United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Room 407
Denver, Colorado 80202-2517

Phone: (303) 844-2282 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. JW POWERLINE, LLC, and its successors, Respondent.	OSHRC Docket No. 18-1469

Appearances:

Matthew P. Sallusti, Esq., Department of Labor, Office of Solicitor, Dallas, Texas
For Complainant

Christopher V. Bacon, Esq., Vinson & Elkins LLP, Houston, Texas
For Respondent

Before: Judge Patrick B. Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

Late at night on May 2, 2018, the power went out at a drilling site in rural Texas after a thunderstorm. Respondent received a call to go out and restore power to the equipment. Ultimately, Respondent determined that a downed power line had caused the disruption and called out a two-person crew to perform the repair.[1] The crew foreman misidentified a downed line as the source of the problem. He believed it belonged to Respondent's customer when, in fact, the line belonged to the power company. While he was in the process of splicing together the downed

[1]. The two-person crew was accompanied by Respondent's newly hired superintendent of its Midland branch, who went to the worksite to relieve the electrician who had been sent to restore electricity to the customer's drilling equipment. (Tr. 70-71, 365-66).

line, the crew foreman was electrocuted when the power company restored power to the line at a recloser station nearly five miles away.

OSHA investigated the incident and determined Respondent committed four violations of the Occupational Safety and Health Act ("OSH Act"). Respondent admits: (i) the standards cited by Complainant apply; (ii) its foreman violated those standards; and (iii) that its employees were exposed to the hazards resulting from those violations. *See* Section II, *infra*. However, Respondent contends it did not know, nor could it have known, of the violations. Respondent argues its foreman had been properly trained and its superintendent-in-training did not have adequate knowledge of the work being performed to know the foreman's work practices were hazardous. Based on the Court's review of the evidence and relevant law, it finds the foreman's actions were foreseeable because Respondent did not conduct regular or even intermittent monitoring of its field employees' or supervisors' work practices, especially those employees who performed late night repair work, which Respondent estimated happened at least once per week. Accordingly, the Court affirms all four violations alleged by Complainant.

I. PROCEDURAL HISTORY

As stated above, this case was precipitated by the fatal electrocution of one of Respondent's employees during the repair of a downed power line. Complainant was notified of the fatality and sent Compliance Safety and Health Officer Alex Daniels, who conducted an investigation of Respondent and the worksite on May 3, 2018. Although Respondent did what it could to maintain the condition of the worksite, the actual owner of the power line, Oncor, came to the site to reconnect the lines and restore power. (Tr. 87). Based on his review of the worksite, relevant documents, and interviews, CSHO Daniels recommended, and Complainant issued, a four-part Citation and Notification of Penalty, which alleged serious violations of 29 C.F.R. §§

1910.269(a)(4), 1910.269(c)(1)(ii), 1910.269(m)(3)(ii), 1910.269(n)(2). *See* Citation and Notification of Penalty. Complainant grouped the foregoing citation items in pairs, which resulted in a total penalty of $25,611. Respondent timely contested the Citation, bringing this matter before the Commission.

Prior to the trial in this matter, Complainant filed two[2] unopposed motions to amend the Citation and Complaint, requesting the following changes: (1) the relevant date be modified to include May 3, 2018, which is when the employee was electrocuted; (2) Citation 1, Item 1b be modified to allege a violation of § 1910.269(c)(1)(ii) instead of § 1910.269(c)(1)(i); and (3) changing the narrative description of Citation 1, Item 2b, which accidentally repeated the narrative of Citation 1, Item 2a. The Court granted both motions.

The trial was held on July 23–25, 2019, in Midland, Texas. The following witnesses testified: (1) CSHO Alex Daniels; (2) Respondent's Superintendent, Joshua Fine; and (3) Respondent's President, Justin Burris. Both parties timely submitted post-trial briefs.

II. STIPULATIONS & JURISDICTION

The parties stipulated to numerous matters, which are included in their joint stipulation statement. In addition to stipulating to the jurisdiction of the Commission, that Respondent is an employer subject to the requirements of the OSH Act, and other perfunctory matters, the parties also stipulated: (i) the cited standards apply; (ii) the terms of each of the cited standards were violated; (iii) Respondent's employees were exposed to the hazards posed by violations of the cited standards; and (iv) subject to the affirmative defense of unpreventable employee misconduct, each violation, if proven, was properly characterized as serious . Thus, the only matters for the Court's

[2]. In its first unopposed motion, which was granted by the Court, Complainant failed to correct the alleged violation description narrative in Citation 1, Item 2b, which merely repeated the same description contained in Citation 1, Item 2a. The second unopposed motion, which was also granted by the Court, corrected this mistake.

resolution are whether: (i) Complainant proved Respondent had knowledge of the violation; (ii) Respondent proved the violations were the product of unpreventable employee misconduct; and (iii) the penalties proposed by Complainant are appropriate.

III. FACTUAL BACKGROUND

A. Respondent's Operations

Respondent is an electrical contractor that builds and maintains power lines for utility companies and oil companies, as well as maintains electrical systems and equipment for the oil companies it services.[3] (Tr. 589-90). Respondent has roughly 130 employees spread across four locations, with about 120 of those employees working in the field. (Tr. 457-58). Those field employees were split up into two categories: line work and electrical work. (Tr. 589-90). Line crews, as the name implies, work on power lines, and electrical crews work on electrical equipment at various worksites. Across the entire company, Respondent had 16-17 line crews and 5-6 electrical crews. (Tr. 457-58).

Justin Burris is the President of JW Powerline and oversees all of its operations, including the Midland yard, the employees of which were involved in this case. (Tr. 561). Burris had recently hired a new superintendent for the Midland location, Joshua Fine, who came to Respondent with extensive experience, including certifications as a journeyman electrician, unlimited electrical contractor in Oklahoma, and master electrician in Texas.[4] (Tr. 348-49). Notwithstanding those certifications, he did not have any experience in line construction or maintenance. (Tr. 358). As superintendent, however, Fine was responsible for overseeing both the electrical and line sections of the Midland yard. The electrical section was supervised by General

[3]. Respondent also has other business lines, but they were not involved in the events at issue in this case. (Tr. 590-92).

[4]. According to Fine, the designations of unlimited electrical contractor and master electrician are the same. (Tr. 349). Oklahoma and Texas basically use different nomenclature for the same status.

Foreman Glenn Walker and the line section was supervised by General Foreman Mojias Williams. (Tr. 334). Burris hired Fine with the expectation he would learn the ins and outs of line work over time, but he was principally concerned with the electrical side of the operation, which was in need of support. (Tr. 358). Because of Fine's credentials, Burris brought him on and set him to work before orientation training, which typically took place on the first of the month. (Tr. 578). Although Fine did not receive formal training, Burris had the safety director give Fine a brief primer on the use and importance of Job Safety Analyses. (Tr. 362-63, 578).

B. Respondent's Safety and Training Program

Although there are two principal divisions of Respondent's operations, they are more or less governed by the same set of policies and are provided the same training. (Tr. 67, 361-62). According to CSHO Daniels' investigation, all of Respondent's employees attend the same training sessions on de-energization, lockout/tagout, job briefings, and grounding. (Tr. 67; Ex. C-20, C-25, R-1). Insofar as the content of the classroom training was concerned, linemen and electricians received the exact same information about the foregoing topics. (Tr. 216). This appears to be consistent with Burris' belief that the basic principles behind electrical work, regardless of whether it is line work or equipment, are the same. (Tr. 617).

According to CSHO Daniels, Respondent's policies were sufficient to address the hazards at issue in this case and the training provided by Respondent was given to all crew members involved (with the exception of Fine). (Tr. 247-48). As will be discussed later in this decision, however, it is unclear what program of monitoring, if any, Respondent had implemented to ensure its policies and OSHA regulations were being followed in the field. (Tr. 315). There was no evidence of any consistent monitoring/auditing program indicating the number, frequency, or duration of workplace inspections occurring outside of the workplace, which is most of

Respondent's business. Instead, there is only evidence of remote monitoring via GPS and a proposed program of remote JSA submission, which was not implemented until after the accident. (Tr. 201, 581-82; Ex. C-22). This is borne out by the evidence, which shows that, prior to the incident on May 2-3, Respondent's only documented disciplinary actions involved: speeding in company vehicles caught on GPS software; failure to wear personal protective equipment (PPE) at Respondent's yard; and no-call, no-shows, which are not safety-related violations. (Tr. 201-207; Ex. C-22). Burris testified he once fired an entire crew on the spot for failing to complete a JSA and not wearing proper PPE. (Tr. 568). However, his observation appears to be a result of happenstance: he noticed the crew working on the side of the road while on his way to another client's location. (Tr. 568). Further, while Burris testified they had an audit program, he qualified what he meant by discussing programs designed to ensure people were qualified to perform jobs, such as equipment operators and doing electrical safety training. (Tr. 579-81).

While Burris claims to have fired "people" before the accident, there was no documentation submitted in support of this to substantiate the reason for the termination, nor the way the behavior justifying the termination was discovered. (Tr. 568). While there may have been weaknesses in the HR and safety departments prior to Burris becoming president, this does not explain the lack of any in-the-field disciplinary actions or evidence of employee monitoring. Burris admitted his crews conduct late-night, on-call repairs at least once a week, and yet there appears to be no evidence these employees, or any field employees for that matter, were ever monitored as part of a programmed inspection regime. (Tr. 467). Indeed, it was not until after the incident occurred that Respondent's records of discipline took a notable jump in number or indicated inspections occurring in the field.[5] (Tr. 632-35; Ex. C-22, C-35). The dearth of such records prior to the

[5]. Even then, Complainant's counsel was quick to point out that many of the individual violations were the result of

accident, and the overwhelming amount of documented actions post-incident, suggests some failures of previous leadership, whether documentary or otherwise, lingered. It is also worth noting not one of the employees involved were disciplined, even though Respondent admitted OSHA regulations and company rules were violated.

C. Events of May 2-3, 2018

On May 2, 2018, Burris received a call from one of its clients, CrownQuest, who reported it had lost power on a salt-water disposal unit (SWD) after a thunderstorm had come through the area. (Tr. 466, 589). Burris contacted Fine, who sent out Glenn Walker to restore electricity to CrownQuest's equipment. (Tr. 466). When he was unable to restore power locally, it became clear that a power line had been damaged. (Tr. 495-96). Walker contacted Mojias Williams, Respondent's general foreman for line-side operations, who called in M.T. and Art Mejia, the on-call linemen for that night. (Tr. 234, 250). M.T. and Mejia traveled to Respondent's yard, got a company truck, and traveled out to CrownQuest's Nail Ranch location, which was in a remote, rural area in Midland, Texas. (Tr. 442-43). M.T. was a crew foreman, who, under normal circumstances, would oversee a crew of four, and Mejia was his helper. (Tr. 468-69).

M.T. and Mejia met up with Walker at the Nail Ranch location to check meters and walk the lines to identify the location of the line break. (Tr. 61-63, 251-52). The roads in the area are winding and there are no street lights, which meant the crew had to rely on vehicle headlights and flashlights to see. (Tr. 442-443). In order to be more efficient, Mejia paired with Walker and walked one way, while M.T. walked the other in order to find the source of the outage. (Tr. 251-52). Eventually, M.T. identified a broken power line, which he believed was causing the power outage, and let Mejia and Walker know. (Tr. 62-63). Without isolating the line, M.T. tested it with

singular incidents wherein multiple people were cited for the same failure, i.e., completing a JSA and lock out tag out ("LOTO').

a voltage meter, and confirmed it was dead. (Tr. 63). After testing it, Walker, Mejia, and M.T. drove 200 yards down the road to the primary meter, which they incorrectly believed was the power source for the downed line, and pulled the fuses. (Tr. 63-64, 475-77). Although they pulled the fuses, none of the crew members locked out or tagged the meter. (Tr. 476-77).

The crew contacted Williams and told him they needed a size 1/0 splice to fix the broken line. (Tr. 497). Williams asked if M.T. was sure he properly identified a CrownQuest line, because CrownQuest typically used a size-two line. (Tr. 68). M.T. told Williams he had walked the line and affirmed it was, in fact, CrownQuest's. (Tr. 68). In response, Williams contacted Terry Shipman, Respondent's Master of Record, so the crew could obtain the necessary 1/0 splice. (Tr. 69). Shipman called Fine, who agreed to open the warehouse for M.T. and Mejia and volunteered to replace Walker at Nail Ranch, because Walker had another shift scheduled the next morning. (Tr. 70-71, 365-66).

M.T. and Mejia drove back to the yard and met Fine at the warehouse, where they retrieved the splice. (Tr. 71). Traveling in a separate company truck, Fine followed M.T. and Mejia back to the location of the broken line. (Tr. 71-72). On the way back to the site of the broken line, M.T., Mejia, and Fine stopped at an air switch just a short distance away to the northwest. (Tr. 72, 371-76; Ex. C-33). M.T. showed Fine the box on the pole and told him a lock had been applied to the switch. Fine never actually saw the lock, which, it was later discovered, did not belong to any of Respondent's employees. (Tr. 374-75, 471). Once they reached the broken line, Fine asked Mejia whether he and M.T. had filled out a JSA. (Tr. 434). Mejia indicated they had; though, Fine did not ask to see a copy of the JSA. (Tr. 434; Ex. C-21 at DOL383). Being unfamiliar with the process of reconnecting a line, Fine asked M.T. how he could verify the line was, in fact, dead. (Tr. 378-79). M.T. took out a screwdriver and hovered it over the top of the line on the north and south

sides of the break. (Tr. 377). This process, which M.T. referred to as "fuzzing", is a violation of company policy; though Fine testified he did not know that at the time.[6] (Tr. 379; Ex. C-11 at 467). M.T. told Fine if the line was energized, electricity would arc to the screwdriver. (Tr. 387). There was no arc, which illustrated the line was not energized at that time, and which the crew believed was the result of the air switch being locked out and the meter's fuses being pulled.

As it turned out, the broken line belonged to Oncor, the local utility company.[7] (Tr. 383; Ex. R-10). Whether due to the darkness, distraction, or the manner in which the power line from Oncor split at the post where CrownQuest's line began, M.T. mistakenly traced the path of the line, and what he believed was CrownQuest's line was, in fact, Oncor's. Thus, when the fuses were pulled on the primary meter and the lock on the air switch was identified, they did not cut off power to the line M.T. proposed to fix. (Tr. 394). In reality, the line was powered down because a recloser, which serves as an automated circuit breaker, had tripped and had not been reset by Oncor. (Tr. 384, 477). The recloser was located approximately 5 miles away from the broken line, and there is no evidence any of Respondent's employees visited it. (Tr. 477).

After fuzzing the line to Fine's apparent satisfaction, M.T. instructed Mejia that he needed a hoist to splice the separated lines together. (Tr. 380-88). Fine used his cellphone flashlight to help Mejia locate the hoist in the back of the service truck. (Tr. 441). Realizing one hoist was insufficient, M.T. asked Mejia and Fine to retrieve an additional hoist. (Tr. 76). At some point while Mejia and Fine were retrieving the second hoist, an Oncor employee reset the reclosure, causing the line M.T. was working on to be re-energized. (Tr. 76-77). As a result, M.T. was

[6]. The Court finds this hard to believe. Not only did Fine have extensive qualifications and knowledge that would highlight such a practice as improper, he also testified he testified he would use a voltmeter on an outlet, which might have 220V of electricity compared to the 7200-plus volts that are found on overhead power lines. (Tr. 379).

[7]. Although Respondent occasionally performed work for Oncor, the utility's own employees typically performed repairs after a loss of power.

electrocuted when 14,400 volts coursed through the line he mistakenly believed was de-energized. (Tr. 77, 188).

IV. BURDEN OF PROOF AND LAW APPLICABLE TO 5(a)(2) VIOLATION

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

The Secretary must establish his *prima facie* case by preponderance of the evidence. *See Hartford Roofing Co*., 17 BNA OSHC 1361 (No. 92-3855, 1995).

"Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014).

V. ANALYSIS, FINDINGS OF FACT AND LEGAL APPLICATION

As noted above, Respondent admits to the first three elements of a section 5(a)(2) violation for each of the cited standards, including applicability of the standard, the terms of the standard were violated, and its employees were exposed to a hazard. *See* Amended Joint Stipulation Statement. The only element of Complainant's *prima facie* case before the Court is knowledge, which also implicates Respondent's claim of unpreventable employee misconduct. With respect

to each of the citation items, the Court finds Respondent knew or, with the exercise of reasonable diligence, should have known of the violative conditions.

A. Law Applicable to Knowledge Analysis

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of an employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of a hazardous condition, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980).

Because this case originated in the 5th Circuit, and due to the unique facts of this case, the analysis is more complicated. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.") (citing 29 U.S.C. § 660(a), (b)). Under Commission precedent, as well as that of other circuit courts, Complainant meets its *prima facie* burden when a supervisor engages in violative conduct. Because the supervisor is aware of his own conduct, such knowledge can be imputed to his employer. *See Empire Roofing Co.*, 25 BNA OSHC 2221 (No. 13-1034, 2016) ("Under Commission precedent, the Secretary can establish the knowledge element of his burden of proof by imputing a supervisor's knowledge of a violative condition, including knowledge of his or her own

misconduct, to the employer."). This can be rebutted by Respondent showing the supervisor's conduct was not foreseeable by pleading the unpreventable employee misconduct defense. *See Archer-Western Contractors, Ltd*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991) (holding defense of unpreventable employee misconduct involving a supervisor requires proof employer took all feasible steps to prevent incident, including adequate instruction and supervision of the supervisor).

According to the 5th Circuit, however, the Commission improperly relieves the Secretary of its burden of proof as to knowledge in this situation. *See W.G. Yates*, 459 F.3d 604, 609 (5th Cir. 2006). Before imputing to an employer the knowledge of a supervisor whose misconduct is the subject of the citation, the 5th Circuit requires the Secretary to show "the employer's safety policy, training, and discipline" are insufficient such that the supervisor's conduct was foreseeable. *Id.* at 608. In other words, the standard for proving foreseeability is ostensibly the same as the standard of proof for establishing the supervisory misconduct defense, albeit in reverse. *See W.G. Yates*, 459 F.3d at 609 n.7 ("Thus it appears that the required considerations for this affirmative defense closely mirror the foreseeability analysis required to determine if a supervisor's knowledge of his own misconduct, contrary to the employer's policies, can be imputed to the employer.").

In decisions subsequent to *Yates*, the 5th Circuit has clarified its holding is a narrow one. For example, in *Byrd Telecom, Inc.*, the court upheld an ALJ's determination that the employer had constructive knowledge of the violation because it had no work rules governing the violation, did not properly train its employees, and failed to discipline the supervisor who engaged in the misconduct. *Byrd Telecom, Inc.*, 657 Fed. Appx. 312, 316 (5th Cir. 2016) (unpublished). In other words, the inadequacy of the employer's program alone was sufficient to establish the employer's

constructive knowledge "[i]rrespective of who was serving as foreman", thereby rendering any such supervisor's misconduct as foreseeable. *Id.*

"[A]n employer has a general obligation to inspect its workplace for hazards." *Hamilton Fixture*, 16 BNA OSHC 1073, 1993 WL 127949 at *16 (No. 88-1720, 1993) (citing *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980)). The scope of that obligation "requires a *careful and critical examination* and is not satisfied by a mere opportunity to view equipment." *Austin Comm. v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979). Some factors to assess whether an employer has exercised reasonable diligence include an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). Additionally, an employer "cannot claim lack of knowledge resulting from its own failure to make use of the sources of information readily available to it." *Wiley Organics, Inc. d/b/a Organic Tech*, 17 BNA OSHC 1586, 1597 (No. 91-3275, 1996), *aff'd* 124 F.3d 201 (6th Cir. 1997); *see also N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000) ("Reasonable diligence implies effort, attention, and action; not mere reliance upon another to make violations known.").

Constructive knowledge, just like actual knowledge, can be imputed to the employer through the knowledge of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of a hazardous condition, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980).

B. Citation 1, Item 1a

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

> 29 CFR 1910.269(a)(4): Existing characteristics and conditions of electrical lines and equipment that are related to the safety of the work to be performed shall be determined before work on or near the lines or equipment is started:
>
> On or about May 2nd and May 3rd, 2018, the employer did not ensure that the existing characteristics and conditions of electrical lines, related to the safety of work, was determined before work was started. This exposed the employees to electrical hazards.

See Citation and Notification of Penalty.[8]

As noted above, multiple supervisors took part in the decision-making and repair process leading to M.T.'s electrocution, including Walker, Williams, Fine, and M.T.[9] Complainant contends Walker, Williams, and Fine all qualify as supervisors whose knowledge could (and should) be imputed to Respondent with respect to M.T.'s failure to identify the line as belonging to CrownQuest.[10] Respondent argues Walker and Williams' roles in the process were minimal; that Fine lacked the requisite knowledge as a superintendent-in-training to qualify as a supervisor whose knowledge should be imputed; and that M.T.'s actions were unforeseeable. With regard to this citation item, the Court agrees with Respondent as to Walker, Williams, and Fine. However, with regard to M.T., the Court finds Respondent had constructive knowledge of the violation.

While there is some cachet to Complainant's argument that Williams should have known M.T. misidentified the line, it is unclear what more he could have reasonably done under the

---

[8]. The Citation and Notification of Penalty was amended (twice) by Complainant. The most up-to-date version of the Citation narrative is contained in the Court's *Order Granting Unopposed Motion to Correct Typographical Error in the Secretary's Unopposed Motion to Amend Citation and Complaint*. This is the case for each reference to the Citation and Notification of Penalty.

[9]. At trial Respondent questioned whether M.T. could properly be characterized as supervisor. (Tr. 33). The evidence shows M.T. was designated as a crew foreman, and would typically be in charge of a crew of four individuals. Though he did not have a full crew on the night of May 2-3, 2018, he had a helper, Mejia, whom he directed to perform tasks and for whom he was responsible. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-630, 1992) ("An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer.").

[10]. Complainant opted to not discuss M.T. as a supervisor's knowledge should be imputed to Respondent in its principal arguments, but instead focused on the two general foremen and the superintendent. Perhaps because Complainant asserts *Yates* is inapplicable to the present case that it only addresses M.T. as a source of imputable knowledge in its response to the Court's certified questions.

circumstances. When M.T. called in with Mejia and Walker, he told Williams he found the downed line and needed a 1/0 splice to repair it. Because CrownQuest did not typically use 1/0 cable on its power line, Williams asked M.T. whether he was sure the line belonged to CrownQuest and whether M.T. had walked the line to ensure that was the case. M.T. assured Williams he had done so. Burris testified CrownQuest had multiple contractors that worked on its lines, any of whom could have installed a different size cable in response to a growing power load. (Tr. 498). Considering Williams was not at the worksite, the Court finds he exercised reasonable diligence by asking follow-up questions in response to unusual information; namely, when he asked whether his experienced crew foreman performed an adequate survey of the line.

Walker's role in the matter was even further attenuated: he was initially called out to perform electrical repairs on equipment but could not do so until the lines were repaired. He helped Mejia and M.T. find the downed wire and was around during the phone call to Williams, the line supervisor, but otherwise was uninvolved in the decision-making process or repair. It is unclear to what extent he participated in the phone call or what the information discussed during the call should have prompted him to do, given his primary sphere of knowledge was in electrical equipment and not line work. Once the conversation with Williams concluded, Walker returned to work on the equipment in the oil fields. Given these facts, the Court sees no reason why Walker would react any differently than Williams, who asked M.T. whether he had properly identified the line.

As for Fine, the Court finds this is one instance where his overall lack of knowledge regarding line work matters. It was not until after M.T. had "identified" the line and Williams had asked him whether he had confirmed that fact when Fine entered the picture. (Tr. 429). According to Fine, he was contacted by Shipman to open the warehouse to get a 1/0 Autosplice for M.T. and

Mejia. (Tr. 429). Shipman commented they "don't use them" to which Fine responded, "I don't even know what that is, but I'll open the warehouse." (Tr. 429). Given Fine's relative lack of knowledge about line sizes, splices, and what size line CrownQuest used specifically, the Court disagrees with Complainant that Fine's conversation with Shipman should have raised a red flag. Given his inexperience, it is unclear whether Fine would have known there was a concern about operating on an incorrect line; indeed, under such circumstances, it would make sense for him to rely on a competent person with more experience.[11] As such, the Court finds Complainant failed to prove Fine did not exercise reasonable diligence when he failed to ask how M.T. knew the line belonged to CrownQuest.

As regards M.T., however, the Court finds he should have known the line did not belong to CrownQuest and that his failure to exercise reasonable diligence under the circumstances was foreseeable by Respondent. Respondent attributed M.T.'s misidentification to his failure to complete a JSA and job briefing prior to conducting a repair, because "one of the purposes of a job briefing would have been to determine the conditions of the line and to ensure the right line was being worked on." *Resp't Br.* at 18. In other words, had M.T. taken the time to perform the company-mandated steps before performing the job, he would have noted the location where the CrownQuest line separated from the Oncor line and correctly identified the line as belonging to Oncor. (Tr. 474, 609; Ex. C-33). This, in turn, would have illustrated that neither of the switches he identified—the primary meter and air switch—would cut off power to that location.

[11]. While inexperience plays a factor under this set of facts, *Thomas Industrial Coatings* does not compel this conclusion. In that case, the Commission determined that a foreman-in-training did not have an adequate view of the violative conduct such that it could conclude he should have known of the violation, nor was it able to ascertain how long the condition existed such that the foreman-in-training would have had opportunity to see it. *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2012 WL 1777086 at *4 (No. 06-1542, 2012). In either case, the Court notes the status of the foreman as one "in training" had no bearing on the outcome of the case. *Id.*

Respondent asserts its safety policies, training, and record of discipline illustrate M.T.'s actions were unforeseeable and uncharacteristic. The Court disagrees. Although Respondent claims M.T.'s actions were uncharacteristic, there is no evidence Respondent had a system in place to monitor the behavior of its employees such that it could be said to have exercised reasonable diligence. *See L.E. Meyers Co.*, 16 BNA OSHC 1037 (No. 90-945, 1993) ("[O]ne of the factors considered in determining whether an employer effectively enforced its safety rules are the efforts it took to monitor adherence to those safety rules by supervisory employees.").

There is no dispute Respondent had rules in place to address this particular violation—or the others for that matter—nor does it appear there is any question that M.T. was trained. (Ex. C-3). Complainant contends Respondent's training program was surely inadequate based on the multiple failures that occurred on the night of May 2-3, 2018; however, Complainant does not point to any particular aspect of Respondent's training program that is deficient. On the basis of this evidence, the Court refuses to conclude M.T. was not trained; however, as discussed in more detail below, the fact that all three employees failed to comply with multiple rules while in the field suggests something about Respondent's program was deficient. Perhaps training was lacking; though the more likely conclusion is that Respondent failed to adequately monitor and discipline its employees such that they felt compelled to comply. The Court is most concerned about Respondent's failure to inspect its many and varied workplaces and, as a result, impose meaningful discipline with respect to the work practices that substantially impact safety and health.

As noted above, reasonable diligence reflects an "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981); *see also N&N Contractors, Inc.*, 18 BNA OSHC 2121 ("Reasonable diligence implies effort, attention, and

action; not mere reliance upon another to make violations known."). There is nothing in Respondent's safety program to indicate the existence of an internal inspection program or to suggest inspections took place at all. Burris' testimony regarding "audits" appear to be a reference to skills tests and certifications for the use of equipment rather than actual inspections occurring in the field, especially of crews performing late-night power line repairs.

The lack of inspections is borne out by the disciplinary notices issued by Respondent prior to the incident on May 3, 2018. Of those disciplinary notices, most were related to speeding and no-call/no-shows. (Tr. 201-208; Ex. C-22). While there were a few disciplinary notices issued for failure to wear a hard hat, those notices were issued to employees working in the yard of Respondent's facilities; not in the field, where a predominant amount of Respondent's work took place. The speeding violations were caught by GPS monitoring, and no-call/no-shows have no relationship to safety and health. In fact, the only record of an in-the-field "inspection", so-called, was Burris' oral account of the time he fired a group of people for failing to wear PPE and draft a JSA. (Tr. 568). Even then, Burris testified he was on his way to another client's location when he happened to observe this crew. Otherwise, by Burris' own admission, the disciplinary notices issued post-May 3, 2018, are the only documented instances of the disciplinary policy being enforced in the field. (Tr. 634).

Respondent had crews working at night under the same conditions as M.T. and Mejia at least once a week, and there is no evidence to suggest any of them had been inspected during the performance of their duties. Commission precedent is rife with examples of what constitutes sufficient monitoring and adequate, targeted discipline. *See Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082 (No. 06-1542, 2012) (finding monitoring sufficient when: insurance company performed 9 audits over two-year period, safety manager performed unannounced inspections at

various worksites, owner visited specific worksite periodically and inquired about "everything", superintendent walked site weekly and completed checklist evaluating safety issues); *New York State Elec. & Gas Corp.*, 19 BNA OSHC 1227 (No. 91-2897, 2000) (finding, upon remand by circuit court, twice daily visits of 30-45 minutes plus unannounced audits and worker's compensation audits were sufficient); *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2182 (No. 00-1268, 2003) (finding supervision adequate where supervisors visited each work site at least once a day, safety manager visited ten to fifteen sites a week, and company president made unannounced visits to worksites). Indeed, even site visits alone are not enough if the supervisors themselves are not being monitored for compliance with the rules. *See Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097 (No. 98-1748, 2000) (holding employer "failed to take reasonable steps to monitor its site supervisors' compliance" and imputing supervisor's knowledge to it); *Dover Elevator Co.*, 15 BNA OSHC 1378 (No. 88-2642, 1991) (finding that although union conducted periodic safety inspections, employer failed to show it took any measures to monitor adherence to safety rules by supervisory personnel). The lack of persuasive evidence indicating Respondent conducted monitoring of its employees in the field—who are performing high-risk work—undermines its claim its safety program was adequate or its disciplinary record reflected its employees followed the rules. *See L.E. Meyers*, 16 BNA OSHC 1037 (holding scant evidence of disciplinary action, only one of which related to the violations at issue, in face of history of OSHA violations suggests employer safety program insufficient). Burris' blanket statement that audits occurred, without indicating the number, frequency, or duration, is insufficient to show its monitoring program was adequate. Without adequate monitoring of performance, Respondent could not accurately assess whether its rules and policies were being followed. As such, any claim that non-complying behaviors, such as M.T.'s, were unforeseeable, is difficult to accept. Further the fact that neither

Mejia nor Fine were disciplined after the incident also undermines Respondent's suggestion its disciplinary program was adequately enforced. *See Byrd Telecom*, 657 Fed App'x at 316 (citing favorably to ALJ's conclusion that a safety program is inadequate when, amongst other things, Respondent failed to discipline the supervisor involved in the misconduct).

While Respondent suggests prior leadership in the safety and health and human resources arenas failed to document disciplinary actions and conduct monitoring, the Court notes that improvements did not occur when new managers were put into place by Burris. The safety director, Sammy Hunnycut, was hired in February of 2018, and David Roundtree, who was hired to handle training programming, was hired in January 2018. (Tr. 563, 566). The uptick in discipline did not occur until after the incident in this case, suggests some of those prior failures still lingered. Accordingly, the Court finds Complainant established its *prima facie* case for constructive knowledge on behalf of M.T. Because he was a supervisor at the time of the violation, his knowledge is properly imputed to Respondent.

C. Citation 1, Item 1b

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

> 29 CFR 1910.269(c)(1)(ii): The employer shall ensure that the employee in charge conducts a job briefing that meets paragraph (c)(2), (c)(3), and (c)(4) of this section with the employees involved before they start each job.
>
> On or about May 2nd and May 3rd, 2018, the employer did not conduct a job briefing for employees performing repair work on an overhead power line. This exposed the employees to electrical hazards.

See Citation and Notification of Penalty.[12]

As with Item 1a, Respondent readily admits M.T. failed to conduct a job briefing meeting the requirements of subparagraph (c). Indeed, Respondent points out, had M.T. conducted the

[12]. *See, supra*, note 8.

requisite job briefing, he likely would have correctly identified the downed line as belonging to Oncor instead of CrownQuest. According to Fine, he had a brief discussion with M.T. prior to M.T. attempting to fix the line. (Tr. 386). Specifically, he testified, "We had a job briefing about as to how to fix [the line] as [M.T.] was showing me how to fuzz and what the procedure was, what he was going to do, just a general conversation as we were walking from point A to point B. But to answer, I think, the question you asked, no, we did not stop and have a job briefing to write it down." (Tr. 386). Fine also admitted he was aware, at the time of the incident, a JSA was required to be completed prior to work beginning and that he, as part of the crew present to perform a job, was at least partly responsible for completing the document. (Tr. 392-93). Though he says he asked Mejia if a JSA had been completed—to which Mejia responded it had—he did not verify this fact, nor did he confirm with M.T. As it turns out, a JSA form was discovered, though it was missing most, if not all, vital information.

Complainant argues Respondent had knowledge of the violation because Fine knew a job briefing was required, that such a briefing had not occurred while he was present at the worksite, and he had not participated in the drafting of, nor signed, a JSA. Respondent contends when Fine asked Mejia if a JSA had been performed and asked M.T. how the job was going to be performed, he exercised reasonable diligence in ascertaining whether OSHA regulations were being complied with and whether company rules were being followed. The Court disagrees.

Even though he had been employed by Respondent for just over a week, Fine had been given guidance from the Safety Director regarding JSAs and job briefings; indeed, it was the one area Burris wanted to ensure Fine was aware of before starting work. (Tr. 362-63, 578). Thus, not only was he aware briefings/JSAs needed to be performed, his position as superintendent required more than simply relying on the word of the least senior member of the crew on duty that night,

which he admitted during his testimony. (Tr. 364). *See N&N Contractors, Inc.*, 18 BNA OSHC 2121, *supra*. Burris testified it was Fine's responsibility to ensure a job briefing occurred, and he expected Fine would carry out that duty. (Tr. 505, 552). Fine traveled to the worksite with the crew, was present before work began, and had a discussion with M.T., albeit brief and insufficient, about the nature of the job to be performed.

As crew foreman, M.T. was primarily responsible for conducting a job briefing; however, Fine, by his own admission and as testified to by Burris, had an obligation to ensure the briefing took place. (Tr. 364). According to Respondent's rules, the JSA represented written evidence the job briefing took place, and each employee involved in the job was required to sign it, which indicated they were aware of the requirements of the job, regardless of whether they had been physically present for the briefing itself. (Tr. 364; Ex. C-22 § 2.10). Fine knew this, and yet he testified he did not participate in a complete job briefing and did not ask to review or sign a JSA documenting the elements of the job briefing (Tr. 407). Instead, he appeared to be satisfied with Mejia's oral representation that a briefing had occurred and a JSA had been filled out. Regardless of whether a written document memorializing the job briefing is required, in this instance the lack of a written and completed JSA highlighted Fine's failure to ensure a briefing occurred. Accordingly, the Court finds Fine had constructive knowledge, and Respondent, through Fine, knew a compliant job briefing did not occur. Thus, the Court finds Complainant established a violation of the standard.

D. Citation 1, Item 2a

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

> 29 CFR 1910.269(m)(3)(ii): The employer shall ensure that all switches, disconnectors, jumpers, taps, and other means through which known sources of electrical energy may be supplied to the particular lines and equipment to be deenergized are open. The employer shall render such means inoperable, unless its

> design does not so permit, and then ensure that such means are tagged to indicate that employees are at work:
>
> On or about May 2nd and May 3rd, 2018, employees performing repair work on an overhead power line were exposed to electrical hazards when the employer did not ensure that all switches were open.

See Citation and Notification of Penalty.[13]

This violation is, in some ways, an extension of Item 1a in that M.T. did not properly identify the line and, therefore, did not properly identify the switch designed to cut off power to the line. As noted earlier, the switch designed to cut off power to this particular location was the Oncor recloser, which was located roughly 5 miles away. While M.T. did not have actual knowledge of this fact, he could have known had he exercised reasonable diligence, just as with Item 1a. What is interesting about this citation item, however, is Complainant's argument that it does not matter whether Respondent knew the Oncor recloser was the proper switch or not. Instead, Complainant argues, Respondent had actual knowledge that the crew never opened *and rendered inoperable* any switches through which known sources of energy may be supplied. *See* 29 C.F.R. § 1910.269(m)(3)(ii). The Court agrees.

It is undisputed the crew did not open the recloser switch, nor did they lock it out. Further, even though M.T. had incorrectly identified the air switch and primary meter as switches that could stop the flow of energy to the cable, he failed to apply a lock to either of them. While the evidence indicates he pulled the fuses on the primary meter, there is no evidence he applied a tag or lock to the switch as required by the cited standard. Likewise, when he stopped at the air switch on his return trip from the warehouse, along with Fine, he found a lock on the switch, but it did not belong to any JW Powerline employee. While M.T. was mistaken about which switch needed to be opened, he nevertheless failed to "render such means inoperable" through the use of a lock or

[13]. *See, supra*, note 8.

otherwise tag the switch to indicate his crew was working, one of which is required by 29 C.F.R. § 1910.269(m)(3)(ii). This constitutes actual knowledge of the violation, which, as concluded in the previous section, was foreseeable by Respondent. Accordingly, the Court finds Complainant established its *prima facie* case for knowledge.

Alternatively, the Court also finds knowledge can be established through Fine. As distinct from the previous item, the Court finds Fine had adequate experience and understanding of electrical principles to be aware that switches should have been opened and locks applied. As noted previously, Fine was a journeyman electrician and licensed in two different states as a master electrician and an unlimited electrical contractor. According to Burris, he expected an individual armed with such knowledge, regardless of their experience with line work, should have known how to lock out and tag out a line and Fine should have ensured that LOTO had taken place. (Tr. 551). Notwithstanding this knowledge, Fine did not ensure or verify M.T. and Mejia had locked out the switches they believed cut off power to the downed portion of line. Instead, he merely accepted M.T.'s word a lock had been applied to the air switch without conducting an independent inspection of it. (Tr. 374). Although Fine may not have had actual knowledge M.T. failed to lock out or tag out the various switches they believed supplied power to the broken line, he could have discovered this failure had he exercised reasonable diligence. *See N&N Contractors, Inc.*, 18 BNA OSHC 2121, *supra*.

Under the circumstances, Fine was merely an observer of M.T.'s misconduct and did not specifically fail to do anything except inquire further. As such, *Yates'* foreseeability analysis does not apply. *See Calpine*, 774 Fed. Appx. 879, 883 (5th Cir. 2019) ("Yates addresses only when a supervisor's knowledge of his *own* misconduct violates an employer's policy or instructions."). That said, even if it were to apply, the same failures of Respondent's safety program identified

under the analysis of M.T.'s behavior would apply equally to Fine. In fact, the conclusion is stronger in Fine's case, because Respondent only provided him with an impromptu session of "training", which only addressed JSAs, with the safety director prior to sending him into the field. Further, to the extent Burris relied upon Fine's credentials as a substitute for proper training, there is no evidence he performed any independent analysis of his abilities to suggest he was so qualified. Thus, any failure to comply with company rules regarding LOTO were certainly foreseeable, and therefore imputable to Respondent.

E. Citation 1, Item 2b

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

> 29 CFR 1910.269(n)(2): For any employee to work transmission and distribution lines or equipment as deenergized, the employer shall ensure that the lines or equipment are deenergized under the provisions of paragraph (m) of this section and shall ensure proper grounding of the lines or equipment as specified in paragraphs (n)(3) through (n)(8) of this section:
>
> On or about May 2nd and May 3rd, 2018, employees performing repair work on an overhead power line were exposed to electrical hazards when the employer did not ensure proper grounding of lines.

See Citation and Notification of Penalty.[14]

The analysis for this item is similar to the analysis for item 2a, albeit much simpler. While items 1a and 2a involve a state of imperfect knowledge, i.e., neither Fine nor M.T. knew the wire or switches were the incorrect ones, this item addresses something they failed to do and should have been readily apparent to both: grounding. When asked by Fine how he knew the lines were deenergized, M.T. fuzzed the line with his screwdriver, which would produce an arc if it were energized. However, beyond this rudimentary (and contrary to company policy) illustration, M.T. did nothing else to ensure compliance with the cited standard and Respondent's rules governing

[14]. *See, supra*, note 8.

grounding of power lines. (Tr. 388; Ex. C-23). In fact, Respondent discovered later that M.T. and Mejia did not have grounding chains in their service truck, which means they were either unprepared or chose to proceed notwithstanding the lack of proper equipment. (Tr. 516-17). As such, M.T. had actual knowledge of the violative condition. For the reasons stated in the previous two sections, the Court finds this failure was foreseeable and, thus, M.T.'s knowledge is properly imputed to Respondent.

Alternatively, the Court also finds Fine's knowledge is imputable to Respondent. While Fine may have been unfamiliar with the specifics of grounding power lines, his certifications and background should have put him on notice that M.T. failed to ground the broken wires. Fine was not present for the initial assessment of the problem; however, he was there before any work started on the line. (Tr. 174-75). Based on the evidence, the only actions he observed were: (1) M.T. fuzzing the line; (2) Mejia collecting a hoist to install the splice; (3) M.T. starting to install the splice and requesting an additional hoist to complete the job; and (4) Mejia collecting an additional hoist. Notwithstanding the importance of grounding for electrical work generally, Fine did not ask M.T. or Mejia whether the line had been grounded, nor did he observe M.T. or Mejia do anything that could be reasonably construed as grounding. (Tr. 406-407, 426). Given these facts, his experience as a master electrician, and his position as superintendent, Fine knew, or at the very least should have known, the line had not been grounded. Burris, who hired Fine, testified Fine should have known M.T. did not ground the power line and expected he would have ensured grounding had taken place. (Tr. 551-52).

While Fine could arguably be held to have participated in the misconduct, he was more of an observer in this situation. His participation in the repair amounted to holding a flashlight for Mejia to retrieve a hoist from the service truck. Nonetheless, according to Respondent's work

rules, he was responsible for ensuring workers complied with grounding procedures. (Tr. 217-18; Ex. C-23 at DOL-000101). Although he was required to ensure grounding took place, he was not specifically engaged in the misconduct alleged. As such, the foreseeability analysis of *Yates* does not apply. And, as stated before, even if it were to apply to this situation, the Court would equally find Fine's misconduct foreseeable, because Respondent either (a) failed to provide adequate training before sending him into the field or (b) failed to make a proper assessment of his knowledge, skills, and abilities prior to sending him into the field. Further, the analysis regarding the foreseeability of M.T.'s actions is equally applicable to Fine. Accordingly, his knowledge is also properly imputable to Respondent.

VI. Respondent Failed to Prove Unpreventable Employee Misconduct

In order to prevail on a claim of unpreventable employee misconduct, Respondent must prove: (1) it has established work rules designed to prevent the violation, (2) has adequately communicated those rules to its employees, (3) has taken steps to discover violations, and (4) has effectively enforced the rules when violations have been discovered. *See W.G. Yates*, 459 F.3d at 609 n.7. As noted earlier, the standard for determining whether a supervisor's actions were foreseeable closely tracks the elements of the unpreventable employee misconduct defense. *Id.* Respondent contends M.T.'s misconduct should not be imputed to it, because his actions were unforeseeable based on Respondent's policies, training, and discipline. For many of the reasons previously discussed, the Court disagrees.

Respondent clearly had policies and rules to address the violations alleged in this case, and documentary and testimonial evidence indicates classroom and on-the-job training occurred. The problem, as previously discussed, was with Respondent's lack of monitoring and inadequate discipline. While Respondent introduced evidence of disciplinary actions, they were not connected

to monitoring occurring in the field; instead, the disciplinary notices were the product of remote monitoring of vehicle speed via GPS, violations of the hard hat rule in Respondent's yard, and violations of the no-call/no-show rule, which has no relationship to safety and health.

Respondent argues so long as it has a disciplinary policy and shows it has disciplined employees in conformity with that policy, it does not need to show employees were disciplined for violating the particular standards at issue in the case, especially when there is no evidence such rules were routinely violated. The problem with this argument, however, is that it is unclear Respondent would have been capable of determining whether rules were routinely violated. Indeed, the lack of any disciplinary actions stemming from inspections of field work prior to May 3, 2018, whether related to the specific violations at issue in this case or not, indicates inadequate enforcement. *See, e.g., Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097 ("Although SWBT had a safety program and conducted site visits, there is no evidence that either the program or the visits pertained to enforcing the competent persons' obligation to perform trench inspections."). Likewise, the fact that Respondent began issuing many more disciplinary notices after M.T.'s electrocution, including notices for failing to comply with rules related to the behaviors complained of in this case, suggests Respondent's monitoring and disciplinary program was insufficient.

In order to show it had an adequate program to monitor its employees, Respondent needed to introduce evidence it performed inspections in the first instance, let alone evidence that it performed inspections of the employees who performed work at night. Burris testified audits occurred, but then went on to describe training and competency evaluations, as opposed to a program of periodic and surprise inspections. As discussed previously, the Commission has held an employer must provide evidence of the number, frequency, and duration of the inspections it

performs in order to establish it appropriately monitored its employees' compliance with company rules. This includes monitoring supervisory employees. There was simply no evidence of consistent, intentional monitoring of field employees, nor persuasive evidence of related disciplinary actions. Accordingly, the Court finds Respondent failed to establish the defense of unpreventable employee misconduct as to any of the violations alleged.

Respondent failed to rebut Complainant's proof of knowledge as to Citation 1, Items 1a, 1b, 2a, and 2b. Accordingly, those citation items shall be AFFIRMED.

VII. Penalty

Under the Act, the Secretary has the authority to propose a penalty according to Section 17 of the Act. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441–42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). Ultimately, it is the province of the Commission to "assess all civil penalties provided in [Section 17]", which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995).

"Regarding penalty, the Act requires that "due consideration" be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). Rather, the Commission assigns the weight that is reasonable under the circumstances. *Eric K. Ho,* 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (Consol.), *aff'd sub nom.*, *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005). It is the Secretary's burden to introduce evidence bearing on the factors and explain how he arrived at the

penalty he proposed. *Valdak Corp*., 17 BNA OSHC at 1138. "The gravity of the violation is the 'principal factor in a penalty determination. Assessing gravity involves considering: (1) the number of employees exposed to the hazard; (2) the duration of exposure; (3) whether any precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury. *See, e.g.*, *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished).

Respondent is a mid-size employer, employing roughly 130 and 160 employees. As for the gravity of the violations, the Court generally agrees with the assessments of Complainant, who determined the violations were of high gravity. The Court finds the following factors support that assessment. First, for a period of 30 minutes, three employees—Mejia, M.T., and Fine—were exposed to an ungrounded, 14,400-volt line that was neither locked out nor deenergized. Second, while Respondent had policies in place to address the electrocution hazard, M.T.'s crew appeared to take very few precautions to prevent injury, including their failure to ground, lock-out/tag-out, or conduct a job briefing. Third, the probability an accident would occur was not a mathematical certainty, but given the interconnection between CrownQuest and Oncor's lines, the dark conditions, winding roads, the potential for multiple crews to be working during an outage, and the crew's failure to utilize any precautions, the Court finds the probability to be fairly high. Finally, as illustrated by what happened to M.T., the likelihood of a serious or fatal injury stemming from an accident was high.

Notwithstanding the foregoing, the Court finds Respondent, through the leadership of Burris, was attempting to become a safer and more conscientious employer after what appears to have been years of mismanagement in the arena of safety and health. While the Court does not find this amounts to good faith warranting a reduction in the penalty originally proposed by

Complainant, it does find such attempts militate against Complainant's argument, which the Court takes as a motion, that the Court ungroup the violations and propose individual penalties for each violation, essentially doubling the original proposed penalty. As originally proposed, Complainant grouped Citation 1, Item 1a and 1b, with a proposed penalty of $12,806, and Citation 2a and 2b, with a proposed penalty of $12,805. The grouping of the foregoing citations makes sense: 1a and 1b relate to the planning stage of the electrical work, while 2a and 2b relate to the execution of steps necessary to ensure the line was deenergized. The Court has found nothing in Complainant's presentation of evidence to justify a 100% increase in the proposed penalty. Complainant's motion to ungroup the penalties is DENIED. Accordingly, Citation 1, Item 1a and 1b shall be assessed a group penalty of $12,806, and Citation 1, Item 2a and 2b shall be assessed a group penalty of $12,805.

ORDER

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

1. Citation 1, Item 1a and 1b are AFFIRMED as serious, and a grouped penalty of $12,806 is ASSESSED.
2. Citation 1, Item 2a and 2b are AFFIRMED as serious, and a grouped penalty of $12,805 is ASSESSED.

SO ORDERED

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: May 4, 2020
Denver, Colorado