

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS  
PENDING COMMISSION REVIEW**

Secretary of Labor,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 09-1278
	)	
Otis Elevator Company,	)	
	)	
Respondent.	)	
	)	

APPEARANCES:

For the Complainant:

For the Respondent:

Bruce Canetti, Esq.  
U. S. Department of Labor  
Office of the Solicitor  
Chicago, Illinois 60604

Paul Waters, Esq.  
Akerman Senterfitt  
Sun Trust Financial Centre, Ste. 1700  
401 E. Jackson Street  
Tampa, Florida 33602-5250

Before: Dennis L. Phillips  
Administrative Law Judge

**DECISION AND ORDER**

Background

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). Otis Elevator Company (Otis or Respondent) designs, manufactures, installs and services elevators, escalators, and moving walks for commercial and

residential buildings. (Exh. 10).<sup>1</sup> On June 16, 2009, Otis employee Ken Nauholz injured himself with hand lacerations while repairing a gate of a freight elevator at an Otis worksite in Brookfield, Wisconsin. (Tr. 48). Occupational Safety and Health Administration (OSHA) was notified of the incident by the Brookfield Police Department. (Tr. 47). Between June 26 and July 20, 2009, OSHA conducted its investigation of the incident. As a result of that investigation, OSHA issued a Citation and Notification of Penalty to Respondent alleging two serious violations of the Act. The first item charged Otis with a violation of 29 C.F.R. § 1910.147(d)(3) for Mr. Nauholz' failure to use an energy isolating device to block the gravity energy in a freight elevator gate while working. The second item alleged a violation of 29 C.F.R. § 1910.147(f)(2)(i) (standard) for not using energy control procedures to secure the gravity energy of the gate and not informing or obtaining energy control procedures from the customer to be used for the repair. Respondent filed a timely Notice of Contest. Prior to trial, the parties stipulated that Citation 1, Item 1 was withdrawn. Therefore, only Citation 1, Item 2 concerning the use and exchange of energy control procedures remained in dispute at trial. The proposed penalty is \$5,000. A trial was conducted in Milwaukee, Wisconsin on April 6 and 7, 2010. Both parties submitted post-trial, reply and supplemental briefs in support of their respective positions.

#### Cited Standard

The cited standard provides:

29 C.F.R. § 1910.147(f)(2)(i): Whenever outside servicing personnel are to be engaged in activities covered by the scope and application of this standard, the on-site employer and the outside employer shall inform each other of their respective lockout or tagout procedures.

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<sup>1</sup> Elisha Graves Otis founded Otis in Yonkers, New York in 1853 after he invented a safety mechanism for a lifting platform. (Exh. 10, at p. 3).

Complainant alleges in Citation 1, Item 2 that:

29 C.F.R. § 1910.147(f)(2)(i): When outside personnel were engaged in activities covered by the scope and application of the standard, the onsite employer and the outside employer did not inform each other of their respective lockout or tagout procedures: (a) On or about June 16, 2009, an authorized employee was performing repairs to the freight elevator gate in the storeroom at the customer located at 15875 W. Bluemound Road, Brookfield, Wisconsin 53005. Energy control procedures to secure the gravity energy of the gate were not utilized. The company did not inform or obtain the energy control procedures from the customer to be used for this repair.

(Tr. 8-9).

#### Stipulations

Prior to trial, the parties agreed upon and submitted the following stipulations (Stip.):

1. The Occupational Safety and Health Review Commission has jurisdiction over this matter.
2. Respondent is, and was at all relevant times, a corporation with an office and place of business at 6070 N. Flint Road, Glendale, Wisconsin 53209.
3. Respondent is, and was at all relevant times, engaged in the business of servicing and repairing elevators.
4. Respondent at all relevant times engaged in a business affecting commerce by handling goods or materials which had been moved in commerce.
5. Respondent at all relevant times was an employer employing employees in the business of servicing and repairing elevators, including at the workplace of 15875 W. Bluemound Road, Brookfield, Wisconsin.
6. Boston Store has, and at all relevant times had, a department store at 15875 W.

Bluemound Road, Brookfield, Wisconsin, which had a freight elevator.

7. Respondent serviced and repaired the freight elevator at Boston Store on June 16, 2009.

8. Ken Nauholz was an Otis employee sent by Otis to service and repair the freight elevator at Boston Store on June 16, 2009.

9. Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1910.147(d)(3) is withdrawn. (Joint Prehearing Submission, March 25, 2010).

#### Jurisdiction

Based on the parties' pleadings, stipulations and the trial record, I find that Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of Sections 3(3) and 3(5) of the Act.<sup>2</sup> I also find that jurisdiction of this proceeding is conferred upon the Commission by Section 10(c) of the Act.<sup>3</sup> I conclude, therefore, that the Commission has jurisdiction over the parties and subject matter in this case.

#### Secretary's Burden of Proof

To establish a *prima facie* violation of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Offshore Ship Bldg., Inc.*, 18 BNA OSHC 2169, 2171 (No. 99-257, 2000), *Astra Pharm. Prod.*, 9 BNA OSHC 2126 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d

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<sup>2</sup> In its First Amended Answer, Respondent admitted that it was at all relevant times engaged in a business affecting commerce and an employer employing employees. (First Amended Answer, at p. 1; Stip. Nos. 3-5).

<sup>3</sup> In its First Amended Answer, Respondent admitted that jurisdiction of this action was conferred upon the Commission by section 10(c) of the Act. (First Amended Answer, at p. 1; Stip. No. 1).

69 (1<sup>st</sup> Cir. 1982). A violation is serious if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k)(2009). Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm would result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp.*, 15 BNA OSHC 2072 (No. 88-0523, 1993).

#### Relevant Testimony and Findings of Fact

Four witnesses testified at trial: Kevin Robertson, OSHA Compliance Safety and Health Officer (CSHO); Kenneth Nauholz, an elevator service mechanic employed by Respondent; Louis DeLoreto, Respondent's Senior Manager for Environmental Safety and Health; and George Karosas, Respondent's expert witness. (Tr. 44, 105, 173, 199). Based on their testimony, the stipulations, and the evidentiary exhibits admitted into the record, the court makes the following factual findings.

On June 16, 2009, Otis service mechanic Ken Nauholz was assigned to a job by his supervisor Dean Kleveno to repair a damaged gate and elevator at The Boston Store (The Boston Store or store) in the Brookfield Square Mall, Brookfield, Wisconsin.<sup>4</sup> (Tr. 48, 68, 105, 107). At the time of the incident, Mr. Nauholz had eleven years experience as a mechanic with Otis and about 29 years overall industry experience.<sup>5</sup> (Tr. 105, 126; Exh. 9). He received the call through Otis dispatch center in Connecticut through his personal digital assistant. The only information he

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<sup>4</sup> The Boston Store is a department store where they sell general merchandise, clothing, and housewares. (Tr. 47). The elevator was located on the first floor of the store and was used to move merchandise and personnel between the first and second floors. (Tr. 51).

<sup>5</sup> Mr. Nauholz was an experienced elevator service mechanic who previously worked at Schumacher Elevator

received about the job was that the elevator car gate was "hung up and not functioning." Mr. Nauholz did not know the particular nature of the job and did not have a particular plan to repair the gate prior to arrival at The Boston Store. He did not have any anticipation that he would necessarily employ any energy control procedures at the store that day. (Tr. 108).

The store was not open for business when Mr. Nauholz arrived at about 8:30 a.m. (Tr. 138-39) He signed in with Irene at the store's entrance. Irene expected him and knew he was there to work on the elevator. (Tr. 56, 108-09, 139). On his way to the elevator, Mr. Nauholz encountered a couple of store employees who told him that the gate was "hung up on the car" and they were not sure why. (Tr. 109). Those employees were not working near the freight elevator, but in an area "quite a ways from the [elevator] car," in another room where they take shipments that come in off the trucks.<sup>6</sup> (Tr. 111, 139). Before working on the distressed elevator, he did not provide any store employee with a written copy of any Otis lockout/tagout procedure.<sup>7</sup> (Tr. 156, 188, 254). Mr. Nauholz testified that neither he, nor the elevator service industry, had a practice of informing customers of Otis' or the industry's lockout/tagout procedure when performing an elevator service or repair call. (Tr. 156). Mr. Nauholz testified that no lockout/tagout procedures were needed to perform his work on June 16, 2009 at the store. (Tr. 170).

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Company and Braun Elevator. The State of Wisconsin issued him an elevator mechanic's license. (Tr. 106-07).  
<sup>6</sup> No Boston Store employees were involved in Mr. Nauholz' work on the elevator that day. (Tr. 110). During Mr. Nauholz' three years of servicing The Boston Store, no store employees had ever been involved in his elevator work. (Tr. 110). In Wisconsin, only licensed elevator mechanics, who maintain their licenses with continuing education and training, are allowed to perform service on elevator equipment. (Tr. 106-07; Exh. K).

<sup>7</sup> Lockout is defined as "The placement of a lockout device on an energy isolating device, in accordance with an established procedure, ensuring that the energy isolating device and the equipment being controlled cannot be operated until the lockout device is removed." Tagout is defined as "The placement of a tagout device on an energy isolating device, in accordance with an established procedure, to indicate that the energy isolating device and the equipment being controlled may not be operated until the tagout device is removed." 29 C.F.R. §

Once at the elevator, Mr. Nauholz proceeded to determine the nature of the problem.<sup>8</sup> To do this, he needed to access the elevator cartop by using a large step-ladder inside the elevator car. (Tr. 112; Exh. T). As he approached the gate, Mr. Nauholz observed that the bi-parting outer hoistway doors were completely open and the bottom of the gate was approximately three feet off of the floor.<sup>9</sup> (Tr. 112-13, 115-18; Exh. T). He saw that the elevator gate was stuck in the open position. Despite pulling on the gate “pretty hard,” Mr. Nauholz could not move it.<sup>10</sup> (Tr. 112-13, 119). There was virtually “no way” that the gate would move. Mr. Nauholz testified that “[y]ou could have hung on it with all your weight, and it wasn’t moving.” (Tr. 119, 122, 158).

No one could enter the elevator car without stooping to get under the elevator’s gate, and, at five feet five inches tall, Mr. Nauholz had to duck to get under the gate. (Tr. 113-15). Working alone, Mr. Nauholz positioned an eight-foot red step-ladder just inside the partially opened gate to access the cartop escape hatch in order to get to the inspection station on top of the car. (*Id.*, 137, 167; Exh. T at “C” and “G”). At the cartop inspection station, Mr. Nauholz took the elevator “out of service” so no one could call the elevator away from him and flipped the “stop switch” to take total control of the elevator. (Tr. 61-62, 113, 119, 143-44, 148-50). He stated that he “can’t set foot on that car top without having complete control of it.” (Tr. 149). The mechanism that controlled the movement of the freight elevator gate was also located on the

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1910.147(b).

<sup>8</sup> The buttons on the wall in front of the elevator that called the elevator to the floor were covered with a large “Out of Order” sign. (Tr. 117-18, 170, 198; Exh. T at “E”).

<sup>9</sup> The gate was a gray, metal, grated gate, located in front of the elevator car. (Exhs. 11, T). The bi-parting doors could not accidentally or unexpectedly close because they were counterweighted evenly together. (Tr. 119).

<sup>10</sup> The elevator gate was normally operated manually by pulling or lifting the gate itself. (Tr. 51).

top of the elevator car on its right side near the front. (Tr. 120-21; Exhs. P, T at "F"). When Mr. Nauholz examined the door operating mechanism, he saw that the inner gate chain had come off of its sprocket and had become tightly wedged. This chain was jammed and could not move in any way mechanically.<sup>11</sup> (Tr. 119, 121-22, 136, 162-63; Exh. P at "A" and "B"). The chain and sprocket were worse than he had ever seen before during his previous visits to the store over the past three years.<sup>12</sup> (Tr. 56, 73, 157). The only way for the chain to move was for it to be repaired or "un-wedged." (Tr. 122). Mr. Nauholz decided to pry and restore the chain back onto the sprocket. (Tr. 56, 122-23).

The gate chain could not move unexpectedly while he pried the chain back onto the sprocket. Mr. Nauholz expected that the chain would move after the chain was placed back onto the sprocket and his hand was safely away from the chain. (Tr. 122-23). At that time, he had control of the gravity energy in the elevator's gate. When the gate chain began to move as expected, Mr. Nauholz then made the deliberate and intentional, ill-timed decision to grab the chain with his hands.<sup>13</sup> This, unfortunately, caused his injury.<sup>14</sup> (Tr. 56, 74, 123, 172; Exh. T at "F"). He grabbed the chain because he was worried about its connecting link breaking when the gate closed. (Tr. 123-24). Prior to grabbing the chain, Mr. Nauholz had not been in a position where he could have been injured by that chain. He would not have been injured if he had not intentionally grabbed the chain. (Tr. 123-25). Otis issued a NAA Safety Citation Form and

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<sup>11</sup> There was no possibility that the chain would move unexpectedly prior to being repaired. (Tr. 112-13, 119, 122, 158, 270).

<sup>12</sup> During his July 1, 2009 interview with CSHO Robertson, Mr. Nauholz stated that he had "not seen a situation this bad before with the chain twisted and hung up." He also admitted that he "had control of the elevator but did not block the gravity energy which created the incident about one half hour later." (Tr. 61-62; Exh. 3).

<sup>13</sup> The injury occurred at about 9:35 a.m. (Exh. 9).

<sup>14</sup> During the course of his inspection, CSHO Robertson was unaware that Mr. Nauholz had grabbed the chain. (Tr. 74).

written warning to Mr. Nauholz regarding the incident.<sup>15</sup> (Tr. 53-54; Exh. 9).

The elevator car top where Mr. Nauholz repaired the sprocket and chain mechanism was under his exclusive control the entire time he was working on top of the car. (Tr. 74, 76, 125, 144-45, 180, 241-42, 269, 271-72). The only way to access the elevator car top was to climb a large stepladder, go through a hatch in the elevator car roof, and climb onto the top of the elevator. (Tr. 113). Store employees were not allowed to perform any service or maintenance on any store elevator equipment or to be on top of the elevator car. (Tr. 74, 76, 110-11, 125-26). The elevator car top could not be accessed by any Boston Store employee and Mr. Nauholz was unaware of any Boston Store employee having ever been on the elevator car top.<sup>16</sup> (Tr. 125-26). No Boston Store employee was exposed to any injury from any movement of the gate, or its chain and sprocket, while Mr. Nauholz serviced the elevator.<sup>17</sup> (Tr. 90, 125-26, 242-43, 270-72). Only Mr. Nauholz was exposed to any injury from the chain and sprocket and that was because he intentionally grabbed the chain. (Tr. 126, 246).

Prior to June 16, 2009, The Boston Store had no energy control procedures that applied to the freight elevator.<sup>18</sup> (Tr. 81, 213-14). When Mr. Nauholz was at the worksite, there was no

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<sup>15</sup> The NAA Safety Citation Form stated: "Ken did not take into account the Stored Energy present when the Freight Elevator Car Gate became inoperative with slack chain present. The gate should have been block (sic) up mechanically or with a Bi-Parting Door Tool to prevent unexpected gate movement." (Exh. 9). CSHO Robertson determined that Mr. Nauholz failed to mechanically block the gate. (Tr. 85). Respondent concedes that Mr. Nauholz failed to utilize an "energy isolating device" that was required by Otis' procedures. (Respondent's post-hearing brief, at p. 27, n 5; Exh. B). The fact that Mr. Nauholz was disciplined for failing to follow Otis' energy control procedures does not mean that the potential release of energy was "unexpected."

<sup>16</sup> With the freight car gate jammed open and the car placed on "inspection mode", the elevator car could not possibly move. (Tr. 148-50).

<sup>17</sup> Mr. Nauholz could see the area in front of the gate and no one could approach the gate and enter the car without him seeing them. (Tr. 113, 121, 125).

<sup>18</sup> As part of the settlement of the citation issued to it by OSHA after the incident, The Boston Store adopted an energy control procedure that applied to the freight elevator. (Tr. 82, 213-14; Exh. F). This procedure dealt with locking and tagging out the power supply to the freight elevator and did not apply to the hazard of gravity energy associated with the chain and sprocket during Mr. Nauholz' work. (Tr. 217; Exh. F).

Boston Store employee in any responsible position to receive a copy of Otis' energy control procedures.<sup>19</sup> (Tr. 57). Prior to the incident, Otis had developed and implemented policies and procedures to protect its employees from potentially hazardous energy. (Tr. 175). Otis expected its employees to analyze the circumstances they confront in the field and determine the hazardous energy control procedures necessary to perform their work after they arrived at the work site. (Tr. 177, 214-15). Otis developed specific tools and procedures for working on the bi-parting freight door such as the one involved in this case. (See Otis Technical Information Publication (TIP) 28.3-2 (REV) *Tools & Procedures for Working on Bi-Parting Freight Doors*, dated March 9, 2000 (TIP 28.3-2)(REV), at Exh. B).<sup>20</sup> This procedure applied to the repair performed by Mr. Nauholz on the freight elevator's bi-parting gate. (Tr. 48-49; Exh. B). TIP 28.3-2(REV) called for the blocking of any stored energy in the elevator door system at the store on June 16, 2009. (Exh. B, at p. 3).

With Otis' cooperation, CSHO Robertson interviewed Messrs. Nauholz and Kleveno, and Otis' area safety representative, Jeff Case, on July 1, 2009.<sup>21</sup> Messrs. Kleveno and Case acknowledged that Mr. Nauholz did not share information regarding Otis' lockout tagout procedure with the Boston Store on June 16, 2009 because there were no Boston Store employees around to actually share that information with. (Tr. 54, 57; Exhs. C-3 through C-4, at p. 2). Mr. Nauholz never told CSHO Robertson that he intended to use lockout tagout or energy control procedures before he began his work on the elevator. (Tr. 87). CSHO Robertson was

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<sup>19</sup> The store employee, Fred, that Mr. Nauholz normally met with when performing elevator service at the store was on vacation. (Exh. 3, at p. 1).

<sup>20</sup> TIP 28.3-2(REV) stated that "Most repairs to bi-parting doors will be unique to the particular situation, condition, and setup of the equipment." (Exh. B, at p. 2).

<sup>21</sup> CSHO Robertson may have been involved in one other case where a citation was issued for a failure to exchange an energy control program. (Tr. 90-91).

not told by any Otis employee that they expected Mr. Nauholz to need to perform any task that required some sort of energy control at the worksite.<sup>22</sup> (Tr. 88-90). CSHO Robertson made no inquiry as to whether any company in the elevator industry would have exchanged any type of energy control program or lockout tagout material with its customer before performing the repair involved in this case. (Tr. 68-70).

Mr. Nauholz testified that he could not estimate how many different tasks that he performed when servicing elevators called for some sort of energy control procedure because each service call is different with too many variables. He further testified that he did not know what energy control procedures he was going to use before he arrived at the work site. He stated that there are times that he performs repairs on elevators without using any energy control procedures. (Tr. 145-46). He further stated that when he initially goes atop an elevator he may not use any type of energy control procedure because he has not yet assessed the problem. (Tr. 148). He testified that he would have no reason to go near the chain and sprocket atop the elevator unless there was something wrong with either of them. When working atop elevators, he would ordinarily not be near the chain and sprocket. (Tr. 168-70; Exh. P). He stated that it was not feasible for customers to have copies of all of the energy control procedures that he might implement during elevator service calls. He also testified that he was not always able to make contact with building personnel during service calls because “There’s times, a lot of times, where you don’t have someone to talk to....” He also testified that elevator mechanics needed to respond quickly during emergencies when passengers were trapped in elevators. (Tr. 129-31, 135). Mr. Nauholz testified that Otis did not give its proprietary elevator maintenance work

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<sup>22</sup> CSHO Robertson could not recall any Otis employee telling him during his interviews that the gate door had

procedures to customers because of “liability purposes, if someone else gets a hold of it and performs it wrong, gets hurt, you know, it – we wouldn’t want that happening, ....” (Tr. 133-35).

No employees of The Boston Store were either "affected employees"<sup>23</sup> or "authorized employees"<sup>24</sup> with respect to Mr. Nauholz' work repairing the chain on the freight car door . (Tr. 76, 78, 80, 90, 110-12, 139-40). No potential for interaction with any Boston Store employee existed while the work was performed on the elevator car top, and no store employee was expected to be on the car top while the work was being performed. (Tr. 81, 109-10, 170). There was no exposure to the "unexpected release" of "hazardous" energy to any Boston Store employee. (Tr. 92-93, 241-43). It was neither Otis' nor industry's practice to exchange energy control programs with a customer before allowing its mechanics to perform the type of work Mr. Nauholz performed on June 16, 2009.<sup>25</sup> (Tr. 68-69, 70, 91, 156, 177-78). Only in situations where the mechanic was to interact with another contractor's employees, or the customer's

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moved as a result of “unexpected energy.” (Tr. 75-76).

<sup>23</sup> The standard’s preamble states that “an ‘affected employee’ is one who does not perform the servicing or implement the energy control procedure, but whose responsibilities are performed in an area in which the energy control procedure is implemented and servicing operations are performed under that procedure.” (Tr. 262-63; Control of Hazardous Energy Sources (Lockout/Tagout): Final Rule, 54 Fed. Reg. 36,644 (Sept. 1, 1989) to be codified at 29 C.F.R. § 1910, at Exh. 14). Affected employee is further defined as “An employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed.” (Tr. 272; 29 C.F.R. § 1910.147(b)).

<sup>24</sup> The standard’s preamble states that “If an employee must utilize the energy control procedure, that employee is considered to be an ‘authorized employee.’” (Exh. 14). Authorized employee is further defined as “A person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. An affected employee becomes an authorized employee when that employee’s duties include performing servicing or maintenance covered under this section.” 29 C.F.R. § 1910.147(b).

<sup>25</sup> Mr. Nauholz testified that he did not know of any elevator maintenance company that exchanged an energy control program with a customer before it opened a bi-parting elevator gate in order to work on the elevator. He stated that this was the first time he had heard that OSHA indicated that a company should start doing so. (Tr. 126).

employees, would such an exchange of energy control procedures be expected.<sup>26</sup> (Tr. 178).

Without such circumstances, Otis and other companies in the elevator industry would not share their proprietary energy control procedures. (Tr. 70, 179). Because of the inherently dangerous nature of elevator work, it is customary in the elevator industry not to share such work procedures because doing so can increase the risk of injury to untrained, unauthorized and unlicensed employees of other employers who may try to self-maintain elevators. (Tr. 179).

Mr. Lou DeLoreto, Senior Manager, Environmental Health and Safety, for Otis, North and South America, and Chairman of the National Elevator Industry's Safety Committee, testified that he was familiar with no incidents of injury to any elevator or customer employee because of an elevator company not exchanging its energy control program with that customer before an elevator mechanic implemented an energy control procedure.<sup>27</sup> (Tr. 174-75, 183-84, 196). Had such an incident caused an injury, he would have identified it as part of the root cause investigation performed by Otis. (Tr. 196-97). Mr. DeLoreto testified that Otis does not have specific energy control procedures for the more than one hundred varieties of equipment that it services because of the enormity of the mechanical parts involved. (Tr. 177). He stated that it was his experience that Otis and all other elevator industry companies did not normally share

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<sup>26</sup> Otis required its mechanics to communicate energy control procedures to employees of other employers when other affected employees were working with, or in proximity to, Otis employees. (Tr. 193-94) When controlling hazardous electrical energy while other trades are involved with a power source, Otis calls for its mechanics to "communicate the issue to all concerned/affected workers." (Otis' Employee Safety Handbook, Chapter 10, Exh. 5, at p. 39).

<sup>27</sup> Mr. DeLoreto has served in his current position for two years and has been employed by Otis for ten years. His major responsibility is to develop and deploy environmental health and safety programs, including hazardous energy control. (Tr. 174-75). There is no evidence in the record establishing any nexus between Mr. Nauholz' injury to his finger and the lack of any exchange of lockout/tagout procedures.

control of their hazardous energy programs with their customers.<sup>28</sup> (Tr. 178-79, 185). He stated that he did not expect Mr. Nauholz to interact with The Boston Store employees during his service call on June 16, 2009. (Tr. 178-79). He stated that an initial exchange of energy control procedures between Otis and its customers provided no increased benefit to Otis or its customer's employee's health or safety.<sup>29</sup> (Tr. 184).

Otis is one of the largest elevator companies in the world.<sup>30</sup> (Tr. 186). Otis has approximately 80,000 customers with more than 200,000 varieties and types of equipment, excluding escalators, with vintages dating from as early as 1960 to the present to maintain in the United States.<sup>31</sup> (Tr. 180, 192, 195). It also maintains more than 5,000 escalators. (Tr. 180). Mr. DeLoreto testified that it would be impractical, "unrealistic and unfeasible" for Otis to provide all of its energy control programs to each customer before its service mechanics were actually allowed to implement control procedures at a work site. (Tr. 180-82). He also testified that Otis did not typically inform its customers of its lockout/tagout procedures. (Tr. 185-86).

Mr. DeLoreto further testified that it would be "very difficult" for an elevator mechanic to be able to conclude that a customer had an energy control procedure that was appropriate for the particular circumstance found at the work site. (Tr. 181-83). In many instances when

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<sup>28</sup> Mr. DeLoreto testified that serious injuries and fatalities have occurred where building engineers have tried to self-maintain their elevators. (Tr. 179).

<sup>29</sup> There was no evidence that indicated that any injury resulted to any other employer's employee because information on hazardous energy control programs was not exchanged between the customer and the elevator service company.

<sup>30</sup> Otis employs about 61,000 employees worldwide, with about 8,000 employees in the United States. Its annual revenue worldwide in 2008 was about \$12.9 billion, with about \$2.5 billion generated in the United States (Tr. 186; Exh. 10).

<sup>31</sup> About 1.6 million elevators and escalators are serviced by Otis worldwide. (Exh. 10).

performing work on a customer's elevators, even finding an individual employed at the work site to communicate with may not be possible. (Tr. 129-31, 135, 183). Such a requirement could prevent the prompt response to an emergency, such as freeing a trapped passenger in an elevator car. (Tr. 131). Mr. DeLoreto testified that there would be an increased risk to safety extended to both the riding public and the mechanic, as well as the equipment, where an elevator mechanic's repairs are delayed by any need for Otis and its customers to first exchange energy control procedures that may or may not be appropriate to the circumstance subsequently found at the work site. (Tr. 183, 243-45).

Both Messrs. DeLoreto and Karosas testified where there are no affected or authorized employees of the customer, and no expected interaction between Otis employees and the customer's employees, exchanging energy control procedures created no health and safety benefit for Otis or customer employees. (Tr. 184, 239-41, 245). The CSHO was aware of no instances where the failure of an elevator to inform a customer of its energy control procedures resulted in any injury to the customer's employee. (Tr. 91).

The Court found Mr. George V. Karosas qualified to testify and render expert opinions in matters relating to whether or not: 1) there was any potential for the unexpected release of stored energy due to gravity acting on the elevator car door where there was no potential of interaction of Otis and store employees, 2) there was any potential for injury due to the release of stored energy due to gravity acting on the elevator car door to anyone other than Mr. Nauholz, 3) the lockout/tagout standard contained at 29 C.F.R. § 1910.147 is a performance standard allowing flexibility in the specific means by which the objectives of the standard may be achieved, 4) the goals and objectives of the standard as they relate to the interaction of the Otis outside servicing

personnel with the on-site employer were met by the practices employed on June 16, 2009, 5) the failure to secure the gravity energy of the elevator door and the unexpected release of energy resulting in injury to Mr. Nauholz was irrelevant to, and not a basis for the citation regarding noncompliance with 29 C.F.R. § 1910.147(f)(2), 6) disseminating Otis energy control procedures to employers whose employees are not allowed by law to work on elevator equipment would increase the risk of injury to any unauthorized and untrained employees attempting to utilize those procedures or provide any benefit, gain or increase to employee health or safety, and 7) industries such as the elevator industry do not understand or apply 29 C.F.R. § 1910.147(f)(2)(ii) in a manner that requires the exchange of energy control programs because a host employer or a servicing contractor may utilize energy control procedures on equipment when absolutely no interaction of their respective employees can occur when such procedures are utilized on the equipment in question. (Tr. 228; Joint Prehearing Submission, at pp. 3-4).

Mr. Karosas testified regarding industry understanding and the requirements of the industry consensus standard American National Standards Institute (ANSI) Z-244.1 (Control of Hazardous Energy, Lockout/Tagout and Alternative Methods).<sup>32</sup> OSHA used the Z-244.1 standard as a principal reference source when it developed and promulgated OSHA's energy control standard, 29 C.F.R. § 1910.147 (The Control of Hazardous Energy Sources

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<sup>32</sup> Mr. Karosas is an engineering consultant specializing in product safety analysis and engineering, industrial and workplace safety, machine guarding and safeguarding, lockout/tagout, hazardous energy control procedures, risk assessment, accident analysis and reconstruction, and hazard analysis. In 1975, he earned a Bachelor of Science degree in industrial and systems engineering from the Illinois Institute of Technology. He is a licensed professional engineer in the State of Illinois and a certified safety professional. He has over 37 years of experience in the areas of product safety, employee safety, and safety standards, including identifying situations where energy control programs should be exchanged between employers. Since 1988, Mr. Karosas has been a member of the ANSI committee that originally developed the American National Standard for Personnel Protection – Lockout/Tagout of Energy Sources – Minimum Safety Requirements Z244.1 (Z244.1) standard in 1982. (Tr. 202-06, 209-10; Exhs. H, I).

(lockout/tagout)), in 1989.<sup>33</sup> (Tr. 206-07; Exh. H).

Mr. Karosas testified that he reviewed the Boston Store's energy control procedures and found that there was no machine-specific procedure associated with the elevator that existed when Mr. Nauholz repaired the elevator on June 16, 2009.<sup>34</sup> (Tr. 213-14, 273). He also testified that the specific hazard that injured Mr. Nauholz was the sprocket and the chain that passed over the sprocket that was associated with the elevator gate. Mr. Karosas' expert report also stated that Mr. Nauholz "was injured because of his failure to follow Otis' established energy control procedure, not because of a failure to inform Bon-Ton [The Boston Store], or a failure to obtain Bon-Ton's [The Boston Store's] (non-existent) procedure."<sup>35</sup> (Tr. 216; Exh. I, at p. 9).

Mr. Karosas testified that the ANSI standard places the responsibility on the host employer, or customer in this case, to determine the degree of coordination of energy control programs necessary, as well as apprising outside contractors of any special unique hazards existing in the host facility operation. (Tr. 231-33, 235-36; Exh. H). Mr. Karosas testified that under the circumstances present when Mr. Nauholz performed his work on June 16, 2009, ANSI Z-244.1 would not have required an exchange of energy control programs between Otis and The Boston Store. (Tr. 238). This is because Mr. Nauholz was the only authorized employee, with no other affected employees, and Mr. Nauholz had exclusive control over the elevator, with no reasonable expectation that any other employee would be exposed to any safety hazard or

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<sup>33</sup> Before then, Z-244.1 was the document used by industry for guidance in the control of hazardous energy. (Tr. 230-31). Z-244.1 continues to be used by industry as supplemental guidance to help determine how to comply with the standard at 29 C.F.R. § 1910.147. (Tr. 236-38).

<sup>34</sup> Mr. Karosas testified that only Otis had an energy control procedure that applied to the work performed by Mr. Nauholz on June 16, 2009 at the store. (Tr. 273).

<sup>35</sup> Mr. Karosas' expert report stated that Mr. Nauholz "failed to neutralize or block the stored energy due to gravity in the bi-parting door assembly and was injured as a result." Mr. Karosas' report stated that had Mr. Nauholz

potential injury.<sup>36</sup> (Tr. 76, 238, 246, 272). Where there were no other authorized employees, no affected store employees, and the few store employees at The Boston Store working away from the elevator were aware that the elevator was being serviced, and with a work area under the exclusive control of Mr. Nauholz, there was no potential for interaction with any employees of The Boston Store. (Tr. 241-42, 274). Under the circumstances of June 16, 2009, where Mr. Nauholz had exclusive control of the work area and no expected interaction with others, the elevator industry does not ordinarily understand 29 C.F.R. § 1910.147 to require an exchange of energy control programs. (Tr. 239, 242, 246, 274). Mr. Karosas testified that there was no health or safety benefit by an exchange of energy control procedures between Otis and the store on June 16, 2009. This was because there was no store procedure to exchange, no hazardous energy control store guidance that would benefit Mr. Nauholz, no possibility that a store employee was an employee authorized to work on the elevator, and no possibility that a store employee could be an employee exposed to a hazard related to the mechanic's work. (Tr. 240-41, 245). Mr. Karosas also testified that there was no potential hazard created by Mr. Nauholz not providing a copy of an energy control procedure to the Boston Store on June 16, 2009. (Tr. 242-43). In his opinion, had Mr. Nauholz disclosed guidance to restrict potentially hazardous energy to the Boston Store, there is an increased risk that store employees may, at some point, feel able to perform maintenance on the elevator themselves. (Tr. 243-44; Exh. I, at p. 12). Mr. Karosas also testified that Mr. Nauholz conveyed enough information to comply with the standard by informing the store that he was there to service the elevator. (Tr. 254-55, 257, 263-66, 275-76).

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“followed his written procedures and training, he would not have been injured.”). (Exh. I, at pp. 1, 12).

<sup>36</sup> The Court agrees with Mr. Karosas and finds that there were no affected store employees at the store on June 16,

Mr. Karosas also testified that any propping of the elevator door to prevent gate chain movement on June 16, 2009 would not have triggered a duty to exchange energy control programs under 29 C.F.R. § 1910.147(f)(2)(i). (Tr. 246). He also stated that 29 C.F.R. § 1910.147 was a performance standard that provided Respondent flexibility in how to comply with the standard. (Tr. 263; Exh. I, at p. 4). He testified “that the performance requirements of preventing the injuries due to unexpected energization while servicing and conducting maintenance and servicing operations in the elevator industry are met essentially by the practices in the elevator industry, with respect to the facts in this case.” (Tr. 264-65). He stated that Otis actually and exclusively controlled the area where Mr. Nauholz worked on June 16, 2009. (Tr. 269). He testified that there was no unexpected energization or release of energy that the chain could have inflicted upon Mr. Nauholz because Mr. Nauholz “indicated that it was expected. He controlled it. He knew what was going to happen.” (Tr. 270). He stated that to fall within the standard, the release of energy “has to be unexpected.” (Tr. 270-71).

#### Discussion

In order to prove the alleged violation, the Secretary must prove that Mr. Nauholz was engaged in activities on June 16, 2009 that were covered by the scope and application of The Control of Hazardous Energy (lockout/tagout) standard at 29 C.F.R. § 1910.147.<sup>37</sup> It has not done so. The Secretary called only the CSHO to testify at the trial. The evidence before the Court does not prove that the standard applies. The Commission has stated that the “lockout/tagout standard begins with a scope provision, the first sentence of which reads as

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2009.

<sup>37</sup> The regulatory violation at issue is not based upon any failure to implement lockout/tagout procedures. It is based upon Otis and the store not informing each other of their respective lockout or tagout procedures for isolating gravity energy before Mr. Nauholz serviced the store elevator.

follows: ‘This standard covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.’ 29 C.F.R. § 1910.147(a)(1)(i)(emphasis in original).<sup>38</sup> *Sec’y of Labor v. Gen. Motors Corp.*, 17 BNA OSHC 1217, 1218 (No. 91-2973, consolidated, 1995)(“the standard applies only to those machines and pieces of equipment for which energization or start up would be *unexpected* by employees”)(emphasis in original), *aff’d Reich v. Gen. Motors Corp.*, 89 F.3d 313 (6<sup>th</sup> Cir. 1996). The term “unexpected” is an unambiguous limitation on the application of the standards. (*Gen. Motors Corp.*, 17 BNA OSHC at 1220). The standard applies where a service employee is endangered by a release of energy without the employee’s foreknowledge.<sup>39</sup> *Gen. Motors Corp.*, 89 F.3d at 315.

The Secretary must establish that the hazard of unexpected energizing, start up, or release of stored energy could occur and cause injury. (*Gen. Motors Corp.*, 17 BNA OSHC at 1218). As shown by the convincing testimony of Messrs. Nauholz, DeLoreto and Karosas, there was no hazard of unexpected energization on the elevator car top.<sup>40</sup> The Secretary’s view that Otis and its customers are required to inform each other of their respective lockout/tag out procedures where there is no possibility of “unexpected” energization fails to give effect to the term “unexpected” as a limitation on the application of the standard. (*Id.* at 1219-20). In this case, the evidence proved that there was no potential for an unexpected release of stored gravity energy

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<sup>38</sup> The Court finds the standard to be plain on its face and not vague. *Tex. E. Prods. Pipeline Co. v. Occupational Safety & Health Review Comm’n*, 827 F.2d 46, 50 (7<sup>th</sup> Cir. 1987)(standards that are “not models of clarity” and not “incomprehensively vague” may still satisfy due process considerations); *Price Chopper Supermarkets*, 15 BNA OSHC 1518, 1519, n.2 (No. 90-0552, 1992)(when the meaning of the cited regulation is plain on its face, no further inquiry is necessary).

<sup>39</sup> See *Dayton Tire, Bridgestone/Firestone*, 23 BNA OSHC 1247, 1251 (No. 94-1374, 2010)(use of the word “unexpected” in the lockout/tagout context “connotes an element of surprise”)(internal citation omitted).

<sup>40</sup> The Court finds that these three witnesses have knowledge and experience with the activities engaged in by Mr. Nauholz at the store on June 16, 2009 that are superior to that of the CSHO and are entitled to greater weight with

while Mr. Nauholz performed his work on the gate chain and sprocket atop of the elevator car. Mr. Nauholz testified that there was no way to manually move the gate in its broken condition before he placed the gate chain back onto its sprocket. (Tr. 119, 122, 158).

The only time that the chain, and the gate, could move was after Mr. Nauholz had completed his repair by placing the chain back onto the sprocket. Mr. Nauholz expected and fully anticipated that the gate and chain would begin moving at that point. (Tr. 122). Mr. Nauholz testified:

Q. What expectation did you have for that chain moving once you put the chain back on the sprocket?

A. Well, I expected it to move, because there was only one counterweight holding it. The counterweight was – hung up, too.

(Tr. 122).

No part of Mr. Nauholz' body, including his hand, was in a zone of danger when he put the chain back on the sprocket. (Tr. 123-24). The only reason that Mr. Nauholz injured his hand was because he intentionally grabbed it as it started moving. (Tr. 123, 125). He testified as follows:

Q. Q. Okay. Was your hand in any danger when you put the chain back on the sprocket?

A. No.

Q. Why not? Why wasn't your hand in any danger?

A. It wasn't in any danger unless I grabbed the chain, so that was my own –

Q. Ok.

A. – my own doing.

(Tr. 123).

The Court finds Mr. Nauholz' testimony that he expected the chain to move once he put it back

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regard to such activities.

on the sprocket and that he intentionally grabbed the chain to be entirely credible.<sup>41</sup>

The standard at 29 C.F.R. § 1910.147(f)(2)(i) applies when employers have employees who potentially can interact in the common work area while the elevator servicing work is being performed, so that coordination is necessary.<sup>42</sup> (Tr. 215-16; Exh. I, at pp. 6-9). Here, there was only one employer, Otis, allowed to perform servicing work on the elevator in question. (Tr. 106-07; Exh. K). The only employee who would ever be on the elevator car top, where the work was performed, would be an Otis employee. No Boston Store employee could service the elevator equipment in question. The store had no lockout or tagout procedure that applied to the freight elevator or to work performed by Mr. Nauholz. No "authorized employee" existed at the work site other than the Otis employee, Mr. Nauholz. No "affected employees" existed at The Boston Store.<sup>43</sup> No non-Otis employee was exposed to an actual potential hazard, the chain and sprocket on the elevator car top.<sup>44</sup>

The only "zone of danger" was the area on the elevator car top which contained the chain and sprocket that caused Mr. Nauholz' injury. As the Commission has stated, "... the inquiry is not simply

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<sup>41</sup> See *Vandervoort's Dairy Foods Co.*, 20 BNA OSHC 1605, 1608 (No. 02-2175, 2003) ("The safeguards required by the cited standard [29 C.F.R. § 1910.147(c)(7)(i)] are intended to protect employees *only* from the unexpected reactivation of equipment attributable to inadvertence. No lockout/tagout procedures can protect employees from the deliberate and malicious actions of another.") (emphasis in the original).

<sup>42</sup> See *Equipment Depot Ltd.*, 20 BNA OSHC at 1198 (purpose of exchanging lockout/tagout programs under 29 C.F.R. § 1910.147(f)(2)(i) "is to ensure that the customer will not attempt to activate a machine while the outside party is working on it").

<sup>43</sup> The Court finds that there is insufficient evidence to show that store employees were in the area of the gate while Mr. Nauholz serviced the elevator.

<sup>44</sup> Should the elevator gate routinely be considered a hazard under these circumstances, every employee in a fifty-story building who passed the hoistway door of an elevator being serviced atop the car, on which some sort of energy control procedure might potentially be used, may be exposed to injury and become an "affected employee." Under this rationale, the elevator company would be required to initially exchange its potentially, innumerable energy control procedures (whether mechanical, hydraulic, electrical, gravity or otherwise) with employers of every potential "affected employee" in the building, including on-site management, security, and janitorial employees, as well as employers of every employee leasing space in the building. The Secretary's rationale "presumes" that an outside employer's failure to inform on-site employers in these circumstances "will create hazardous conditions for both the outside employee and the on-site employee." (Secretary's post-hearing brief, at p. 10, n. 2).

into whether exposure is theoretically possible. Rather the question is whether employee entry into the danger zone is reasonably predictable." *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)(footnote and internal citations omitted). The evidence showed that the only "zone of danger" was on the elevator car top near the chain and sprocket on which Mr. Nauholz worked. There was insufficient evidence that another "zone of danger" was created by the gate. Within the "zone of danger" (the elevator car top) there was no possibility for employees of The Boston Store and Otis to "interact," or create "misunderstandings," so that "coordination" of energy control programs was necessary to protect employee safety. (Exh. G; *see also Carpenter Contracting Corp.*, 11 BNA OSHC 2027, 2030-31 (No. 81-838, 1984) (failure to establish that employee activity would bring employee into "zone of danger" created by alleged violation with "reasonable predictability" justified vacation of citation).

Mr. Nauholz' activities atop the elevator car were not covered by the scope and application of the standard. Under these unique circumstances, the standard does not apply.<sup>45</sup> The foregoing is sufficient to dispose of the alleged violation in that the Secretary has failed to meet one of the four essential elements of her prima facie case. *See, e.g., Kokosing Constr. Co.*, 17 BNA OSHC 1869 (No. 92-2596, 1996), citing to *Waldon Healthcare Center*, 16 BNA OSHC 1052 (No. 89-2804, 1993).

### Findings of Fact and Conclusions of Law

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<sup>45</sup> No evidence was presented to contradict these dispositive facts. The CSHO made no determination regarding any movement of the elevator at the time the work was being performed. (Tr. 67). He made no determinations regarding any potential for movement of the chain, sprocket, or gate. The CSHO admitted that he did not know when or whether Mr. Nauholz expected the gate chain to move during the repair. (Tr. 87). *See Vandervoort's Dairy Foods Co.*, 20 BNA OSHC at 1608 (Because evidence does not establish 29 C.F.R. § 1910.147 applicable to operation, alleged violation must be vacated).

