



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

Secretary of Labor,

Complainant,

v.

Wayne J. Griffin Electric, Inc.,

Respondent.

OSHRC Docket No. 15-0858

APPEARANCES:

Susan G. Salzberg, Esquire
U.S. Department of Labor, Boston, Massachusetts
For the Secretary

Dion Y. Kohler, Esquire
Carla J. Gunnin, Esquire
Jackson Lewis PC, Atlanta, Georgia
For the Respondent

BEFORE: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Health and Safety Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). On October 18, 2014, an employee of Wayne J. Griffin Electric, Inc. (Griffin) was seriously injured when he came into contact with an energized bus bar during installation of an electric substation for Fidelity Real Estate Company (Fidelity or FREC) at One Spartan Way in Merrimack, New Hampshire (worksite).

The Occupational Safety and Health Administration (OSHA) began its inspection of the Fidelity worksite on November 21, 2014. As a result of the inspection, OSHA cited Griffin for

two serious violations of OSHA's construction electrical standard. The two item serious citation¹ was issued to Griffin on April 8, 2015, for a total proposed penalty of \$14,000.00.

Griffin filed a timely notice of contest, bringing this matter before the Commission. The Secretary filed a complaint. In its answer to the complaint, Griffin asserted the affirmative defenses of unpreventable employee misconduct and multi-employer worksite. A hearing was held in Manchester, New Hampshire on March 15-16, 2016. Both parties filed post-hearing and reply briefs.

For the reasons discussed below, the citation items are affirmed and a grouped, total penalty of \$7,000.00 is assessed.

Jurisdiction

Based upon the record, I find that at all relevant times Griffin was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. (Ex. J-16, stipulations 1-3). I also find that the Commission has jurisdiction over the parties and subject matter in this case.

Background

The Project

Griffin was hired to implement a significant update to the electrical systems of two Fidelity buildings. Fidelity's emergency power upgrade project involved replacing the existing electrical substations² and installing generators in the Fidelity buildings located at One Spartan

¹ Serious citation 1, item 1 alleges a violation of 29 C.F.R. § 1926.416(a)(1), as follows: On or about October 18, 2014, an employee received severe electrical burns while working in the electrical switchgear tie breaker compartment of SS41B. An energized bus bar operated at approximately 480 volts and was not protected from accidental contact. The Secretary proposes a penalty of \$7,000 for this citation item (as amended by Order dated December 21, 2015).

Serious citation 1, item 2 alleges a violation of 29 C.F.R. § 1926.416(a)(3), as follows: On or about October 18, 2014, the employer did not ascertain, by adequate inquiry, or direct observation, or by instruments, the specific parts of the energized electrical switchgear tie breaker SS41A and SS41B electrical power circuits, which were not safely located or de-energized. Additionally, the employer did not adequately advise all employees of the locations of hazardous energized lines and of the necessary measures required to be taken to ensure that exposure to electrical hazards was eliminated. The Secretary proposes a penalty of \$7,000 for this citation item.

² The terms switchgear and substation refer to the same equipment. These terms were used interchangeably at this worksite.

Way and Two Contra Way, in Merrimack, New Hampshire (Fidelity project). (Tr. 39, 203-04; Ex. J-1; Ex. J-16, stipulations 4-6). The substations were the primary power source for the two buildings. (Tr. 46). Fidelity, the property owner, required that the project be completed with as little disruption as possible to the building occupants. (Tr. 69).

Fidelity used CBRE as its onsite property management company. (Tr. 256). Richard Gustafson, CBRE's senior facilities manager for the New Hampshire Region, was responsible for the Fidelity account. Mr. Gustafson was not a licensed electrician or engineer. (Tr. 132, 140, 299-300). Ed Smith was CBRE's chief engineer for the One Spartan Way building. He had worked at this building for a total of thirty-eight years – nineteen years as the chief engineer. Mr. Smith was not a licensed electrician or engineer. (Tr. 141, 159-60, 261-62). One of the seven engineers Mr. Smith supervised was a licensed electrician. (Tr. 281. *See* Tr. 133-34).

The Fidelity project was managed by Jones, Lang, LaSalle (JLL). JLL's head project manager was Richard Ventura. (Tr. 132, 140; Ex. R-1).

The electrical engineer of record who designed the emergency power systems upgrade for Fidelity was John Lane of Facilities Engineering Associates, P.C. (FEA). Mr. Lane prepared the project specifications, drawings, and schematics. (Tr. 141-42, 254; Ex. J-4 p. 1; Ex. R-2 p. 14).

The construction manager for the Fidelity project was Gilbane Building Company (Gilbane). (Ex. J-3). Greg Emerson was Gilbane's senior project manager. (Tr. 131, 134; Ex. R-1; R-2).

Gilbane contracted with Griffin to dismantle the old electrical equipment and install the new substations and generators because of Griffin's expertise in the installation of electrical substation equipment.³ (Tr. 41, 237, 239, 241-42; Ex. J-3). Griffin was to remove generators and switchgears that were over thirty years old and replace them with new, larger units for each building. (Tr. 38-39, 203-04). Piping and connections to the generators inside and outside the buildings were dismantled in preparation for installation of the new generators. (Tr. 206). Over the course of the Fidelity project nine existing switchgears were dismantled and removed from the two buildings and seven new switchgears were installed. (Tr. 40. *See* Tr. 205). The one-year project began in the fall of 2013. (Tr. 237, 240).

³ The contract between Griffin and Gilbane, article 1.3 states, in part, "The Trade Contractor (Griffin) expressly represents and warrants to Construction Manager (Gilbane) that Trade Contractor holds special knowledge, training, and experience in such Work" (Ex. J-3 p. 3).

Griffin's Project Management and Employees

Throughout the project, at any given time, two to eight Griffin employees worked at the Fidelity worksite. (Tr. 240). At the time of the accident, Griffin had been working at the Fidelity project for almost a year. (Ex. J-3; Ex. J-16, stipulation 4). The accident that injured Griffin's employee, electrician Mr. J,⁴ occurred on October 18, 2014, at the One Spartan Way building. (Tr. 84-85, 106, 129).

Keith Piechocki, a licensed journeyman electrician, was Griffin's onsite project foreman. Mr. Piechocki had worked at Griffin for eighteen years. He had worked as an electrician for almost thirty years. (Tr. 37-38, 44, 118-19). Mr. Piechocki was responsible for the disassembly, installation, and assembly of the switchgears. (Tr. 43-46). Mr. Piechocki supervised all Griffin employees at the worksite and occasionally assisted with installation. (Tr. 44, 224).

Brian Connerton, a licensed electrician, was Griffin's electrical foreman. He reported to Mr. Piechocki and had worked at Griffin for fourteen years. Mr. Connerton had worked on the Fidelity project from the beginning. He was the primary supervisor for the Griffin crew dismantling and installing the equipment. (Tr. 46, 202-04, 206-07, 209). Mr. Connerton and his crew dismantled and installed the new switchgears for substations SS41A, SS41B, SS42A, SS42B, and installed the bus duct between SS41A and SS41B. (Tr. 207-08). Dismantling each switchgear took several days. (Tr. 205).

Mr. J was a licensed journeyman electrician who had worked at Griffin for five years. He had worked at the Fidelity project worksite for several months. (Tr. 44, 129). Mr. J was part of the Griffin crew that installed the switchgears. (Tr. 204, 208).

Wayne Pease, a licensed electrician, was Griffin's senior project manager. Mr. Piechocki reported to Mr. Pease. (Tr. 82, 249-50). Mr. Pease had worked for Griffin for twenty-five years. (Tr. 236). Mr. Pease was responsible for managing the Fidelity project, making sure the products (switchgears and generators) were purchased, delivered, and installed correctly. (Tr. 236-37).

In October 2014, Michael Weider was Griffin's corporate safety director. He supervised five safety professionals. (Tr. 171, 173). Mr. Weider had worked for Griffin for approximately nine years. He trained employees on electrical safety, voltage testing, proper use of electrical

⁴ In the interest of privacy, the injured employee's name is not used in this decision.

equipment, electrical hazards, and other worksite safety matters, including confined space and asbestos removal. (Tr. 174-76). He occasionally visited worksites to observe for compliance with Griffin's safety policies. (Tr. 192-93). Mr. Weider was not a trained electrician. (Tr. 173, 175, 177).

Drawings, Specifications, and Plaques

The Fidelity project's construction drawings and job specifications, which showed the detailed installation plan for the new substations and generators, were always available at the worksite's "print table" for anyone to reference. (Tr. 208-09; Exs. J-1, J-2). The job specifications⁵ were frequently referenced by electrical foreman Connerton and project foreman Piechocki throughout the project. (Tr. 51, 208-09, 211; Ex. J-1). Mr. Connerton testified that he regularly reviewed the specifications and drawings "to make sure we put the right sections together and we installed the pipe in the right place." (Tr. 208-09). Mr. Piechocki reviewed them "to have a guide to where the equipment was, what was coming out, what was going in, what was being permanently eliminated and what new was going in." (Tr. 47).

The job specifications, at section 1.13 A. "Transformer and Substation Replacement," state "[t]hese projects will be implemented concurrently and prior to the installation of the emergency generator." (Tr. 51, 211; Ex. J-1 p. 30 section 1.13 A.1). "The substations have Main-Tie-Main arrangements and this is to be used to allow implementation of the project, thereby minimizing the premium time, although some premium time work will be required." (Tr. 51, 211; Ex. J-1 p. 30 section 1.13 A.2).

Main-Tie-Main means two of the substations at One Spartan Way were connected together with a tie system. (Tr. 243). A tie breaker is a circuit breaker associated with providing power to another unit. (Tr. 46). The connected substations were designated as SS41A and SS41B. (Tr. 243). Mr. Connerton explained that "Main-Tie-Main" means there is a tie switch breaker between the two main breakers. (Tr. 211). Mr. Piechocki also testified that a Main-Tie-Main system indicates there is a tie breaker that connects the SS41A and SS41B switchgear. (Tr. 51-52. *See* Tr. 243).

⁵ The job specifications are set forth in the document, "One Spartan Way and Two Contra Way Emergency Power Upgrade, Merrimack, NH, Specifications, Issued for Construction, August 22, 2013." (Ex. J-1).

The Fidelity project's construction drawings included a "One Spartan Way, One Line SS41A&B Part Plan" issued August 22, 2013. (Ex. J-2 p. 5). This plan included a page with two one-line schematics of SS41A and SS41B. (Tr. 221-22; Ex. J-2 p. 5). Senior project manager Pease explained the schematic at the top of the page showed the layout of the system being dismantled; the bottom schematic showed the layout of the new system being installed. (Tr. 244-45. *See* Tr. 54, 160-61).

The schematics illustrated the differences between the old and new systems. (Tr. 54, 160-61, 244-45; Ex. J-2 p. 5). Key differences between the old and new systems were the different locations for breakers and the addition of a tie breaker switch. (Tr. 222; Ex. J-2 p. 5). The new switchgear also had extra loads from substations that had been dismantled and not replaced, an automatic transfer switch (ATS), and a generator on the substation. (Tr. 54; Ex. J-2 p. 5). Mr. Pease stated the diagram for the new system showed a "hard-bolted connection between SS41A and SS41B by way of a bus duct." (Tr. 245). A bus duct is an encapsulated protective outer metal enclosure that contains metal bars to bring power out from one substation – SS41A – to another substation – SS41B. The bus duct is operated by tie breakers. (Tr. 46, 112). The schematic for the new substations showed the electrical connection, the bus duct, between SS41A and SS41B, which was labelled as "3,000 a[mp], 3P, 3W BUSDUCT." (Tr. 54-55, 112; Ex. J-2 p. 5). Mr. Connerton's crew installed switchgears SS41A and SS41B and the bus duct connection between SS41A and SS41B. (Tr. 207-08).

Additionally, two placards were affixed to the SS41B switchgear equipment by the equipment manufacturer, Square D⁶, before it was delivered to the Fidelity worksite. (Tr. 56-57, 61-62, 64; Exs. C-1, C-2, J-17 stipulations). One placard was a diagram, affixed to the SS41B equipment, which showed the breakers and connections between SS41A and SS41B. (Tr. 57-58; Exs. C-1, J-17). According to project foreman Piechocki, the placard's diagram showed the potential for an electrical connection between switchgear SS41A and switchgear SS41B through the tie bus. (Tr. 57-61; Ex. C-1). Mr. Piechocki stated that in normal operations there would still be an electrical connection between SS41A and SS41B, even when the open tie breaker B switch itself had no power. (Tr. 60-61, 68, 161; Exs. C-1, C-2). The second placard affixed to the SS41B equipment was a list of written instructions that explained the sequence of opening

⁶ Square D manufactured the new switchgears for this project. Square D's parent company is Schneider Electric. (Tr. 51, 246-47; Ex. J-4).

breakers for lockout and normal operations. (Tr. 66-68, 163-64; Exs. C-2, J-17 stipulations). An early draft version of these two placards was included in the manufacturer's early submittal documents, which Mr. Pease and Mr. Piechocki reviewed in January 2014. (Tr. 61-62, 65; Ex. J-4 p. 7).

Method of Procedure (MOP)

The Method of Procedure (MOP) was the written procedure used for planned shutdowns at the Fidelity project. (Tr. 155-56, 290). The project's electrical shutdowns were planned to minimize the impact on building activities. Each of the approximately sixty shutdowns at the Fidelity project used an MOP. (Tr. 69). Project foreman Piechocki stated that Griffin's employees were to follow the "proper safe method" outlined in the MOP. (Tr. 120).

Mr. Piechocki prepared the initial draft of each MOP. Each MOP was discussed at project meetings to ensure that all necessary steps in the shutdown were included, with meeting participants providing suggestions and edits to the document. (Tr. 69, 142-43). Mr. Piechocki stated that MOP meeting participants made non-substantive suggestions regarding typos, punctuation, and spelling errors, and substantive suggestions, such as areas in the Fidelity building where people would be working and Fidelity did not want the electricity "shut down." (Tr. 157-58). Importantly, Fidelity required that only Fidelity or CBRE were allowed to open the circuit breakers. (Tr. 80, 155-56). The MOP project meetings included representatives from Fidelity/FREC, CBRE, Gilbane, Griffin, FEA,⁷ and Schneider Electric.⁸ (Tr. 69, 72, 138-42; Ex. R-2 p. 14). Mr. Piechocki was the only regular Griffin representative at the project meetings.⁹ (Tr. 72-73).

MOP-51 was the procedure for the October 18, 2014 planned shutdown. It had been developed over a three-week period at several project meetings. (Tr. 69, 72, 140, 142-43; Exs. J-6, J-7). The purpose of MOP-51 was to coordinate the electrical outage and planned work. (Tr. 75).

⁷ FEA electrical engineer John Lane was the project electrical engineer of record. (Tr. 141-42; Ex. J-4 p. 1; Ex. R-2 p. 14).

⁸ See Note 6 above.

⁹ Electrical foreman Connerton attended "a couple" project meetings during the year-long project. He did not attend any meeting where MOP-51 was reviewed. (Tr. 73, 227). Senior project manager Pease only attended the first Fidelity project MOP meeting. (Tr. 255).

At the October 7, 2014 project meeting, where MOP-51 was discussed, the attendee roster shows twelve individuals attended the meeting, with an additional nine listed individuals who did not attend. (Tr. 140; Ex. R-2 p. 14). The twelve attendees included one Griffin representative, project foreman Piechocki; one FEA representative, electrical engineer John Lane; three Gilbane representatives; and seven Fidelity/FREC¹⁰ representatives. The Fidelity/FERC representatives included CBRE chief building engineer Smith; a licensed electrician in charge of Fidelity's data center John Iannuzzo; and a Fidelity in-house electrical engineer Bill Hart. (Tr. 140-43; Ex R-2 p. 14). Even though Griffin's senior project manager Pease was listed as a possible attendee, he did not attend any meetings for MOP-51. (Tr. 72-73, 255; Ex. R-2 p.14).

At the project meetings, Mr. Piechocki projected the draft of an MOP onto a screen and read through each step to elicit any necessary modifications from the attendees. When asked if Mr. Lane reviewed and evaluated any MOP during a project meeting, Mr. Piechocki stated, "I would assume. I don't know for a fact if he did nor did not. But they were there." (Tr. 142-43).

Mr. Piechocki sent the final version of MOP-51, for review, to his immediate superior, senior project manager Pease, and to Griffin's corporate safety director Weider, with a copy to electrical foreman Connerton, on October 16, 2014. (Tr. 85; Ex. J-9. *See* Tr. 69, 89).

Mr. Pease testified that he had "zero" role in the development of MOP-51 and "zero" knowledge of the development of MOP-51, even though he was Mr. Piechocki's supervisor. (Tr. 249). Mr. Pease testified that no one monitored Mr. Piechocki in the development of MOP-51. Mr. Pease, a licensed electrician, did not check the project specifications or drawings or ask Mr. Piechocki whether the SS41A tie breaker was open and locked. Mr. Pease did not ask Mr. Piechocki why there was no step in MOP-51 for de-energizing the SS41A tie breaker. (Tr. 249-53. *See* Tr. 107).

Corporate safety director Weider testified that he had no role in supervising Mr. Piechocki in the development of MOP-51. (Tr. 179). Mr. Weider was not an electrician. (Tr. 173). Mr. Weider testified that he reviewed MOP-51 to determine what hazards each step presented and what personal protective equipment was needed. (Tr. 195). He did not discuss with Mr. Piechocki whether all live sources had been identified. (Tr. 182).

¹⁰ Because CBRE was Fidelity's agent and property manager at this worksite, in the record CBRE employees are sometimes referred to as Fidelity or FREC employees.

During the MOP-51 development process Mr. Piechocki was not supervised by anyone in Griffin management, even though Mr. Piechocki had never before worked at a worksite where Griffin did not have complete control of the breakers to de-energize the electrical equipment. (Tr. 107, 130, 154).

The focus of the planned shutdown for October 18, 2014, set forth in MOP-51, was for Griffin to install the end section on switchgear SS41B and relocate the temporary connections to a permanent circuit breaker in the newly-installed end section.¹¹ (Tr. 70-72, 92-93, 105; Ex. C-4). MOP-51 included steps that noted certain breakers must be switched off to de-energize connections – the breakers for SS41B and SS42A – but no step to open the tie breaker SS41A.¹² (Tr. 73; Exs. J-6; J-9).

After the accident, MOP-54 was developed to finish the work that had begun on October 18, 2014. MOP-54 included a step to open the tie breaker SS41A. (Tr. 110; Ex. J-8 p. 4).

October 18, 2014 One Spartan Way Planned Shutdown

Mr. Piechocki was in charge of the shutdown on October 18, 2014. Two Griffin crews worked in the One Spartan Way building's electrical equipment room, where the substations and switchgears were located for the October 18, 2014 shutdown. Project foreman Piechocki and electrical foreman Connerton discussed the work plan before the day of the shutdown. (Tr. 96, 228-29).

For the October 18 shutdown, Mr. Connerton was assisted by two licensed Griffin electricians to work on substation SS42A. (Tr. 88-89, 228). Mr. Piechocki assigned electrician Mr. J to work with him on substation SS41B. (Tr. 88). The room where both crews worked was roughly fifty feet by one hundred feet. (Tr. 166). Mr. Connerton's crew was about twenty five to fifty feet away from Mr. Piechocki and Mr. J. There were two pieces of switchgear equipment between the crews that blocked Mr. Connerton's view of Mr. Piechocki and Mr. J. (Tr. 166, 233).

¹¹ The MOP-51 "Executive Summary" described the planned shutdown to switchgears SS42A, SS42B, and SS41B as follows: "Shutdown SS42A, SS42B and SS41B install end section on SS41B relocate CH-1 from temporary breaker and terminate on breaker in new end section. In SS42B relocate PD4-1-2 from temporary breaker and terminate on breaker in new end section. Pull new emergency feeds from MES to ATS42A and ATS42B." (Ex. J-6 pp. 3, 9). "ATS" is an automatic transfer switch. (Tr. 76).

¹² "Opening" a breaker means preventing electrical current from flowing through the breaker. "Closing" a breaker means allowing electrical current to flow through the breaker. (Tr. 326).

Before starting work that day, Mr. Piechocki reviewed MOP-51 with Griffin's employees, CBRE chief building engineer Smith, and two FREC electricians (Tr. 76-77, 96; Ex. J-6). To start the shutdown, the FREC electricians transferred the building's power source to the generators. (Tr. 97).

Step 3 of MOP-51 stated "CBRE to open breaker Griffin to LOTO [lockout / tagout] breaker." (Tr. 97, Exs. C-6, J-6, J-7). Step 4 of MOP-51 stated "Griffin to test SS41B for power." (Exs. J-6 p. 4).

Mr. Smith, following the steps in MOP-51, opened the main circuit breaker to SS41B. Mr. Piechocki observed Mr. Smith open the main circuit breaker.¹³ Mr. Piechocki then locked out the breaker in its open position, and kept the breaker's kirk key in his pocket. (Tr. 97, 99, 166, 277). Wearing a "live work suit," Mr. Piechocki then verified that SS41B was off by testing, with his multi-meter and proximity meter, the end section main busing and the wiring in the compartment that Mr. Piechocki and Mr. J "were going to come in contact with." (Tr. 102, See Tr. 99-102, 152).

While Mr. J was installing bus bars at the end of the SS41B cabinet, Mr. Piechocki was working approximately fifteen to twenty feet away removing the temporary wiring at the back of the SS41B switchgear tie breaker compartment. The wires were bolted to a stud in the back of the SS41B switchgear cabinet. The cabinet was very narrow. (Exs. C-4, C-5). Mr. Piechocki used his proximity tester to check the bolts that he would be loosening in that cabinet. Lying on his stomach, Mr. Piechocki attempted, with no success, to loosen the bolts holding the wires. Mr. Piechocki then asked Mr. J to assist him with this task. Mr. Piechocki moved to the other side of the cabinet to hold the bolt with his wrench while Mr. J attempted to loosen the bolt from inside the cabinet. Then to get better leverage, Mr. J. got up on his hands and knees to lean in to loosen the bolts. At that moment, his face contacted the energized bus bar that was in the upper area of the cabinet. Mr. Piechocki pulled Mr. J off the energized bus bar. Mr. J was seriously injured with disfigurement to his jaw, which required plastic surgery. (Tr. 105-08, 152-54, 230, 371).

¹³ After opening the breaker, Mr. Smith left the work area at Fidelity's One Spartan Way building. (Tr. 166).

After the accident, MOP-54 was implemented on November 1, 2014 to finish the work that was started on October 18, 2014. MOP-54 included the step to open the tie breaker for the connection from SS41A, which had been missing in MOP-51. (Tr. 110; Ex. J-8 p. 4).

Discussion

The Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more 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. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Construction standards apply to Griffin's work at the Fidelity project

The Secretary asserts the Fidelity project is construction work as set forth in 29 C.F.R. § 1910.12(b), which defines construction work as “work for construction, alteration, and or repair.” (S. Br. p. 21). In determining whether an activity is construction or the maintenance of existing equipment, the Commission has held that projects that are improvements, non-routine, lengthy, and of considerable scale or complexity to be construction activities. *Brand Energy Solutions, LLC*, 25 BNA OSHC 1386, 1387 (No. 09-1048, 2015); *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2062 (No. 10-0551, 2014). Here the project lasted for approximately one year, was an upgrade to the existing equipment, and was the first time the equipment had been replaced in over thirty years. (Tr. 39-40, 262-65; Exs. J-1, J-3, J-16). Griffin does not dispute that the Fidelity project was construction activity. The nature of this project was lengthy, an improvement to the existing equipment, and not routine. I find the work at the Fidelity project was construction.

Citation 1, Item 2 – Alleged violation of 29 C.F.R. § 1926.416(a)(3)

This item alleges a serious violation of 29 C.F.R. § 1926.416(a)(3), which states:

Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact with the

electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

The Secretary asserts Griffin did not ascertain whether the bus bar located in the SS41B switchgear cabinet where employees were scheduled to work was energized. (S. Br. p. 26).

Griffin asserts it had no knowledge that an energized circuit was in the employees' work area, that it had relied upon Fidelity to determine which circuit breakers had to be opened before starting work, and that employee exposure was the result of unpreventable employee misconduct. (R. Br. p. 22, 25).

For the following reasons, I find the Secretary has met his burden and established that Griffin did not ascertain prior to beginning work that an electrical power circuit was energized and located such that employees were exposed to electrical hazards when working in the SS41B switchgear tie breaker compartment.

The standard applies

As discussed above, Griffin's work at the Fidelity project was construction work. The cited standard applies.

Employees were exposed to the hazard

Both project foreman Piechocki and electrician Mr. J were exposed to the hazard of electric shock from the energized bus bar while working in the SS41B switchgear tie breaker compartment. Mr. J's face contacted the energized bus bar while working to loosen bolts in the SS41B switchgear compartment. The Secretary has established employee exposure to the hazard.

Griffin did not comply with the requirements of 29 C.F.R. § 1926.416(a)(3).

The Secretary asserts that Griffin did not ascertain by either inquiry, direct observation, or with instruments whether any part of the energized electric power circuit was located so that work could bring the employee (or tool or machine) into contact with the electric power circuit. (S. Br. p. 26). I agree.

Griffin asserts that it did make reasonable inquiry into whether an energized power circuit was in the work area. Further, Griffin asserts that the standard does not require that it use every possible means to discover energized circuits; it must only take steps that are considered reasonable by industry practice. (R. Br. 19).

To support its assertion that it made a reasonable attempt to find energized circuits, Griffin relies primarily on the MOP review process at the project meetings. (R. Br. 19). Griffin states that industry experts attended the MOP meetings and that no one identified there was no step to open the tie breaker circuit and de-energize the bus bar before employees worked on the SS41B switchgear. This argument is unsound for three reasons.

First, Griffin presented no evidence to show that the MOP meeting process was representative of industry practice. *See generally, Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1117 (No. 84-0696, 1987)(where a standard prescribes employer conduct in specific terms that are not vague, industry practice is not relevant). Second, Griffin presented no evidence that anyone attending the Fidelity project MOP meeting was reviewing MOP-51 to determine if every energized circuit had been identified. Finally, Griffin was in the best position to determine which circuits were energized, as Griffin had installed the new system and knew precisely what components had been installed. Griffin had been specifically selected by the construction manager, Gilbane, because of its expertise in installing electrical systems.

Griffin essentially asserts that, instead of supervising Mr. Piechocki's preparation of MOP-51 or reviewing MOP-51 for compliance with Griffin's safety policies, it had relied upon the various MOP meeting participants to determine if Griffin's safety procedures had been included and every energized circuit accounted for.¹⁴ Because Griffin did not task the electrical engineer who designed the project or any of the other participants at the project meetings with determining whether every energized circuit was identified in MOP-51, Griffin's reliance on the MOP process for that result is irresponsible.

Griffin also asserts that CBRE chief building engineer Smith did not identify the unaccounted-for energized circuit even though he had thirty-eight years of experience with building's previous electrical system. Griffin's assumption that Mr. Smith was carefully reviewing MOP-51 to determine if all energized circuits were identified is also irresponsible. Mr. Smith was not a licensed electrician and he had no experience with the new equipment and electrical system that Griffin was installing. He simply opened or closed a breaker as listed in the MOP.

¹⁴ Project foreman Piechocki provided MOP-51 to senior project manager Pease, corporate safety director Weider, and electrical foreman Connerton. (Ex. J-9). However, no Griffin manager reviewed MOP-51 to ensure safety compliance. (Tr. 85-86, 178-79, 182, 225, 249-53).

Griffin further asserts that project foreman Piechocki's review of MOP-51 before starting work on October 18, 2014, constituted adequate inquiry into what circuits were energized. In the context of the unique challenges present at this worksite, Mr. Piechocki's review of MOP-51 that morning was inadequate and noncompliant with the cited standard. Mr. Piechocki had never before worked at a worksite where Griffin did not have complete control of the breakers to the electrical equipment its employees would work on. That morning, Mr. Piechocki was simply reading through the procedure he had drafted, which no one at Griffin supervised or reviewed for safety compliance. Reading through a procedure is not an inquiry into whether the SS41B switchgear was still energized through the bus duct.

Griffin contends that both Mr. Piechocki and Mr. J used the proper equipment to test the SS41B switchgear equipment. It appears the equipment present at the worksite was adequate to test for an energized circuit. However, to be effective and compliant, all the circuits that could be contacted during the work task must be tested. The testing conducted by Mr. Piechocki in the SS41B switchgear compartment was inadequate to ascertain whether there was an energized power circuit that could be contacted in the employee's work area. Mr. Piechocki's testing did not include areas of potential inadvertent contact as required by the cited standard.¹⁵ (Tr. 102,

¹⁵ I find that project foreman Piechocki's testimony reveals his understanding that Respondent's No Live Work and Test Before You Touch policy was limited to just the electrical equipment he intended to contact during work. For example, Mr. Piechocki testified:

“[B]esides the main bussing, any of the wiring in that [SS41B] compartment, we tested that we were *going to come in contact with* in the – that rear section.” (Tr. 102).

“*If we know we're going to come into contact with something we are to - to test it.*” (Tr. 116) (emphasis added).

Regarding Respondent's Test Before You Touch policy, when asked by Respondent counsel what areas he was supposed to “test before your touch,” Mr. Piechocki answered: “The areas that you tend to come in contact with.” . . . “*That you test anything that you're going to touch, what you're going to come into contact with.*” (Tr. 126) (emphasis added).

Further, Mr. Piechocki's specific actions, on October 18, 2014, provide additional strong evidence that Mr. Piechocki understood Respondent's No Live Work and Test Before You Touch policy to apply to electrical equipment that he intended to contact during work. Mr. Piechocki testified that he tested the “lugs” from which he intended to remove wires in the SS41B switchgear compartment, not other areas in that compartment. “I tested it for any voltage before I touched the lugs.” (Tr. 105) “[T]here was no energy on those lugs that we were going to be interacting with.” (Tr. 152).

I do not find that Mr. Piechocki understood Respondent's No Live Work and Test Before You Touch policy to apply to equipment or areas that Griffin employees might inadvertently contact during work. Mr. Piechocki's limited testimony in this regard was elicited only after

105, 116, 126, 152). No one tested the energized bus bar in the SS41B switchgear compartment to determine if it was energized.

In addition, Mr. Piechocki testified that on October 18, 2014, he and Mr. J. were to follow the proper safe method for work as it was set forth in MOP-51, which was specific to this worksite.¹⁶ Mr. Piechocki testified that because it was not a listed step in MOP-51, electrician Mr. J was not required to test anything or wear any personal protective equipment. (Tr. 100, 106-07, 120).

The SS41A tie breaker was not opened and physically disconnected from the bus, therefore the bus bar, located in the SS41B switchgear compartment, was still connected to the SS41A switchgear via the bus duct and remained energized. (Tr. 52, 55, 222, 245, 326). The only step Griffin took to inquire whether there was an energized power circuit in the work area was project foreman Piechocki's preparation of MOP-51. Mr. Piechocki's preparation of MOP-51 was not supervised by any Griffin manager to ensure safety compliance and to determine if all energized circuits had been identified before Griffin employees began working in the SS41B switchgear compartment. I find this was not a reasonable effort to ascertain whether there were any energized circuits that could be contacted by its employees during the October 18 planned shutdown. Griffin did not comply with the standard's requirement.

Knowledge is established

The Secretary asserts that Griffin had both actual and constructive knowledge of the violative condition. The Secretary must prove that the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1207 (No. 05-0839, 2010) *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished) (*Summit*).

Respondent counsel directed Mr. Piechocki to read a bullet point on Respondent Test Before You Touch policy and posed a leading question. (Tr. 126-27; Ex. R-7). Mr. Piechocki's testimony, on the question whether the policy applied to areas of inadvertent contact, was hesitant and uncertain. His answer to Respondent counsel's leading question is not credited.

¹⁶ When asked by Respondent counsel if he complied with Respondent's No Live Work policy on October 18th, Mr. Piechocki answered:

[F]irst of all, we followed the MOP. We had an MOP, the steps to follow that everyone agreed was the proper safe method. We thought we disengaged any energy into the substation. Put on the proper PPE and tested for any known power. (Tr. 120; Ex. R-4).

A supervisory employee's actual knowledge or constructive knowledge can be imputed to the employer. *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001). Constructive knowledge is imputed where a supervisory employee knew or should have reasonably known about the safety violation. *P. Gioioso & Sons, Inc. v. OSHRC*, 675 F.3d 66, 73 (1st Cir. 2012) (*Gioioso II*), citing *Cent. Soya de P.R., Inc. v. Sec'y of Labor*, 653 F.2d 38, 40 (1st Cir.1981) (*Soya*) (where two supervisors in charge of facility knew of the hazard, the supervisory employees' knowledge of the hazardous condition existing within the scope of their supervisory responsibility, was properly imputed to the employer); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 589 (D.C. Cir. 1985)(*Simplex*) (finding employer had constructive knowledge of safety violation based on physical conditions and work practices that were "readily apparent" and that "indisputably should have been known to management").

Knowledge is directed to the physical conditions that constitute a violation. The Secretary need not show that an employer understood or acknowledged that the physical conditions were hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) (*Phoenix*), *aff'd*, 79 F.3d 1146 (5th Cir. 1996).

Actual Knowledge

The Secretary asserts that Griffin had actual knowledge of the electrical connection between SS41A and SS41B through its project foreman Piechocki. (S. Br. pp. 28-30). I agree.

Griffin asserts it had no actual knowledge the bus bar in the SS41B switchgear cabinet was energized and posed a hazard to Mr. Piechocki and Mr. J. Griffin asserts that if Mr. Piechocki had known of the potential for a live connection he would have taken actions to de-energize the connection. Further, Griffin asserts Mr. Piechocki's paperwork demonstrates he did not expect to work on any live circuits that day. (Resp. Reply Br. p. 2).

I find that Mr. Piechocki had actual knowledge of the electrical connection through project specifications, schematics, drawings, and diagram placards attached to the SS41B switchgear equipment. (Tr. 51, 53, 208-09, 222, 241-42, 244-45; Exs. J-1, p. 30; J-2, p. 5; J-17; C-1; C-2). Mr. Piechocki was an experienced licensed electrician. He could read electrical specifications. (Tr. 47, 51, 53). The schematics and specifications illustrating the connection were onsite and always available. (Tr. 47, 208-09).

Electrical foreman Connerton supervised the crew and helped install switchgears SS41A and SS41B. (Tr. 207-08). Mr. Connerton reported directly to Mr. Piechocki. (Tr. 209). As the project foreman, Mr. Piechocki oversaw the installation of switchgears SS41A and SS41B and the bus duct. (Tr. 46, 207-08).

Both Mr. Piechocki and Mr. Connerton reviewed the project's schematics and specifications throughout the project. (Tr. 53-55, 208-09; Exs. J-1, J-2 p. 5). The bus duct which provided the physical connection between SS41A and SS41B was bolted together and installed by Griffin employees. (Tr. 46, 207-08). Mr. Piechocki knew that the bus duct had been installed prior to the October 18 shutdown. (Tr. 51, 53, 208-09, 241-45; Exs. J-1, J-2, C-1, C-2).

In addition to the project's specifications, schematics, and drawings, two placards permanently attached to the SS41B switchgear equipment showed the connection to SS41A. Mr. Piechocki admitted that both placards showed the connection between SS41A and SS41B. (Tr. 57, 66-67). One placard, which was attached to a metal cover located above the tie breaker unit of SS41B, consisted of a diagram that illustrated the connection between SS41A and SS41B. (Tr. 56-57, 67; Exs. C-1, J-17). The other placard, which was attached to the front of the tie breaker unit of SS41B, consisted of a step-by-step written description of how the SS41A and SS41B switchgears were tied together. (Tr. 56-57, 67; Exs. C-2, J-17). The two placards were plainly visible, had been attached to the switchgear by the manufacturer, and were in place when the switchgear arrived for Griffin's installation. (Tr. 57, 249). Also, project foreman Piechocki and senior project manager Pease had reviewed an early draft version of both placards that had been submitted in January 2014. (Tr. 61-62, 244-48; Ex. J-4 p. 7).

I find the project's drawings, specifications, schematics, and equipment placards provided Griffin with actual knowledge of the electrical connection between SS41A and SS41B, through Mr. Piechocki, Mr. Connerton, and Mr. Pease. Because Mr. Piechocki knew the bus duct connection was installed and because he had reviewed the system specifications, he knew there was an electrical connection between SS41A and SS41B.

Further, because he drafted MOP-51, Mr. Piechocki knew which circuits had been identified as energized for the October 18 shutdown. Senior project manager Pease and corporate safety director Weider received the final version of MOP-51 on October 16, 2014, so they also knew which circuits were identified to be de-energized. Electrical foreman Connerton also had received a copy of MOP-51 on October 16, 2014. (Tr. 68-69, 224; Ex. J-9).

CBRE building engineer Smith followed the steps in MOP-51, which identified which circuit breaker to open. Mr. Piechocki observed Mr. Smith open the circuit breaker; Mr. Piechocki then removed the kirk key to lockout the breaker switch. Mr. Piechocki kept the key in his pocket, establishing his control over the circuit breaker; he was the only person who could close the breaker and re-connect the circuits. Therefore, Mr. Piechocki had actual knowledge of which circuit breaker had been opened before Griffin began work on the SS41B switchgear tie breaker compartment. Mr. Piechocki also had knowledge of the steps in MOP-51 and which circuits were identified to be disconnected. He knew Griffin had installed a physical connection through the bus duct between SS41A and SS41B. (Tr. 96-97, 99).

These facts demonstrate Mr. Piechocki knew of the electrical connection between the substations, knew which breakers had been opened and which remained closed on October 18, 2014; thus, he knew of the hazardous condition.¹⁷ I find that Mr. Piechocki had actual knowledge of the electrical connection between SS41A and SS41B and that no breaker switch had been disengaged to de-energize that connection. The Secretary has proven actual knowledge of the physical condition that created the violation.

Constructive Knowledge

Under Commission precedent, the Secretary can prove constructive knowledge by proving the cited employer could have known of the violative condition with the exercise of reasonable diligence. *Summit*, 23 BNA OSHC at 1207. “Reasonable diligence requires the formulation and implementation of adequate work rules and training programs to ensure that work is safe, as well as adequate supervision of employees.” *Id.* quoting *N & N Contractors, Inc.*, 18 BNA OSHC at 2123.

The Secretary asserts that in addition to actual knowledge, Griffin had constructive knowledge of the violative condition. The Secretary asserts that with reasonable diligence,

¹⁷ Griffin attempts to show that Mr. Piechocki thought that the system was not energized because it was not yet “commissioned.” (R. Br. p. 9). This argument is unpersuasive. Mr. Piechocki, Mr. Connerton, and Mr. Pease each testified that commissioning is the step at which a third party tests the system to be sure it is installed properly and in working order before turning the system over to the building for normal operations. (Tr. 73-74, 129-30, 149, 226, 331-32). Commissioning is a testing step and not relevant to whether or not a part of the system is energized. Because Griffin installed the new electrical equipment at the Fidelity project, it was in the best position to know which parts of the system were connected and thus energized. I reject Griffin’s argument that the commissioning status of the system was relevant to energization.

Griffin should have known of the electrical connection through the bus duct between switchgears SS41A and SS41B, and the potential electrical energization of the bus bar through the SS41A tie breaker. (S. Br. p. 29). I agree.

Project foreman Piechocki had reviewed the specifications and schematics for SS41A and SS41B. The specifications and construction drawings were always available onsite and Mr. Piechocki and his crew routinely consulted them during the project. Mr. Piechocki admitted the specifications, drawings, and schematics all showed the electrical connection between SS41A and SS41B through the bus duct. Mr. Piechocki knew the crew had installed the bus duct that connected SS41A and SS41B.

MOP-51, drafted by Mr. Piechocki, included steps to open other circuit breakers, but no step to open the tie breaker to disconnect the electrical connection between SS41A and SS41B through the bus duct. (Ex. J-6 p. 4). The MOP developed after the accident, MOP-54, included a step that opened the tie breaker for SS41A. (Tr. 110; Ex. J-8 p. 4).

Mr. Piechocki observed the lockout of the main circuit breaker to SS41B on October 18 and completed the step by removing and maintaining control of the kirk key so the breaker could not be re-engaged without his knowledge. (Tr. 69). Mr. Piechocki had all the available information about which circuits had been de-energized and with reasonable diligence could have known the bus bar in the SS41B switchgear tie breaker compartment was still energized.

The Secretary also asserts that senior project manager Pease – Mr. Piechocki’s supervisor – could have known MOP-51 did not include a necessary step to de-energize and lockout the electrical connection between SS41A and SS41B. (S. Br. p. 30). I agree.

Senior project manager Pease, a licensed electrician, admitted that he reviewed the project’s specifications, construction drawings, and schematics that showed a bus duct that provided an electrical connection between SS41A and SS41B. (Tr. 253). Mr. Pease received a copy of every MOP developed for the project, including MOP-51. (Tr. 69). Mr. Pease admitted that he and corporate safety director Weider received an email from Keith Piechocki on October 16, 2014, with MOP-51 attached. (Tr. 250; Ex. J-9).

Mr. Pease stated that even though he was Mr. Piechocki’s supervisor, he did not review the steps in any MOP to determine if the MOP adequately identified all energized circuits that needed to be shut down. (Tr. 253). Mr. Pease further stated that no one at Griffin reviewed the MOPs drafted by Mr. Piechocki. (Tr. 253). Senior project manager Pease’s actions were not

reasonably diligent: delegating the drafting of the MOP to Mr. Piechocki; failing to supervise or monitor Mr. Piechocki's preparation of the MOP; and, receiving a copy of MOP-51 in its final form before execution of the work procedure and failing to review the MOP for safety compliance. Mr. Pease's inaction appears particularly lax when considered in light of the unique working conditions on the Fidelity project, where Griffin did not control the breakers to de-energize the electrical equipment Griffin's employees worked on. I find that with reasonable diligence, Mr. Pease would have known MOP-51 did not include a step to open the tie breaker for SS41A and disrupt the electrical connection between SS41A and SS41B through the bus duct.

Respondent asserts there is no constructive knowledge because it exercised reasonable diligence in three ways: when requesting comment on the MOP at project meetings, through Mr. Piechocki's partial compliance with Griffin's Test Before You Touch policy, and through Griffin's implementation of its safety program. (R. Br. pp. 14-16). I disagree.

First, MOP-51 was one of approximately sixty MOPs developed during the Fidelity project. (Tr. 68). Mr. Piechocki drafted each MOP and presented the draft at project meetings where it was reviewed line-by-line so that changes, corrections, and suggestions made at the meetings could be included. (Tr. 69, 142-43). Griffin asserts that it relied on the individuals present at the project meetings to evaluate the MOP for any missing steps or deficiencies. (R. Br. p. 16). Griffin asserts that because the experts at the meetings did not identify that a step to de-energize the tie breaker connection to SS41B was missing, it is not reasonable to expect Griffin to identify the error. In other words, how could Griffin be expected to notice something the accumulated expertise at the project meeting did not notice. (R. Br. p. 17; Tr. 255-56). In particular, Griffin asserts that electrical engineer Lane, who designed Fidelity's new electrical system, was at the meetings and did not recognize that there was no step in MOP-51 to de-energize the connection between SS41A and SS41B. (R. Br. pp. 8-9).

However, Griffin presented no evidence that anyone at the project meeting was tasked to evaluate MOP-51 relative to safety procedures for Griffin's employees. There is no evidence that Griffin requested or contracted with Mr. Lane for evaluation of the MOP or its safety procedures. Mr. Piechocki did not ask Mr. Lane if every electrical connection was accurately identified in MOP-51. (Tr. 141-42).

Asserting that Mr. Lane, or any meeting participant, should have been evaluating the MOP to determine if it complied with Griffin's safety rules is not reasonable. Mr. Lane did not control the equipment's installation and was not responsible for the safety of Griffin's employees during the shutdown. This is especially unreasonable because Mr. Piechocki's supervisor did not review the MOPs to ensure the safety of Griffin's employees or provide general supervision or oversight to Mr. Piechocki. Further, Griffin's corporate safety director Weider did not review the MOPs for safety as it concerned required de-energization or lock out tag out.

Griffin cannot shift its duty for the safety of its employees to another party. *See Summit*, 23 BNA OSHC at 1206-07, citing *Froedtert Mem'l Lutheran Hosp. Inc.*, 20 BNA OSHC 1500, 1508-09 (No. 97-1839, 2004) (an employer cannot "contract away its legal duties to its employees or its ultimate responsibility under the Act by requiring another party to perform them" (citation omitted)) and *Cent. of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620, 624-25 (5th Cir. 1978) (noting that Commission precedent establishes that "an employer may not contract out of its statutory responsibilities under" the OSH Act).

Second, Griffin contends that it exercised reasonable diligence because project manager Piechocki attempted to follow Griffin's No Live Work / Test Before You Touch policy. (Resp. Reply Br. p. 3). I disagree.

Griffin's No Live Work / Test Before You Touch policy required an employee to assume that all parts were energized and to test all the areas that could be contacted, either intentionally or inadvertently, while working. (Ex. J-10; R-7). Project manager Piechocki knew electrician Mr. J would be working near the bus bar; he had assigned Mr. J to work with him in the narrow SS41B switchgear tie breaker compartment. (Tr. 88). Mr. Piechocki used the proximity meter to check the bolts ("lugs") he planned to loosen, but he did not check the areas around the compartment that he or Mr. J could inadvertently contact. (Tr. 98-100, 105, 107). While assisting Mr. Piechocki with a stubborn bolt, Mr. J inadvertently leaned into the bus bar and was seriously injured. (Tr. 106).

Mr. Piechocki's testimony reveals that he did not understand that he also needed to test the areas that could be inadvertently contacted by a body part or tool while working at a task. (Tr. 102, 115-16, 124-27). In fact, Mr. Piechocki's specific action of testing *only the bolts* in the 2241B cabinet that he intended to loosen with a wrench, further confirms Mr. Piechocki's inaccurate understanding that he only needed to test components that he was going to contact or

touch.¹⁸ Mr. Piechocki's incomplete application of Griffin's No Live Work / Test Before You Touch policy did not demonstrate reasonable diligence, especially when considering that Mr. Piechocki knew the bus duct connected the two switchgears and he knew which circuits had (and had not been) locked out before work began in the SS41B switchgear compartment.

Further, as discussed below,¹⁹ Griffin's overall implementation of its work rules did not show reasonable diligence. Griffin did not adequately communicate that an employee must test any area that could be inadvertently contacted.

Griffin provided no oversight to determine if MOP-51 complied with Griffin's safety program. This is of particular importance, as Mr. Piechocki's testimony disclosed his understanding that Griffin's employees, including Piechocki and electrician Mr. J, were to follow the "proper safe method" outlined in MOP-51, specific to this worksite, on October 18, 2014. As it was not part of MOP-51, Mr. J was not required to test anything. (Tr. 100, 106-07, 120; *See* R. Ex. 4).

I find Griffin did not exercise reasonable diligence to ensure its employees had a safe working environment. The Secretary has proven that Griffin had constructive knowledge of the violative condition.

Project manager Piechocki's conduct was foreseeable

Griffin also asserts that the Secretary must show that a supervisor's "rogue conduct" was foreseeable in order to impute that supervisor's knowledge to the employer. (R. Br. p. 14).

The Commission applies the case law of the circuit where a case may be appealed.²⁰ Here, Griffin may appeal to either the First Circuit or the District of Columbia Circuit Court of Appeals. Both courts have established case law on the issue of imputation of the supervisor's knowledge to the employer when the supervisor participates in violative conduct. *See Gioioso II*, 675 F. 3d at 73 (1st Cir. 2012); *Soya*, 653 F.2d at 40 (1st Cir. 1981); *Simplex*, 766 F.2d at 589 (D.C. Cir. 1985).

¹⁸ *See* Note 15 above.

¹⁹ Griffin's safety program is discussed in the Unpreventable Employee Misconduct section below.

²⁰ The Commission has held that "[w]here it is highly probable that a Commission decision [will] 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." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). *See* 29 U.S.C. §§ 660(a) and (b).

Griffin asserts that *Gioioso II* cannot be applied to the facts of the instant case because the open trench in *Gioioso II* was an obvious hazard. Griffin asserts that, here, the hazard was not obvious because the electrical engineer who designed the Fidelity electrical system did not point out MOP-51's missing step at a project meeting. (Resp. Reply Br. p. 6). I disagree. In the instant case, the hazard was obvious to a licensed electrician. Project foreman Piechocki, senior project manager Pease, and electrical foreman Connerton – all licensed electricians who worked for Griffin - admitted that the specifications, drawings, schematics, and the placards affixed to the equipment showed the electrical connection from SS41A to SS41B. (Tr. 53-55, 207-09, 222, 244-45). The specifications clearly showed that the tie breaker circuit controlled the connection between SS41A and SS41B. The undisputed facts do not support Griffin's assertion that the hazard here was not obvious.

Griffin asserts that *Soya* supports its position that Mr. Piechocki's knowledge cannot be imputed to Griffin because his actions were not foreseeable. I disagree. In *Soya*, the First Circuit held, “[w]e think it is reasonable on the facts of this case to charge the employer with knowledge of the hazard based on the knowledge of supervisory personnel of an unsafe condition existing within the scope of their supervisory responsibility.” *Soya*, 653 F.2d at 39. It was within project foreman Piechocki's responsibility to ascertain the equipment that had been de-energized. Mr. Piechocki knew the equipment's specifications, had a copy of MOP-51 (which did not include a step to de-energize the connection between SS41A and SS41B), and supervised the onsite installation crew. The unsafe condition was within the scope of Mr. Piechocki's responsibility and, based on MOP-51, it was foreseeable to him and to his supervisor, Mr. Pease, that the tie breaker switch would not be opened and employees working in the SS41B switchgear compartment would be exposed to an energized circuit. Griffin's assertion that the knowledge of its supervisors cannot be imputed is rejected.

Simplex compares favorably to the facts here. In *Simplex*, the D.C. Circuit held that actual knowledge was not required as long as an employer is not “held responsible for violations of which it was reasonably unaware.” *Simplex*, 766 F.2d at 588. There, the court found the employer had constructive knowledge because the physical conditions “were readily apparent to anyone who looked . . . and should have been known to management.” *Id.* at 589. Similarly here, the energized connection through the bus duct between SS41A and SS41B was apparent from the Fidelity project specifications, schematics, and diagrams. (Tr. 53-55, 207-09, 222, 244-

45). This energized connection was apparent to licensed electricians Mr. Piechocki, Mr. Pease, and Mr. Connerton from their review of these project documents. It was not reasonable that no one on Griffin's management team reviewed the MOPs prepared by Mr. Piechocki to determine if Griffin's safety practices were fully incorporated and implemented. It was not reasonable that no one on Griffin's management team supervised Mr. Piechocki's preparation of MOP-51 to ensure safety compliance with the cited standard. As in *Simplex*, here the violative condition was apparent and should have been known to management.

To support its contention that project foreman Piechocki's knowledge of the violative condition cannot be imputed to Griffin, alleging that his actions were not foreseeable, Griffin relies on cases from several other circuits. Griffin contends that Mr. Piechocki's conduct in the instant case was "outrageous" and unforeseeable. (R. Br. p. 14). See *Comtran Group v. Sec'y*, 722 F.3d 1304, (11th Cir. 2013); *W.G. Yates & Sons Constr. Co., Inc.*, 459 F.3d 604 (5th Cir. 2006); *Penn. Power & Light Co. v. OSHRC*, 737 F.2d 350, 355, 357-58 (3d Cir. 1984) (*PP & L*); *Mountain States Telephone & Telegraph Co. v. OSHRC*, 623 F.2d 155 (10th Cir. 1980); *Ocean Elec. Corp. v. OSHRC*, 594 F.2d 396, 401 (4th Cir. 1979). (R. Br. p. 14-15).

I disagree. I find that project foreman Piechocki's actions in violation of the standard were foreseeable and, therefore, Mr. Piechocki's knowledge may be imputed to Griffin. Even when a supervisor participates in violative conduct, the Secretary's burden of proving that a violation of the standard was preventable may be achieved "by showing that the violation was foreseeable because of inadequacies in safety precautions, training of employees, or supervision." *PP & L*, 737 F.2d at 358, quoting *Capital Elec. Line Builders, Inc. v. Marshall*, 678 F.2d 128, 130 (10th Cir. 1982). See *Kansas Power & Light Co.*, 5 BNA OSHC 1202, 1204 (No. 11015, 1977) (knowledge of the supervisor will be imputed to the employer unless employer can show that supervisor was "adequately supervised with regard to safety matters").

In the instant case, Griffin failed to supervise the supervisor, project foreman Piechocki, who was assigned the important task of preparing the MOPs. Mr. Piechocki understood that MOP-51 set forth the proper safe method that Griffin's employees would follow on October 18, 2014. Mr. Piechocki provided the final MOP-51 to his immediate supervisor, senior project manager Pease, and to Griffin's corporate safety director Weider. However, no Griffin manager supervised Mr. Piechocki's preparation of the MOP or reviewed the MOP to ensure worksite safety and compliance with the standard.

Griffin's failure to supervise Mr. Piechocki's work on the important task of preparing the MOP, reveals Mr. Piechocki's conduct to be foreseeable. It was reasonably foreseeable that MOP-51 would be followed during the October 18 shutdown and therefore the electrical connection between the substations would not be de-energized. Griffin had constructive knowledge of the violative condition through project foreman Piechocki and senior project manager Pease.

I find the cited standard applies, its terms were violated, employees were exposed, and Griffin had knowledge of the hazardous condition. The Secretary has met his burden for citation 1, item 2.

Unpreventable Employee Misconduct Defense

Respondent also asserts that project foreman Piechocki and electrician Mr. J engaged in unpreventable employee misconduct when they did not accurately implement Griffin's No Live Work / Test Before You Touch policy. (R. Br. pp. 25-26).

"To establish this defense, an employer must show that it had: (1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *E.g., Manganas Painting Co.*, 21 BNA OSHC 1964, 1997, (No. 94-0588, 2007). "Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), *aff'd*, 978 F.2d 744 (D.C. Cir. 1992) (citations omitted) (unpublished).

The First Circuit recognized the "OSH Act requires that an employer do everything reasonably within its power to ensure that its personnel do not violate safety standards" and that the employer must prove the affirmative defense of unpreventable employee misconduct to not be liable for the violative conduct. *Modern Cont'l. Const. Co., Inc. v. OSHRC*, 305 F.3d 43, 51 (1st Cir. 2002) citing *P. Gioioso & Sons*, 115 F.3d 100, 109 (1st Cir. 1997) (*Gioioso I*).

For the reasons that follow, I find that Griffin's work rules were inadequate, Griffin did not effectively communicate its work rules to its employees, and Griffin did not adequately discover and discourage violations. Therefore, Griffin's unpreventable employee misconduct defense fails.

Griffin's work rules were inadequate

Respondent asserts that its No Live Work / Test Before You Touch policy was adequate and that if Mr. J and Mr. Piechocki had followed this rule, there would have been no accidental contact with an energized circuit. (R. Br. pp. 25-26; R. Reply Br. p. 4). Additionally, Griffin asserts MOP-51 was not a work rule, so it cannot be used to show Griffin's work rules were inadequate. (R. Reply Br. p. 4).

The Secretary asserts Griffin's generic work rules were inadequate for the Fidelity worksite. The Secretary points to Griffin's claim that it usually had complete control over the circuit breakers during a project and Fidelity's requirement, that Fidelity maintain control, was an aberration from Griffin's normal practice. (S. Br. pp. 34-35). Because of this significant change in Griffin's routine practice, a more specific work rule was needed for Griffin's employees at the Fidelity worksite because Griffin did not have complete control over the breakers. (S. Br. pp. 35, 38).

The Commission has held that an employer's work rules must be clear enough so that they will eliminate the hazard covered by the standard. *Beta Constr. Co.*, 16 BNA OSHC 1435, 1444 (No. 91-102, 1993). "In order to fulfill its statutory obligation an employer must do more than issue safety instructions or hold safety meetings. . . . Specific safety instructions and work rules concerning particular hazards that may be encountered on the job are the essential foundations of an adequate safety program." *Paul Betty*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981) (citations omitted). *See also CMC Electric, Inc.*, 221 F.3d 861, 866 (6th Cir. 2000) (affirming Commission's findings that employees were not given specific work rules for the assigned work and it was foreseeable employees would be exposed to the hazard).

Griffin's No Live Work policy states "live work" is "any work in such proximity to any part of an electrical system with exposed energized parts where an employee could contact the energized parts in the course of work." (Ex. J-10). Griffin's Test Before You Touch safety sheet states that an employee must "never assume that the equipment or system is de-energized – "Test every circuit, every conductor, every time you touch!" – even if it seems "redundant or unnecessary." (Ex. R-7). It also lists unplanned situations that an employee must account for, including "unintentionally going outside the isolated safe work zone." (Ex. R-7). Griffin's corporate safety director Weider explained that the Test Before You Touch policy is training for one particular aspect of the No Live Work policy. (Tr. 183; Exs. R-7, J-10).

Griffin's No Live Work policy also states:

There are a number of other hazards related to working equipment hot that are not obvious. In particular, determining that a circuit is OFF can be difficult in some instances. Even with the best of intentions to avoid working hot, it is necessary and important to check for circuit voltage with an appropriate voltmeter before working on equipment presumed to have been de-energized. This situation results when the equipment involves items such as *tie breakers*, double-throw disconnect switches, automatic transfer switches and emergency generation. *In such cases, turning the equipment OFF may result in power being supplied by another circuit route or from another source. Working on these circuits requires extra knowledge and caution.* (emphasis added)

(Ex. J-10, p. 5).

The record shows that it was unclear who had the responsibility to determine which breakers would be opened and de-energized. CBRE chief building engineer Smith and CBRE senior facilities manager Gustafson believed that Griffin would identify which breakers needed to be open during a shutdown. (Tr. 276-77, 309-11). Griffin's project foreman Piechocki believed that either Fidelity or CBRE identified which breakers needed to be opened for a particular work activity. (Tr. 156). MOP-51 did not designate which party was responsible to identify the breakers to open before work began. (Ex. J-6). MOP-51 states that FREC will open the breakers, but does not designate who determines or identifies which breakers should be opened. (Ex. J-6). This was of particular importance here, because Griffin's project foreman Piechocki²¹ had never worked at a project where he did not completely control the breakers. (Tr. 130, 154).

I find that Griffin made no adjustment to its rules, despite what it asserts was a significant change to its routine practice. Griffin did not establish a work rule that would provide a substitute for its complete control of the circuit breakers. Further, it did not include a necessary step in MOP-51, which Mr. Piechocki and Fidelity were following, to ensure all live circuit breakers were identified and opened.

Further, project foreman Piechocki's testimony discloses that on October 18, 2014, it was his understanding that Griffin's employees, including Piechocki and electrician Mr. J, were to follow the proper safe method for work set out in MOP-51 (which was specific to this

²¹ Mr. Piechocki testified that he was unsure if the Test Before You Touch policy applied before a system was commissioned. (Tr. 73, 115, 161-62).

worksite).²² (Tr. 100, 106-07, 120). Mr. Piechocki's testimony demonstrates he believed following the steps of MOP-51 was the same as following Griffin's No Live Work policy. (Tr. 120). Mr. Piechocki testified that as it was not part of MOP-51, Mr. J was *not required to test anything*. (Tr. 100, 106-07. See Ex. R-4). As it was not part of MOP-51, Mr. J was not required to wear any personal protective equipment. (Tr. 107). In fact, the record reveals that electrician Mr. J followed the lead of his foreman, Mr. Piechocki, and did not test the areas in the SS41B switchgear compartment he planned to or could unintentionally make contact with.

Griffin's generic work rules were not sufficient for the work at the Fidelity worksite. Further, MOP-51, which was relied on by Piechocki, was incomplete.

Griffin's work rules were not adequately communicated

To determine whether work rules are adequately communicated, the Commission considers evidence of how the work rules are conveyed to employees. *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1823 (No. 78-5159, 1986)(*Cerro*). "[T]he employer must establish that it took all feasible steps to prevent the [incident], including adequate instruction and supervision of its supervisory employee[s]." *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001) *aff'd*, 53 F. App'x 122 (D.C. Cir. 2002) (unpublished), quoting *L.E. Myers Co.*, 16 BNA OSHC 1037, 1041 (No. 90-0945, 1993).

Griffin asserts that it communicated its No Live Work / Test Before You Touch policy through its safety manual, its onsite training, weekly toolbox talks, annual safety reviews, and a signed acknowledgement by each employee that he would comply with the policy. (R. Br. p. 26). Corporate safety director Weider, who was not a trained electrician, provided the safety training for Griffin employees. (Tr. 173, 175, 177).

Project foreman Piechocki's testimony demonstrates Griffin's communication of these work rules was inadequate. As discussed above, Mr. Piechocki's testimony discloses that it was his understanding that Griffin's employees were to follow the proper safe method for work outlined in MOP-51 as a replacement for Griffin's generic No Live Work policy. (Tr. 100, 106-07, 120; R. Ex. 4). Mr. Piechocki's understanding that electrician Mr. J was not required to follow the No Live Work policy at the Fidelity worksite, at best, discloses that Griffin's No Live Work policy was not adequately communicated on the Fidelity worksite.

²² See Note 16 above.

Further, Mr. Piechocki stated that he did not know if the No Live Work / Test Before You Touch policy applied to equipment that had not yet been commissioned. (Tr. 73, 115, 124, 161-62). When asked why no step to open the SS41A tie breaker had been discussed at the MOP-51 meeting, Mr. Piechocki replied that it was because “the tie bus was not installed yet so it wasn’t commissioned.” (Tr. 73). However, Mr. Piechocki also testified that even if the bus duct was not commissioned it would still be a source of potential power. (Tr. 73-74). This conflicting testimony further illustrates that Mr. Piechocki was unclear regarding when the No Live Work / Test Before You Touch policy applied.²³

Mr. Piechocki also testified that the No Live Work / Test Before You Touch policy meant he was supposed to test any area that he planned to contact to determine whether it was still energized. (Tr. 124-27). His response demonstrates he did not understand that he was supposed to also test any circuit or part that he could inadvertently contact while engaged in a work task.²⁴ Griffin’s communication of its rule to test any area that could be contacted intentionally or inadvertently was not adequately communicated.

There was no training or other communication from Griffin on how to proceed when another entity had control over the circuit breaker switch at the Fidelity worksite. Griffin’s general lockout policy required the identification of all live sources; however, MOP-51 did not note who would identify the live energy sources. (Ex. J-13 pp. 3-4). Griffin’s eight-step lockout / tagout procedure was not modified to clarify what steps Griffin employees would implement when Fidelity was a part of the lockout process. (Ex. J-13 p. 4). Mr. Piechocki observed Fidelity open the circuit breaker and then he kept the lockout key in his pocket. He was responsible for a part of the lockout process, but had no guidance on how to implement the policy when Fidelity retained operation of the breaker itself.

Mr. Piechocki’s testimony reveals that Griffin provided no information or training for implementation of its safety policies adjusted for the Fidelity worksite. Griffin did not adequately communicate its work rules to test areas that could be inadvertently contacted. Further, Griffin did not adequately communicate that its general No Live Work / Test Before

²³ Griffin asserts that Mr. Piechocki’s testimony reflects his upset over the incident and not a lack of understanding the No Live Work / Test Before You Touch policy. (R. Reply Br. p. 4). I disagree. I find this testimony shows a general confusion of how and when to apply the No Live Work / Test Before You Touch policy. *See* Note 17 above.

²⁴ *See* Note 15 above.

You Touch policy remained in effect regarding Griffin's work at the Fidelity worksite, in addition to the proper safe method of work outlined in MOP-51.

Griffin's methods to discover safety violations were inadequate

Griffin asserts it had many ways to discover violations of its safety policy: Griffin's employees were required to report violations, supervisors observed employees for safety compliance, and Griffin's safety staff conducted site inspections. (R. Br. p. 26). Griffin's corporate safety director Weider testified there were three safety representatives that visited Griffin's worksites in the Northeast United States. Mr. Weider visited a site when requested or if the site was unique in some way. (Tr. 193).

Notwithstanding Griffin's assertions, no one provided oversight to project foreman Piechocki's development of the MOPs. (Tr. 181-82, 249-250). No one provided oversight to Mr. Piechocki to ensure that Griffin's No Live Work / Test Before You Touch policy was clearly incorporated into the MOP's safe work procedures. Mr. Weider reviewed MOP-51 only to see what tools and personal protection equipment would be needed at the worksite. (Tr. 195-96; Ex. J-6). He reviewed the MOPs for clarity but not for any possible modifications. Mr. Weider did not ask Mr. Piechocki if all the live energy sources had been identified in MOP-51. (Tr. 181-82). Senior project manager Pease admitted that no one from Griffin supervised Mr. Piechocki's development of MOP-51. (Tr. 251-52).

I find Griffin provided no oversight of the MOP process to determine if Griffin's work rules were followed.

Additionally, Griffin asserts there was no indication that a higher level of supervision was needed to be provided to Griffin's project foreman Piechocki. (R. Br. p. 16, R. Reply Br. p. 8). Griffin asserts it was justified in relying on project foreman Piechocki and electrician Mr. J to work safely without additional guidance or monitoring. (R. Br. p. 16).

Griffin relies on four Commission cases to support its premise that greater supervision was not required: *S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1896-98 (No. 12-1045, 2016) (*SJL*), citing *LJC Dismantling Corp.*, 24 BNA OSHC 1478, 1481-82 (No. 08-1318, 2014) (instructions sufficient in light of employee's extensive training, experience and no evidence of safety violations); *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012) (*Thomas*) (supervision adequate for experienced laborers with no history of violating safety rules); *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1939-40 (No. 97-1676, 1999) (*Ragnar*)

(no constructive knowledge where Secretary could not show how long the violative condition had existed at the worksite or how aggressively the employer would have had to investigate to detect the violative condition, where the job superintendent was onsite every day and the general superintendent (safety manager) and project foreman regularly visited the worksite, on a weekly and biweekly basis); *Cerro*, 12 BNA OSHC at 1824-25 (reliance on employee justifiable in light of employee's extensive training, lengthy experience and fine work record). (R. Br. p. 16; R. Reply Br. p. 8).

In *Cerro*, the Commission held the Secretary had not established constructive knowledge for a general duty clause violation. *Cerro*, 12 BNA OSHC at 1824-25. There, the record showed that Cerro had an adequate safety program, that the employees received and understood the company's safety rules, and that supervisors had provided adequate supervision relative to the experience and expertise of the employee. The employee in *Cerro* had significant training, years of experience on the equipment, and had completed an 8,000 hour apprenticeship program. The Commission found that based on the facts the supervisors could not have foreseen the need for additional precautions and the Secretary did not show that there was a "specific, feasible additional step" that could have been taken to improve communication of the work rule to employees; thus the Secretary did not carry the burden of proof for knowledge. *Id.*

By contrast, in the instant case, even though project foreman Piechocki was a licensed journeyman electrician, he had never worked at a site where Griffin did not have control over the circuit breaker switches. He had no experience drafting procedures where the building's owner maintained control of the circuit breakers. Mr. Piechocki was the only Griffin employee at the group project meetings where the MOP steps were discussed, and his supervisor, senior project manager Pease, admitted that no one reviewed the MOPs that Mr. Piechocki drafted. Here, there was no supervision of Mr. Piechocki in the development of MOP-51 that Griffin's employees relied upon as the safe work procedure for the October 18, 2014 shutdown. It was not reasonable to provide no oversight or supervision for a critical shutdown process and, in particular, it was not reasonable because Fidelity maintained control over the circuit breaker switches, which was not routine for Griffin worksites. *Cerro* does not support Griffin's premise that it was reasonable to completely rely on project manager Piechocki's experience and provide no supervision or oversight of the MOP development process.

Griffin cites *Ragnar* to support its premise that there was no notice that Griffin needed to implement additional measures to discover the hazard. *Ragnar* is unavailing. In *Ragnar*, the violative condition was non-fastened hole covers that contractors routinely accessed to conduct work. The record disclosed that Ragnar's general superintendent (safety manager) visited the worksite once a week for a short duration, the project foreman visited the worksite twice a week for a short duration, and the job superintendent was onsite every day. The Commission found no proof for constructive knowledge where the Secretary could not show how long the violative condition had existed or whether the condition could be easily detected. Therefore, the Commission was unable to determine whether Ragnar had or had not exercised reasonable diligence in discovering a violation of the standard. *Ragnar*, 18 BNA OSHC at 1939-40.

Here, Griffin provided no oversight or supervision to project foreman Piechocki to ensure that he effectively identified all the sources of energization and accounted for them in the MOP-51 shutdown procedure. The Secretary is not asserting that constant surveillance is needed; the issue at hand is the lack of any supervision for Mr. Piechocki. This shows Griffin was not reasonably diligent in taking steps to determine if MOP-51, developed by Mr. Piechocki, identified all energy sources to be shut down. Further, Griffin was aware that inserting the building owner into the shutdown process was not Griffin's usual practice, yet Griffin made no effort to ensure all energy sources were identified so its employees could work safely. Griffin took no measures to determine if MOP-51 addressed the worksite's hazards. Griffin provided no oversight to ensure that MOP-51 incorporated Griffin's general safety procedures.

In *SJL*, the Commission found it was reasonable for the employer to rely on the employees' experience and training where its employees had demonstrated an understanding of relevant training a month before the inspection, there had been no observations of any shortcuts at the worksite, and the employer had six safety specialists that conducted random and planned worksite audits. *SJL*, 25 BNA OSHC at 1899. The instant case does not compare. Here, there was no additional training or guidance provided to Griffin's project foreman Piechocki or electrician Mr. J to address the unique worksite conditions present where an entity other than Griffin (Fidelity) controlled the circuit breaker switch in Griffin's work procedures. Further, no one provided oversight for whether MOP-51 included all relevant safety procedures. *SJL* does not support Griffin's premise that it could rely on its employees' past training and experience at the Fidelity worksite.

In *Thomas*, the Commission found adequate supervision where the employer had a crew foreman on site at all times, the superintendent walked the job every week, the owner periodically visited the worksite, and the safety manager conducted random inspections. *Thomas*, 23 BNA OSHC at 2088-89. The Commission's finding in *Thomas* does not support Griffin's premise. To the contrary, I find there was no oversight or supervision to project foreman Piechocki in his development of MOP-51, even though MOP-51 served as the primary guide during the shutdown process and Mr. Piechocki understood MOP-51 to describe the "proper safe method" for the work tasks outlined.

The Secretary asserts that Griffin had a duty to supervise Mr. Piechocki. (S. Br. p. 44). I agree. See *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479-80 (No. 76-1538, 1979) (finding employer did not adequately supervise supervisor, did not take necessary steps to prevent violation, and violative conduct of supervisor was imputable to the employer); see also, *Dana Container, Inc.*, 25 BNA OSHC 1776, 1782-83 (No. 09-1184, 2015) *aff'd*, 847 F.3d 495 (7th Cir. 2017) (finding safety entry permits were reviewed, but no action was taken to correct deficiencies, thus it was reasonably foreseeable employee would not follow company's work rules).

Here, MOP-51 was submitted to two Griffin managers, senior project manager Pease and corporate safety director Weider. (Tr. 84, 279-80, 224, 250; Ex. J-9). Mr. Pease admitted that the project's specifications showed the bus duct connected SS41A and SS41B. (Tr. 245). Mr. Pease also admitted that no one at Griffin reviewed MOP-51 (or any MOP) to determine whether all energy sources had been identified for shutdown or that Mr. Piechocki had followed Griffin's safety guidelines. (Tr. 253).

I find that Griffin did not provide adequate supervision of its employees, and in particular, project foreman Piechocki's MOP procedures, to determine if all energized circuits had been identified and opened prior to working on the SS41B switchgear.

Griffin had an adequate disciplinary policy

Respondent asserts that it had a progressive disciplinary policy that was routinely enforced. (R. Br. p. 26; Tr. 363, 366, 370; Ex. R-10). Actions included warnings, suspension, and termination. (Tr. 366-67). Evidence for the time period from January 2012 until November 2014 shows that four employees were suspended, fourteen employees received written warnings, and nineteen employees received verbal warnings for violations of safety rules. (Tr. 365-67; Ex.

R-10). Five of the actions were related to violations of Griffin's No Live Work policy. (Tr. 373-376; Ex. R-10).

The Secretary asserts that because no one was disciplined for the safety violations related to the October 18, 2014 accident, Griffin's disciplinary policy was inadequate. (S. Br. p. 48). I disagree.

In lieu of traditional discipline regarding the October 18th incident, Griffin management decided to place a memo in project foreman Piechocki's personnel file because he had an excellent safety record prior to the accident and had saved electrician Mr. J's life by pulling him off the energized bus bar. (Tr. 371; Ex. J-14). Griffin's director of administrative operations Gerald Richards testified that because Mr. J did not return to work after the accident, no determination was made about possible disciplinary action. If Mr. J returned to work in the future, Mr. Richards anticipated that management would have a discussion with Mr. J about the incident and lessons learned.²⁵ (Tr. 371-72; R. Br. pp. 25-26).

The Secretary has not presented evidence to rebut Griffin's showing that it had an effective disciplinary policy that it enforced. The lack of discipline for a single event is not determinative of whether an employer has an effective policy. *See Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012) (finding that one instance of delayed discipline two months after the inspection did not undermine its otherwise strong enforcement policy). That is particularly true here where Mr. Piechocki's discipline was modified because of his prior safety record and his efforts to assist Mr. J during the accident.

Griffin's safety rules, its communication of safety rules to its employees, and its discovery of violations of its safety rule were inadequate for the Fidelity worksite. Griffin's unpreventable employee misconduct defense fails.

Multi-Employer Worksite Defense

Griffin asserts that because it did not have control over the circuit breaker that it did not create or control the worksite's hazards and thus could not abate the hazard. Griffin asserts that

²⁵ While Respondent contends that electrician Mr. J. violated the No Live Work / Test Before You Touch policy on October 18, 2014, that claim is contradicted by project foreman Piechocki's testimony. Mr. Piechocki testified that he and Mr. J followed MOP-51 regarding the proper safe method of work that day and that pursuant to MOP-51 Mr. J was not tasked to test anything. This testimony contradicts Respondent's claim that Griffin's No Live Work policy was applicable to the work procedure set forth on MOP-51 and violated by Mr. J. *See* Note 16 and accompanying text.

it relied upon Fidelity's property manager, CBRE, to identify which circuits would be opened or closed. (R. Br. p. 10).

It is true that Fidelity's contract required control over the circuit breakers to remain with its agent, CBRE. This was reflected in MOP-51. (Ex. J-6). However, MOP-51 shows CBRE's role was limited to operation of the circuit breaker switch. Mr. Piechocki observed the opening of the switch and maintained responsibility for the lockout and testing of the breakers. (Tr. 78; Ex. J-6). Mr. Piechocki drafted MOP-51, so Griffin controlled the document that established the steps in the process. CBRE followed the steps in MOP-51. (Tr. 69). CBRE's building engineer Smith stated, "I wasn't contracted to do the job. I mean I just - all I was there to do was to open the breaker, like it said in the MOP." (Tr. 277).

Griffin's employees were exposed to the hazards related to unidentified energized circuits. Because Griffin's own employees were exposed, to prevail in establishing a multi-employer worksite defense, Griffin must prove that "1) it did not create the violative condition to which its employees were exposed; 2) it did not control the violative condition, so that it could not itself have performed the action necessary to abate the condition as required by the standard; and 3) it took all reasonable alternative measures to protect its employees from the violative condition." *Rockwell Int'l Corp.*, 17 BNA OSHC 1801, 1808 (No. 93-45, 1996) (consolidated); *see also, Summit*, 23 BNA OSHC at 1206-07.

As the Commission stated in *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1975):

[E]ach employer has primary responsibility for the safety of its own employees. Simply because a subcontractor cannot himself abate a violative condition does not mean it is powerless to protect its employees. It can, for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, instruct its employees to avoid the area where the hazard exists if this alternative is practical, or in some instances provide an alternative means of protection against the hazard. We therefore expect every employer to make a reasonable effort to detect violations of standards not created by it but to which its employees have access and, when it detects such violations, to exert reasonable efforts to have them abated or take such steps as the circumstances may dictate to protect its employees. In the absence of such actions, *we will still hold each employer responsible for all violative conditions to which its employees have access.*

Id. at 1189 (emphasis added).

Griffin asserts that *Summit* supports its position that it had little control over the circuit breakers and could not control the hazard. (R. Reply Br. pp. 7-8). In *Summit*, the Commission found that the general contractor had significant control at the worksite and thus could be cited for the violative condition. *Summit*, 23 BNA OSHC at 1206-07. Griffin asserts that because Fidelity maintained control of the circuit breaker switches, it was the controlling employer and Griffin was not responsible for the violative condition. (R. Reply pp. 7-8). I disagree. *Summit* does not support Griffin's position that it had insufficient control to be cited for the violative condition. *Summit* concerned whether a general contractor could be cited when the employees of another employer at the worksite (and none of their own employees) were exposed to the violative condition. Here, Griffin's own employees were exposed to the violative condition and, therefore, Griffin was responsible for their safety. Additionally, I find Griffin had sufficient control over the violative condition to abate the hazard.

Griffin also asserts that the decision in *Fabi Constr. Co., Inc. v. Sec'y of Labor*, 508 F.3d 1077 (D.C. Cir. 2007) supports its premise that it had implemented a reasonable means of abating the hazard to its exposed employees because the designer of Fidelity's new electrical system was present at the MOP meetings and could have suggested changes to the MOP-51 procedure. *Id.* at 1083.

Fabi is an inapt comparison to the instant case. Here, the system's designer was present at the meetings, but there is no evidence Griffin asked the designer to determine whether all energized circuits had been identified in MOP-51. Merely presenting a procedure to a group, with the hope someone will identify all the safety hazards to which Griffin's own employees will be exposed, is not reasonable. Further, the fact that no one at Griffin provided any oversight or review of the MOP procedures drafted by Mr. Piechocki was unreasonable. Mr. Pease, Piechocki's supervisor, had all the system's specifications and the MOP, but took no actions to ensure Mr. Piechocki had correctly identified all the live energy sources.

Because Griffin installed the new electrical system, wrote MOP-51, observed the circuit breaker that was opened, and maintained control of the lockout key, I find that Griffin created the violative condition. Additionally, Griffin had sufficient control over the circuit breakers. Mr. Piechocki identified, through the MOP, which breaker would be opened and he maintained lockout control of the breaker.

Griffin had the ability to have the hazard abated as required by the standard – it only had to ask the Fidelity representative, CBRE chief engineer Smith, to operate a circuit breaker switch to de-energize a circuit. Griffin, as the hired electrical specialist and system installer, had the skills and information to identify which circuit breakers had to be opened to de-energize the system its employees were working on. Griffin provided no evidence that it could not comply with the cited standard’s requirement or that it took reasonable alternative steps to protect its employees who were exposed to the hazard. Griffin’s multi-employer defense fails.

Citation 1, Item 1 – Alleged violation of 29 C.F.R. § 1926.416(a)(1)

This item alleges a serious violation of 29 C.F.R. § 1926.416(a)(1), which states:

No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means.

The Secretary asserts Griffin permitted employees to work near an energized bus bar in the SS41B switchgear tie breaker compartment without any protection from electric shock.

Respondent asserts it had no knowledge that an energized circuit was in the employees’ work area, that it relied on Fidelity to determine the location of energized circuits, and any employee exposure was the result of unpreventable employee misconduct.

For the following reasons, I find the Secretary has met his burden and established Griffin allowed two employees to work near an energized electrical power circuit without any means of protection.

The standard is applicable

As discussed above, Griffin’s work at the Fidelity project was construction work. The cited standard applies.

Employee Exposure

Both project foreman Piechocki and electrician Mr. J were exposed to the hazard of contact with an energized electrical circuit. The energized bus bar was located just above the area in the narrow cabinet where the employees were unbolting connections and close enough that inadvertent movement resulted in contact with the energized bus bar. (Tr. 105-06). Mr. J’s

face contacted the energized bus bar while he was attempting to loosen bolts in the SS41B compartment. (Tr. 106). Griffin's employees were exposed to the cited hazard.

Griffin did not comply with the requirements of 29 C.F.R. § 1926.416(a)(1).

The Secretary asserts Griffin permitted its employees Mr. J and Mr. Piechocki to work in proximity to an energized bus bar located in the rear of the SS41B electrical switchgear compartment and took no precautions to protect the employees against electric shock. (S. Br. p. 24). As the case facts show, both employees were close enough to inadvertently contact an energized electrical circuit while working in the SS41B switchgear compartment. Griffin does not dispute that the employees were working in the assigned location, which was close enough for the employees to make contact with the energized bus bar. Further, Griffin does not assert that it protected its employees by grounding, guarding, or insulating the energized circuit. Griffin simply asserts that it did not know the circuit was energized and that the employees did not follow Griffin's work rules.

I find that Griffin did not comply with the standard when it allowed its employees to work in the SS41B switchgear compartment within proximity of the energized bus bar, with no protection against electrical shock.

Knowledge is Established

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Summit*, 23 BNA OSHC at 1207. Constructive knowledge is imputed where a supervisory employee could have reasonably known about the safety violation. *Gioioso II*, 675 F.3d at 73 (citations omitted). Knowledge is directed to the physical conditions that constitute a violation. The Secretary need not show that an employer understood or acknowledged that the physical conditions were hazardous. *Phoenix*, 17 BNA OSHC at 1079-1080.

As discussed above for citation 1, item 2, the Secretary asserts that Griffin had both actual and constructive knowledge of the violative condition. The Secretary asserts Griffin had actual knowledge the bus bar was energized and could be contacted by anyone working in the SS41B switchgear compartment.

Griffin asserts it had no actual knowledge the bus bar was energized and posed a hazard. (Resp. Reply Br. p. 2).

As discussed above, project foreman Piechocki and senior project manager Pease knew there was a bus duct that provided an electrical connection from SS41A to the bus bar in SS41B. Placards attached to SS41B showed the electrical connection through the bus duct. MOP-51, developed by Griffin's project foreman Piechocki, did not include a step to open the tie breaker switch for the connection from SS41A to fully de-energize the bus duct in the SS41B switchgear compartment. Griffin installed SS41A and SS41B and the connecting bus duct and therefore knew of the electrical connection.

Through Mr. Piechocki, Griffin knew the bus duct connecting SS41A and SS41B had been installed, there was no step in MOP-51 to break that connection, and employees would be working near the bus bar, which had not been de-energized. The Secretary has proven actual knowledge of the physical condition that created the violation.

The Secretary also asserts Griffin had constructive knowledge of the violative condition. I agree.

"[A]n employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about." *Gioioso II*, 675 F.3d at 73. As discussed above, Mr. Piechocki also had constructive knowledge of the violative condition. With reasonable diligence, he could have determined the bus bar above the area where he and Mr. J were going to work was still energized. Mr. Piechocki knew the bus duct connection had been installed, that it provided an electrical connection from SS41A to SS41B. He knew where he and Mr. J would be working. Mr. Piechocki wrote MOP-51, observed Mr. Smith open the circuit breaker, personally removed the kirk key to lockout the breaker switch, and then maintained control of the lockout key. Griffin had constructive knowledge that the tie breaker circuit had not been de-energized.

I find that Griffin did not exercise reasonable diligence to ensure its employees were not working in proximity to an energized circuit. No one at Griffin made an effort to ensure the MOP drafted by project foreman Piechocki was complete and included the necessary protections from energized circuits. Senior project manager Pease had all the necessary information to know that when Griffin employees followed MOP-51 they would be exposed to contact with an energized circuit.

Further, it was not reasonable for Griffin to expect the system designer to determine if MOP-51 identified all the energized circuits; especially, when senior project manager Pease, Mr.

Piechocki's supervisor, did not review MOP-51 to determine whether all the safety steps had been included. Griffin cannot shift its duty for the safety of its employees to another party. *See Summit*, 23 BNA OSHC at 1206-07 (citations omitted).

As discussed above, I find that it was foreseeable that employees would be exposed to the energized bus bar. There was no step in MOP-51 to de-energize the connection. Mr. Pease received MOP-51 prior to the October 18 shutdown. Mr. Piechocki and Mr. Pease knew SS41B had an electrical connection to SS41A based on the project's specifications.

The violative condition was apparent and should have been known to Griffin's supervisory employees. It was reasonably foreseeable that MOP-51 would be followed during the October 18 shutdown, the electrical connection between the switchgears would not be de-energized, and an employee would be exposed to the energized bus bar while working in the narrow SS41B switchgear compartment. I find Griffin had constructive knowledge of the violative condition.

Further, for the reasons stated above regarding citation 1, item 2, Griffin's unpreventable employee misconduct defense fails.

I find the Secretary has met his burden and proven a violation of the standard cited at citation 1, item 1. This item is affirmed as a serious violation.

The violations of the cited standards are not duplicative

Griffin asserts the two citation items are duplicative, citing *Cleveland Consolidated*, 13 BNA OSHC at 1118. (R. Br. pp. 18, 21-22).

The Secretary contends that the citation items are not duplicative, as Griffin's failure to ascertain by inquiry, direct observation or by instrument whether tie breaker SS41A, which connected electrically to the bus bar in the SS41B switchgear compartment, was energized was separate and distinct, from Griffin's failure to prevent employees from working near the energized bus bar in the SS41B switchgear compartment without first taking protective measures. (S. Reply Br. pp. 1-3). I agree.

In *Cleveland Consolidated*, the Commission held the employer's failure to prevent employees from working in close proximity to an energized part of an electric power circuit

before implementing protective measures [29 C.F.R. § 1926.416(a)(1)]²⁶ and an employer's failure to ascertain and advise its employees of the location of energized circuits and the hazards involved [29 C.F.R. 1926.416(a)(3)] were distinct violations.²⁷ Based on case-specific facts in *Cleveland Consolidated*, the Commission found the standards were duplicative only, *in part*, as compliance with the two cited standards, could be achieved by the same “protective measures,” de-energizing the live circuit or using other protective means. It found the employer shall ascertain and advise its employees of the “protective measures to be taken” to avoid the electrical hazards, as required in 29 C.F.R. § 1926.416(a)(3), and the employer shall protect its employee against electric shock by “de-energizing the circuit and grounding it, or by guarding it effectively by insulation or other means,” before permitting an employee to work in proximity to an electric power circuit, as required by 29 C.F.R. § 1926.416(a)(1). *Cleveland Consol.*, 13 BNA OSHC at 1118.

In the instant case, Griffin failed to comply with both cited standards. Each cited standard requires separate, distinct measures an employer must take to protect its employees. The cited standards are not duplicative, except to the limited extent, that compliance with both standards would have been achieved, in part, through the single act of effectively de-energizing the circuit.

A violation of both cited standards is found. The citations are grouped for penalty assessment, to reflect the relationship between the cited standards and possible compliance through a single abatement measure. *See Miller Electric Co.*, 2001 WL 95797, *5 (No. 99-1702, Jan. 1, 2001) (ALJ provided a penalty reduction because of the overlap between the two cited

²⁶ *Cleveland Consolidated* involved 29 C.F.R. § 1926.400(c)(1) and 29 C.F.R. § 1926.400(c)(2), the predecessor standards to 29 C.F.R. § 1926.416(a)(1) and 29 C.F.R. § 1926.416(a)(3), respectively. When the Secretary revised the electrical standards in Subpart K (Electrical) of Part 1926, the standards were re-designated as noted. Electrical Standards for Construction, 51 Fed. Reg. 25294, 25308 (July 11, 1988) (to be codified at 29 C.F.R. pt. 1926).

²⁷ In *Cleveland Consolidated*, the Commission held that the employer's failure to advise its employees of the location of the energized circuits and the hazards involved was a *de minimis* violation as the cable-replacement work the employees were performing was “routine” and the employees had knowledge of the location of the energized circuits and the hazards involved. Those case facts stand in sharp contrast to the facts in the instant case, where the work environment of Griffin's employees at the Fidelity worksite was unusual and not routine. At the Fidelity worksite, Griffin's employees did not control the breakers to de-energize the equipment they worked on. Griffin's violation of 29 C.F.R. § 1926.416(a)(3) was not *de minimis*.

standards) *remanded* by Commission on unrelated grounds, 19 BNA OSHC 1666 (No. 99-1702, 2001).

Penalty and Classification

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, that the gravity of the violation, the employer's good faith, and its prior history of violations. Gravity is generally the primary factor in the penalty assessment. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary classified both citation items as serious for a total proposed penalty of \$14,000.00. A violation is classified as serious "if there is a substantial probability that death or serious physical harm could result" if an accident occurs. *Compass Env'tl., Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The hazard for each of the citation items was injury or death from electric shock. Here, an employee was seriously injured after his face contacted an energized bus bar in an electrical switchgear. The serious classification is appropriate.

The recommended penalty amount was based on an assessment that the gravity of the violation was high. There was no good faith discount because a serious injury had occurred. (Tr. 345-46, 359). There was no penalty reduction for size because the company had approximately 1,400 employees and there was no modification for history. (Tr. 345).

As discussed in the preceding section, the citation items are grouped for penalty assessment, to reflect the relationship between the cited standards regarding compliance. I conclude that a total penalty of \$7,000.00 is appropriate. A grouped total penalty of \$7,000.00 is assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See Fed. R. Civ. P. 52(a)*. All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED

that:

Citation 1, Item 1, for a violation of 29 C.F.R. § 1926.416(a)(1) and Citation 1, Item 2, for a violation of 29 C.F.R. § 1926.416(a)(3) are both AFFIRMED as Serious and a total penalty of \$7,000.00 is ASSESSED.

/s/ Carol A. Baumerich

Carol A. Baumerich

Judge, OSHRC

Date: May15, 2017

Washington, D.C.