SECRETARY OF LABOR,	:	
Complainant,	:	OSHRC Docket No. 96-0062
v.	:	
AKZO NOBEL CHEMICALS, INC.	:	
Respondent.	:	

Appearances:

Dennis Kade, Esq.
William Staton, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Dennis J. Morikawa, Esq.
Morgan, Lewis & Bockius
Philadelphia, PA
For Respondent

Before Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This is a proceeding arising under ' 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. ' 651 *et seq.*, (Athe Act@) to review citations issued by the Secretary of Labor pursuant to ' 10(a) of the Act.

On June 7, 1995, the Occupational Safety and Health Administration commenced a Process Quality Verification (PQV) inspection at Respondent's chemical processing plant located at Burt,

New York. That site is known as an organic peroxide manufacturing facility and the primary product manufactured there is methyl ethyl ketone peroxide (MEKP) which is used in the manufacture of fiberglass products. The inspection was completed on December 4, 1995 and, as a result of that inspection, a serious citation alleging eight violations with a total of fourteen subparts and instances of violations; a Willful citation alleging two violations with a total of seven instances or violations; a Repeat citation alleging eight violations with a total of fifteen instances of violations and an Aother@ type citation alleging six violations were issued to Respondent on December 5, 1995. The total proposed penalty for all of the alleged violations was $240,000. Respondent filed a timely notice of contest and a complaint and answer were filed with the Review Commission. Respondent admitted jurisdiction of the Commission over the parties and the subject matter of this proceeding in its answer to the complaint and generally denied the allegations contained therein.

The parties engaged in vigorous pretrial discovery and the Secretary, prior and during the hearing in this matter, amended the citations and complaint as follows:

Serious Citation No. 1

Item 1 (a)	withdrawn
Item 1 (b)	withdrawn
Item 1 (c)	withdrawn
Item 2	Proposed penalty amended from $5,000 to $2,500
Item 3 (a)	withdrawn
Item 3 (b)	instance (a) - withdrawn
Item 4	withdrawn
Item 5 (a)	withdrawn
Item 5 (b)	withdrawn
Item 6 (a)	withdrawn
Item 6 (b)	withdrawn
Item 7	withdrawn
Item 8	withdrawn

Willful Citation No. 2

Item 1 (a)	proposed penalty amended from $55,000 to $45,000
Item 1 (b)	withdrawn
Item 1 (d)	withdrawn
Item 2 (a)	withdrawn
Item 2 (b)	withdrawn
Item 2 (c)	withdrawn

Repeat Citation No. 3

Item 1 (a) withdrawn
Item 1 (b) withdrawn
Item 1 (c) withdrawn
Item 2 (a) withdrawn
Item 2 (b) withdrawn
Item 2 (c) withdrawn
Item 2 (d) withdrawn
Item 3 withdrawn
Item 4 amended from a repeat Aserious@ to a repeat Aother@ and the proposed penalty reduced from $12,500 to $200.
Item 5 withdrawn
Item 6 (a) withdrawn
Item 6 (b) Instance (b) withdrawn. Instance (a) remains as originally written with a proposed penalty in the amount of $12,500.
Item 8 withdrawn

Other Citations No. 4

Item 2 withdrawn
Item 4 withdrawn

The items remaining in contest at the conclusion of the hearing are serious citation No. 1 items 2 and 3(b); willful citation No. 2, items 1(a) and 1(c); Repeat citation No.3, items 4, 6(b) instance (a) and 7; other citation No. 4 items 1, 3, 5 and 6. The total proposed penalty has been amended from $240,000 to $75,200.

DISCUSSION

Serious Citation No. 1 item 2

The citation item issued to Respondent reads as follows:

29 CFR 1910.119(e)(5): The employer did not establish a system to promptly address the team=s findings and recommendations; assure that the recommendations are resolved in a timely manner and that the resolution is documented; document what actions are to be taken; complete actions as soon as possible; develop a written schedule of when these actions are to be completed; communicate the actions to operating, maintenance and other employees whose work assignments are in the process and who may be affected by the recommendations or actions;

a) Plant. On or about 6/7/95 - present, the employer did not address PHA recommendations such as but not limited to those dealing with mechanical integrity programs, containment and spill cleanup of 70% hydrogen peroxide, and the improvement of the 70% hydrogen peroxide storage tank dike area in a timely manner and these recommendations were not completed as soon as possible.

The standards set forth at 29 CFR 1910.119 *et seq* contain the requirements Afor preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals@. (29 CFR 1910.119 purpose). The standard set forth at 29 CFR 1910.119(e) requires that an initial process hazard analysis must be performed by employers subject to the standard to identify, evaluate and control hazards involved in the covered process. The analysis, in pertinent part, must identify hazards and methods of controlling or eliminating hazards. The standard also requires that the hazard analysis must be performed by Aa team with expertise in engineering and process operations@ (29 CFR 1910.119(e)(4)). Finally, as stated above, the employers must establish a system to promptly address the findings and recommendations of the hazard analysis team. (1910.119(e)(5)).

Complainant concedes that Respondent complied with the aforesaid standards. The record supports the conclusion that a team of individuals meeting the requirements of the standard evaluated the processes at Respondents= worksite, made recommendations regarding hazards and those recommendations, in large part, were promptly addressed by Respondent as required. (TR 196; Complainant's brief pg. 27) The one exception to the Aprompt@ completion of recommendations made by the hazard analysis team, according to complainant, was Respondent=s failure to repair cracks in the floor of the concrete dike surrounding the hydrogen peroxide bulk storage tanks (TR 238). The record reveals that two hydrogen peroxide (HP) bulk storage tanks, each with a capacity of 5,000 gallons, were located within a common concrete dike. The walls of the dike are four and one half feet high. A separate dike having a common wall with the HP tanks contains a bulk storage tank with a 15,000 gallon capacity containing methyl ethyl ketone. The compliance officer observed a crack in the floor of the HP dike approximately two feet long and 3/8 of an inch wide with several inches of vegetation growing in the crack (TR 233, 238, 1118). The process analysis team recommended that the crack in the concrete should be repaired because the dike would not hold water (TR 233, 787-788). Respondent asserts that the recommendation to repair the crack in the dike floor was merely good housekeeping (Resp. brief pg. 11-12) and had no direct impact upon employee safety and health. Moreover, authorization to expend the funds to repair the crack had to be approved elsewhere in the corporate hierarchy and the crack was repaired subsequent to OSHA=S inspection (TR 1098-99).

A fundamental issue raised by this citation is whether the crack in the concrete floor of the dike created a hazard to employees? According to the compliance officer who conducted the inspections, the hazard arises from the presence of weeds growing in the cracked concrete floor. Compliance officer Stratton testified as follows:

> In the event of a leak of hydrogen peroxide, 70 percent of hydrogen peroxide, the 70 percent hydrogen [7] peroxide would ignite those weeds and they were within ten yards of a methyl ethyl ketone storage tank that - so that there might the possibility of flammable vapors around and that could serve as an ignition source (TR 239).

Stratton further testified that there was no hazard to employees by cracks in the dike floor if the cracks contained no weeds (TR 476-477). The Secretary=s expert witness, Hugh McLaughlin, possesses a Bachelor and Masters degree in Chemical engineering and a Doctorate of Philosophy and Chemical engineering. He is self employed as a consulting engineering firm and has significant work experience as a chemical engineer (TR 735-743). Dr. McLaughlin examined the investigation files provided to him by the Secretary, researched his personal library as well as materials at the University of Massachusetts (TR 770-771) and he visited the worksite including the dike which contained the cracks (TR 772-773). When asked what hazard was created by the cracks in the dike floor, Dr. McLaughlin stated: Athere is really no danger associated with that particular pathway for hydrogen peroxide@ (TR 777).

However, he further observed that hydrogen peroxide coming in contact with the weeds in the cracks could cause a small fire. He stated:

> AThere=s a leak of hydrogen peroxide which ignites the vegetation. The fire resulting from that breaches the integrity of perhaps the site glass or some valve and therefore creates a larger leak@. (TR 784)

Dr. Mc Laughlin testified, however, that the probability of this occurance is equal to the probability of begin hit by an automobile on the ninth floor of an office building (TR 785). Since the record in this case fails to support a finding that the condition of the dike floor presented a reasonable probability that a hazard to Respondent=s employees was present at the worksite, this item must be vacated.

Citation 1 Item 3(b) instance(b).

This citation item reads as follows:

> 29 CFR1910.147 (f)(2)(i): When outside servicing personnel were engaged in activities in a facility, the on-site employer and the

> outside employer did not inform each other of their respective lockout or tagout procedures:
>
> b) Building 22 area. On or about 6/16/95, during the contractor orientation, the employer did not provide information about the requirements and applicable provisions of the AKZO energy control program before the contractor began work on the DMP storage tank.

The standard cited in this instance requires employers and outside contractors to inform each other of their respective lockout/tagout procedures when those procedures are applicable. In this instance, compliance officer Stratton attended an orientation meeting conducted by Respondent=s Safety and Training Manager, Frank Sherwin, which was conducted for the benefit of employees of an outside contractor, Marcor Corporation, who were scheduled to perform cleaning operations on one of Respondent's chemical storage tanks, The orientation session is required to be given to all outside contractors to inform them of smoking rules, confined space entry rules, lockout/tagout rules and other general safety rules. (TR 1254) Although Mr. Sherwin informs contractors of the need for lockout/tagout procedures at its plant, it is the role of the engineer responsible for supervising the work performed by the contractor=s employees to explain and ensure that Respondent=s specific lockout/tagout procedures are followed (TR 1254-1855). In this instance, Ms. Cook, one of Respondent=s employees, was responsible for ensuring that Marcor employees were instructed in lockout/tag out procedures applicable to the work to be performed as well as ensure compliance with those rules (TR 1855). At the conclusion of the orientation session, compliance officer Stratton discussed the session with Mr. Sherwin and expressed no dissatisfaction or problems with the orientation. (TR 1261)

Compliance officer Stratton testified that he did not determine whether it was necessary for Macor employees to use lockout/tagout procedures during their work activities. Moreover, he did not believe at the conclusion of Mr. Sherwin=s orientation that lockout/tagout procedures had not been covered (TR 1015). However, at some point after the orientation session Mr. Stratton was asked by a fellow compliance officer whether lockout/tagout was discussed during the aforesaid orientation meeting. Compliance officer Stratton, after consulting his notes, concluded that Mr. Sherwin had not informed Macor employees of lockout/tagout procedures

(TR 1015-1016). Based upon these facts, the Secretary issued a serious citation to Respondent with a proposed penalty of $2,500.

Respondent insists that the required information was conveyed to the Macor employees. First, it is standard procedure for Mr. Sherwin to conduct a safety orientation session for all outside contractors and he uses a standard outline for all of those sessions (TR 1257). Sherwin specifically remembered the orientation session conducted for four Macor Corporation employees which was also attended by compliance officer Stratton. Mr. Sherwin testified that he specifically remembered instructing those employees that Respondent=s lockout/tagout procedures required compliance (TR 1258). At the conclusion of the session, according to Sherwin, the Macor employees reported to Respondent=s employee, Cook, for specific instructions regarding lockout/tagout procedures (TR 1254, 1255, 1259).

The evidence presented by the Secretary in support of this item consisted entirely of compliance officer Stratton=s recollection of the orientation meeting conducted by Mr. Sherwin. There is a clear contradiction in the testimony of those individuals. Based upon a review of his notes, the compliance officer states that he has no recollection of lockout/tagout procedures being discussed during the orientation meeting. On the other hand, Sherwin states that he routinely conducts a safety meeting with outside contractors to generally discuss safety requirements including the need for lockout/tag out procedures when applicable. Moreover, it is the responsibility of the engineer in charge of the work project to instruct the workers in the actual lockout/tagout procedures.

This conflict could have been resolved by the Secretary by calling a Macor employee or Ms. Cook as a witness to determine whether specific lockout/tagout instructions had been given to Macor employees. It is apparent, based upon this record, that compliance officer Stratton did not fully understand Respondent=s procedures for providing contractors with lockout/tagout instructions. Further inquiry would have provided essential information regarding this issue. Thus, questioning the Macor employees or Ms. Cook would have clarified whether the aforesaid instructions were, in fact, provided. In the absence of that information and in light of the unresolved contradictory testimony on the record, this item must be vacated.

Willful Citation No. 2 Items 1 (a) and 1 (c)

These citation items read as follows:

Citation 2 item 1(a)

> 29 CFR 1910.120(q)(2)(ii): The emergency response plan did not address, to the extent not addressed elsewhere, the personnel roles, lines of authority, training, and communication:
> a) Plant On or about 6/7/95 - 7/31/95, the emergency response plan did not address training of Emergency Response Team members including, but not limited to the level of training required, the person responsible for training, and refresher training.

Citation 2 Item 1c

> 29 CFR 1910.120(q)(2)(x): The emergency response plan did not address, to the extent not addressed elsewhere, the critique of response and follow-up:
>
> a) Plant On or about 6/7/95 - 7/31/95, the emergency response plan did not address critique of response and follow-up, including but not limited to the procedures to be used, and the areas to be addressed following an emergency response.

The standard set forth at 1910.120 applies to five categories of operations involving hazardous waste. See 1910.120(a). The parties agree that, for purposes of this litigation, only one of the categories, if any, is applicable to Respondent=s work activity. Specifically, the standard applies to Respondent=s work activities if it engages in A[e]mergency response operations for releases of, or substantial threats of releases of, hazardous substances without regard to the location of the hazard@ 29 CFR 1910.120(a)(i)(v). Moreover, in the event that complainant establishes that Respondent engages in the aforesaid activity, the standard requires that Respondent must only comply with subparagraph (q) of that section see 29 CFR 1910.120(a)(2)(iv).[1] Therefore, in the

[1] Subsection (q) of 1910.120 provides:

> (q) Emergency response to hazardous substance releases. This paragraph covers employers whose employees are engaged in emergency response no matter where it occurs except that it does not cover employees engaged in operations specified in paragraphs (a)(1)(i) through (a)(1)(iv) of this section. Those emergency response organizations who have developed and implemented programs equivalent to this paragraph for handling releases of

event that Respondent falls within the scope of the standard as set forth above, Respondent must develop an emergency response plan in accordance with 1910.120(q)(1).[2] Complainant asserts that Respondent possessed an emergency response plan as required by the standard; however, two of the required elements were missing from Respondent=s written plan; personnel roles, lines of authority, training and communication (item 1(a) above) and a provision addressing a critique of response and follow up (items 1(c) above) see 29 CFR 1910.120(q)(2)

> hazardous substances pursuant to section 303 of the Superfund Amendments and Reauthorization Act of 1986 (Emergency Planning and Community Right-to-know Act of 1986, 42 U.S.C. 11003) shall be deemed to have met the requirements of this paragraph.

[2] Section 1910.120(q)(1) provides:

> (1) Emergency response plan. An emergency response plan shall be developed and implemented to handle anticipated emergencies prior to the commencement of emergency response operations. The plan shall be in writing and available for inspection and copying by employees from the danger area when an emergency occurs, and who do not permit any of their employees to assist in handling the emergency, are exempt from the requirements of this paragraph if they provide an emergency action plan in accordance with '1910.38(a) of this part.

Complainant asserts and Respondent concurs that an emergency response team was in existence at the worksite (TR 618, 619, 1079, 1081, 1082, 1121.) Moreover, Respondent developed a written contingency plan which Adescribes the actions taken by plant personnel in the event of an accident and outlines the duties of the Emergency Coordinator who has the responsibility for coordination all emergency response measures...@ (AKZA Chemical Inc. Contingency Plan Exhibit C-4 pg 1); Complainant asserts that the response team was authorized to respond to uncontrolled spills as described at 29 CFR 1910.120(q); therefore, Respondent's Contingency Plan (Exhibit C-4) should address training of emergency response team members and the critique of response and follow up (TR 542, 548, 2036, 1037). Since Respondent=s Contingency Plan (Exh. C-4) failed to address the aforesaid topics, the cited violations should be affirmed.

According to the Secretary, Respondent=s worksite contained chemicals in sufficient quantities to create the potential for an uncontrolled release. These chemicals are methyl ethyl ketone, caustic soda, and hydrogen peroxide. These chemicals are listed in Respondent=s contingency plan as hazardous bulk tank materials (Exhibit C-4 appendix x page 39) see also complainant=s Exhibit C30 (49 CFR '172.101 Table of Hazardous Materials and Special Provisions) and complainant=s Exhibit C-7, C-8, C-9, C-10; material safety data sheets for the aforesaid chemicals. Respondent=s contingency plan also states A[i]n the event of a major emergency involving a bulk tank material, the maximum safe evacuation distance is 2,000 feet@ (Exhibit C-4 page 4) Thus, although Respondent states that a major emergency has never occurred at the plant, there is a recognition within the contingency plan that a major emergency involving the chemicals listed above could occur and employees must evacuate the area. Accordingly, based upon Respondent=s internal documents (Exhibit C-4) it is concluded that there is a reasonable probability that Respondent=s employees may be exposed to safety and health hazards in the event of an uncontrolled release of the chemicals listed above. Thus, the provisions of 29 CFR 1910.120 apply to Respondent=s work place unless it is exempt from the requirements of section 1910.120(q).

Respondent agrees that it has in place an emergency response team. The duties of that team, however, constitutes a major dispute between the parties. Complainant asserts that the

response team is authorized to take necessary action in the event of an uncontrolled chemical release. This belief is based upon (a) the existence of the response team, (b) the existence of a contingency plan and (c) interviews with employees Cook and Benton conducted by the OSHA inspector which convinced the compliance officer that those employees, who were members of the response team, would take action to control an uncontrolled release of hazardous chemicals (TR 876-878). Thus, according to complainant, Respondent should have developed an emergency response plan in accordance with '120(q)(2)

Respondent, on the other hand, vigorously argues that its employees were specifically ordered not to respond to an uncontrolled release of hazardous materials. Respondent points to the definition of Aemergency response or responding to emergencies@ set forth at 29 CFR 1910.120(a)(3) which reads:

> *Emergency response or responding to emergencies* means a response effort by employees from outside the immediate release area or by other designated responders (i.e., mutual-aid groups, local fire departments, etc.) to an occurrence which results, or is likely to result, in an uncontrolled release of a hazardous substance. Responses to incidental releases of hazardous substances where the substance can be absorbed, neutralized, or otherwise controlled at the time of release by employees in the immediate release area, or by maintenance personnel are not considered to be emergency responses within the scope of this standard. Responses to releases of hazardous substances where there is no potential safety or health hazard (i.e., fire, explosion, or chemical exposure) are not considered to be emergency responses.

Respondent asserts that there has never been an uncontrolled release of hazardous chemicals at its worksite. However, in the event of an uncontrolled release, employees are instructed to call the local fire department. Arrangements had been made between the fire department and Respondent to the effect that uncontrolled hazardous chemical spills would be handled by the fire department. Respondent also asserts that the response team was only authorized to handle medical emergencies (first aid), incipient fires (TR 618-620) and incidental chemical spills; defined as Aa leak from a 55 gallon drum to a flange leaking (TR 596). Moreover, in the event of an incident, Respondent=s employees are directed to evacuate the area to allow the response team to evaluate the situation. All members of the team had been trained at the Aawareness level@ and were

therefore, qualified to determine whether the incident constituted an uncontrolled release or and incidental release of hazardous materials (TR 337, 338, 1036). Since employees are directed to respond only to incidental spills, according to Respondent, it is exempt from the requirements of '1910.120 because employees do not perform emergency responses within the meaning of the standard (see '1910.120(a)(3).

Although there is no evidence that Respondent=s employees have actually responded to an uncontrolled release of hazardous chemicals nor is there any testimony from employees that they are authorized to respond to uncontrolled spills, the Secretary insists that the potential for responding to uncontrolled releases by Respondent=s employees exists. However, Respondent=s plant manager and safety director emphatically denied that any of Respondent=s employees were directed or authorized to respond to uncontrolled spills. To the contrary, the testimony of plant manager Morobey and safety director Sherwin left no doubt that Respondent does not want its employees to respond to uncontrolled spills of hazardous chemicals.

The source of this controversy is Respondent=s failure to clearly define the duties of its personnel in the event of an uncontrolled release or, for that matter, what actions are expected of employees in the event of an incidental spill. The source of this confusion, in large part, is Respondent=s contingency plan (Exhibit C-4). As currently written, Respondent=s contingency plan is a paragon of ambiguity when analyzed in relation to the standard set forth at ' 1910.120. (emergency response). There is no doubt that Respondent=s worksite contains hazardous chemicals and its employees would be exposed to safety or health hazards in the event of an uncontrolled release of those chemicals. Thus, Respondent=s worksite falls within the coverage of the cited standard (29 CFR 1910.120). However, Respondent=s desire to prohibit its employees from responding to uncontrolled releases is not clearly stated in the current contingency plan. Therefore, in the absence of that prohibition, the Secretary insists that Respondent=s employee be trained to respond to uncontrolled releases contrary to Respondent=s intent to evacuate those employees in the event of an uncontrolled release.

Based upon the record in this matter as well as the demeanor of the witnesses, it is more probably true then false (Ultimate Distrib. Systems Inc. 10 OSHC 1569, 1570 (1982)) that Respondent

does not intend for its employees to respond to uncontrolled spills and, in the event of an uncontrolled release, employees should evacuate the area. Thus, Respondent relies upon the exemption from the requirements of the cited standard set forth at ' 1910.120(q)(i) as follows:

> Emergency response plan. An emergency response plan shall be developed and implemented to handle anticipated emergencies prior to the commencement of emergency response operations. The plan shall be in writing and available for inspection and copying by employees, their representatives and OSHA personnel. (Employers who will evacuate their employees from the danger area when an emergency occurs, and who do not permit any of their employees to assist in handling the emergency, are exempt from the requirements of this paragraph if they provide an emergency action plan in accordance with ' 1910.38(a) of this part.)

However, it is clear that Respondent failed to comply with the requirements to provide an emergency action plan in accordance with ' 1910.38(a). An examination of Respondent=s Contingency plan (Exhibit C-4) reveals that Respondent has failed to comply in whole or in part with virtually every requirement of that standard. Thus, this record supports a finding that Respondent violated the provisions of ' 1910.38(a). Accordingly, the pleadings are amended pursuant of Rule 15(b) of the Federal Rules of Civil Procedure to conform to the evidence presented by the parties, and the citation, as amended, is affirmed. Moreover, since Respondent has designated the aforesaid chemicals as hazardous substances, it is likely that employees exposed to said chemicals would sustain serious injuries. Accordingly, the citation is affirmed as a serious violation within the meaning of section 17 of the act. However, since Respondent made an effort to comply with the requirements of the standard, (Exhibit C-4) it cannot be concluded that the violation is willful. see Kew Industries Inc 13 BNA OSHC 1161, 1169 (1987)

The record reveals a high gravity factor for the violation alleged. Respondent has no history of uncontrolled releases of hazardous chemicals and an effort was made by Respondent to establish a rudimentary evacuation plan (exhibit C-4 page 34). However, the extent and severity of injury in the event of an uncontrolled release would likely be high. Accordingly, a penalty in the amount of 7,000 is assessed for the violation as amended.

Citation 3 Item 4

29 CFR 1910.119(j)(3): The employer did not train each employee involved in maintaining the on-going mechanical integrity of process equipment in an overview of that process and its hazards and in the procedures applicable to the employee=s job tasks to assure that the employee can perform the job tasks in a safe manner:

a) Plant. On or about 6/7/95 - present, the employer did not train each employee involved in maintaining the on-going mechanical integrity of process equipment for the methyl ethyl ketone peroxide production process, in the hazards of that process uncovered by the Process Hazard Analysis including, but not limited to, the hazards associated with overheated pumps delivering hydrogen peroxide and MEKP.

Compliance officer Stratton, a member of Complainant=s compliance team, testified that he interviewed two of Respondent=s mechanics, Bruce Pless and Dick Serth, who stated that they had not received any training in the hazards related to the repair of pumps used to pump hydrogen peroxide when said pumps became overheated. (TR 245-248) Although Mr. Stratton did not determine how the pumps could become over heated (TR 488) he relied upon Respondent=s Process Hazard Analysis to determine that an over heated condition could exist. (TR 248) However, Stratton was not aware that no work was performed on overheated pumps until they were locked out and flushed with water (TR 1084-1086). Moreover, complainant=s expert witness, Dr. McLaughlin, testified that flushing the pumps with water in accordance with Respondent=s safety procedures, (Exhibit R-48) was the best procedure for protecting Respondent=s maintenance employees when working on the pumps. Furthermore, when presented with documentation establishing that employees Pless and Serth did receive the training required by the standard, (Exhibits R-53 and R-54) Mr. Stratton acknowledged that the training records were in his investigation file; however, he did not remember seeing the documents prior to his cross examination. Additionally, both employees have over twenty years experience at the plant and received specific training relating to the hazards of hydrogen peroxide (TR 1009-1011). Based upon all of the evidence in this record, it is concluded that the Respondent=s employees received the training required by the standard. Accordingly, this item is vacated.

Citation 3 Item 6(b) instance (a)

29 CFR 1910.147(c)(4)(ii): The energy control procedures did not clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be

utilized for the control of hazardous energy, including but not limited to Items A-D of this section:

> A) Building 22. On or about 5/8/95 - 5/13/95, specific energy control procedures were not developed and documented where multiple employees, including contractor employees, were performing construction and repair on the reactor which had multiple energy sources such as but not limited to: electro-mechanical, chemical and thermal.

The standard set forth at 29 CFR 1910.147(c)(i) provides:

> C) General - (1) Energy control program. The employer shall establish a program consisting of energy control procedures, employee training and periodic inspections to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, start up or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source, and rendered inoperative.

As written, the aforesaid standard requires employers to implement, *inter alia*, lockout/tagout procedures for machines that may unexpectedly be energized when employees are exposed to moving parts. The standard cited by the Secretary in this instance requires employers subject to the lockout/tagout standard to develop written procedures Afor the control of potentially hazardous energy...@ see 29 CFR 1910.147(c)(4)(i). Employers need not document their lockout/tagout procedures for individual machines if said employers meet <u>all</u> of the qualifications to be exempt from the requirements of the standard.[3]

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[3] Employers must meet <u>all</u> of the following conditions to be relieved of the requirement to have a written lockout/tagout procedure for a particular machine:

> NOTE: *Exception*: The employer need not document the required procedure for a particular machine or equipment, when all of the following elements exist: (1) The machine or equipment has no potential for stored or residual energy or reaccumulation of stored energy after shut down which could endanger employees; (2) the machine or equipment has a single energy source which can be readily identified and isolated; (3) the isolation and locking out of that energy source will completely deenergize and deactivate the machine or equipment; (4) the machine equipment is isolated from that energy source and locked out during servicing or maintenance; (5) a single lockout device

will achieve a locked-out condition; (6) the lockout device is under the exclusive control of the authorized employee performing the service or maintenance; (7) the servicing or maintenance does not create hazards for other employees; and (8) the employer, in utilizing this exception, has had no accidents involving the unexpected activation or renerization of the machine or equipment during servicing or maintenance. see 29CFR 1910.147(c)(4)(i)

There is no dispute between the parties that Respondent had in place during the inspection a written lockout/tagout procedure. Moreover, the record supports the conclusion that Respondent had in place an energy control procedure for all equipment subject to lockout/tagout requirements. This dispute did arise, however, with respect to a Areactor@ located in Respondent=s Building 22. According to the record, the aforesaid reactor had multiple sources of energy, including electrical and chemical, which required lock out procedures for the agitator and six chemical pumps. Thus, a specific written lock out procedure, according to complainant, should have been in place for the reactor rather than including said apparatus within the general lockout/tagout procedure (see footnote 3). Respondent=s failure to develop a specific lock out procedure for the reactor, according to the Secretary, violated the cited standard.

Respondent, in its brief, presents a less than spirited defense to this item. Respondent notes that, in fact, all energy sources were locked out whenever anyone performed maintenance on the reactor; therefore, no employees were exposed to safety or health hazards. (Respondent=s brief pg. 44) There is no doubt, based upon the record in this case, that the reactor, because of its failure to meet all of the requirements to the exceptions as set forth in the standard, falls within the category of equipment which requires an individual written lock out procedure. Thus, this item is affirmed.

Although complainant presented sufficient evidence via a prior citation for a similar violation at another plant that this is a repeat violation within the meaning of the act, the Secretary failed to provide any evidence that employees were exposed to a hazard which presented a substantial probability that death or serious physical harm could result. The undisputed evidence establishes that all energy sources to the reactor were, in fact, locked out whenever anyone performed maintenance on the equipment. In the absence of any evidence that employees were exposed to serious injury or death, this item must be affirmed as an Aother@ type violation. Moreover, based upon the low gravity factor and no history of injury, a penalty in the amount of $5,000 is assessed for the violation.

CITATION 3 Item 7

29 CFR 1910.147(c)(6)(i): The employer did not conduct an annual or more frequent inspection of the energy control procedure to ensure that the procedure and requirements of this standard were followed:

> a) Throughout establishment. On or about 6/7/95, the employer had not performed an inspection at least annually: Program deficiencies such as, but not limited to, lack of training for Aauthorized@ employees (operators) and lack of specific energy control procedures for equipment with multiple energy sources were identified during the inspection.

The only reference to this item in complainant=s post hearing brief appears as follows: ARespondent had not conducted a review of its procedures within the year preceding the OSHA inspection to insure that they were being implemented correctly (Complainants post hearing brief at pp 9-10) Complainant references page 286 of the transcript in support of the aforesaid statement. That page contains the direct examination of compliance officer Stratton and represents the only evidence presented by the Secretary in her case in chief in support of this item.

Mr. Stratton testified as follows:

> **Q** Turning your attention to Citation 3, Item 7, which alleges that the employer did not conduct an annual, or more frequent inspection of the energy control procedure.
> Did you recommend the issuance of that citation item?
> **A** Yes.
> [14] **Q** What was the basis for your recommendation?
> [15] **A** Mr. Sherwin admitted that there had not been an annual inspection of the lockout/tagout procedures.
> [17] **Q** And he made this admission to you?
> [18] **A** No.
> [19] **Q** Who did he make it -
> [20] **MR. MORIKAWA**: **A** The same objection, Your Honor.
> [21] **JUDGE YETMAN**: Who did you say?
> [22] **THE WITNESS**: Mr. Kirchgessner.
> [23] **JUDGE YETMAN**: You don=t have any personal knowledge of it?
> [25] **THE WITNESS**: I wasn=t present.

(TR 286)

Further, at transcript page 287, compliance officer Stratton testified as follows:

[8] **JUDGE YETMAN**: Okay. Well, Mr. Stratton, your recommendation that Citation 3, Item 7 be issued was not based upon any personal knowledge that you had?

[11] **THE WITNESS**: No.

It is clear that the testimony given by compliance officer Stratton in support of this item is inadmissable hearsay. Thus, the Secretary has failed to provide any admissible evidence in support of this item in her case in chief. The only other reference to this citation appears during the cross examination of Respondent=s Safety officer, Frank Sherwin. Mr. Sherwin testified as follows:

> **Q** Are you familiar - you said you=re familiar with the OSHA requirement for lockout/tagout; is that correct?
> **A** Yes, sir.
> **Q** Are you familiar with the provision that requires the company to conduct periodic inspections, at least annually, to ensure that the procedures and the requirements of the standard are being followed?
> **A** Yes.
> **Q** On occasion would AKZO NOBEL employees use lockout/tagout procedures, even where no contractor is present?
> **A** Yes, sir.
> **Q** And how do you evaluate the performance of the lockout/tagout procedures in those circumstances?
> **A** I would just walk around, make sure they=re all filled out. We had no formal program for our own people.
> **Q** Does that mean there was no audit for your own people, either, with respect to lockout/tagout, particularly?
> **A** We had no audit for - yes.
> **Q** Excuse me?
> **A** We had no formal audit, if that=s what you mean. (TR 677, 678)

It appears from the forgoing testimony that the Respondent had in place an Ainformal@ audit procedure to ensure compliance with the lockout/tagout requirements. The Secretary provides no guidance, however, as to whether a Aformal@ audit is required by the standard and what form said audit must take; if any. Thus, the paucity of this record fails to provide a sufficient ground for determining whether the actions of Respondent=s safety manager satisfied the requirements of the cited standard. Thus, this item must be vacated because of a failure of proof.

Citation 4 Item 1

29 CFR 1910.119(f)(3): The employer did not certify annually that the operating procedures are current and accurate:

> a) Plant. On or about 6/7/95 to present, the employer did not certify annually that the operating procedures for the methyl ethyl ketone peroxide process are current and accurate.

In support of this allegation, compliance officer Stratton testified that during the inspection he was told by Arthur Fisher, identified as the PQC Technical Manager and a member of Respondent=s Management Team (TR 195), that operating procedures had not been reviewed for accuracy within the previous year (TR 263). In addition Mr. Stratton personally reviewed the operating procedures in effect for the MEKP process (methyl ethyl ketone peroxide) and did not observe any certificates on the documents (TR 263). During cross examination, compliance officer Stratton affirmed the statement made by Mr. Fisher:

> AHe said that the process for the manufacture of, the procedures that we had, which was (SIC) for the manufacture of methyl ethyl ketone peroxide, which included part of that process, had not been certified annually@ (TR 488)

In its brief, Respondent argues that the process described by Mr. Fisher, as related by compliance officer Stratton, does not fall within the scope of the cited standard. In support of this assertion Respondent points to the Aadmission@ of compliance officer Stratton that the so called MEKP process does not fall within the scope of the cited standard (TR 486). A review of the record, however, fails to reveal the admission relied upon by Respondent. Indeed, it is clear that compliance officer Stratton relied upon the Aadmission@ of a member of management (Fisher)[4] that the aforesaid operating procedure was part of the covered process and, therefore, should have been certified annually. Accordingly, this item is affirmed as an other that serious violation as alleged. The Secretary has proposed no penalty for the violation; therefore, no penalty is assessed.

[4] Mr. Fisher=s statement is admissible pursuant to Rule 80 1(d)(2)(d) of the Federal Rules of Evidence.

Citation 4 Item 3

29 CFR 1910.119(1)(5): A change covered by 29 CFR 1910.119(1) resulted in a change in the operating procedures or practices required by 29 CFR 1910.119(f), and such procedures or practices were not updated:

> a) Plant. On or about 6/7/95 - present, a modification was made in the operating procedure to enable the operator to select which hydrogen peroxide tanks (either T0201 and T0211) the process would draw material from. The former procedure, which required the operator to turn a hand valve, was modified so the operator currently actuates a pneumatic valve. This change was not reflected in a modification and update of the written operating procedures.

In support of this item, the Secretary relies upon information conveyed to compliance officer Stratton by one of Respondent=s employees during the inspection. Specifically, Mr. Stratton testified that an operator named Mr. Rosemillia told him that Athere had been a change in the way the 70 percent hydrogen peroxide was delivered from the storage tanks@ (TR 266). According to the information provided by the employee, employees were required to turn a valve located outside the building to switch tanks delivering hydrogen peroxide to the process. The system was changed by pushing a button in the control room to switch tanks (TR 266). This information was confirmed by Mr. Fisher. (TR 267). Moreover, the change was not reflected in Respondent=s operating procedures as required by the cited standard. Accordingly, this item is affirmed as an other than serious violation as alleged. Since no penalty has been proposed, no penalty is assessed.

Citation 4 Item 5

29 CFR 1910.146(e)(6): The employer did not retain each canceled entry permit for at least one year to facilitate the review of the permit-required confined space program required by 29 CFR 1910.146(d)(14)

> a) Plant. On or about 6/7/95 - present, the employer did not retain the canceled entry permit for one year for the confined space entry into the reactor in Building 22, which took place in May, 1995.

With respect to this item, the record reveals that Respondent had developed a confined space entry permit system. (TR 671) Permits were required to be issued prior to entry into spaces designated by Respondent as confined spaces and, in fact, were issued to employees who entered designated confined spaces (TR 505-507). In this instance Respondent failed to retain a canceled entry permit for at least one year as required by the standard. (TR 672, 505) Accordingly, this item is affirmed as an other than serious violation as alleged. Since the Secretary proposed no penalty for this item, no penalty is assessed.

Citation 4 Item 6

29 CFR 1910.146(k)(1)(iii): The employer did not ensure that each member of the rescue service had practiced making permit space rescues at least once every 12 months, by means of simulated rescue operations in which they removed dummies, manikins, or actual persons from the actual permit spaces or from representative permit space:

> a) Plant. On or about 6/7/95 - present, each member of the rescue service did not practice permit space rescues at least once every 12 months by means of operations as outlined in this paragraph.

Respondent=s safety manager, Mr. Sherwin, stated that the firm uses a tripod rescue device to rescue injured employees from confined spaces (TR 673) Sherwin also acknowledged to compliance officer Stratton that the firm had not required the rescue team to practice rescue procedures at least once every twelve months as required by the standard (TR 289). For this reason, this item is affirmed as an other item serious violation as alleged. Since the Secretary proposed no penalty for this violation, no penalty is assessed.

FINDINGS OF FACT

Findings of fact relevant and necessary to a determination of all issues have been made above Fed R. CIV.P.52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

CONCLUSION OF LAW

1. Respondent Corporation is engaged in a business affecting Commerce and has employees within the meaning of section 3(5) of the act.

2. Respondent, at all times material to this proceeding, was subject to the requirements of the act and the standards promulgated thereunder. The Review Commission has jurisdiction of Respondent and the subject matter of this proceeding as it relates to said Respondent.

3. At the time and place alleged Respondent was not in violation of the standard set forth at 29 CFR 1910.119(e)(5) as alleged (Serious Citation No. 1 item No. 2)

4. At the time and place alleged, Respondent was not in violation of the standard set forth at 29 CFR 1910.147(f)(2)(i) as alleged. (Serious Citation No. 1 item No. 3(b), instance(b))

5. At the time and place alleged, Respondent was not in violation of the standard set forth at 29 CFR 1910.120(q)(2)(ii) and 120(q)(2)(x) as alleged but was in violation of the standard set forth at 29 CFR 1910.38(a) and said violation was serious within the meaning of the act. (Willful Citation No. 2 items 1(a) and 1(c))

6. At the time and place alleged, Respondent was not in violation of the standard set forth at 29 CFR 1910.119(j)(3) as alleged. (Repeat Citation No. 3 item No. 4)

7. At the time and place alleged, Respondent was in violation of the standard set forth at 29 CFR 1910.147(c)(4)(ii) and said violation was a repeat other than serious violation within the meaning of the act. (Repeat Citation No. 3 item 6(b) instance(a))

8. At the time and place alleged, Respondent was not in violation of the standard set forth at 29 CFR 1910.147(c)(6)(i) as alleged (Repeat Citation No. 3 item 7)

9. At the time and place alleged, Respondent was in violation of the standard set forth at 29 CFR 1910.119(f)(3) and said violation was other than serious as alleged (Citation No. 4 item 1)

10. At the time and place alleged, Respondent was in violation of the standard set forth at 29 CFR 1910.119(L)(5) and said violation was other than serious as alleged. (Citation No. 4 item 3)

11. At the time and place alleged, Respondent was in violation of the standard set forth at 29 CFR 1910.146(e)(6) and said violation was other than serious as alleged. (Citation No. 4 item 5)

12. At the time and place alleged, Respondent was in violation of the standard set forth at 29 CFR 1910.146(k)(1)(iii) and said violation was other than serious as alleged. (Citation 4 item 6)

ORDER

1. Serious Citation No. 1, items 1(a), 1(b), and 1(c) have been withdrawn by the Secretary.

2. Serious Citation No. 1, item 2 is vacated.

3. Serious Citation No. 1, items 3(a) and 3(b), instance (a) have been withdrawn by the Secretary.

4. Serious Citation No. 1, item 3(b) instance (b) is vacated.
5. Serious Citation No. 1, item 4 has been withdrawn by the Secretary.

6. Serious Citation No. 1, items 5(a) and 5(b) have been withdrawn by the Secretary.

7. Serious Citation No. 1, items 6(a) and 6(b) have been withdrawn by the Secretary.

8. Serious Citation No. 1, item 7 has been withdrawn by the Secretary.

9. Serious Citation No. 1, item 8 has been withdrawn by the Secretary.

10. Willful Citation No. 2, items 1(a) and 1(c) as amended to a violation of 29 CFR 1910.38(a) is affirmed as a Serious violation and a penalty in the amount of $7,000 is assessed thereto.

11. Willful Citation No. 2, items 1(b) and 1(d) have been withdrawn by the Secretary.

12. Willful Citation No. 2, items 2(a), 2(b) and 2(c) have been withdrawn by the Secretary.

13. Repeat Citation No. 3, items 1(a), 1(b) and 1(c) have been withdrawn by the Secretary.

14. Repeat Citation No. 3, items 2(a), 2(b), 2(c) and 2(d) have been withdrawn by the Secretary.

15. Repeat Citation No. 3, item 3 has been withdrawn by the Secretary.

16. Repeat Citation No. 3, item 4 is vacated.

17. Repeat Citation No. 3, item 5 has been withdrawn by the Secretary.

18. Repeat Citation No. 3, items 6(a) and 6(b), instance (b) have been withdrawn by the Secretary.

19. Repeat Citation No. 3, item 6(b), instance (a) is affirmed as a repeat citation and a penalty in the amount of $5,000 is assessed thereto.

20. Repeat Citation No. 3, item 7 is vacated.

21. Repeat Citation No. 3, item 8 has been withdrawn by the Secretary.

22. Citation No. 4 (other) item 1 is affirmed and zero penalty is assessed thereto.

23. Citation No. 4 (other) item 2 has been withdrawn by the Secretary.

24. Citation No. 4 (other) item 3 is affirmed and a zero penalty is assessed thereto.

25. Citation No. 4 (other) item 4 has been withdrawn by the Secretary.

26. Citation No. 4 (other) item 5 is affirmed and a zero penalty is assessed thereto.

27. Citation No. 4 (other) item 6 is affirmed and a zero penalty is assessed thereto.

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ROBERT A. YETMAN

Judge, OSHRC

Dated: _____

Boston, Massachusetts