No. 18-2831

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,

Petitioner,

v.

ANGELICA TEXTILE SERVICES, INC.,

and,

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary of Labor requests oral argument because he believes oral presentation of the issues would be helpful to this Court's disposition of the petition for review.

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STATEMENT OF JURISDICTION

This matter arises from an Occupational Safety and Health Administration (OSHA)[1] enforcement proceeding before the Occupational Safety and Health Review Commission (Commission). The Commission had jurisdiction pursuant to section 10(c) of the OSH Act, 29 U.S.C. § 659(c). This Court has jurisdiction over this appeal pursuant to section 11(b) of the OSH Act. 29 U.S.C. § 660(b). The Commission issued a decision and order on July 24, 2018, which disposed of all claims involved in this proceeding. The Secretary of Labor (Secretary) filed a timely petition for review with this Court on September 21, 2018.[2]

STATEMENT OF THE ISSUES

Whether the Commission erred in finding that Angelica's violations of two OSHA safety and health standards were not properly characterized as "repeated" under 29 U.S.C. § 666(a) because they were not "substantially similar" to Angelica's previous violations of the same standards, where the Commission failed

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[1] The Secretary responsibilities under the Occupational Safety and Health Act (OSH Act) have been delegated to an Assistant Secretary who directs OSHA. Secretary of Labor's Order 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

[2] Although the caption lists the Commission as a respondent in accordance with Fed. R. App. P. 15 (a)(2)(B) (petition for review of an agency order must "name the agency as a respondent"), the Commission is not an active party in the matter because, "[l]ike a district court, the Commission has no duty or interest in defending its decision on appeal and it has no stake in the outcome of the litigation." *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991) (citation omitted).

to apply the factors that drive the Commission's long-standing test for determining if two violations are substantially similar, and instead substituted a completely different set of factors that bear no relevance to whether the violations involved similar hazards and workplace conditions.

STATUTORY AND REGULATORY BACKGROUND

The OSH Act's purpose is "to assure so far as possible" safe working conditions for "every working man and woman in the Nation." 29 U.S.C. § 651(b). To advance that purpose, Congress created an "unusual regulatory structure" that divides regulatory, enforcement, and adjudicative functions between two independent administrative actors. *Martin v. OSHRC* (*CF&I Steel Corp.*), 499 U.S. 144, 151 (1991). Specifically, Congress gave the Secretary, acting through OSHA, regulatory, policymaking, and enforcement responsibilities, and conferred on the Commission, an independent body that is not part of the U.S. Department of Labor, purely adjudicative responsibilities. *Id.* at 147, 152-54.

OSHA's regulatory responsibilities include promulgating and enforcing "mandatory occupational safety and health standards," *see* 29 U.S.C. §§ 651(b)(3), 654, 655, 658, 659, and OSHA enforces its standards by conducting inspections of workplaces and issuing citations for discovered violations. *Id.* §§ 657-659. OSHA citations "describe with particularity the nature of the violation," require the employer to abate the violation, and, where appropriate, assess a civil penalty. *Id.*

§§ 658-659, 666. The purpose of these civil penalties is to provide employers with a financial incentive to prevent and abate violations of OSHA standards. 29 U.S.C. § 666.

Violations of OSHA standards are characterized as "serious," "other-than-serious," "willful," or "repeated," 29 U.S.C. § 666(a)-(c), and, at the time that OSHA issued the citations relevant to this case, the OSH Act authorized civil penalties of up to $7000 for serious and non-serious violations, and a heightened penalty of up to $70000 for willful and repeated violations.[3] *Id.* § 666(a)-(c). A mandatory minimum penalty of $5000 was required for "each willful violation," *id.* § 666(a), but there was (and is) no mandatory minimum penalty for a repeated violation.

When a cited employer contests a citation, an administrative law judge (ALJ) appointed by the Commission adjudicates the dispute, after which a party that is dissatisfied with the ALJ's decision may petition the three-member Commission for discretionary review. 29 U.S.C. §§ 659(c), 661(a), (j); 29 C.F.R. § 2200.91(a). OSHA proposes specific penalty amounts when it issues citations, but when an employer contests a citation, the Commission is responsible for setting the ultimate penalty amount after "giving due consideration to … the size of the

[3] Congress has since increased the penalty amounts under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, § 701.

business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). Final orders of the Commission are reviewable in the courts of appeals. *Id.* § 660(a)-(b).

In subpart J ("General Environmental Controls") of its general industry standards, OSHA has promulgated the permit-required confined spaces (PRCS) standard to protect employees from the dangers associated with entering confined spaces, including potential exposure to a hazardous atmosphere, an engulfing material, or an internal configuration that could trap or asphyxiate an entrant. 29 C.F.R. § 1910.146; Permit-Required Confined Spaces, 58 Fed. Reg. 4462, 4462, 24081-85 (Jan. 14, 1993) (confined spaces "pose special dangers for entrants because their configurations hamper efforts to protect entrants from serious hazards," including asphyxiation due to toxic or oxygen-deficient atmospheres, and the release of energy and material in the confined space). Where an employer allows its employees to enter a permit-required confined space, the employer must develop and implement a written PRCS program, 29 C.F.R. § 1910.146(c)(4), and such programs must include, at a minimum, procedures for "[i]solating the permit space" and "[v]erifying that conditions in the permit space are acceptable for [the duration of an authorized] entry." *Id.* § 1910.146(d)(3)(iii), (vi); *see* § 1910.146(b) (defining "isolation" as "the process by which a permit space is removed from

service and completely protected against the release of energy and material into the space …").

Subpart J also contains standards that govern "[t]he control of hazardous energy (lock-out/tag-out)." 29 C.F.R. § 1910.147. The lock-out/tag-out, or "LOTO," standard requires employers to establish a program to prevent the unexpected energization of machines or equipment, or the release of stored energy, that could injure employees who perform "servicing and/or maintenance" on a machine or equipment. *Id.* §§ 1910.147(a)(1)(i) & (3)(i), (a)(2)(i) & (ii); *see* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644, 33646-48 (Sept. 1, 1989) (discussing the hazards targeted by the LOTO standard). The LOTO standard requires that employers develop an "[e]nergy control program" to articulate the "energy control procedures" that will "ensure that before any employee performs any servicing or maintenance … the machine or equipment [will] be isolated from the energy source and rendered inoperative." *Id.* § 1910.147(c)(1).

Section 1910.147(c)(4) of the LOTO standard specifies the minimum contents of these written energy control procedures, and demands that such procedures "clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy and the means to enforce compliance." *Id.* § 1910.147(c)(4)(ii). Such procedures must

include "[s]pecific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy," "for the placement ... of lockout devices," and "for testing a machine or equipment to determine and verify the effectiveness of lockout devices … and other energy control measures." *Id.* § 1910.147(c)(4)(ii)(B)-(D).

STATEMENT OF THE CASE

OSHA launched an inspection of Angelica's commercial laundry facility in Ballston Spa, New York on June 5, 2008. SPA-1.[4] On September 30, 2008, OSHA issued citations to Angelica that, as amended, alleged fourteen violations of OSHA standards and proposed a total civil penalty of $58,525.[5] SPA1; APP1-19, 27-30. Angelica contested the citations, and on August 27, 2012, ALJ John H. Schumacher issued a decision that affirmed two citation items and vacated all remaining citation items. SPA38-77.

On September 20, 2012, the Secretary filed a petition for discretionary

[4] Citations to the Commission's and ALJ's decisions use the page numbers in the Special Appendix ("SPA[#]"), while the citations to record documents use the page numbers in the Appendix to the Brief for the Secretary of Labor ("APP[#]").

[5] OSHA initially issued two citations, one of which contained eleven citation items (three of which had sub-items) alleging serious violations, and the other of which contained a single item alleging an other-than-serious violation. *See* APP1-16. After Angelica contested the citations to the Commission, the Secretary withdrew the other-than-serious citation, and also amended four of the items in the remaining serious citation to re-characterize them as "repeated," including the two citation items at issue in this case. *See* APP27-30.

review requesting that the Commission review the ALJ's decision to vacate two citation items: Item 2b (instances (b) and (c) only), which alleged a repeated violation of 29 C.F.R. § 1910.146(d)(3) due to insufficient isolation and verification procedures in Angelica's PRCS program for its continuous batch washers (CBWs), and item 8, which alleged a repeated violation of § 1910.147(c)(4)(ii) due to insufficient LOTO procedures for several commercial laundry machines, including the CBWs. *See* APP64-93. The Commission granted review, and on July 24, 2018, issued a decision and order that affirmed citation items 2b and 8, but found that the violations were not properly characterized as repeated. SPA1-23. The Secretary timely filed petition for review with this Court on September 21, 2018, to challenge the Commission's determination that Angelica's violations could not be characterized as repeated.

Angelica has not appeared through counsel in this matter and is in default on the appeal. As explained in the letters to the clerk that the Secretary filed on October 22, 2018, and that Angelica's counsel during the Commission proceeding filed on December 3, 2018, Angelica filed for bankruptcy during the pendency of the Commission's review, and will not be defending the Commission's decision in opposition to this petition for review. The status of Angelica's business, however, does not impact this Court's authority to review the Commission's final order. *See Martin v. OSHRC (CF&I Steel Corp.)*, 941 F.2d 1051 (10th Cir. 1991) (employer

filing for bankruptcy does not prevent the Court from reviewing a Commission order); *Reich v. OSHRC* (*Jacksonville Shipyards*), 102 F.3d 1200, 1202-03 (11th Cir. 1997) (employer's cessation of business does not render the proceeding moot).

STATEMENT OF FACTS

I. OSHA Cites Angelica For Repeated Violations of the LOTO and PRCS Standards.

This case arose from a 2008 OSHA inspection of Angelica's commercial laundry facility in Ballston Spa, New York. Angelica's employees laundered soiled linens by operating a series of interconnected machines that were configured in a "wash alley," and also performed service and maintenance activities on those machines. APP51 (Stipulated Fact (Stip). ¶ 5); *see* APP236, 322; SPA1-2.

The machines at Angelica's Ballston Spa facility included two continuous batch washers (CBWs), each of which consisted of a long, cylindrical tunnel with eight washer modules. APP51-53 (Stip. ¶¶ 7, 8, 20, 21); *see* APP156, 236, 239-40, 243, 395 (Figure 3); SPA2. An auger, akin to a large corkscrew, ran through the center of each CBW and spun water and linens as the linens passed through the CBW's modules. APP52-53 (Stip. ¶¶ 20, 21); APP395 (Figure 3); *see also* APP148, 240; SPA4. An electric motor drove a chain-and-sprocket that turned the CBW's tunnels, while compressed air delivered hot water, steam, and wash chemicals into the CBW's tunnels. APP53 (Stip. ¶¶ 24-25), 143, 144, 243-44, 336 (§ 5.15); SPA4. The CBWs thus had several energy sources, including thermal

energy (from steam), electrical energy, mechanical energy, and compressed air. APP136, 144, 145, 243-44, 336 (§ 5.15); SPA4-5.

Angelica employees were required to enter the CBWs' tunnels when a CBW needed maintenance, and particularly, when linens became jammed or lodged inside a tunnel. APP53 (Stip. ¶ 28), 146-47, 242, 250-51, 261; *see also* APP323-43, 395 (Figure 3); SPA7. Employees had limited visibility once inside a CBW and could not see from one end to the other. APP148. If a CBW was not properly shut off, locked out, and purged of washing fluids before an employee entered its tunnels, the employee would be exposed to myriad hazards, including heat hazards, mechanical and electrical hazards, hazardous energy sources (steam, electrical, mechanical, and compressed air), as well as poison, suffocation, and asphyxiation hazards.[6] APP135, 136, 137, 143, 243-44; *see* APP391-96 (documents created by the CBWs' manufacturer identifying hazards posed by the machine, including "[p]anic and [i]solation [h]azards," "[c]hemical [b]um [h]azards," "[p]oison and [s]uffocation [h]azards," "[b]um and [h]eat [p]rostration [h]azards," "[b]iological

[6] In addition to the CBWs, Angelica had a laundry press, which "pressed the water out of the linen" and into a "cake," and would pose a crushing hazard if its energy sources were not properly locked-out before an employee cleared a laundry jam from it. APP52, 60 (Stip. ¶¶ 16-17, 71), 154, 162, 236, 241, 381-90; SPA2, 8-9. Angelica also had seven dryers that were heated by natural gas and used electrical energy to rotate a mechanical drum, and if not properly locked-out before clearing a laundry jam, the dryers would pose mechanical, heat, and asphyxiation hazards, and a potentially hazardous atmosphere. APP130-31, 264-65, 358, 373-80, 423, 426, 438; SPA2-3, 5.

[h]azards," an "[e]lectrocution [h]azard," and a "[c]rush [h]azard," and noting "[i]f not thoroughly purged, flushed, cooled, and drained, modules may contain toxic gases that can kill or injure you if inhaled").

On June 5, 2008, OSHA initiated an inspection of the Ballston Spa facility after the facility appeared on a list of high-hazard industries. APP405; SPA1. OSHA Compliance Safety and Health Officer (CSHO) Margaret Rawson visited the facility three times, interviewed employees and management personnel, and reviewed Angelica's PRCS and LOTO programs. SPA34. OSHA issued citations to Angelica on September 30, 2008, alleging numerous violations of OSHA standards, including the citation items at issue in this case (item 2b, instances (b) and (c), and item 8, of Citation 1), which, as amended, alleged repeat violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii). SPA2; APP1-19, 27-30.

Specifically, the CBWs' tunnels were permit-required confined spaces, and item 2b alleged that Angelica's written PRCS program, which was comprised of several documents,[7] violated 29 C.F.R. § 1910.146(d)(3) because it lacked specific instructions for verifying that electrical power had been shut off to the CBWs

[7] Angelica's PRCS program consisted of a general confined space entry program, a section of its safety and health manual, documents provided by the CBWs' manufacturer, and the complete LOTO program for the CBWs. APP56 (Stip. ¶ 47), 244-46, 323-96. Note that the parties' stipulated facts cite to McDonough Ex. 3 (APP323-43) and Rawson Ex. 5 (APP557-577) interchangeably because they are the same document ("Procedure SFY-1100: Confined Spaces Entry"). *See* APP57-58 (Stip. ¶¶ 55-56) (noting that the exhibits are interchangeable).

(instance b), or isolating the CBWs' from the energy and potentially hazardous materials (water, steam, liquid chemicals, and compressed air) that could be released through the CBWs' valves (instance c). APP578-80; SPA10-15, 50-51.

Angelica's LOTO program was also comprised of several documents,[8] and item 8 of OSHA's citation alleged that Angelica's LOTO procedures for its commercial laundry machines, including its CBWs, violated 29 C.F.R. § 1910.147(c)(4)(ii) because they lacked sufficiently specific instructions for locking out the energy sources to the machines or verifying that an attempted lock-out had been successful. APP581-82; SPA4-9, 65.

OSHA characterized both items 2b and 8 as repeated because Angelica had previously violated 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) at another commercial laundry facility in Edison, New Jersey.[9] On July 2, 2004, OSHA

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[8] Angelica's LOTO program consisted of a section of its general safety and health manual, a general LOTO program, LOTO surveys for specific machines, and the relevant portions of the manufacturer's operating manual. APP56 (Stip. ¶ 47), 244-46, 352-96.

[9] A violation is properly characterized as "repeated" under 29 U.S.C. § 666(a) "if, 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 1061, 1063 (No. 16183, 1979) (*Potlatch*). "The obvious purpose of [the repeated characterization] is to encourage employers who have previously violated a standard to take the necessary precautions to prevent the recurrence of similar violations." *Kent Nowlin Const. Co., Inc. v. OSHRC*, 648 F.2d 1278, 1282 (10th Cir. 1981); *see also Reich v. D.M. Sabia Co.*, 90 F.3d 854, 860 (3d. Cir. 1996) ("Enhanced liability for a second or subsequent violation of the same or similar regulation or standard is appropriate because once an employer has been

issued Angelica a citation alleging a serious violation of § 1910.147(c)(4)(ii) because Angelica did not have site-specific LOTO procedures for the machines in its "production area." APP669; SPA18-19. The citation stated that Angelica's LOTO procedures needed to identify the locations of the machines' energy sources, and the means for isolating those energy sources, and noted that Angelica's employees were exposed to hazards when they "perform[ed] maintenance/servicing including clearing jams on machinery such as but not limited to tunnel washers." *Id.*; *see* APP127 ("tunnel washers" refers to CBWs). That same day, OSHA also issued Angelica a citation alleging a willful violation of 29 C.F.R. § 1910.146(c)(4)[10] because Angelica's PRCS program did not "protect[ ] … employee(s) who enter tunnel washers to remove jammed/clogged laundry." APP662; SPA17. OSHA's citation noted that the "critical deficiencies" in Angelica's PRCS program included a lack of procedures for isolating the CBWs' tunnels from thermal and mechanical energy sources. *Id*.

OSHA and Angelica ultimately resolved the Edison citations in a settlement agreement, which became a final order of the Commission on August 15, 2005.

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found to have violated the Act, it is reasonable to expect that extra precautions will be taken to prevent a 'repeated" violation.").

[10] Paragraph (c)(4) of the PRCS standard requires employers to "develop and implement a written permit space program that complies with [the PRCS standard]," including the requirements of § 1910.146(d). 29 C.F.R. § 1910.146(c)(4).

APP94-116. The settlement left the serious violation of 29 C.F.R. § 1910.147(c)(4)(ii) unchanged, and broke down the willful violation of 29 C.F.R. § 1910.146(c)(4) into six serious violations of the PRCS standard, including a serious violation of § 1910.146(d)(3). *Id.*

II. The ALJ Vacates the Alleged Violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii), but the Commission Affirms the Violations, and Rejects the Secretary's Characterization of the Violations as Repeated.

Angelica contested OSHA's citations, and pursuant to 29 C.F.R. § 2200.61, the Secretary and Angelica agreed to forgo an administrative hearing and submitted to the ALJ a fully stipulated record upon which to decide the case, which included deposition transcripts, exhibits, and an extensive list of agreed-upon facts. APP62 (Stip. ¶ 92); SPA1 n.2, 39. On August 27, 2012, the ALJ issued a decision that affirmed two citation items, but vacated all remaining citation items, including the citation items now before the court: the alleged repeated violations of 29 C.F.R. §§ 1910.146(d)(3) (item 2b) and 1910.147(c)(4)(ii) (item 8).

The Secretary petitioned the Commission to review the ALJ's decision to vacate item 2b (instances b and c) and item 8. APP64-92. The Commission granted review, and in a two-to-one decision issued on July 24, 2018, reversed the ALJ's decision and affirmed the citation items. SPA1-15. As to item 2(b), the Commission found that Angelica's PRCS program violated 29 C.F.R. § 1910.146(d)(3)(iii) because it lacked procedures for isolating the CBWs' valves

that fed hazardous materials (water, steam, liquid chemicals, and compressed air) into the tunnels, SPA10-13, and § 1910.146(d)(3)(vi) because it lacked instructions for verifying that an attempted lock-out of a CBW had been effective. SPA13-15.

As to item 8, the Commission found that Angelica's LOTO procedures violated 29 C.F.R. § 1910.147(c)(4)(ii)(B)-(C) because they did not sufficiently instruct employees on how to lock-out all of the energy sources to the CBWs and dryers. SPA5-6. As to the CBWs, Angelica's LOTO procedures "fail[ed] to specify the number and locations of the valves that employees are required to lock out" to prevent the unexpected release of steam, hot water, chemicals and compressed air into the tunnels. SPA5. Angelica's LOTO procedures also violated § 1910.147(c)(4)(ii)(D) because they lacked sufficient procedures for verifying that a lockout of the energy sources for the CBWs, dryers, and press had been successful. SPA7-9. As to the CBWs, Angelica had "no documented instructions … specifying how such an attempt should be made to verify electrical lockout of the CBW." SPA7.

A two-person majority of the Commission, however, rejected the Secretary's characterization of the violations as repeated. SPA1-23. The third Commissioner, Commissioner Cynthia L. Atwood, wrote a dissenting opinion in which she argued that that OSHA had properly characterized the violations as repeated. SPA24-37.

A. The Majority's Determination that Angelica's Violations Were Not Properly Characterized as Repeated.

The majority explained that a violation is properly characterized as repeated, if, "at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation," SPA15 (quoting *Potlatch*, 7 BNA OSHC at 1063) (additional citation omitted), and recognized that because Angelica violated the same standards at Edison and Ballston Spa, the Secretary had established a *prima facie* case that Angelica's violations were "substantially similar."[11] SPA15-16. The majority concluded, however, that Angelica rebutted the Secretary's *prima facie* case by proving that its violations at Edison and Ballston Spa "took place under disparate conditions" and concerned "materially different circumstances." SPA22.

Specifically, the majority opined that while Angelica's violations at Edison involved "a nearly complete failure to comply" with OSHA's LOTO and PRCS standards, its violations of those standards at Ballston Spa concerned only "minimal" and "discrete" deficiencies of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii). SPA17-19. When comparing the breadth of Angelica's Edison and Ballston Spa violations, the majority credited Angelica's efforts after the Edison inspection to comply with OSHA's PRCS and LOTO standards, such as its

[11] The majority also found that Angelica's violations at Edison became final orders when the Commission approved the 2005 settlement agreement. SPA15.

development of a PRCS program to address employee entry into the CBWs. SPA18. The majority also inferred that, because Angelica abated the LOTO violations for which it was cited at Edison, there was "no basis" to find that Angelica knew that its LOTO procedures at Ballston Spa violated § 1910.147(c)(4)(ii). SPA19 n.21. After noting that both of the cited standards are "performance-oriented," in that they provide employers with "flexibility in meeting their requirements," SPA19-20, the majority concluded that Angelica's Ballston Spa violations could not be characterized as repeated because, after the Edison inspection, Angelica had not "fail[ed] to learn from experience." SPA20 (quoting *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998)). The majority therefore re-characterized the violations as "serious" and assessed a single penalty of $7000 for both violations. SPA22-23.

B. Commissioner Atwood's Dissenting Opinion Arguing that Angelica's Violations Were Properly Characterized as Repeated.

Commissioner Atwood vigorously dissented from the majority's determination that Angelica's violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) were not properly characterized as repeated. SPA24-37. Commissioner Atwood explained that, while the courts initially disagreed about when a violation should be characterized as repeated under 29 U.S.C. § 666(a), the *Potlatch* decision resolved the disagreement and "has since been cited with approval by several circuit courts and consistently affirmed and applied by the

Commission." SPA25. She also noted that the *Potlatch* test is "in complete accord with the Secretary's interpretation of section 17(a) of the Act." SPA25-26. Although the majority claimed to apply *Potlatch* to the facts of the case, Commissioner Atwood charged the majority with departing from *Potlatch* and effectively "rewriting the repeat characterization test." SPA24.

Commissioner Atwood pointed out that the majority declined to analyze the factor that the Commission has consistently held to be the "principal factor" in the substantial similarity inquiry: whether the violations resulted in substantially similar hazards. SPA34, 34 n.8. Additionally, she argued that the majority's reliance on the relative "breadth" of Angelica's Edison and Ballston Spa violations was a flawed approach that would lead to absurd results, as it would effectively reward employers that have committed extensive violations of OSHA standards in the past. SPA31 n.5. And, by considering whether Angelica knew that its procedures were non-compliant with OSHA's standards, and whether Angelica had made good faith efforts to comply with the standards, the majority relied on the "types of facts" that "the Commission and the circuit courts have long held are only relevant to a willful characterization." SPA24; *see* SPA28-32. Taken together, Commissioner Atwood claimed that the majority had "silently rejected" *Potlatch* and rewritten the repeated characterization test without affording

appropriate deference to the Secretary's interpretation of the term "repeatedly" in 29 U.S.C. § 666(a). SPA24, 32-34.

Applying *Potlatch* to the facts at hand, Commissioner Atwood found that Angelica's violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) at Edison and Ballston Spa were substantially similar. SPA34-37. Angelica's violations of § 1910.146(d)(3) at Edison and Ballston Spa involved "the same type of equipment … (the CBWs) and both violations addressed essentially the same hazards – *i.e.*, those hazards that could exist within the confined spaces of the CBWs." SPA35. Similarly, Angelica's violations of § 1910.147(c)(4)(ii) at both facilities concerned "the unexpected energization of a CBW (or other equipment) while attempting to unjam it." SPA36. Accordingly, Commissioner Atwood found that Angelica's Ballston Spa violations were properly characterized as repeated. SPA36-37.

SUMMARY OF THE ARGUMENT

The Commission's decision must be reversed because the Commission departed without explanation from its precedent to find that Angelica's violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) were not repeated because they were not substantially similar to the company's prior violations of the same standards. The Commission's long-standing test for applying a repeated characterization focuses on whether an employer's prior and instant violations

involved similar workplace conditions and hazards, but here, the Commission majority did not assess the similarity of the workplace conditions and hazards involved in Angelica's prior and instant violations at all. Instead, the majority focused on factors that are irrelevant to the Commission's repeated characterization test. The Commission did not acknowledge this clear departure from precedent or provide a reasoned explanation for its reliance on factors that are irrelevant to the test, and the decision is thus arbitrary and capricious and an abuse of discretion. Additionally, the *Potlatch* test embodies the Secretary's reasonable interpretation of the term "repeatedly" in section 17 of the OSH Act, and this interpretation is entitled to deference by the Commission and the courts.

Even assuming *arguendo* that the majority's reliance on factors that are not germane to the workplace conditions and hazards involved in Angelica's prior and instant violations was consistent with the Commission's test, the majority's finding was error because, if applied faithfully to the record evidence, the Commission's test compels a finding that Angelica's violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) were substantially similar to its prior violations of those standards, and are thus properly characterized as repeated. Angelica violated these standards at both facilities because its PRCS and LOTO procedures did not contain the specific information necessary to ensure that a CBW was effectively locked-out and isolated before an employee entered its tunnels to unclog jammed laundry.

Because both violations concerned employee exposure to the same hazards while performing the same maintenance activity on the same type of machines, they were unquestionably substantially similar. The Court should therefore reverse the Commission's erroneous characterization finding and remand the case with a direction to affirm the violations as repeated and reassess the penalty under that proper characterization.

STANDARD OF REVIEW

The Court must reverse the Commission's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Sec'y of Labor v. Cranesville Aggregate Cos.*, 878 F.3d 25, 32 (2d Cir. 2017). Factual findings are reviewed for "support by substantial evidence on the record considered as a whole," 29 U.S.C. § 660(a); *see Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 488 (1951) (internal quotation omitted) ("substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," taking into account "whatever in the record fairly detracts from its weight"), while the Commission's application of the law to the facts must be overturned if it is arbitrary, capricious, an abuse of discretion, or contrary to law. *Otis Elevator Co.*, 762 F.3d 116, 120-21 (D.C. Cir. 2014) (citation omitted). Legal conclusions are reviewed "*de novo*, deferring as appropriate to the Secretary's reasonable interpretation of the [OSH Act]." *Triumph Constr. Corp. v.*

Sec'y of Labor, 885 F.3d 95, 98 (2d Cir. 2018) (per curium) (citation omitted).

A Commission order is arbitrary and capricious when it fails to consider the relevant factors and rationally explain the choice it made. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82, 89-90 (2d Cir. 2000). A Commission order is also arbitrary and capricious and an abuse of discretion when it departs from past precedent without announcing a principled reason for its departure. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985) ("It is settled that where an agency departs from established precedent without announcing a principled reason for such a reversal, its action is arbitrary … and an abuse of discretion … and should be reversed."); *New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 110 (2d Cir. 1996) (*NYSEG*) (Commission finding was arbitrary and capricious because it "depart[ed] without explanation from its prior decisions"). A Commission order is not in accordance with law when the Commission fails to afford appropriate deference to the Secretary's interpretation of the OSH Act. *Cranesville*, 878 F.3d at 36.

ARGUMENT

I. The Commission's Re-Characterization of Angelica's Violations Was Arbitrary and Capricious and an Abuse of Discretion Because the Commission Departed from its Precedent Without Providing a Reasoned Explanation.

It is a basic tenet of administrative law that administrative agencies must follow their precedent unless they provide a reasoned explanation for deviating from it. *See NYSEG*, 88 F.3d at 107-08; *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). When finding that Angelica's violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) were not substantially similar to the company's prior violations of those same standards at another facility, the majority departed from the *Potlatch* test by hinging its analysis on factors that are not relevant to whether the violations involved similar workplace conditions and hazards. Such irrelevant factors include the relative breadth of Angelica's PRCS and LOTO violations at Edison and Ballston Spa, Angelica's unsuccessful efforts to comply with OSHA's PRCS and LOTO standards after the Edison inspection, and Angelica's mental state regarding its compliance with OSHA's PRCS and LOTO standards at the time of the Ballston Spa violations. The majority failed to acknowledge its departure from its precedent, let alone provide a reasoned a justification for it, and the Commission's decision is thus arbitrary and capricious and an abuse of discretion.

A. The Commission Departed from *Potlatch* by Failing to Assess Whether Angelica's Violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) at Edison and Ballston Spa Concerned Similar Workplace Conditions and Hazards, Focusing Instead on Irrelevant Factors.

1. The *Potlatch* Test Correctly Turns on the Similarity of the Workplace Conditions and Hazards Involved in the Employer's Prior and Instant Violations.

Under the Commission's *Potlatch* decision, a violation is repeated "if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." 7 BNA OSHC at 1063. Applying the *Potlatch* test, the Secretary makes a *prima facie* case that the employer's prior and instant violations were substantially similar where (as here) the violations concerned the same standard; the burden of proof then shifts to the employer to show that the violations concerned "disparate conditions and hazards."[12] *Id.* at 1063. Since issuing the *Potlatch* decision, the Commission has often clarified that "the principal factor" is "whether the two violations resulted in substantially similar hazards," *Amerisig Se., Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996), *aff'd without published opinion*, 117 F.3d 1433 (11th Cir. 1997).[13]

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[12] Where an employer's prior and instant violations concern *different* standards, a violation may still be characterized as repeated, but the burden stays with the Secretary to demonstrate that the violations involved similar conditions and hazards. *Potlatch*, 7 BNA OSHC at 1063; *see, e.g., John R. Jurgensen Co.*, 12 BNA OSHC 1889, 1893 (No. 83-1224, 1986).

[13] *Accord Deep South Crane & Rigging Co.*, 23 BNA OSHC 2099, 2105 (No. 09-0240, 2012), *aff'd without published opinion*, 535 Fed. App'x 386 (5th Cir. 2013);

The workplace conditions involved in the violations, such as the equipment involved and the activities that caused employees to be exposed to the hazard, are also germane to the analysis. *See, e.g., FMC Corp.*, 7 BNA OSHC 1419, 1421-22 (No. 12311, 1979) (violations substantially similar because they all "alleged that hoses and electric conductors were in passageways and work areas," and "[e]ach violation created the same hazard—a tripping hazard).[14]

The *Potlatch* test's focus on the workplace conditions and hazards involved in the violations stems from the purpose of the OSH Act's repeated characterization, which is to provide an enhanced compliance incentive where an OSHA citation informs the employer of specific hazards and associated working

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Midwest Masonry, Inc., 19 BNA OSHC 1540, 1543 (No. 00-322, 2001); *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88–310, 1990); *Farmers Coop. Grain and Supply Co.*, 10 BNA OSHC 2086, 2089, (No. 79-1177, 1982); *Austin Road*, 8 BNA OSHC at 1918.

[14] *See also, e.g., Stone Container*, 14 BNA OSHC at 1762 (violations substantially similar because they both involved employees' use of the same type of cranes and resulted in similar fall hazards); *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005) (two "violations were substantially similar because both involved the same standard and the same hazard, a fall of more than 20 feet to a road below"); *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1189 (No. 00-0553, 2005) (general duty clause violations were substantially similar because both involved employees entering a fuel tank to clean it, which exposed them to similar asphyxiation hazards); *Automatic Sprinkler Corp. of Am.*, 8 BNA OSHC 1384, 1389-90 (No. 76-5089, 1980) (violations of same standard substantially similar because both resulted in fall hazards and "involve[d] manually propelled mobile scaffolds more than ten feet above the floor or ground and lacking the required guardrails"); *Modern Continental / Obayashi v. OSHRC*, 196 F.3d 274, 283-84 (1st Cir. 1999) (violations substantially similar because they exposed employees to fall hazards during "precisely the same excavation process").

conditions that must be corrected. It is the employer's failure to correct similar hazards and working conditions, despite the heightened notice provided by the initial citation, that renders later violations repeated.[15] *See Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1337 (l0th Cir. 1982) (the OSH Act "imposes a burden on employers to discover and correct potential hazards prior to an OSHA inspection, and an even greater obligation to do so once alerted by a citation and final order," and a repeated characterization is thus appropriate where "an employer fails adequately to respond to a citation"); *Potlatch*, 7 BNA OSHC at 1065 (violation was properly characterized as repeated because the prior citation of the same standard gave the employer "adequate notice" that electrical equipment needed to comply with the standard); *Austin Road Co.*, 8 BNA OSHC 1916, 1918 (No. 77–2752, 1980) (a citation supplies "notice that [the employer's] safety regime is deficient" and creates an "obligation to prevent a recurrence of the

[15] The *Potlatch* test's burden shifting scheme also reflects this heightened notice concept. Because OSHA's standards target specific hazardous conditions, "in most cases" where an employer has recurrently violated the same standard, "the reference in the previous citation to the standard violated gives the employer adequate notice of the condition or conduct proscribed" to receive a repeated violation. *Potlatch*, 7 BNA at 1063 n.8. OSHA's standards vary in their specificity – as some standards "designate the specific means of preventing a hazard or hazards," while others "either do not specify the means of preventing a hazard or apply to a variety of circumstances" – but where (as here) the employer's prior and instant violations were both cited under the same *specifically-worded* OSHA standards, it is "difficult for an employer to rebut the Secretary's *prima facie* showing of similarity … simply because in many instances the two violations must be substantially similar in nature in order to be violations of the same standard." *Id.* at 1063 (citations and footnotes omitted).

violation"). Even where an employer twice violates the same OSHA standard, however, *Potlatch* permits the employer to show that its first violation did not put it "on notice of the need to take steps to prevent the second violation," *Caterpillar,* 154 F.3d at 403, by proving that the two violations were caused by dissimilar workplace conditions and resulted in dissimilar hazards.[16]

Although the majority referenced the Commission's rule that the similarity of the hazards drives the analysis, SPA16, it did not actually consider whether Angelica's violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) at Edison and Ballston Spa resulted in similar hazards. And, other than a fleeting mention in a footnote that Angelica's Edison violations also "involved CBWs," SPA16 n.18, the majority also failed to assess the similarity of the workplace conditions involved in the violations. This constituted a clear departure from Commission precedent.

[16] The location of the workplace at which the violations occurred is not relevant, as employers receive adequate notice for a repeated violation even where (as here) the prior violation occurred at a different facility in a different state than the allegedly repeated violation. *Potlatch*, 7 BNA OSHC at 1064; *see, e.g., Wal-Mart Stores, Inc. v. Sec'y of Labor*, 406 F.3d 731, 737 (D.C. Cir. 2005) (prior citation for egress violations at a Wal-Mart store should have alerted controlling corporation of the need to take steps to prevent the second violation at a different store in a different state).

2. The Commission's Analysis of the Relative Breadth of Angelica's Violations of the PRCS and LOTO Standards at Edison and Ballston Spa Is Irrelevant to the *Potlatch* Test.

Instead of analyzing the workplace conditions and hazards involved in the violations, as *Potlatch* requires, the majority spent the bulk of its substantial similarity analysis comparing the relative breadth of Angelica's PRCS and LOTO violations, as a whole, at Edison and Ballston Spa. The Commission found that while Angelica's Edison violations involved "a nearly complete failure to comply" with OSHA's PRCS and LOTO standards, Angelica's Ballston Spa violations concerned only "minimal" and "discrete" deficiencies. *See* SPA17-20. Angelica's PRCS program at Edison had "wide-ranging deficiencies," SPA17-18 n.20, but the majority found that Angelica subsequently "develop[ed] a PRCS program specific to its CBWs" that "included a comprehensive procedure for employee entry into the washer modules," which explained why Angelica had only "discrete deficiencies in [its] verification and isolation procedures" at Ballston Spa. SPA18. Similarly, Angelica "comprehensive[ly] fail[ed] to comply with its LOTO responsibilities" at Edison because it had no site-specific LOTO procedures, while at Ballston Spa, Angelica had LOTO "procedures specific to the machines," but they contained "discrete deficiencies" as to the steps necessary to lock-out the CBWs and dyers, and to verify the effectiveness of an attempted lock-out of the CBWs, dryers, and laundry press. SPA19. In essence, because Angelica more

extensively violated OSHA's PRCS and LOTO standards at Edison than it did at Ballston Spa, the majority concluded that "the violations took place under disparate conditions," and thus did not "indicate a failure to learn from experience." SPA20 (citing and quoting *Caterpillar,* 154 F.3d at 403).

The majority's comparative analysis of the extensiveness of Angelica's violations of the PRCS and LOTO standards at Edison and Ballston Spa is irrelevant under *Potlatch*. The degree to which an employer violated OSHA standards as a whole at the time of the prior and instant violations has no bearing on whether the workplace conditions and hazards involved in the specific violations at issue (here, Angelica's recurrent violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii)) were similar. The *Potlatch* test aims to assess whether the employer failed to discover and eliminate a hazardous condition despite having heightened notice of its duty to discover and eliminate such conditions by virtue of a prior OSHA citation. *See supra* pp. 24-26. Logically, assessing whether the employer may have abated *other* hazardous conditions identified during the first inspection is irrelevant to whether the second violation of a standard is repeated.

Indeed, hinging a repeated characterization on the extensiveness of an employer's violations would lead to absurd results, as it would permit OSHA to assess an enhanced fine to an employer that twice committed "minimal" or

"discrete" infractions of the same standard, but *not* to an employer that comprehensively violated a standard, and subsequently committed a less extensive violation of that same standard. *See* SPA31 n.5. Such a result contravenes the purpose of the OSH Act's repeated characterization, which is to incentivize employers to respond to OSHA citations by *actually achieving compliance* with the standard that they violated. *See, e.g., Dun-Par,* 676 F.2d at 1337; *Kent Nowlin*, 648 F.2d at 1282. The majority's breadth-based approach would effectively reward employers (like Angelica) who extensively violate an OSHA standard and then fail to fully address the problem.

The facts of this case illustrate the irrelevance of the extensiveness of an employer's OSHA violations to the *Potlatch* test. There is no dispute that, as a whole, Angelica more comprehensively violated OSHA's PRCS and LOTO standards at Edison than it did at Ballston Spa. But "[t]he fact that Angelica had previously committed many other violations in addition to those cited here does not alter the fact that … Angelica 'repeatedly' violated two of the very same standards." SPA31. Sections 1910.146(d)(3) and 1910.147(c)(4)(ii) both identify specific information that employers must include in their PRCS and LOTO procedures; that requisite information was missing from Angelica's procedures for its commercial laundry machines at Edison in 2004, and some of that same information – specifically, the information required by 29 C.F.R. §§

1910.146(d)(3)(iii) and (vi) and 1910.147(c)(4)(ii)(B)-(D) – was *again* missing from Angelica's procedures for several of its commercial laundry machines at Ballston Spa in 2008. Angelica's failure after the Edison inspection to ensure that its PRCS and LOTO procedures for its commercial laundry machines at Ballston Spa (and particularly, for its CBWs) fully complied with 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) thus represents a classic scenario in which a repeated characterization is appropriate. *See infra* sec. III.

When conducting this breadth-based analysis, the majority also considered the extensiveness of the steps necessary to *abate* Angelica's PRCS violations at Edison and Ballston Spa, but that too is inappropriate and illogical. *See* SPA17-18 n.20. Even if Angelica had to take more steps to abate its PRCS violations at Edison than it did at Ballston Spa, the action necessary to abate its violations of 29 C.F.R. §§ 1910.146(d)(3)(iii) and (vi) at both facilities was exactly the same: add procedures to the PRCS program for isolating the CBWs' tunnels from thermal and mechanical energy sources, and for verifying that an attempted lock-out of a CBW was successful. Moreover, giving *any* consideration to the steps necessary to abate Angelica's prior and instant PRCS violations was a deviation from Commission precedent. "The Commission has held that similarity of abatement is not the criterion, that the test is whether the two violations resulted in substantially similar hazards." *Active Oil*, 21 BNA OSHC at 1189 (citation omitted); *see, e.g., Lake*

Erie, 21 BNA OSHC at 1289 (violations were substantially similar because they both involved the same standard and a fall hazard of more than twenty feet, and rejecting employer's argument that the different methods taken to abate the violations proved otherwise). Although the Commission has occasionally considered the similarity of abatement methods when applying the *Potlatch* test, it has only done so *in combination with* an assessment of the similarity of the hazards that resulted from the violations. *See, e.g.*, *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994) (violations of different standards were not substantially similar due to "the disparity of the hazards and the means of abatement required"); *Midwest Masonry*, 19 BNA OSHC at 1542 (violations of same standards were substantially similar because they created the same "fall hazards from scaffolds due to lack of required safety railings," and also considering, among other factors, that the same action was required to abate the two violations). The majority here did not consider the similarity of the hazards that resulted from Angelica's violations at all.

Not only did it fail to acknowledge its departure from precedent, but the majority also offered no explanation of the relevance of the relative breadth of Angelica's total PRCS and LOTO violations at Edison and Ballston Spa to the *Potlatch* test. The majority did not cite to any cases in which the Commission or a circuit court previously relied on the extensiveness of an employer's violations to

find that they were not substantially similar under the *Potlatch* test.[17] In fact, at least one federal appellate court has expressly rejected an employer's attempt to use the disparate breadth of its prior and instant violations to rebut the Secretary's *prima facie* case of substantial similarity. *Manganas Painting Co. v. Sec'y*, 273 F.3d 1131, 1135 (D.C. Cir. 2001) (rejecting employer's argument that its violations of a fall protection standard were not substantially similar because the prior violation concerned a failure to provide *any* fall protection, while the instant violation concerned a failure to provide *adequate* fall protection). The majority also made no attempt to explain why it would be consistent with *Potlatch* or the purpose of the OSH Act's repeated characterization to focus the substantial similarity inquiry on the relative breadth of Angelica's Edison and Ballston Spa violations, rather than the workplace conditions and hazards involved in the company's specific violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii).

[17] Comparing the extensiveness of the employer's violations is reminiscent of the bygone standard that only permitted OSHA to issue repeated violations to employers that "flaunted" the requirements of a standard. *See, e.g., D.M. Sabia*, 90 F.3d at 858-60 (adopting the *Potlatch* test and rejecting prior test set forth in *Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157 (3d Cir. 1976), which assessed whether the employer had "flaunted the requirements of the [OSH] Act" based on, among other factors "the number … and extent of violations"); *see also Potlatch*, 7 BNA OSHC at 1063 (establishing that "an employer's attitude (such as his flouting of the Act)" is irrelevant to the repeated characterization test); SPA28-29.

3. The Majority's Analysis of Angelica's Efforts to Comply with OSHA's PRCS and LOTO Standards, and Whether Angelica Knew that its Procedures at Ballston Spa Violated 29 C.F.R. § 1910.147(c)(4)(ii), Are Also Irrelevant Under *Potlatch*.

In assessing the breadth of Angelica's violations, the majority also considered two factors that have been found by the Commission and circuit courts to be irrelevant to the repeated characterization test: (1) the employer's good faith efforts to comply with the standards; and (2) the employer's awareness of its non-compliance with the standards. The majority's inclusion of these factors in its analysis further establishes that its repeated characterization analysis improperly departed from *Potlatch*.

First, the majority inappropriately relied on Angelica's efforts to comply with OSHA's PRCS and LOTO standards following the Edison inspection as a factor explaining why Angelica committed fewer and more "discrete" PRCS and LOTO violations at Ballston Spa than it did at Edison. *See* SPA18 ("Not surprisingly, given Angelica's compliance efforts, the number of deficiencies in its PRCS program affirmed here … have been meaningfully reduced."); SPA20 (Angelica committed "only minimal deficiencies here, reflecting that after those prior violations, Angelica took affirmative steps to achieve compliance and avoid similar violations in the future"). Giving consideration to Angelica's compliance efforts when determining whether prior and subsequent violations are substantially similar directly contradicts *Potlatch*, which established that an employer's good

faith compliance efforts are relevant when setting the amount of a civil penalty under 29 U.S.C. § 666(j), but *not* when applying the repeated characterization. *Potlatch*, 7 BNA OSHC at 1064 ("an employer's attitude" is not pertinent to whether a violation is repeated because it "will be considered in assessing a penalty"); *see also Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167-68 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994) (Table) (an employer's "inadequate attempts to comply with the standard might be relevant to a finding of willfulness … and may have a bearing on the 'good faith' component of the penalty assessment," but "evidence of an employer's inadequate efforts to comply are not relevant to whether the violation was repeated"); *accord FMC Corp.,* 7 BNA OSHC at 1421-22; *Midwest Masonry,* 19 BNA OSHC at 1544.

The majority also departed from *Potlatch* and other precedent when it considered whether Angelica knew that its LOTO procedures at Ballston Spa violated 29 C.F.R. § 1910.147(c)(4)(ii). The majority found "no basis" to conclude that Angelica had such knowledge because "Angelica abated the prior LOTO citation at the time of the [Edison] inspection." SPA19 n.21. Absent evidence that Angelica knew that its LOTO procedures were inadequate, the majority claimed that it could not find that Angelica deserved a repeated violation. *Id.*

The majority's reliance on Angelica's mental state as a mitigating factor deviates from *Potlatch*, which made clear that "an employer's attitude (such as his

flouting of the Act) … do[es] not bear on whether a particular violation is repeated." 7 BNA OSHC at 1063. Furthermore, considering an employer's mental state regarding its compliance with a standard impermissibly blurs the distinction between the "repeated" and "willful" characterizations. *See* 29 U.S.C. § 666(a) (permitting a heightened civil penalty to be assessed to employers who "willfully or repeatedly violate[ ]" a standard, and setting a minimum penalty amount for willful, but not repeated, violations).

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety." *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1111 (No. 11-2559, 2016); *see also Chao v. Barbosa Grp., Inc.*, 296 Fed. Appx. 211, 212-213 (2d Cir. 2008) (unpublished) (willful violations "are characterized by an employer's heightened awareness of the violative nature of its conduct or the conditions at the workplace"). Accordingly, a "violation is not willful if the employer had a good faith belief that it was not in violation." *Barbosa Grp.*, 296 Fed. Appx. at 212-13. However, the Commission and numerous circuits have clarified that a repeated violation is appropriate "when an employer committed recurrent violations that did not necessarily rise to the level of willfulness." *George Hyman Constr. Co., v. OSHRC*, 582 F.2d 834, 841 (4th Cir. 1978); *see also D.M. Sabia*, 90 F.3d at 860

(3d Cir. 1996) (rejecting *Bethlehem Steel*'s "flaunting" test in part because the penalty structure in 29 U.S.C. §§ 666(a) indicates that "willful" and "repeated" violations are substantively distinct). An employer's state of mind is thus irrelevant when applying a repeated characterization. *See* SPA28-29 (Commissioner Atwood discussing cases rejecting the "flaunting disregard" standard). The majority's consideration of Angelica's mental state is thus both legal error and an unacknowledged departure from *Potlatch* and its progeny.

An employer's mental state regarding its compliance with an OSHA standard is plainly unfit for consideration under *Potlatch* because it sheds no light on whether the employer's prior and instant violations concerned "disparate conditions and hazards." 7 BNA OSHC at 1063. The *Potlatch* test aims to ascertain whether the employer's prior violation gave it heightened notice of its obligation to protect employees from the hazardous condition at issue in the instant violation, and whether an employer had such notice stems from the similarity of hazards and workplace conditions involved in the two violations. *See supra* pp. 24-26. Whether an employer attempted to comply, or believed that it had complied, with an OSHA standard is immaterial to that notice question.

And, even if Angelica's awareness of its non-compliance *were* relevant to the *Potlatch* test, the majority's finding of "no basis" to conclude that Angelica knew that it had violated 29 C.F.R. § 1910.147(c)(4)(ii) at Ballston Spa, SPA19

n.21, is improper, unsupported by the record, and plainly illogical. First, because Angelica had the burden of proving that its prior and instant violations concerned disparate conditions and hazards, the majority's expectation that *the Secretary* adduce evidence that "Angelica knew its safety precautions and corrective actions were inadequate," SPA19 n.21, is an improper shifting of that burden.

Second, the majority infers that, because Angelica abated its violation of 29 C.F.R. § 1910.147(c)(4)(ii) at Edison, Angelica must have thought that its LOTO procedures at Ballston Spa were compliant with that standard. That inference rests on an assumption that Angelica's post-inspection LOTO procedures at Edison were similar to its LOTO procedures at Ballston Spa, but there is no evidence suggesting that those procedures were actually similar. The majority's finding is thus unsupported by substantial evidence in the record.

Third, the majority's finding is patently illogical. If Angelica did, in fact, "abate" its violation of 29 C.F.R. § 1910.147(c)(4)(ii) at Edison, Angelica necessarily would have added specific instructions to its LOTO procedures indicating how to lock-out the energy sources to the CBWs, and verify that an attempted lock-out of a CBW had been successful – *i.e.*, the very same instructions that the majority confirmed were missing from Angelica's LOTO procedures at Ballston Spa. *See* SPA2-9. So, if it is assumed that Angelica fully abated its violation of § 1910.147(c)(4)(ii) at Edison, it must also be assumed that Angelica

knew (either actually or constructively) that its LOTO procedures at Ballston Spa were missing some of the instructions necessary to comply with §§ 1910.147(c)(4)(ii)(B)-(D), and particularly, specific steps for locking out the CBWs' valves and verifying the effectiveness of an attempted lock-out. As such, Angelica's failure after the Edison inspection to ensure that its LOTO procedures for the commercial laundry machines at its other facilities were compliant with the standard only *confirms* that Angelica "fail[ed] to learn from experience." *Caterpillar,* 154 F.3d at 403. Angelica's violation of § 1910.147(c)(4)(ii) at Ballston Spa thus presents a textbook example of a repeated violation, and the majority's contrary finding must be reversed.[18]

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[18] The majority further deviated from *Potlatch* by factoring into its analysis that 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) are "performance-oriented" standards that provide employers with "flexibility in meeting their requirements." SPA19. An OSHA standard is performance-oriented when it states the result that an employer must achieve, rather than identifying the specific action that an employer must take to achieve that result. *See, e.g., Diebold, Inc.*, 3 BNA OSHC 1897, 1900 (Nos. 6767, 7721 & 9496, 1976) (machine guarding standard was performance-oriented because it stated "the result required (protection against the … hazard), rather than specifying that a particular type of guard must be used"). Contrary to the majority's suggestion, *Potlatch* expressly stated that its test applies in equal force where an employer's violations concern a standard that "designate[s] specific means of preventing a hazard" as it does when they concern a standard that "either do[es] not specify the means of preventing a hazard or appl[ies] to a variety of circumstances." 7 BNA OSHC at 1063; *see, e.g., Hamilton Fixture*, 16 BNA OSHC 1073, 1096 (No. 88-1720, 1993), *aff'd* 28 F.3d 1213 (6th Cir. 1994) (applying *Potlatch* and finding that two violations of a generally-worded and performance-oriented standard were substantially similar because "in both cases, the form of personal protective equipment required was safety shoes, and employees were exposed to the hazard of objects sufficiently weighty to cause

B. The Majority Did Not Provide a Reasoned Explanation for its Departure From *Potlatch*.

The majority's recharacterization of Angelica's violations is arbitrary and capricious and an abuse of discretion because it did not provide a reasoned explanation for departing from precedent and relying on a new set of factors that are not derived from *Potlatch*. Administrative agencies are generally obliged to follow precedent and issue decisions that reflect "a consideration of the relevant factors," *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and particularly, those factors that have been considered dispositive in prior cases. *Burlington Truck*, 371 U.S. at 168. When an adjudicatory agency decides to depart from its precedent, it must "at the very least … 'supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored ….'" *Airmark Corp. v. F.A.A.,* 758 F.2d 685, 692 (D.C. Cir. 1985); (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)); *see also Fox Television,* 556 U.S. at 515 (an agency must "display awareness that it is changing position," and "may not, for example, depart

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injuries falling on their feet"). Irrespective of the nature of the standard, it remains incumbent on the employer to prove that its prior and instant violations of the same standard concerned "disparate conditions and hazards." *Id.* at 1063. The majority did not acknowledge or attempt to justify this departure from *Potlatch*, as it offered no explanation for why the performance-oriented nature of a standard is relevant to whether two violations concerned similar workplace conditions or hazards, nor did it cite to any cases in which the Commission or a circuit court previously considered a standard's performance-oriented nature when applying the *Potlatch* test.

from a prior policy *sub silentio* or simply disregard rules that are still on the books"). So, while the Commission is free to "overrule [its] precedent when further deliberations have led it to conclude that an earlier case was wrongly decided," *Niles*, 17 BNA OSHC 1940, 1942 (No. 94-1406, 1997), it must acknowledge its departure from precedent and "make a clear statement of its new rule and articulate its reasons for making the change." *NYSEG*, 88 F.3d at 107-08 (citations omitted).

Here, the majority failed to acknowledge, let alone provide a reasoned explanation for, its departure from *Potlatch* and its progeny. The majority claimed that it was applying *Potlatch* to the facts and acknowledged that the similarity of the hazards should drive its analysis, SPA15-16, but it failed to actually consider whether Angelica's violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) at Edison and Ballston Spa involved similar hazards or concerned similar workplace conditions.[19] Although it cryptically stated at the

[19] To support its claim that it simply "applied Potlach in the specific context of the facts of this case," the majority points to *Suttles Truck Leasing, Inc.*, 20 BNA OSHC 1953, 1970 (No. 97-0545, 2004), SPA21 n.24, which, to the Secretary's knowledge, is only prior case in which the full Commission has determined that two violations of the same specifically-worded standard were not substantially similar. *Suttles*, however, does not help the majority's cause: In *Suttles*, the Commission assessed the similarity of an employer's prior violation of 29 C.F.R. § 1910.146(d) for failing to test tanks used to transport hazardous chemicals for oxygen, flammable gases, and toxic air contaminants, to several PRCS violations that the employer committed at another facility where it worked with the same type of tanks. The Commission determined that the prior violation was substantially

outset of its analysis that it "decline[d] a mechanical application of the test for establishing a repeat characterization," SPA17 (citing *George Hyman*, 582 F.2d at 841 (4th Cir. 1978)),[20] the majority offered no explanation for why it would be consistent with *Potlatch* and the purpose of the OSH Act's repeated characterization to rely on the alternative factors on which it hinged its analysis. *See supra* sec. I.A.2-3. In doing so, the majority swerved without explanation from the *Potlatch* test, *Greater Boston*, 444 F.2d at 852 (agency acts arbitrarily if it "glosses over or swerves from prior precedents without discussion"), and effectively ignored the criteria that the Commission has established as germane to

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similar to the employer's violations of §§ 1910.146(d)(2) and (d)(5)(i) for failing "to evaluate the hazards in the washed tanks and … test for toxic atmospheres before employees entered the tanks," but *not* substantially similar to a violation of § 1910.146(d)(4) for failing to possess the necessary equipment to calibrate the combustible gas meter that it used to test the atmosphere in the tanks. *Suttles*, 20 BNA OSHC at 1967, 1970. To justify the latter finding, the Commission simply stated that "[b]ecause the facts alleged in [the prior] citation were very different … the hazards posed by the violations were not substantially similar," *id.* at 1970, and did not identify which facts established the dissimilarity of the hazards. The *Suttles* decision did not look beyond the workplace conditions and hazards associated with the violations, nor did it consider any of the factors on which the majority hinged its analysis in this case.

[20] As Commissioner Atwood explained, SPA26-27 n.2, given that *George Hyman* is a pre-*Potlatch* and pre-*Chevron* decision from a circuit to which this case could not be appealed, the Fourth Circuit's statement in dicta that it "avoided setting forth an all-inclusive and rigid definition of 'repeatedly'" in order to afford the agency "flexibility in working out reasonable guidelines in enforcing the Act" based on "further enforcement experience," *George Hyman*, F.2d at 841, 841 n.12, does not give the majority license to disregard the dictates of *Potlatch* and its progeny some four decades later.

the repeated characterization.[21] *NYSEG*, 88 F.3d at 110 (Commission acts "arbitrarily and capriciously" where it "effectively ignore[s] the usual rule it has followed"); *Cellular Phone*, 205 F.3d at 89-90 (agency decision is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem"); *Adams Steel*, 766 F.2d at 807 (agency departure "from established precedent without announcing a principled reason for such a reversal" is "arbitrary … and an abuse of discretion"). The Commission's characterization finding must therefore be reversed.

[21] The majority also suggested in its decision that, because the substantial similarity determination is a factual one, it was free to disregard the specific factors that the Commission previously established as driving the *Potlatch* test. *See* SPA21-22 n.24 (claiming its analysis is "reasoned," and therefore irreversible, because it "take[s] into consideration the differing circumstances that, in our view, require a determination that these violations are not repeated"); SPA16-17 n.19 (arguing that its finding regarding the similarity of Angelica's violations is "conclusive" because "Congress has specifically authorized the Commission, through the exercise of its adjudicatory powers, to conclude that the violations at issue here are not substantially similar"). Plainly, the majority's suggestion is wrong: the Commission must issue decisions that reflect "a consideration of the relevant factors," *State Farm*, 463 U.S. at 43, and particularly, those factors that have been considered dispositive in prior cases, *Burlington Truck*, 371 U.S. at 168, and "any deviation from prior rulings" when making factual determinations must "be carefully reasoned and fully explained." *Airmark*, 758 F.2d 685 at 692, 695 (FAA factual determination that an airline was not eligible for a regulatory exemption was arbitrary and capricious because the FAA "arbitrarily applied different decisional criteria to similarly situated carriers").

II. The Secretary's Reasonable Interpretation of the Term "Repeatedly" Is Entitled to Deference.

Even if the majority *had* acknowledged and provided a reasoned explanation for its departure from *Potlatch* and its progeny, the majority's decision would still require reversal because the *Potlatch* test, and its focus on the workplace conditions and hazards involved in the violations, is what gives effect to the Secretary's long-standing interpretation of the term "repeatedly" in 29 U.S.C. § 666(a). *See D.M. Sabia*, 90 F.3d at 860, 860 n.12 (explaining that "the Commission has acceded to the Secretary's interpretation of the term 'repeatedly' as used in section 666(a)," and "[s]ince *Potlatch*, the Commission and the Secretary have been in full accord as to the definition of the term 'repeatedly'"). Both the Commission and this Court must defer to the Secretary's reasonable interpretation of ambiguous terms in the OSH Act. *Chevron, U.S.A., Inc. v. Nat. Res. Def Council, Inc.*, 467 U.S. 837, 842-45 (1984) (federal courts must defer to the reasonable construction of a statute by the administrative agency charged with administering it); *Martin*, 499 U.S. at 154-57 (under the OSH Act, the Secretary, not the Commission, is the administrative actor to whom *Chevron* deference is owed); *Cranesville*, 878 F.3d at 32 (this Court affords *Chevron* deference to the interpretations of the Secretary, rather than the Commission).

As dissenting Commissioner Atwood explained, the term "repeatedly" is ambiguous, the Secretary has consistently asserted its reasonable interpretation of

that term – both through the repeated citations that he has issued and OSHA's Field Operations Manual (FOM) – and "decades of enforcement history applying [the *Potlatch*] test" have established the reasonableness of the Secretary's interpretation. SPA32-34; *see* SPA33 n.7 (explaining that OSHA's FOM directs enforcement staff to apply repeated characterizations when employers "have been cited previously for the same or a substantially similar condition or hazard and the citation has become a final order"); *Cranesville*, 878 F.3d at 33 (where "the Secretary's interpretation of the OSH Act [is] embodied in a series of citations for safety violations, it is entitled to the deference described in *Chevron*"); *see also D.M. Sabia*, 90 F.3d at 860 (the Secretary's interpretation of the term "repeatedly" is both reasonable and "plainly consistent with the language of the statute"). Accordingly, even if the majority expressly overruled *Potlatch* as wrongly decided, it would be obliged to defer to the Secretary's interpretation of the term "repeatedly," which (like *Potlatch*) precludes consideration of the factors on which the majority's repeated characterization analysis relied.

III. A Straightforward Application of the *Potlatch* Test to the Record Evidence Compels a Finding that Angelica's Violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) Were Properly Characterized as Repeated.

As explained above, the majority clearly departed from the *Potlatch* test by basing its repeated characterization analysis on factors that shed no light on whether Angelica's violations of 29 C.F.R. §§ 1910.146(d)(3) and

1910.147(c)(4)(ii) at Edison and Ballston Spa concerned similar workplace conditions and hazards. The majority also failed to acknowledge, let alone explain its reasons for, its departure from bedrock Commission precedent. That said, even assuming *arguendo* that the *Potlatch* test could accommodate some or all of the factors on which the majority relied, the majority's characterization determination cannot stand because a straightforward application of the *Potlatch* test to the record evidence establishes that Angelica did not prove that its violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) at Edison and Ballston Spa concerned "disparate conditions and hazards." *Potlatch*, 7 BNA OSHC at 1063. To the contrary, the evidence makes plain that, at both Edison and Ballston Spa, Angelica failed to include in its PRCS and LOTO procedures the same specific information that was necessary to protect Angelica's employees from the hazards associated with unclogging jammed laundry from its commercial laundry machines, and particularly, from the tunnels of CBWs. Accordingly, the factors that *Potlatch* and its progeny identify as driving the repeated characterization test compel a finding that Angelica's Ballston Spa violations were properly characterized as repeated.

As to the PRCS violations, OSHA cited Angelica at Edison because its PRCS program was not "implemented for [the] protection of employee(s) who enter tunnel washers to remove jammed/clogged laundry," and, among the many "critical deficiencies," noted that Angelica lacked procedures to "isolate the

[confined] space(s) from thermal and mechanical energy sources." APP662. At Ballston Spa, Angelica employees also entered CBWs to unclog jammed laundry, APP53 (Stip. ¶ 28), 146-47, 242, 250-51, 261; *see also* APP197-207 (CBW entry permits), 323-43, 395 (Figure 3); SPA7, and the Commission affirmed that Angelica violated 29 C.F.R. § 1910.146(d)(3) because it lacked procedures to isolate the CBWs' tunnels from the hazardous materials that are fed through the CBWs' valves (water, steam, liquid chemicals, and compressed air), SPA13-15, or to verify that an attempted lock-out of a CBW was effective. SPA10-13. Angelica's defective PRCS procedures at both facilities thus exposed employees to the same hazards associated with the unexpected release of energy and material while unclogging jammed laundry from inside a CBW. *See supra* pp. 9-10 (listing hazards). Based on the factors identified by *Potlatch* and its progeny, Angelica's violations of § 1910.146(d)(3) at Edison and Ballston Spa are "substantially similar," and Angelica's Ballston Spa violation is thus properly characterized as repeated.

Similarly, as to the LOTO violations, OSHA cited Angelica at Edison for violating 29 C.F.R. § 1910.147(c)(4)(ii) because Angelica did not have any site-specific LOTO procedures for the machines in its "[p]roduction area." APP669. The citation stated that Angelica's LOTO procedures needed to include, among other things, procedures identifying the "[l]ocation of" and the "[m]eans for

isolating specific energy sources," and noted that Angelica's "employees [were] exposed [to the resulting hazards] while performing maintenance/servicing including clearing jams on machinery such as but not limited to tunnel washers." *Id.* At Ballston Spa, Angelica employees were likewise required to clear jams from its commercial laundry machines, including its CBWs, APP53 (Stip. ¶ 28), 242, 250-51, 261; *see also* APP197-207 (CBW entry permits), 323-43, 395 (Figure 3); SPA7, and the Commission affirmed that Angelica's LOTO procedures violated § 1910.147(c)(4)(ii)(B)-(C) because they did not sufficiently instruct employees on how to lock-out all of the energy sources to the CBWs and dryers. *See* SPA5-6. As to the CBWs, Angelica's procedures did not "specify the number and locations of the valves that employees are required to lock out." SPA5. Angelica's LOTO procedures also violated § 1910.147(c)(4)(ii)(D) because they lacked sufficient instructions for verifying that an attempted lock-out of its CBWs, dryers, and press had been successful. SPA7-9. Angelica had "no documented instructions … specifying how such an attempt should be made to verify [an] electrical lockout …" for the CBWs. SPA7.

Taken together, Angelica's violative LOTO procedures at both facilities exposed its employees to the hazards associated with the unexpected energization of a commercial laundry machine while clearing jammed laundry, and particularly, from the tunnels of a CBW. *See supra* pp. 9-10 (listing hazards). Based on the

workplace conditions and hazards involved, Angelica's violations of 29 C.F.R. § 1910.147(c)(4)(ii) at Edison and Ballston Spa are substantially similar, and the Edison citation gave Angelica heightened notice of its obligation to include the information required by § 1910.147(c)(4)(ii)(B)-(D) in the LOTO procedures for its commercial laundry machines (and particularly, its CBWs) at Ballston Spa. Angelica's violation of § 1910.147(c)(4)(ii) at Ballston Spa is thus properly characterized as repeated.

Accordingly, even if some or all of the factors on which the majority relied *were* relevant to the *Potlatch* test, Angelica's violations are unquestionably repeated because the workplace conditions and hazards involved in its violations of 29 C.F.R. §§ 1910.146(d)(3) and 1910.147(c)(4)(ii) at Edison and Ballston Spa were nearly identical. The Court should remand this case to the Commission with the direction that the citations be affirmed as repeated, and that the penalty for the violations be reconsidered under that proper characterization. *Sec'y of Labor v. ConocoPhillips Bayway Refinery*, 654 F.3d 472 (3d. Cir. 2011) (where Commission misapplied precedent, remanding to the Commission "with the direction that the citations be affirmed as 'serious' and that the penalty for the violations be reconsidered"); *Sec'y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397 (3rd Cir. 2007) (where Commission relied on improper factors to find that a violation should not be characterized as "serious," and the facts showed that it the

violation was "unquestionably a 'serious' violation," remanding to the Commission solely "for consideration of the proper penalty to be assessed").

CONCLUSION

For the foregoing reasons, the Court should grant the petition for review.

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CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)(B)

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