure to have a hazcom program impacts all aspects of employee exposure to potentially hazardous chemicals, including, but not limited to, PPE requirements, labeling, *and* training, the Court finds this Citation item to be of higher gravity. Accordingly, the Court finds that a penalty of $1,500.00 is appropriate.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED as serious, and a penalty of $500.00 is ASSESSED.
2. Citation 1, Item 2 is AFFIRMED as serious, and a penalty of $500.00 is ASSESSED.
3. Citation 1, Item 3 is VACATED.
4. Citation 1, Item 4 is AFFIRMED as serious, and a penalty of $1,500.00 is ASSESSED.

SO ORDERED

/s/ Peggy S. Ball

Date: October 3, 2014
Denver, Colorado

Peggy S. Ball
Judge, OSHRC