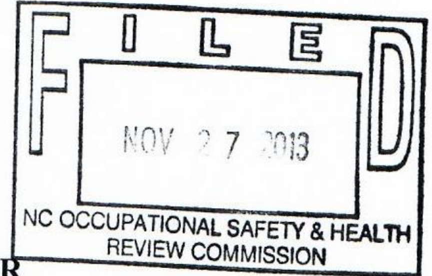
BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA



COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA	)	
COMPLAINANT,	)	**ORDER**
v.	)	
BURCH EQUIPMENT, INC. and its successors 685 BURCH RD FAISON, NC 28341	)	**OSHANC NO: 2008-4850** **INSPECTION NO.; 311937593, 311935217** **CSHO NO. C7621, A2912**
RESPONDENT.	)	

THIS CAUSE came on for hearing and was heard before the undersigned Reagan H. Weaver, Administrative Law Judge for the Safety and Health Review Commission of North Carolina, on December 8, 9, and 10, 2008, at the Safety and Health Review Commission, 217 West Jones Street in Raleigh, North Carolina and was completed on April 5-7, 2009 at the Medical Society Building, 222 N. Person Street, Raleigh, North Carolina.

Linda Kimball, Assistant Attorney General, represented the Complainant. Thomas A. Farr and Michael D. McKnight of Ogletree Deakins, P.A, represented the Respondent. Complainant's witnesses were Lauren Norton, an Agricultural Safety Compliance Officer II with the North Carolina Department of Labor (hereafter referred to as ASCO Norton) and James Burch, Managing Partner, Burch Equipment, LLC. Witnesses for the Respondent were Wilfred Jester, III, Extension Associate Horticulturist with NC State University, retired; Ted Burch, Burch Equipment, LLC. The testimony of the parties and their witnesses is preserved in six volumes. Complainant admitted 78 exhibits and Respondent admitted 41exhibits.

The Commissioner withdrew Items 7, 8a, 8b, 8c, 9b, 9c, 15d, 16b, 16c, 18b, and 18c from its Citations.[1] In addition, the allegations found in the Complaint at paragraph 46 were voluntarily dismissed. The allegations at paragraph 47 were amended to refer to Citation Number 1, Item 13c instead of 13d. The allegations at paragraph 48 were amended to refer to Citation Number 1, Item 13d instead of 13e, and finally, the allegations at paragraph 49 were amended to refer to Citation Number 1, Item 13e instead of 13f.[2]

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[1] See Vol. I, pp. 181, 212; Vol. II, 74, 118, 129, and 154.
[2] See Vol. II, 74-76.

DATABASE

ISSUE PRESENTED

Were the General Industry standards properly applied to Respondent's operation on either side of 685 Burch Road, Faison, North Carolina following the inspections conducted on April 7, July 9, and July 10, 2008?

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Based upon the evidence presented at the hearing, the briefing of the parties subsequent to the hearing and review of the transcript, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion and enters an Order accordingly:

Findings of Fact

1. This case was initiated by a Notice of Contest dated December 29, 2008, which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or "Act"), N.C. Gen. Stat. §95-126, *et seq.*

2. Complainant, Commissioner of Labor of the State of North Carolina, is charged with the enforcement of the provisions of the Occupational Safety and Health Act of North Carolina.

3. Respondent, Burch Equipment, LLC, is a limited liability corporation duly organized and existing under the laws of the state of North Carolina. Respondent is engaged in the growing and sale of produce, including sweet potatoes and vegetables, most of which it produces itself, yet some of which it purchases and sells with its own produce. Vol. V, pp. 42 – 53; Commissioner's Exh. 76.

4. Respondent is subject to the provisions of the Act and is an employer within the meaning of North Carolina General Statute § 95-127(10).

5. On April 7, 2008, Agricultural Safety Compliance Officer II, Lauren Norton, began an investigation of Respondent's work site as a result of a referral received the day before from the Goshen Medical Center which had treated five employees for exposure to chemicals on April 2, 2008. (Vol. I, p. 20)

6. ASCO Norton's investigation was still open when on July 9, 2008 a complaint was received of hazardous activities occurring at Respondent's facility. The earlier investigation was converted into a comprehensive investigation and Norton returned to the facility with others from her office on two more occasions, July 10 and July 11, 2008 to complete a comprehensive inspection/investigation. (*Id. at* p. 23-26)

7. Norton took photographs, made notes, interviewed employees and obtained documents. *See e.g.* Vol. I, pp. 47, 53-55, 74, 82-84, 113-116, 135-136, 146, 149, 156-157, 164, 167, 180, 188, 193, 198, 222-223, 230, 239, 255-256.

8. Following the comprehensive investigation, the Commissioner issued citations alleging serious and non-serious violations of General Industry standards as set out in Complainant's Complaint and in the Citations.

9. Four violations were not contested by Respondent. They are reviewed first immediately below.

Citation 1, Item 1 – Serious

N.C.G.S. 95-129(1)

General Duty Clause

10. N.C.G.S. 95-129(1) provides, in pertinent part, that, "Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees . . . ."

11. Respondent withdrew its notice of contest to the violations alleged. (Respondent's Post-Hearing Brief, p. 1, Ftnt. 1) The citation stated the following:

    a. One worker was repairing a fan while standing on a wooden pallet attached to the forks of a powered industrial truck. The forks were elevated approximately 11 feet from the cement floor below. A second worker was standing directly on the forks of a second powered industrial truck located on the outside of this building and on the opposite side of this fan. The forks of this truck were also elevated approximately 11 feet from the cement surface below.
    b. One worker was not provided with a safe working platform and was exposed to the hazard of stepping or falling onto conveyor belts and rollers or to the cement floor below.

12. The violations occurred as described.

13. The penalty proposed by the Commissioner totaled, after adjustments for size and cooperation, $4,900.

14. The conditions described above were abated.

Citation 1, Items 24a, 24b, 24c – Serious

29 C.F.R. 1910.1200(e)(1)
29 C.F.R. 1910.1200(g)(8)

29 C.F.R. 1910.1200(h)

Hazard Communications

29 C.F.R. 1910.1200(e)(1)

15. 29 C.F.R. 1910.1200(e)(1) provides, in pertinent part, "employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met . . . ."

16. Respondent withdrew its notice of contest to the violations alleged. (Vol. III, p. 59; Respondent's Post-Hearing Brief, p. 1, Ftnt. 1) The citation stated the following: "A written hazard communication program had not been implemented to address hazardous chemicals known to be present in the workplace including, but not limited to, Freshgard 72, Sta-Fresh 7100, Fruit Cleaner 220, Muriatic Acid, EpiClean, and Food Tech Defoamer 10."

17. The violation occurred as described.

18. The penalty proposed by the Commissioner totaled, after adjustments for size and cooperation, $525.

19. The condition as described was abated.

29 C.F.R. 1910.1200(g)(8)

20. 29 C.F.R. 1910.1200(g)(8) provides in pertinent part, "the employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s)."

21. Respondent withdrew its notice of contest to the violations alleged. (Vol. III, p. 59; Respondent's Post-Hearing Brief, p. 1, ftnt. 1) The citation stated the following: "The employer did not ensure that material safety data sheets were readily available to the employees in their work area during each work shift."

22. The violation occurred as described.

23. The penalty proposed was grouped with Citation 1, Item 24a.

24. The condition as described was abated.

29 C.F.R. 1910.1200(h)

25. 29 C.F.R. 1910.1200(h) provides in pertinent part, "Employers shall provide employees with effective information and training on hazardous chemicals in their work area . . . ."

26. Respondent withdrew its notice of contest to the violations alleged. (Vol. III, p. 59; Respondent's Post-Hearing Brief, p. 1, ftnt. 1) The citation stated the following: "Sweet Potato Washing and Grading Operation – Employees working in this area had not been provided with information and training on the requirements of the Hazard Communications Standard, 29 C.F.R. 1910.1200 as it pertains to hazardous chemicals known to be present in their work area including, but not limited to, Freshgard 72, Sta-Fresh 7100, Fruit Cleaner 220, EpiClean, and Food Tech Defoamer 10 and Muriatic Acid."

27. The violation occurred as described.

28. The penalty proposed was grouped with Citation 1, Item 24a.

29. The condition as described was abated.

All Other Violations

30. The buildings inspected by ASCO Norton are located on the site of the original farm and home place of the Burch family. Vol. VI, pp. 146-157.

31. The buildings inspected by ASCO Norton are next to tracts of land that are used by the Respondent for the growing of vegetables, including sweet potatoes, and seedlings in greenhouses. *Id.*

32. The aerial view of the inspected buildings and the surrounding land depicted in Complainant's Exh. 1 is the Burch Equipment farming operation. Vol. I, p. 28.

33. In the building on the right side of 685 Burch Road, Faison, North Carolina, ASCO Norton observed the activities of curing, cleaning, sorting, grading, storing and packaging of all the sweet potatoes processed by Respondent. *See e.g.* Vol. III, pp. 112, 114-115, 119, 127, 147, 185, 187; Vol. V., pp. 58-61, 184.

34. The activities observed by ASCO Norton were incident to or in conjunction with the farming operations of Respondent. *See* Vol. III, 193, 194, 198; Vol. V, 57.

35. Sweet potato farming has become the beneficiary of the discovery that with a short period of curing and then careful maintenance of storage conditions, including temperature and air flow, sweet potatoes can be stored for up to twelve months and sold all year long from storage facilities built on the site of the original Burch family farm. Vol. V, 59-61; Vol. VI, 77.

36. The potato building was placed on land that was formerly cultivated. Growing fields are adjacent to that building and greenhouses are physically close to the icing and storage building on the opposite side of the road from the potato building. *See* Complainant's Exh. 1 and Vol. VI., pp. 143-156.

37. On the left side of 685 Burch Road, Faison, North Carolina ASCO Norton observed soaking, icing, packaging, cooling and storage of vegetables processed by Respondent. Vol. III., pp. 17, 24-27, 117-125.

38. No manufacturing or transformation of potatoes occurs in the facilities, i.e. no slicing, mashing, cooking or changing of the shape or form of the potatoes. Vol. III, pp.127, 177.

39. Storage is managed by placing the potatoes in large ventilated boxes that weigh 800 to 1,000 pounds (filled) that are moved and lifted by powered industrial trucks. *See* Vol. III, pp. 186-187; Vol. V., pp.185-186; Vol. VI., p. 60-62.

40. The potatoes and vegetables that were being processed were primarily the products of the Burch farm. Total purchases of others' sweet potatoes were 418,306 bushels, which was 19.9% of the total grown and purchased by Respondent. Total purchases of other vegetables and the percentages of the purchased vegetables of the total grown and purchased range from about 15% to 40%. Vol. V, p.77, 88-104. Complainant's Exh. 76.

41. The SIC codes that are used by OSHA to classify companies within industries are often based on what the primary engagement of the business is. *See, e.g.,* R.'s Exh.'s 7, 8, 9, 18, 19, 20, 23.

42. The SIC code given to Burch in the ASCO's October 2, 2008 Inspection Report was 5159. This code's description is for "Establishments primarily engaged in buying and/or marketing farm products, not elsewhere classified." R.'s Exh.'s 17-19.

43. In order for Burch to obtain value from the commodities that it grew, it needed to cure, store, clean, grade, sort, and package the potatoes for market. Vol. III, pp. 179-180, 188, 191-194.

44. Without engaging in the curing, storing, cleaning, grading, sorting, and packaging activities, the potatoes could not be marketed to produce maximum revenue and give Burch the incentive to grow new crops the next year. *See e.g.* Vol. III, pp. 180-181, 188, 191-194.

45. The Commissioner's own compliance officer conceded that there would have been no questions of compliance had all the jobs been done by hand. Vol. III, pp. 193-205.

46. The tasks identified that were performed on the potatoes and the washing, cooling and storage of the vegetables all added value to the Burch products. Vol. III, pp. 188, 193-194.

47. The tasks Burch performed on the potatoes as well as on the vegetables are routine tasks that are generally performed to make the products more palatable and attractive to the ultimate consumer. Vol. III, pp. 188, 189, 193-194.

48. At some times of the year, the same workers spend time working both in the field and in the post-harvest facility. Vol. VI, pp. 158-159.

49. There are no written guidelines to offer a farmer such as Respondent guidance in determining when an operation is industrial versus agricultural. Vol. IV, pp. 132-133; *See* Vol. III, p. 214.

50. ASCO Norton considered the potato processing activities industrial regardless of whose potatoes were being processed. Vol. IV, pp. 37-38.

Based on the foregoing Findings of Fact, the undersigned makes the following

Conclusions of Law

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The Respondent is subject to the provisions of the Act.

3. The Complainant proved by a preponderance of the evidence that Respondent violated the Act as set out in Paragraphs 10-29 of the Findings of Fact; the violations were properly classified; and that Respondent is subject to the penalties as set forth in the Findings of Fact.

4. Respondent carried its burden of proof that it was entitled to exceptions from application of General Industry standards regarding all other violations for which Respondent received citations herein.

5. For the tasks and activities which were the subject of citations contested by Respondent, Respondent proved more probably than not that it was engaged in tasks and activities that were integrally related to "agricultural operations," and in the case of Citation 11, "agriculture employment," as well.

6. North Carolina has defined "agricultural employment" in its Migrant Housing Act in the following manner:
   (1) "Agricultural employment" means employment in any service or activity included within the provisions of Section 3(f) of the Fair Labor Standards Act of 1938, or section 3121(g) of the Internal Revenue Code of 1986; and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state and including the harvesting of Christmas trees, and the harvesting of saltwater crabs.

7. The Migrant Housing Act has adopted by reference the provisions of 3(f) of the FLSA, and 3121(g) of the IRC.

8. Respondent's rights not to be deprived of property without due process of law under the U. S. Constitution's 14th Amendment were violated because it was deprived of fair notice that it was not entitled to claim exemptions for being engaged in "agricultural operations" and "agriculture employment."

Decision Discussion

The Complainant imposed numerous citations and fines on the Respondent for its alleged violation of General Industry OSHA regulations found at 29 C.F.R. 1910, *et seq.* The citations covered a range of hazards, and in a regular industrial setting would justify substantial penalties. This decision finds violations only for the citations that were not contested by Respondent. The reasons are discussed below.

While there have been similar cases in other areas of the nation, this is the first case heard in North Carolina to address whether the General Industry standards of OSHA are applicable to a business that grows, stores and sells sweet potatoes and other vegetables. At issue is whether (1) the exception found in 29 U.S.C. 1928.21(b) for "agricultural operations" and (2) the exception for "agriculture employment" found at 29 C.F.R. 1910.147(a)(1)(ii)(A) should apply to the post-harvest processing of sweet potatoes and vegetables performed by the employees of Respondent. If Respondent proved that the exceptions apply, then the citations and fines imposed by the Commissioner of Labor (hereafter "Commissioner" or "Complainant") against Burch should be vacated. In finding that the Respondent herein was engaged in "agricultural operations," and "agriculture employment", the decision vacates the citations of the Commissioner, with the exception of Citation Number One, Item One which is a violation of the General Duty Clause, N.C.G.S. 95-129(1) and Citation One, Items 24(a), (b), and (c) which are violations of the Hazard Communication regulations, 29 C.F.R. 1928.21(a)(5). Respondent withdrew its contest to these provisions. Vol. III, p.59; Respondent's Post-Hearing Brief, p. 1, ftnt. 1.

The definition of "agricultural operations" is not found within the definitions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 652, or in the standards that were subsequently issued to enforce the provisions of the Act. Respondent contends that it is engaged in "agricultural operations," thus it is not subject to the citations and fines that have been imposed by the North Carolina Department of Labor. It relies primarily on the fact that the standards published by OSHA to cover industrial settings, 29 C.F.R. (Part)1910, *et seq.* cover only *seven* "agricultural operations" that are enumerated specifically. These seven topic areas are 1) temporary labor camps, 2) storage and handling of anhydrous ammonia, 3) logging operations, 4) slow-moving vehicles, 5) hazard communication, 6) cadmium, and finally, 7) retention of DOT markings, placards and labels. 29 C.F.R. 1928.21(a)(1) – (7). None of the Respondent's activities that are contested fall into any of the seven topic areas.[3] The next

[3] As previously noted, Respondent withdrew its contest of the citations concerning hazard communications.

paragraph of 29 C.F.R. 1928.21, paragraph (b), states that the remainder of the provisions of Part 1910 *do not apply* to "agricultural operations." 29 C.F.R. 1928.21(b).

The definition of "agriculture employment" is also not found within the definitions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 652, or in the standards that were subsequently issued to enforce the provisions of the Act. Respondent contends with respect to this exception similarly that it is engaged in "agriculture employment," and again, is not subject to citations and fines imposed by the North Carolina Department of Labor. It relies on the definition of "agricultural employment" found in the North Carolina General Statutes at N.C. Gen. Stat. §§ 95-223(1) and referenced within Chapter XI of the Field Operations Manual (FOM) of the Agricultural Safety and Health Bureau of North Carolina Department of Labor's Occupational Safety and Health Division. Respondent contends that the definition found in the FOM describes the kinds of activities that Burch employees did. The Commissioner contends that the FOM is only for migrant housing, field sanitation and agricultural field inspections. Vol. III, pp. 146-155.

The Commissioner also contends among other things that it is following case precedents from other jurisdictions that are sufficiently similar that this forum should follow their lead and affirm the penalties that have been imposed on Burch. In addition, the Commissioner argues that terms similar enough to the undefined terms herein – "agricultural operations" and "agriculture employment" -- have been defined either in other federal or state statutes or have been interpreted by OSHA in the context of small employers or in other jurisdictions' precedents such that the citations and penalties should be affirmed.

Respondent contends among other things that not only are the above terms not defined in either the law or the standards, but in 1976, OSHA published Subpart D of its standards for enforcement of the OSH Act, and these standards specifically addressed the subject of "Safety for Agricultural Employment." 29 C.F.R. 1928.57 These standards' purpose is stated to "provide for the protection of employees from the hazards associated with moving machinery parts of farm field equipment, farmstead equipment and cotton gins. 29 C.F.R. 1928.57(a). Respondent contends that the Commissioner should have applied *these* standards to its inspection instead of general industry standards because there are no other OSHA standards existing that speak to employers in the position of Respondent.

Fundamentally, the issue of this case is whether Respondent was engaged in "agricultural operations" and "agriculture employment" or whether it was engaged in a wholesale trade. If the former, the Respondent should be liable only for the citations which it did not contest. If the latter, Respondent should be liable for the entire list of citations, as the parties' dispute is over the application of the law, not factual matters.

Two of the primary cases that are relied upon by the Commissioner to justify the citations against the Respondent are summarized below.

***Darragh Company*, 1980 OSAHRC LEXIS 189, 9 OSHC (BNA) 1205, 1980 OSHD (CCH) P25,066 (September 25, 1980)**

Darragh Company employees delivered chicken feed to bins on farms that raised chickens and eggs for sale to Darragh. Darragh did not own the farms to which the feed was delivered. To access the bins where the feed was delivered required the Darragh employee to climb ladders that did not meet OSHA standards; however, the bins were the property of farmers who were not subject to OSHA because of a small farmer exception to OSHA standards. The Review Commission examined the case from the perspective of whether the Darragh Company was exempt because it was engaged in "agricultural operations."

Darragh argued that "agricultural operations" should be read broadly and that the feed bins were an integral part of the farmers' agricultural operations because the delivery of feed was integral to both the farmers and its own operations. The OSH Commission said that to determine whether the "agricultural operations" exemption of 29 C.F.R. 1928.21 should apply requires the examination of *"the specific task that exposed the worker to the alleged non-complying condition for which the employer was cited and decide whether the task is part of, or integrally related to, an agricultural operation."* Since the task of delivering the feed was done on the farms and allowed the farmers to maintain their hens and sell their eggs, it was integrally related to the farmers' "agricultural operations" so the exemption was held to apply.

In arguing for enforcement and rejection of the exemption, the Secretary of Labor asserted that exemptions should be read narrowly so that as many workers as possible would be covered. The Commission noted that exemptions from remedial legislation are usually to be narrowly construed, but this exemption needed to be read according to its plain meaning. The exemption was created by the Secretary through his rule-making authority and could be modified by him if he so chose.

J.C. Watson Company, 321 Fed. App'x 9 (D.C. Cir. 2009)

J.C. Watson Company was a grower and packer of onions who ran a "separate, post-harvest operation involving separate processes and employees." 2006 WL 5692683, p. 7 (ALJ Decision). The definitions of both "agricultural operation" and "agriculture employment" were examined in this case. The issues in the case were whether Watson was exempted from the provisions of general industry standards because it engaged in either "agricultural operations" or "agriculture employment" under exemptions found respectively in 29 C.F.R. 1928.21(b) and 29 C.F.R. 1910.147(a)(1)(ii)(A), the same two provisions that are at issue in *Burch.* An employee in Watson was injured in the process of reaching to push himself out from underneath an area where he was working and was seriously injured when his arm was caught in a conveyor.

The Commission applied the same test that it used in *Darragh* to determine whether an exemption applied. It analyzed the specific tasks that exposed the employees to hazards and decided that the tasks were not integrally related to an "agricultural operation" or to "agriculture employment."

Watson's activities at the facility that was cited were post-harvest handling of onions, including (1) receiving harvested items stored in a building next to the shed; (2) cleaning; (3) sorting; (4) sizing and weighing for grading purposes; (5) inspecting; (6) stacking on pallets; (7) packaging; and (8) shipping. These post-harvest activities took place in a facility located away from the farm

where the produce was grown, and the Occupational Safety and Health Review Commission looked only at the activities performed in the facility as opposed to the activities of J. C. Watson Company as a whole. It noted that when the activities in question were performed on a farm, it weighed in favor of finding that the activity was integrally related to an agricultural operation. The location of the activities led the Commission to conclude that they were not integral to the "*growing*" of onions which it called, "the true agricultural operation here." (emphasis in original) *Watson,* p. 3 Thus, the activities being performed in the facility were not "agricultural operations," and the exception for "agricultural operations" did not apply to Watson.

With regard to the question whether Watson was engaged in "agriculture employment," the basis by which Watson claimed an exception from the application of the provisions of the second standard, the Commission again ruled against the company. The Commission acknowledged that there was no definition of "agriculture employment" in the standards, but it noted that the preamble to the standard in question (the Lockout-Tagout, or LOTO standard), had explained the exception for agriculture and two other industries was based on the difficulty of developing a generic energy control standard that could apply across the board. *Watson,* 2008 OSAHRC LEXIS 33, p. 4 (*citing, Control of Hazardous Energy Sources(Lockout/Tagout): Final Rule,* 54 Fed.Reg. 36,644, 36,657 (Sept. 1, 1989) In this publication, the Commission had noted that the agriculture industry was a more transient environment, and the activities in Watson's facility were not limited to harvest time. Thus, the Commission did not apply the exception for "agriculture employment."

Analysis

Guidance From Another Statute

The various definitions of the terms in question that have been put forward by the parties come from related sources but not from the OSHA statute nor the OSHA standards issued by the Secretary. The Fair Labor Standards Act, covering minimum wages and overtime, excepts from coverage any employee employed in "agriculture" and carefully defines the term within the Act. Considerable litigation has addressed whether certain activities of employees should be subject to the provisions of the minimum wage and overtime laws and, in particular, whether employees were employed in "agriculture." The U.S. Supreme Court addressed the meaning of "agriculture" as it was defined in §3(f) of the FLSA:

> 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.'

Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762, 69 S. Ct. 1274, 1278, 93 L. Ed. 1672 (1949)

The Supreme Court summarized the definition in the following manner:

> As can be readily seen this definition has two distinct branches. First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations.

Id.

The above language highlights two perspectives of agriculture. Clearly, agriculture has been viewed as more than just cultivation, tillage and harvesting. The FLSA acknowledges that activities that are incident to or in conjunction with farming operations are part of a secondary definition of agriculture. In particular, the FLSA provides that activities, "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market" are part of the definition of "agriculture." This decision addresses how much broader, or narrower, are the definitions of "*agricultural operations*" and "*agriculture employment*" as found in OSHA standards than the above definition.

Watson appears to have adopted a narrow definition of agriculture that refocuses on the *primary* division of agriculture. For example, the Commission in *Watson* agreed with the administrative law judge who found that the activities performed in the Watson facility were not "integral to the *growing* of onions" (emphasis in original), which it then declared was "the true agricultural operation [t]here." Also, in analyzing liability for violation of the industrial LOTO standard, the Commission was influenced by the preamble to the LOTO standard that spoke of harvesting activities, the final stage of *primary* agriculture. *Watson* virtually ignores the concept of *secondary* agriculture as it relates to the broader terms from the OSHA standards that except "agricultural operations" and "agriculture employment." The facts of the case at hand distinguish themselves from the *Watson* facts, plus an application of the *Darragh* rule supports the conclusion that the activities or tasks performed by the employees of Burch were integrally related to both its "agricultural operation" and "agriculture employment." The discussion below will explain the basis for the decision.

The Burch Operation

Testimony at the hearing established that the curing, cleaning, sorting, grading, storing and packaging of the sweet potatoes was accomplished in the facility that was inspected and that this facility processed all the sweet potatoes from the Burch farm operations. *See e.g.* Vol. III, pp. 112, 114-115, 119, 127, 147, 185, 187; Vol. V., pp. 58-61, 184. Given that these are the processes that were performed on the potatoes post-harvest, they then fall within the *secondary* definition of the FLSA's "agriculture" in that they describe things other than farming (or *primary* agriculture) such as the "preparation for market, delivery to storage or to market or to carriers for

transportation to market."[4] Not only were these activities incident to or in conjunction with Burch farming, they were tasks that enabled Burch to sell what it had grown. Thus, they were integrally related to Burch's agricultural operation. *See* Vol. III, 193, 194, 198; Vol. V, 57.

Likewise, the soaking, icing, packaging, cooling and storage or delivery of Burch's vegetables (Vol. III., pp. 17, 24-27, 119-125) was also part of the FLSA's secondary definition of "agriculture." This was codified in the FLSA's regulations which specifically defined the meaning of "preparation for market" for fruits and vegetables. 29 C.F.R. 780.151(b) ("Assembling, ripening, cleaning, grading, sorting, drying, preserving, packing, and storing.) Burch needed, after harvesting its greens or other vegetables, to get them to market so these tasks were integrally related to the selling or marketing of what it had grown.

Testimony of the Respondent's owners/managers explained that sweet potato farming has become the beneficiary of the discovery that with a short period of curing and then careful maintenance of storage conditions, including temperature and air flow, sweet potatoes can be stored for up to twelve months and sold all year long from storage facilities built on the site of the original Burch family farm. Vol. V, 59-61; Vol. VI, 77. The storage and processing facilities for sweet potatoes as well as the storage and processing facilities for vegetables on the same site are the focus of the activities that were cited by the Agricultural Safety Compliance Officer. The storage facilities include sophisticated cleaning, grading and packaging machines for the potatoes. No manufacturing or transformation of potatoes occurs in the facilities, i.e. no slicing, mashing, cooking or changing of the shape or form of the potatoes.[5] Vol. III, pp.127, 177. Storage is managed by placing the potatoes in large ventilated boxes that weigh 800 to 1,000 pounds (filled) that are moved and lifted by powered industrial trucks. *See* Vol. III, pp. 186-187; Vol. V., pp.185-186; Vol. VI., p. 60-62. The vegetable processing is handled in a separate building across the street from the sweet potato facility. It consists of icing and cooling areas and primarily storage. Vol. III., pp. 117-120, 124-125; Complainant's Exh. 1.

"Agricultural Operations"

If the activities that the *Burch* employees were performing were integral to an "agricultural operation," then the exception provided by 29 C.F.R. 1928.21(b) would require the vacating of the citations that fall within that exception. *Watson* correctly places the burden on Burch to prove that it falls within the exception because Burch is claiming the entitlement to the exemption. *Watson at* p. 4; *See Mitchell v. Hunt,* 263 F.2d 913, 916 (1959). The factors that contribute to the determination that Burch employees *were* involved with "agricultural operations" are discussed below (with discussion following each point):

1. The facility was located on the Burch family farm. (VI, p. 146-55)

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[4] Respondent has argued that sweet potatoes continue to "grow" after being separated from the soil, thus they would fall in "*primary*" agriculture. This decision does not address that contention. *See R's Reply brief.* pp. 12-13.

[5] Some of the potatoes are shrink-wrapped, and 75-80% of the potatoes are waxed. V., pp. 54, 75, 199-200. Burch's customers have demanded that Burch perform these processes in some cases. Vol. V., p. 54. The Commissioner has argued that this is a higher-level of packaging and is akin to manufacturing and is more than necessary to get the potatoes to market.

As stated in *Watson,* "Moreover, when the activity in question takes place on a farm, it weighs in favor of a finding that the activity is integrally related to an agricultural operation." *Watson, supra,* p. 3.[6] The *Watson* facility was located in a separate geographic area apart from where the onions are grown. *Id.* While it was located centrally to the various parts of its farming operation, its separation from the farm itself is a significant difference from the case at hand. The Burch facility was placed on the original location of the family farm where the Burch children were raised. The potato building was placed on land that was formerly cultivated. Growing fields are adjacent to that building and greenhouses are physically close to the icing and storage building on the opposite side of the road from the potato building. *See* Complainant's Exh. 1 and Vol. VI., pp. 143-156.

2. The potatoes and vegetables that were being processed were primarily the products of the Burch farm.

The Commissioner has emphasized that Burch did not process exclusively its own potatoes and vegetables, and has argued that this fact should bar it from qualifying for the "agricultural operations" or "agriculture employment" exceptions. The record reflects that Burch purchased about 20% of the potatoes processed in the facility from other farmers and it may have purchased as much as approximately 40% of some of the vegetables from other farmers.[7] Under FLSA regulations, Burch would likely *not* qualify for an exception. Under OSHA there are no standards published on this point, but Burch grew substantially more than half of the potatoes and vegetables that it processed.

29 C.F.R. 780.141 is one of the FLSA published standards, and it says that for a farmer to qualify under the FLSA for treatment as an "agriculture" employer, *none* of the commodities sold by the farmer may have been produced by another farmer. This regulation refers to the *Mitchell v. Hunt* decision to support its position that for a farmer to qualify as an "agriculture" employer, *none* of the commodities that it sells may have been produced by another farm; however, *Mitchell* does not support such an unequivocal conclusion. *See Mitchell v. Hunt,* 263 F.2d 913, 917-918 (5th Cir. 1959) (impliedly finding that if the cattle farmer's purchases *from others* at his auction barn had not been such a large percentage [66 2/3 %] of his total purchases then the court might have considered applying other tests to determine whether the FLSA standard had been met, i.e. were the sales of his own and the others' cattle "incident to or in conjunction with" *his* farming operations).[8]

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[6] The FLSA regulation, 29 C.F.R. 780.135, defines "farm" as "a tract of land devoted to the actual farming activities included in the first part of section 3(f)." It elaborates by saying that, "The total area of a tract operated as a unit for farming purposes is included in the "farm," irrespective of the fact that some of this area may not be utilized for actual farming operations (see *NLRB* v. *Olaa Sugar Co.,* 242 F. 2d 714; In re Princeville Canning Co., 14 WH Cases 641 and 762)."

[7] Total purchases of others' sweet potatoes were 418,306 bushels, which was 19.9% of the total grown and purchased by Burch. Vol. V, p. 77; Complainant's Exh. 76. Total purchases of other vegetables and the percentages of the purchased vegetables of the total grown and purchased range from about 15% to 40%. Complainant's Exh. 76 and Complainant's Brief, pp. 18-19.

[8] The *Mitchell* decision refers to a 1955 case, *Maneja v. Waialua Agr. Co.,* decided by the U.S. Supreme Court. This case illustrates the challenge in determining when a farmer is engaged in agriculture. One focus of *Maneja* concerned whether sugar cane milling should be treated as agriculture for the purpose of determining whether such employees were covered under the FLSA's minimum wage provisions. The Court decided that the milling of the cane was an industrial process and imposed liability under the FLSA for the milling operation, but it acknowledged

This examiner questions why Burch should forfeit an exception for processing the potatoes and vegetables that it personally grew just because it adds the products of others to its own total, when it purchases less than what it produces itself. The purchases were not separately organized as independent productive activity. They were amalgamated with what Burch was already doing, and Burch's processing of its own products made up a substantially greater share of the productive activity than what was purchased.

Additionally, the SIC codes that are used by OSHA to classify companies within industries are often based on what the *primary engagement* of the business is. *See, e.g.,* R.'s Exh.'s 7, 8, 9, 18, 19, 20, 23. In that Burch was primarily handling its own produce and potatoes, the correct SIC code is arguably an agricultural one. The SIC code given to Burch in the October 2, 2008 Inspection Report was 5159. This code's description is for "Establishments *primarily* engaged in buying and/or marketing farm products, not elsewhere classified." (emphasis added) R.'s Exh.'s 17-19. Based on the testimony at the hearing, it is apparent that 5159 was not the SIC code that fit. The SIC code that is or may be assigned to a business does not establish liability for safety citations, but it gives some indication of what the business does. In this case, the evidence at the hearing shows that Burch was "primarily engaged in" agricultural operations rather than wholesale trade because Burch was preparing more of its own commodities for market than others'. *See* R.'s Exh. 18.

3. The processes used by Burch prepared the potatoes and the vegetables for storage, for markets or for delivery to markets.

In order for Burch to obtain value from the commodities that it grew, it needed to cure, store, clean, grade, sort, and package the potatoes for market. Vol. III, pp. 179-180, 188, 191-194. Without engaging in such activities, the potatoes could not be marketed to produce maximum revenue and give Burch the incentive to grow new crops the next year. *See e.g.* Vol. III, pp. 181, 188. The Commissioner's own compliance officer conceded that there would have been no questions of compliance had all the jobs been done by hand. Vol. III, pp. 193-205. This indicates that the activities themselves were integrally related to the agricultural operations of Burch.[9]

The Commissioner argues that Burch was not *required* to do the post-harvest tasks in order to sell its potatoes. The Commissioner's ASCO allowed that some degree of curing was possibly necessary, but none of the other functions were "necessary." Vol. III, p. 194. She testified that it was dependent on "how much profit they want to make." Vol. III, p. 181. The question is not how much profit [sic] the farmer wants to make, but whether the activity engaged in is integrally related to agricultural operations. Based on the definitions that have been cited for agricultural operations, the tasks are certainly integrally related, especially given that the ASCO conceded

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then that for sugar cane milling, the determination of whether it was "farming or manufacturing [was] extremely close." *Maneja v. Waialua Agr. Co.,* 349 U.S. 254, 265, 266, 75 S. Ct. 719, 726, 727, 99 L. Ed. 1040 (1955).

[9] Respondent claims that this concession demonstrates that the Commissioner was more concerned about the *manner* in which the tasks were done rather than whether the tasks were integral to an "agricultural operation" – the *Darragh* test.

that if the same tasks were done by hand they would have been agricultural. Vol. III, pp. 193-205, *supra*.

4. All of these processes added or contributed to the value of the products for market;

The tasks identified that were performed on the potatoes and the washing, cooling and storage of the vegetables all added value to the Burch products. The Compliance Officer conceded that the activities enhanced what Burch could get for its commodities. Vol. III, pp. 188, 193-194; Respondent's Exh. 2, pp. 2-3.

5. The activities in question are part of the normal activities of farmers who raise sweet potatoes and vegetables.

Every farmer who produces commodities like Burch grows must not only cultivate and till the soil, but they must harvest the products and then prepare them for market and store them until it is time to deliver them to market. This is no different from any other commodities farmer, although Burch has chosen to do it on a larger scale than some farmers. Practically speaking, the activities are clearly associated with those "ordinarily, customarily, or usually performed by a farmer or on a farm." *See Maneja v. Waialua Agricultural Co.,*349 U.S. 254, 265-267, 75 S.Ct. 719, 99 L.Ed. 1040 (1955) (applying the FLSA and looking at the ordinary activities of farmers of sugar cane in order to determine "whether the milling operation is really incident to farming"); *Farmers Reservoir & Irrigation Co. v. McComb, supra at* 760-762. The tasks Burch performed on the potatoes as well as on the vegetables are routine tasks that are generally performed to make the products more palatable and attractive to the ultimate consumer. Vol. III, pp. 188, 189, 193-194.

6. The operation was staffed by employees who worked in the fields and in the facility. Approximately half of the employees worked in the Burch fields as well as in the facility, sometimes on the same day.

The facility in *Watson* was isolated from the Watson farms. Here, the Burch facility was on a Burch farm, part of which, in fact, was the original family farm before additional land was acquired. Vol. V, pp. 48-49; Vol. VI, pp. 146-155. At some times of the year, the same workers spend time working both in the field and in the post-harvest facility. Vol. VI, pp. 158-159. There are growing fields immediately adjacent to the buildings inspected by ASCO Norton. These facts demonstrate how post-harvest functions were integrated with the "growing" functions of the farm. This was possible because Burch had learned how to store the potatoes up to twelve months and allowed labor to be utilized wherever it was most needed.

7. There was no manufacturing of the potatoes such that the potatoes were converted into a different form such as baby food, french fries, or cooked mashed potatoes.

One indicator that a post-harvest facility such as the Burch facility is a separate enterprise is whether it engages in functions that are removed from the primary *and secondary* divisions of agriculture as defined by *Farmers Reservoir & Irrigation Co. v. McComb, supra*. As is noted in

Respondent's Exhibit 2, an Interpretive Memo that looked at the application of the Farming Appropriations Rider in 1992:

> . . . in general, *agricultural operations*, as we interpret them for the purpose of the rider [the rider prohibited the expenditure of any funds for enforcement activities on farms that employed ten or fewer employees if they did not have a temporary labor camp], include not only the preparation of the ground, sowing, watering of plants . . . harvesting . . . but also all activity necessary for these operations . . . and *all activity necessary to gaining economic value from the agricultural products themselves, e.g. selling the products grown by the employer in question.* For example, the growing and selling of one's own apples are agricultural operations, but making cider or jelly from the apples is not an agricultural operation. (emphasis added)

While this memo was directed toward the application of the Rider with regard to small farmers, it demonstrates the importance recognized by OSHA of changing the character of the product. If the product has not been altered as in the making of cider or jelly from a farmer's apples, then the farmer is still considered to be engaging in "agricultural operations." In Burch, the products were not being altered by any manufacturing processes (Vol. III, pp. 127, 177; *see also* Vol. V., pp. 75-76); hence the conclusion follows that the Burch activities were integrally related to "agricultural operations."[10]

In light of the above seven factors, the Respondent proved that its facility was engaged in "agricultural operations" and that they were entitled to an exception under 29 C.F.R. 1928.21(b). In summary, Respondent proved 1) the facility cited was located on its farm and was part of an integrated enterprise; 2) the commodities processed were primarily its own—grown on its own farms; 3) the processes performed on the commodities were for the purpose of preparing for market, storage or delivery to markets; 4) the processes added value to the commodities; 5) the processes were part of the normal activities of farmers who raise sweet potatoes and vegetables; 6) the employees who worked in the facilities were not exclusively working in one area to the exclusion of the fields; and 7) the commodities were not converted through manufacturing into different forms. For all these reasons, Respondent succeeded in proving that it was engaged in "agricultural operations."

"Agriculture Employment"

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[10] The Commissioner has highlighted a later OSHA memo from 1998 that was issued as "Enforcement Guidance for Small Farming Operations." Complainant's Exh. 75. This memo addresses the same exemption for small farms with ten or fewer employees and no temporary labor camps. It also refers to post-harvest processing and appears to refer to manufacturing operations that change "the character of the product" and by inference equates changing the character of the product to using a "higher degree of packaging (washing, bundling and bagging carrots) versus field sorting in a shed for size." This memo may be viewed as updating the language of the 1992 memo, yet neither memo appears to relate to farms bigger than ten employees. Interestingly, the 1992 memo explicitly refers to "agricultural operations" whereas the later memo refers to "farming operations." This inconsistent terminology contributes to confusion with definitions that have never made it into the standards—a subject discussed at greater length later.

The next question is whether Burch was entitled to an exception for being engaged in "agriculture employment" under the provisions of 29 C.F.R. 1910.147(a)(1)(ii)(A). This standard is commonly known as the "lockout/tagout standard" to prevent unexpected energization or start up of machines or equipment, or release of stored energy. It expressly exempts "agriculture employment."

As with its analysis of "agricultural operations," *Watson* did not find that the "agriculture employment" exception applied at that facility. Once again, the *Watson* court focused narrowly on a definition of agriculture that emphasized the *primary* definition discussed earlier and did not consider the applicability of the *secondary* division of agriculture. While the preamble to the lockout/tagout standard characterizes the agriculture industry as being transient and oriented toward harvesting, i.e. '*primary*' agriculture, it also acknowledges that the agriculture, construction and maritime industries were exempted from the LOTO standard because their uniqueness prevented the development of a generic standard across all industries. The application of *Watson's* rationale to Burch does not fit for the reasons identified earlier regarding "agricultural operations." While "agriculture employment" is not an identical term compared to "agricultural operations," the distinction is not clear and there is not enough of a distinction between the terms to justify finding that there is no engagement in "agriculture employment" when justification has been found to find that Burch was engaged in "agricultural operations." Accordingly, Burch proved that it should not be subject to the LOTO standard either.

However, the analysis of "agriculture employment" need not stop with the above conclusion. Two factors regarding the LOTO standard's application need to be addressed. First, the Compliance Officer in this case may have considered but rejected the possible application of Subpart D, Safety for Agricultural Equipment, and its specific provision for Electrical Disconnect of Farmstead Equipment, 29 C.F.R. 1928.57(c)(5). (Vol. IV, p. 191; *but see* Vol. IV., pp. 162-163. This standard applies to, among other things, "materials handling equipment . . . whether or not the equipment is an integral part of a building." *Id. at* 1928.57(a)(2). The same safety goal of preventing unexpected energization is present as in the LOTO standard in the general industry standards. ASCO Norton stated that the standards were not equivalent though. Vol. IV., p. 191. Given that such an *agricultural* standard had been published by OSHA, any violations of this provision observed in an inspection could have been cited, and Respondent would have been unable to cite a lack of notice as its defense. (The provisions for farmstead equipment have been in existence since 1976, so Respondent could not complain of lack of notice.) Respondent's defense to this item would have been more circumscribed--determining only whether an actual violation had occurred.[11] However applicable the agricultural standard under Subpar D was for this particular safety hazard, it is not appropriate for this examiner to determine *post hoc* whether such a violation occurred.

Second, North Carolina has defined "agricultural employment" in its own Migrant Housing Act:

> (1) "Agricultural employment" means employment in any service or activity included within the provisions of Section 3(f) of the Fair Labor Standards Act of 1938, or section 3121(g) of the Internal Revenue Code of 1986; and the handling,

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[11] An examination of the reported cases of the North Carolina OSH Review Board/Commission did not find a single contested case involving Farmstead Equipment.

planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state and including the harvesting of Christmas trees, and the harvesting of saltwater crabs;

N.C. Gen. Stat. Ann. § 95-223(1)

The provisions of the FLSA's § 3(f) contained by reference in the above Migrant Housing Act have been noted earlier. This means that "agricultural employment" would include activities and tasks that prepare commodities for market or for delivery to storage or carriers.

The provisions of §3121(g) of the Internal Revenue Code of 1986 that specifically relate to this definition are found in §3121(g)(4)(A) which defines "agricultural labor" as follows:

> **(4)(A)** in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

26 U.S.C.A. § 3121(g)(4)(A)

This definition covers virtually every activity of Burch employees observed by ASCO Norton except for waxing of potatoes and the portion that are shrink-wrapped (a portion that was never specified). It states expressly that as long as the farmer has produced more than one-half of the commodities itself, then the farmer is treated as having engaged "agricultural labor."

North Carolina OSHA specifically adopts both the above definitions within its Field Operations Manual.[12] Significantly, the North Carolina statute is broader than the definition in the FLSA. The FLSA definition covers activities that are "incident to or in conjunction with such farming operations." This opened up a range of activities that are not as 'soil-connected' (cultivation, tillage and harvesting), and the statute has been interpreted formally in 29 C.F.R. Part 780 (the interpretive regulations for the FLSA) to include post-harvest functions.

The IRC definition is broader than the FLSA's because it includes, additionally, post-harvest activities of farm operators who produce *more than one-half of what they are processing post-harvest*. In other words, the IRC allows the farm operator to perform post-harvest acts on others' produce as long as that farm operator has produced the majority of the produce being processed.

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[12] The North Carolina statute defines the term "agricultural employment" rather than "agriculture employment" as in the FLSA. These modifiers of the word, "employment," seem identical and no discernible difference can be perceived. Likewise, the IRC is defining "agricultural labor" rather than "agriculture employment." The difference between these terms is indistinguishable.

The North Carolina statute adopts both statutes' definitions and adds specifically, "handling, planting, drying, packaging, processing, freezing or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state."

Given the breadth of the definition of "agricultural employment" as defined by North Carolina OSHA and the close similarity, if not complete identity, of the term to "agriculture employment," it is apparent that the activities of Burch in the processing facilities that were inspected clearly fell within the exception that exists for application of the standard in 29 C.F.R. 1910.147(a)(1)(ii)(A).

Finally, the above definition appears in the chapter of NCOSH's Field Operations Manual that addresses "Hazard communication – 29 C.F.R. 1910.1200" which is one of the seven named "agricultural operations" that are specifically covered by the industrial standards. This FOM definition describes at least three of the same kinds of activities that *Watson* treated as being excluded from "agricultural operations," yet the FOM definition clearly covers them as being included under "agricultural employment." The FOM definition specifically includes processing, grading and packaging. These three activities are post-harvest and are very similar to the activities performed by Burch employees. This definition also appears to cover very similarly the type of activities that are referred to in other sources.

The two OSHA memos from 1992 and 1998 that have been referred to previously added additional perspectives to the definitional question of what "agriculture operations" means. The 1992 memo spoke of "*. . . activity necessary to gaining economic value from the agricultural products themselves.*" The Commissioner has contended that because of these words the question of *necessary activities* must be considered. The 1998 memo, which is directed to the subject of compliance with the same Farming Appropriations Rider, addressed "post-harvest processing" and suggested—if it was referring to larger employers—that a higher degree of packaging could be viewed as a manufacturing activity. The Commissioner has contended that shrink-wrapping and waxing fall within the purview of this latter memo, thus Burch should not be entitled to claim the "agriculture employment" exemption. It is unclear from the testimony what portion of the potatoes are shrink-wrapped so it is unclear how much importance this issue should claim. Likewise, there was very little, if any, testimony explaining how involved was the process of waxing potatoes. For these reasons, the Commissioner's contention should not be influential.

The multiple definitions highlight a lack of clarity over what is "agriculture employment," "agricultural employment," "agricultural labor," as well as "agricultural operations." It is apparent to this examiner that Burch was engaging in what can fairly be considered to be "agriculture employment" as well as "agricultural operations."

Due Process Concern

Respondent complains that it was never put on fair notice, by published OSHA standards or otherwise, that it was not involved in "agricultural operations" or "agriculture employment." For the purpose of determining whether Burch is subject to industrial safety standards versus agricultural safety standards, the Commissioner ignores Burch's farming operations and argues

that Burch's purchases of produce from others has transformed its farming operation into the business of "wholesaler." Commissioner's Brief, pp. 25-26. She considers irrelevant the proportion of produce bought by the Respondent and treats Respondent as having crossed an undefined threshold where it lost the identity of being involved with "agricultural operations" and "agriculture employment" and became a wholesaler. A wholesaler cannot be a business engaged in "agricultural operations," thus it is not entitled to exempt itself from industrial standards of safety.

The Commissioner's inspector conceded at the hearing that there is no written criteria by which a business can measure its actions to determine when it loses its identity as being in "agricultural operations." Vol. IV, p.132-33. Inspector Norton also testified that she would have applied industrial standards to the activities she observed irrespective of the wholesale determination she assigned to the business. She noted that even if all the potatoes were Burch's, she would have still applied the industry standards. Vol. IV, pp. 37-38. She volunteered, "even if those processes involve their potatoes, given that the industrial equipment that was being used and it was an industrial environment, it would--that still would be viewed, in my mind, as general industry." Vol. III, p. 201; Vol. IV, p. 39. She noted that it wasn't just the appearance of the facility/equipment and noted that the facility was being used year-round. Vol. IV, p. 38.

The Commissioner compares Respondent to a paint, wallpaper and lighting retailer that decides to sell installation services while remaining a retailer, too. The retailer gains a new identity as being in construction and must accept that its construction activities are subject to the purview of OSHA.

Complainant's analogy oversimplifies. It creates a circumstance that is not analogous. Burch previously qualified for the 1928.21(b) exception because it was a farmer and there is no question that a farmer is engaged in "agricultural operations." The Commissioner's inspector agreed that if Burch used hand labor to do all the activities that were performed with mechanization in the facility she inspected instead of the machines (and only cured, stored, washed, brushed, cleaned, graded and packed its own produce), it would have still been involved in "agricultural operations." Vol. III, p. 205. Burch mechanized what it previously did by hand. It did not start an entirely new activity like the retailer. The retailer did not have an exception to the standards that it then was declared to have lost because it expanded its business and grew out of a vague definition of "agricultural operations." Granted, the retailer might feel that all it did was expand its business, but in the Commissioner's example, the retailer changes the *character* of part of its business. Burch could reasonably have not understood that by doing *more* of what it previously did that it was changing the character of its operation. Because the OSHA standards do not define what "agricultural operations" or "agriculture employment" means, Burch cannot be expected to have understood that it would lose the right to claim an exception that it previously had.

A second aspect of the definitional problem is that the Commissioner also asserts that by processing the produce of other growers that Burch forfeited its claims to the exceptions for "agricultural operations" and "agricultural equipment." The fact that Burch grows produce that is processed at the facility that was cited is not contested. Nor did the Commissioner challenge whether Burch grows the majority of the potatoes and vegetables that are being processed. As

previously noted, approximately 20% of the potatoes are purchased from other producers and from 15% to approximately 40% of the vegetables are purchased. This means that a very clear majority of all produce processed at Respondent's facility is grown by it. Burch was entitled to notice that it would lose its claim to being a *grower* just because it purchased and processed an additional amount of produce that was less than one-half of the facility's total output.

"Agricultural operations" were given an explicit 'bye' in the OSHA standards with the exception of the seven narrow areas that are identified in 29 C.F.R. 1928.21(a). The Secretary of Labor named the seven areas when it created the rule found in 29 C.F.R. 1928.21(b) that explicitly states that none of the industry standards should apply to "agricultural operations." Unfortunately, the exception for "agricultural operations," was left undefined; however, in 1976 some clarification was given to the meaning of "agriculture" when OSHA published standards in Subpart D labeled "Safety for Agricultural Equipment." In these standards, OSHA defines "farm field equipment," and "farmstead equipment," but they give no clarification of agriculture or the several terminologies that are at issue in this case. With the exception of the standards discussed herein, the seven areas identified in 29 C.F.R. 1928.21(a), and the North Carolina Migrant Housing statutory definitions, there are no clear definitions of "agriculture," "agricultural operations," "agricultural labor," or "agriculture employment." Further, there is no clear definition, to the extent it is relevant, of what is meant by the 1998 "Enforcement Guidance for Small Farming Operations" internal memoranda of OSHA that speaks of a "higher degree of packaging." OSHA has published no standard to define when a farmer can be said to be engaging in either "agricultural operations" or "agriculture employment" – the two terms that relate to whether Burch can claim an exception from the application of the industry standards. The lack of clarity is patent.

A statute which is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" violates due process. *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926). This rule applies to administrative regulations. *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 340 (1952). While courts must give deference to an agency's interpretation of a regulation, the due process clause prevents that deference from validating an application of a regulation that fails to give fair warning of the conduct it prohibits or requires. *Gates & Fix Co. v. OSHRC,* 790 F.2d 154, 156 (D.C. Cir. (1986). Like other statutes and regulations that allow monetary penalties, an OSHA standard must give an employer "fair warning of the conduct it prohibits or requires and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." *Diamond Roofing Co. v. OSHRC,* 528 F.2d. 645, 649 (5th Cir. 1976). Thus, where the violation of a regulation subjects private parties to civil sanctions, the Commissioner "has the responsibility to state with ascertainable certainty what is meant by the standards" in question. *Id., see also General Elec. Co. v. U.S.E.P.A.,* 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) ("In the absence of notice -- for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.")

In a North Carolina case, the Court of Appeals noted that it needed to look at previous decisions and guidelines of the regulatory agency -- the Department of Revenue – to see whether it had given adequate fair notice to a corporate taxpayer concerning the appropriateness of separating

related corporate incomes. At issue was the agency's definition of "true income." The Department found that it had published numerous Technical Bulletins for years prior to when the taxpayer improperly tried a scheme to reduce its taxable income by dividing income between related corporations. The Bulletins had given clear and repeated notice. *Delhaize Am., Inc. v. Lay,* 731 S.E.2d 486, 495 (N.C. Ct. App. 2012) (rejecting the claim of plaintiff corporation that the department deprived it of fair notice that it might be required to combine the incomes of two affiliated corporations in order to tax the "true income" of the taxpayer).

Burch can reasonably complain that it was not put on notice that its mechanization of its processing could cause it to lose its ability to claim the exceptions for "agricultural operations" or "agriculture employment." Inspector Norton agreed that there are no written guidelines for her to use to determine when an operation is industrial versus agricultural. Vol. IV, pp. 132-133; *See* Vol. III, p. 214. Where a regulated business cannot claim a lack of notice, it cannot resist regulation. On the other hand, when the business can demonstrate, as here, the vagueness of a regulation that fails to give notice of its application, then it should not be subject to enforcement.

When an agricultural operations business, or as in this case, a farmer, has expanded its operations and become subject to standards not previously applicable, there must be provided to that business a basis upon which it can reasonably learn that it will be subject to new standards in the event of such changes. In this case, OSHA adopted standards on two occasions—soon after the OSHA law was enacted in 1970 and then a few years later in 1976. These are the only published OSHA standards that have addressed farmers, or farming, other than migrant housing, temporary labor camps and field sanitation.

Farming has changed in the decades since the Occupational Safety and Health Act was enacted. Mechanization and technology have changed farming in dramatic ways. If farmers do not choose to utilize technology voluntarily, they may find as did the Burch family, that their customers will require that it be adopted. *See e.g.* Vol. V., pp. 53-54. With the adoption of industrial processing *and the attendant hazards associated with such processing*, farmers need to recognize that the extent to which they can continue to claim the exemptions affirmed in this decision may not continue to exist.

In 1949 the U.S. Supreme Court acknowledged in a Fair Labor Standards Act (29 U.S.C. 201, *et seq.)* case that there are two divisions of agriculture, a *primary* division that includes cultivation, tillage and harvesting of agricultural products and a *secondary* division that relates to the preparation of those agricultural products post-harvest for market or storage for delivery or market whether or not they are farming practices as in the primary definition. It is the secondary division of agriculture that is addressed in this case, although Burch is engaged in the *primary* division of agriculture in addition to the *secondary* division. However, the Supreme Court was not tasked with explaining anything about safety in that case as the Occupational Safety and Health Act did not come into being until 1970. "Agricultural operations" and "agriculture employment" that are addressed herein were not the subject of the Supreme Court's attention then. Among the questions addressed in that case was whether an exception under the FLSA could apply in a minimum wages context for "practices performed by a farmer" or on a farm and whether the practices at issue were "incident to or in conjunction with such farming operations." Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 69 S. Ct. 1274, 93 L. Ed. 1672 (1949) The instant case addresses a different law and different standards. The concept of due

process is stretched too greatly to impose citations and fines on an employer where the definition of liability is as vague as here. Accordingly, the citations against Burch which were contested are vacated.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED** as follows:

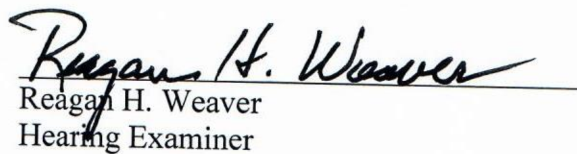
1. Citation 1, Item 1 is affirmed.

2. Citation 1, Items 24a, 24b, and 24c are affirmed.

3. Respondent shall pay the combined penalty for the above two affirmed citations of $5,425 within ten (10) days of the filing date of this Order.

4. All remaining citations are vacated.

This the 27 day of November, 2013.



Reagan H. Weaver
Hearing Examiner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

THOMAS FARR
MICHAEL McKNIGHT
OGLETREE DEAKINS NASH SMOAK & STEWART PC
PO BOX 31608
RALEIGH NC 27611

LINDA KIMBELL
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602-0629

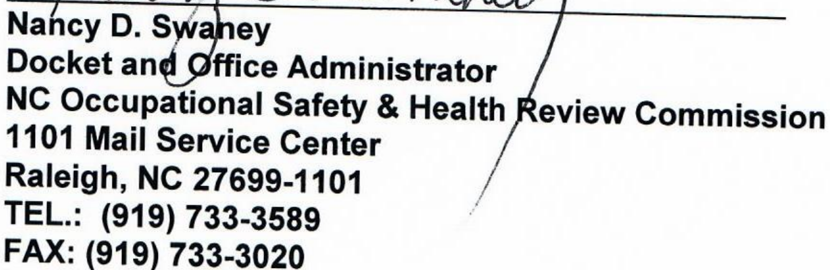
by depositing a copy of the same in the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 4th DAY OF December 2013.

OSCAR A. KELLER, JR.
CHAIRMAN



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