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. MANUA'S, INC., dba MANUA'S DISCOUNT STORE, Respondent	OSHRC Docket No. 18-1059

APPEARANCES:

Louise McGauley Betts, Senior Attorney; U.S. Department of Labor, Washington, DC
For the Complainant

Daniel E. Mooney, Esq.; Mooney Wieland Smith & Rose PLLC; Pago Pago, AS; Jeffrey B. Youmans, Esq; Davis Wright Tremaine LLP; Seattle, WA
For the Respondent

DECISION

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

Respondent Manua's, Inc. operates three retail stores in American Samoa. On January 14, 2017, three of Respondent's employees were fatally electrocuted when a crane operated by a subcontractor contacted a powerline. Following an inspection, the Occupational Safety and Health Administration issued Respondent a citation alleging four serious violations of the Cranes and Derricks in Construction standard, 29 C.F.R. § 1926, Subpart CC.[1]

[1] OSHA also issued Respondent a second citation alleging an other-than-serious violation of 29 C.F.R. § 1926.251(a)(2)(iii) (requiring rigging equipment to be affixed with legible identification markings). This alleged violation is not before the Commission in the instant matter because the four alleged serious violations were severed into a separate docket.

Chief Administrative Law Judge Covette Rooney granted summary judgment to the Secretary on all four violations and assessed a total penalty of $35,492. Respondent filed a Petition for Discretionary Review, arguing that the judge erred in granting summary judgment. Upon consideration of the record and applicable case law, we find no error in the judge's decision. Accordingly, we affirm.

Our colleague, who dissents in part, is troubled by the judge's determination that Manua's was not entitled to a hearing to determine whether it reasonably relied upon a contractor, APECS, in accordance with *Sasser Elec. & Mfg. Co.*, 11 BNA OSHC 2133 (No. 82-178, 1984), *aff'd sub nom.*, 12 BNA OSHC 1445 (4th Cir. 1985) (unpublished), to safely perform the task of lifting steel girders in compliance with the Cranes and Derricks in Construction standard, 29 C.F.R. § 1926, Subpart CC. While we find that the judge decided this case consistent with the undisputed material facts and Commission precedent, we recognize that the Commission may want to consider whether to further identify the circumstances pursuant to *Sasser* under which an employer is entitled to reasonably rely on the expertise of an independent contractor to comply with the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq*., particularly in light of *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077 (D.C. Cir. 2007). However, we do not view this case as the appropriate vehicle to do so.

We agree with Commissioner Sullivan that under Commission precedent, the fact that a cited employer has employees who assist in the work and have access to potential hazards does not mean that the employer cannot reasonably place some reliance upon an independent contractor. *Sasser*, 11 BNA OSHC at 2136. In many situations in the workplace, as the Commission has recognized, it is natural for an employer to rely upon a specialist to perform work related to that specialty safely in accordance with OSHA standards. *Id.* In deciding whether an employer may rely upon an independent contractor to comply with the Act, two cases currently serve as bookends on opposite ends of a shelf: the Commission's decision in *Sasser* and the D.C. Circuit's decision in *Fabi.*[2]

[2] While *Fabi* is not Commission precedent, an employer "adversely affected or aggrieved by an order of the Commission . . . may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . . .", 29 U.S.C. § 660(a), and the Secretary may "obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the

In *Sasser*, the respondent relied upon an independent crane company to perform the specific task of moving a generator onto a truck. The crane company had performed the same type of work three or four times previously at Sasser's worksite without incident. Further, before the work began, Sasser took the precaution of warning the crane operator of the location of the power lines. During the operation, two of Sasser's employees were attempting to remove choker cables from the crane cable when they were electrocuted, one fatally, when the crane operator brought the boom of the crane into contact with a power line. The entire operation apparently took several minutes at most. Sasser was cited under the Crawler locomotive truck cranes standard, 29 C.F.R. § 1910.180(j)(1)(i), for its failure to maintain a minimum clearance between the crane and energized power lines. The judge vacated the citation and the Commission affirmed the judge's decision, holding that Sasser's reliance on the crane company to prevent the violation was justified and that Sasser had no reason to foresee that the violation would occur. *Sasser*, 11 BNA OSHC at 2136-37. In affirming, the Commission stated that "when some of the work is performed by a specialist, an employer is justified in relying upon the specialist to protect against hazards related to the specialist's expertise so long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely." *Id.* at 2136.

In contrast to *Sasser*, more than twenty years later, the Court of Appeals for the D.C. Circuit decided *Fabi*. In *Fabi*, the general contractor for an expansion of the Tropicana Hotel and Casino in Atlantic City, New Jersey, hired Fabi Construction Co. and its management company, Pro Management Group, to place concrete for its Tropicana project. Fabi and Pro Management were hired because of their expertise in the type of concrete construction work this project required. Fabi, in turn, contracted with several other companies whose services it needed to perform its work. Among these companies were two structural engineering firms, one of which provided shop drawings for the placement of reinforcing steel in the poured concrete

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circuit in which the alleged violation occurred or in which the employer has its principal office." *Id.* at § 660(b). *See also Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.") (citing 29 U.S.C. 660(a) and (b)).

floors. As Fabi and Pro Management were pouring concrete on the eighth level of what was intended to be a ten-story parking garage, levels four through eight collapsed, killing four of Fabi's employees and injuring twenty-one others. Fabi and Pro Management were cited for violating several OSHA standards and the Act's general duty clause, 29 U.S.C. § 654(a)(1).

Fabi appealed the adverse decision of Chief Administrative Law Judge Covette Rooney, which became a final order of the Commission following its decision not to review the case. 29 U.S.C. § 661(j). The D.C. Circuit affirmed the judge's decision that Fabi and Pro Management were not entitled to rely upon the expertise of specialists who completed the shop drawings and approved the placement of top steel before Fabi poured concrete into the pre-cast filigree tubs, despite the petitioners' citation to *Sasser* for this proposition. *Fabi*, 508 F.3d at 1083. The court found the case was different from *Sasser* in that the cited employer in *Sasser* had no control over the hazard, whereas Fabi and Pro Management shared control with the specialists. As the court observed: "Sharing control is not relinquishing control." *Id.* It also noted that the duration of the work in *Fabi*, unlike the short timeframe in *Sasser*, spanned several weeks, during which time the employer had ample opportunity to detect and correct the hazard. Accordingly, the D.C. Circuit held that *Sasser* "does not apply when an employer has reason, by way of expertise, control, and time, to foresee a danger to its employees." *Id.*

As noted by the D.C. Circuit in *Fabi*, for the holding of *Sasser* to apply, there must be *reasonable* reliance on a contractor. Far from requiring an employer to duplicate a subcontractor's safety efforts, the Act demands only that an employer use reasonable diligence to apprise itself of which safety efforts the specialty subcontractor has chosen to make in performing the work. *See Blount Intl., Ltd.*, 15 BNA OSHC 1897, 1900 n. 3 (No. 89-1394, 1992). However, the undisputed facts, even viewed in the light most favorable to the Respondent, establish that this was not done here. Other than a general admonition to its employees to "be careful," Manua's did not make reasonable inquiries into APECS' safety precautions or, alternatively, fulfill its duty to protect its employees by exercising its own control over the work conditions. An employer may not assume a subcontractor has taken required safety precautions without reasonable inquiry.[3] *See id.* With no assessment or training,

[3] Our colleague questions how a retail business like Manua's could be expected to ask a crane specialist about specific matters relating to OSHA's crane safety requirements, such as whether the boom truck could get closer than 20 feet from a power line. We agree that an employer's

approximately twelve of Respondent's own employees were assigned to assist with the unloading work (three of whom were fatally electrocuted). Moreover, APECS relied upon Respondent's employees to advise the crane operator of matters pertaining to the safety of the crane, without giving them any instructions in that regard, and Respondent's own employees were intimately involved in the work of rigging the steel beams. Thus, APECS did not perform all of the work or supply all of the "expertise," and Manua's and its employees shared responsibility for safety and for the violations. Additionally, unlike the situation in *Sasser*, this was the first time Manua's used this contractor for crane work, so there was no history of safe crane practices in compliance with the Act upon which to base reasonable reliance.[4]

Our colleague contends that summary judgment is inappropriate here, in part, because there is a theoretical possibility that facts could be uncovered at a hearing relating to Respondent's prior work with APECS and once revealed, those facts would show that the Respondent's reliance on APECS was reasonable here. Respondent, however, has simply not specified any such facts. According to the Secretary, Respondent "failed to apprise itself as to APECS's safety efforts" and "did nothing to ensure, verify, or inquire about safety." The Secretary supported these factual claims with deposition testimony, including that quoted above. In response, Respondent did not challenge the accuracy of the cited testimony, point to any steps that it took to determine whether APECS would take responsibility for the safety of

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obligation to make reasonable inquiries into the safety efforts a contractor will be implementing does not necessarily require the employer to specifically discuss every relevant OSHA requirement in detail with the contractor before it can reasonably rely on that contractor's expertise. In this case, however, Respondent made *no* attempt to apprise itself of the safety efforts APECS would take, or otherwise take any affirmative steps to confirm that APECS would supervise the work, train Respondent's employees, and comply with the relevant OSHA requirements. As the judge pointed out, Respondent's owner admitted that whether APECS would even be supervising Respondent's employees had not been "previously discussed and agreed upon with APECS." Respondent's human resources manager, who arranged for APECS to perform the crane work, further admitted that she never asked APECS whether "they were going to take care of all the safety matters" or train the Respondent's employees and that no one "ever talk[ed] about doing a safety assessment."

[4] The undisputed facts establish that while Manua's had not previously hired APECS for crane work, Manua's had hired APECS for a number of other prior projects, including two that took place around the time of the unloading operation; those projects involved electrical work and the operation of an excavator.

Respondent's employees, or otherwise identify facts (such as features of its prior work with APECS) that would make its reliance on APECS to do so reasonable.

Under Federal Rule of Civil Procedure 56(c), a party to a summary judgment motion "asserting that a fact cannot be or is genuinely disputed must support the assertion," and if a party "fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion . . . ." Fed. R. Civ. P. 56(e). A nonmovant cannot, in other words, overcome summary judgment merely based on the possibility that material facts it has not yet identified exist; instead, it must "present facts essential to justify its opposition" (unless it shows "by affidavit or declaration" that such facts are not yet available to it "for specified reasons"). Fed. R. Civ. P. 56(d); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (the nonmovant must "designate specific facts showing that there is a genuine issue for trial"). Reasonable reliance on a specialty contractor, moreover, is an affirmative defense to constructive knowledge, and therefore Respondent had the burden of proof.[5] *See Sasser*, 11 BNA OSHC at 2135-36; *Fabi*, 508 F.3d at 1083 ("[*Sasser*] established that reasonable reliance upon a specialist . . . can negate the knowledge required for a General Duty Clause violation.").

Finally, we find that the potential duration of exposure and number of employees exposed are relevant factors when considering the reasonableness of Respondent's reliance on APECS. In our view, when very few employees are involved for only a brief period, the work is likely to be incidental in nature and a more limited inquiry by the employer may be reasonable. Indeed, in *Sasser* there was no violation of the cited standard until seconds before the crane's contact with the power line because prior to that moment the contractor was in compliance with the standard then in effect, which required that the maximum extension of the boom be no less than ten feet away from power lines. 11 BNA OSHC at 2136-37. In contrast, in this case there were several violations of the Cranes and Derricks in Construction standard from the moment the unloading work began, such as a failure to identify the work zone for the crane, to determine if

[5] Regarding the question of whether an employee of Respondent acted as a signal person, which the Secretary had the burden to prove, we find that there is no genuine factual dispute relating to this issue given Respondent's express admission that "APECS failed to provide a signal person for the unloading operation, and . . . as a result, [a Manua's employee] . . . gave basic signals to the crane operator." Whether this made the cited signal requirements of the standard applicable or not is a legal, not factual issue.

the boom truck could get closer than 20 feet from a power line, to demarcate the 20-foot boundary from the power line, and to train employees on the hazards of working near a power line. 29 C.F.R. §§ 1926.1408(a)(1), (a)(2), (b)(3), (g)(1). None of these precautions were taken. Furthermore, two of Sasser's employees were assisting the contractor. Here, Respondent had assigned a crew consisting of approximately a dozen employees to work with APECS for two days; these employees were integrally involved in the rigging and unloading work and were exposed to the hazards created by the violations throughout the two-day long project. In short, the purpose of the *Sasser* exception is to allow an employer to rely on the expertise of a specialty contractor in limited situations—when reasonable—not to give an employer an open-ended invitation to delegate its occupational safety and health responsibilities to a specialty contractor.

Given the number of Respondent's employees exposed, their direct involvement in performance of the work, the duration of their involvement, and Respondent's lack of a previous relationship with APECS involving this type of work, the factual scenario here more closely resembles that of *Fabi* than *Sasser*. We agree these two cases still leave a wide swath of grey area between circumstances in which an employer may rely on the expertise of a third party to comply with OSHA requirements and when it may not, but while the Commission may wish to revisit this issue in the future, we find that the appropriate circumstances are not presented here given the undisputed facts. For these reasons, we affirm the judge's grant of summary judgment.

SO ORDERED.

/s/
Heather L. MacDougall
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: September 28, 2018

SULLIVAN, Commissioner, concurring in part and dissenting in part:

While I agree with my two colleagues that Respondent failed to properly train its employees on the hazards of working near a power line in violation of 29 C.F.R. § 1926.1408(g)(1), and the judge's decision should be affirmed with regard to that violation, I dissent from their affirmance of summary judgment on the other alleged violations. In my view, Respondent is entitled to a hearing to determine whether, as to those alleged violations it reasonably relied upon a specialty contractor (APECS) pursuant to *Sasser Elec. & Mfg. Co.*, 11 BNA OSHC 2133 (No. 82-178, 1984), *aff'd sub nom.*, 12 BNA OSHC 1445 (4th Cir. 1985) (unpublished), a case decided by the Commission several decades ago.

The Commission historically has not favored summary judgment, *see Ford Motor Co – Buffalo Stamping Plant,* 23 BNA OSHC 1593 (No. 10-1483, 2011), and to grant it, the case must be very clear cut. I do not consider this to be such a case. There are genuine issues of material fact that remain unresolved. The depositions of six of Respondent's employees and an APECS employee provide substantial evidence that Respondent chose to rely on APECS because of its: (1) expertise in boom truck operations; (2) experience dealing with the power company; (3) knowledge of the process and methods for signaling a crane operator; and, (4) and familiarity with addressing electrical hazards when operating a crane around a power line.

Respondent also presented substantial evidence through deposition testimony that it had determined it needed to consult with APECS to ensure that the contractor could safely unload the containers using the boom truck, and that Respondent did so because it had no experience with planning an unloading operation with a boom truck and did not know anything about a boom truck's operation. The APECS employee's testimony that the agreement between APECS and Manua's did not contemplate APECS supervising the work was directly challenged by the testimony from two employees with authority to speak for Manua's—its owner and human resources manager.

Accordingly, there are clearly material facts in dispute: whether Respondent made it clear to APECS that it was not familiar with the boom truck operation or the hazards involved and that it understood APECS would make an assessment of the electrical hazards involved prior to the first day of unloading. These facts are not capable of being conclusively determined based on the APECS employee's apparent denial that Respondent took such actions. They are also clearly material to the resolution of the issue in the case: whether Respondent reasonably relied upon

APECS' expertise. These are not theoretical facts. To the contrary, these disputed facts elicited in the depositions are material in that they can facilitate the resolution of a critical issue in the case, i.e., did Respondent inform APECS that it was unfamiliar with the operation and the hazards involved.

Furthermore, the length and extent of the prior work relationship between these two employers, and whether Respondent's reliance on APECS was in fact reasonable remains unknown. Under *Sasser*, if Respondent had relevant history with this specialty contractor and that history was without any previous incident, Respondent may well have been "justified in relying upon [APECS] to protect against hazards related to the [APECS'] expertise so long as the reliance is reasonable, and [Respondent] had no reason to foresee that the work will be performed unsafely." *Sasser*, 11 BNA OSHC at 2136. Again, the only way to properly determine whether Respondent's reliance was justified based on its prior experience with APECS is to hear direct and cross-examination of witnesses at a hearing, which, unfortunately, is a path my colleagues decline to pursue.

In addition to there being a genuine issue of material fact as to whether Respondent reasonably relied on APECS, there is a genuine issue as to whether the work performed by one of its employees involved "signaling" the APECS crane operator. In fact, deposition testimony shows that Respondent's employees did not believe there was signaling involved, and that the employee and the crane operator were merely talking to one another. Additionally, the OSHA compliance officer even stated that he believed a signaler was not needed since the crane operator's view was unobstructed. In my view, this is another disputed material fact that should be explored through a hearing, where the compliance officer, as well as employees of Respondent and APECS are questioned.

A retail business owner, such as Respondent, with experience in only the retail industry, should not be expected to ask a crane specialist like APECS whether the boom truck could get closer than 20 feet from a power line, or whether the area needed to be demarcated. How would any retail industry owner, its supervisors, or its employees know to ask these questions? The crane expert in this case, APECS, should certainly have known about these issues and given *Sasser's* holding, there is some forgiveness for an employer in Respondent's position that relies on a specialty contractor, like APECS, for their expertise, if such reliance is reasonable. My colleagues may ultimately be correct that Respondent's reliance here was unreasonable, but

before reaching any such conclusion Respondent is entitled to a hearing where there is direct and cross-examination of witnesses, not merely excerpts of certain deposition testimony.

For these reasons, I dissent from my colleagues and would vacate the judge's grant of summary judgment on three of the four alleged violations.

/s/
James J. Sullivan, Jr.
Commissioner

Dated: September 28, 2018

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.

MANUA'S, INC., dba

MANUA'S DISCOUNT STORE,

Respondent.

OSHRC Docket No. 18-1059

ORDER GRANTING SECRETARY'S

PARTIAL[6] MOTION FOR SUMMARY JUDGMENT

On June 16, 2017, the Occupational Safety and Health Administration (OSHA) issued a citation and notification of penalty (Citation) to Respondent for inspection number #1203732 for four serious violations and one other-than-serious violation of OSHA's construction standards. Respondent filed a timely notice of contest of the Citation bringing this matter before the Occupational Safety and Health Review Commission (OSHRC) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970 (the Act). 29 U.S.C. § 659(c).

[6] Secretary did not request Summary Judgment for the Other-than-serious Citation 2, Item 1 that alleged a violation of 29 C.F.R. § 1926.251(a)(2)(iii).

On April 27, 2018, Secretary (Complainant) filed a Motion for Partial Summary Judgment pursuant to Federal Rule of Civil Procedure 56 for Citation 1, Items 1 through 4.[7] The Secretary does not request Summary Judgment for the alleged other-than-serious violation at Citation 2, Item 1. Manua's Inc., dba Manua's Discount Store (Manua or Respondent) filed an Opposition To Secretary's Motion for Partial Summary Judgment. The Secretary filed a Reply and Respondent filed a Sur Reply. For the reasons set forth below, the undersigned grants Secretary's Partial Motion for Summary Judgment.

I. JURISDICTION

The Commission has jurisdiction of this matter under § 10(c) of the Act. Manua is an employer with employees in a business that affects interstate commerce within the meaning of § 3(5) of the Act. 29 U.S.C. § 659(c). At all relevant times, Manua was an employer as defined by the Act. 29 U.S.C. § 652(5).

II. FINDING OF FACTS

On January 14, 2017, three of Respondent's employees died when a crane unloading steel beams from a shipping container contacted a powerline. On June 19, 2016, the Occupational Safety and Health Administration (OSHA) issued Respondent a Citation alleging four serious violations of the cranes in construction standard at issue here. The Citation alleged Respondent had not identified the work zone for the crane, had not determined if the crane could be within 20 feet of a powerline, had not trained employees on the hazards of working near a powerline, and had not ensured signal persons were adequately qualified.

Manua operates three retail stores and three warehouses in American Samoa. The worksite at issue here is Manua's Tafuna location which consisted of a retail store and an adjacent property (Checkers

7 Federal Rule of Civil Procedure 56(a) states in pertinent part:

Motion for summary judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

lot) that had a parking lot and a building that had been a Checkers restaurant. Manua was expanding the Tafuna location store onto the adjoining Checkers lot. Four 40-foot shipping containers of steel structural beams were delivered to the adjacent parking lot for the construction project.

Manua's owner and CEO, Genhall Manua Chen, decided where the four shipping containers were placed on the Checkers lot. Mr. Chen asked Manua's Human Resources Manager, Connie Corpuz to find a company with a crane to unload the steel beams from the containers; he did not specify what size the crew should be or what services would be included.

Ms. Corpuz contacted APECS to discuss the container unloading job. Ms. Corpuz told APECS project manager, Glenn Sabio, they needed the containers unloaded but did not specify the services needed beyond that of a crane and crane operator. Ms. Corpuz had no experience with scheduling a project of this type. Ms. Corpuz assumed the hourly rate of $125 would include the crane, the operator and supervision. There was no written contract or specific discussion of what services APECS would provide to unload the containers. The parties had only specified that a crane with a crane operator would be provided for the price of $125; Mr. Chen and Ms. Corpuz assumed other services, including training and a signal person, were included.

Sometime after the agreement was reached, Mr. Sabio asked Manua to provide employees to help with strapping and guiding the beams out of the containers. Manua agreed that its employees would assist APECS in unloading the containers.

January 11, 2017, was the first day APECS unloaded a shipping container at the Checkers lot. On that day, in addition to the crane operator, APECS had a signal person at the site, and Mr. Sabio was intermittently onsite supervising the crane operator. Mr. Sabio made a visual estimate the power line was more 10 feet away from the container. Manua's employees assisted by rigging the beams being unloaded out of the container and onto the ground. By the end of the day, Mr. Chen was dissatisfied because the unloading process was taking too long; only one container had been unloaded. The price was re-

negotiated to a flat rate for the remaining containers and APECS returned to the site on January 14, 2017 for its second day of unloading beams with the crane.

On January 14, APECS returned with the crane and crane operator. Mr. Sabio was onsite at the beginning of the day and again just before the accident, around 11:00 a.m. Several Manua managers and supervisors were onsite that day, including: Owner and CEO, Genhall Manua Chen; Human Resources Manager, Connie Corpuz; Warehouse Supervisor, Wilson Toni; Maintenance Department Supervisor, Tupuo Auva'a; and, Warehouse and Maintenance Manager, Masalosalo La'ulu.

Approximately twelve Manua employees assisted with unloading the shipping containers. One of those employees, Misi Fa'amoana, was signaling the crane operator with voice instructions for placement of the beams on the ground next to the container. There was no training or instruction to Manua employees on crane or power line safety. Mr. Chen briefly told the employees working with the unloading to be careful.

At approximately 11:30 that morning, the crane touched an energized power line. Three Manua employees were fatally electrocuted.

III. SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure (Rule 56), governs motions for summary judgment in matters before the Commission. [8] See Commission Rule 2(b), 29 C.F.R. §§ 2200.2(b). To win a case on summary judgment, the moving party must show that there is no genuine dispute as to any material fact, and that the party must be entitled to a judgment as a matter of law. Ford Motor Co. – Buffalo Stamping Plant, 23 BNA OSHC 1593,1594 (No. 10-1483, 2011) (Ford). "In reviewing a motion for summary judgment, a judge is not to decide factual disputes… Rather, the role of the judge is to determine whether any such disputes exist." Id. (citation omitted).

8 Commission Rule 2(b) states: "*Applicability of Federal Rules of Civil Procedure.* In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure." 29 C.F.R. § 2200.2(b).

"[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but… must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Further, "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255. Nonetheless, the non-movant "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." Id. at 257. "[A] conglomeration of 'conclusory allegations, improbable inferences, and unsupported speculation' is insufficient to discharge the nonmovant's burden." Calvi v. Knox County, 470 F.3d 422, 426 (1st Cir. 2006) (citations omitted).

Here, the parties have not submitted contradictory material facts. Manua admits that it did not comply with the requirements of the four cited standards. Manua did not assess the worksite, set up a work zone, or determine if the crane could get closer than 20 feet to a power line. Manua did not train the employees on power line safety and Misi Fa'amoana was not a qualified signal person.

Rather, Respondent asserts a defense for its noncompliance of the cited standards. Respondent asserts, for all alleged violative conditions, it relied on APECS to comply with OSH requirements for the benefit of Manua and Manua's employees.

The Commission has long held that an employer cannot simply contract away its "ultimate responsibility under the Act by requiring another party to perform them." E.g., Summit Contractors, Inc., 23 BNA OSHC 1196, 1206-07 (No. 05-0839, 2010) (citations omitted); Froedtert Mem'l Lutheran Hosp., Inc., 20 BNA OSHC 1500, 1508 (No. 97-1839, 2004). An employer that has arranged for a third party to carry out its safety duties under the Act cannot simply rely on a belief the third party will provide those services; an employer must inform itself as to the safety measures the third party has implemented. Id. at 1508.

In limited circumstances, the Commission has held that an employer may rely on a third party when that reliance is reasonable. In Sasser, the employer hired a crane company to move a generator onto the trailer of a truck. Sasser Elec. & Mfg. Co., 11 BNA OSHC 2133, 2134 (No. 82-178, 1984). After

depositing the generator onto the trailer, the crane operator had swung the crane's boom into a power line. Id. at 2135. The Commission held the employer could not have foreseen or prevented the violative condition.

There, the Commission found the employer's reliance was reasonable because the employer had hired the same company for crane work at the worksite three or four times before without incident; the employer's employees had notified the crane operator of the power line's location; the crane was positioned well away from the power line; the generator had been placed on the trailer without getting too close[9] to the power line, and the crane boom's path in depositing the generator was different than the return path that resulted in contact with the power line. Id. at 2136-37.

In the instant matter Manua's alleged reliance was not reasonable. This was first time Manua hired APECS for crane work. APECS had been hired two prior times for excavator service and air conditioning and wiring. In Sasser, the crane was doing a single lift of a generator; here, the crane work extended over two days, with multiple lifts from four separate shipping containers. Here, APECS informed Manua about the power line whereas in Sasser, the employer told the crane operator about the powerline.

Manua did not have the relevant prior experience with APECS to assume that APECS would provide all safety compliance at the site. Further, Manua took no affirmative action to ensure its employees would be protected while unloading the containers. Respondent's reliance must be reasonable and here it was not. Respondent did not provide facts to support its claim of reasonable reliance on APECS. There is no evidence that Manua asked APECS to train its employees, assess the worksite or that Manua asked APECS for the results of its worksite assessment relative to power line contact.

Instead, Respondent provided the assumptions and beliefs of Mr. Chen and Ms. Corpuz.

9 In the Sasser case the relevant distance was 10 feet; here, the relevant distance is 20 feet.

For example, Mr. Chen assumed APECS would take care of everything; however, Mr. Chen admitted that the supervision of Manua's employees had not been "previously discussed and agreed upon with APECS." (Chen Dep. 101).

Ms. Corpuz, who Mr. Chen designated as the coordinator with APECS, also did not ask questions or make requests related to the safety of Manua's employees. She admitted she did not ask APECS "if they were going to take care of all the safety matters" (Corpuz Dep. 96) or whether "APECS would train the maintenance boys" or "warehouse boys" (Corpuz Dep. 74-75) and no one "ever talk[ed] about doing a safety assessment." (Corpuz Dep.74-75). Further, Ms. Corpuz admitted she had not even had a "discussion of how [] Manua's workers would be helping" APECS. (Corpuz Dep. 74-75). Finally, APECS's letter to agree upon equipment rates shows a rate of $100 per hour for an excavator and $125 for a boom truck (crane). (Sec. Reply at Ex. A, 2). There is no indication of any other services that have been agreed upon.

Manua's reliance on APECS was not reasonable. As set forth in Froedtert, an employer must inform itself as to the safety measures implemented by the hired third party before reliance is appropriate. See Froedtert 20 BNA OSHC at 1508; see also, Blount Int'l Ltd., 15 BNA OSHC 1897, 1899-1900 (No.89-1394, 1992) (Commission found the worksite's general contractor had unreasonably relied on a subcontractor to provide GFCI protection where there was no evidence the general contractor inspected the work area, no documentation was provided the equipment was in compliance, nor any assurances the subcontractor provided GFCI protection.) [10]

Here, there are no facts that Manua attempted to determine whether APECS would implement any of the required safety measures. In a matter of summary judgment, the nonmoving party must provide

10 See also, Brock v. City Oil Well Serv. Co., 795 F.2d 507, 512 (5th Cir. 1986) (citations omitted) ("[A]n employer may not contract out of its statutory responsibilities under OSHA. . . . 'the Act, not the contract, is the source of [the employer's] responsibilities. An employer may carry out its statutory duties through its own private arrangements with third parties, but if it does so and if those duties are neglected, it is up to the employer to show why he cannot enforce the arrangements he has made. If he cannot make this showing, he must take the consequences, and his further remedy lies against the private party with whom he has contracted and whose breach exposes the employer to liability.'")

facts to support its averments. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 3188 (1990) (resolving actual disputes of material facts in favor of nonmoving party "is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint.)

Final responsibility for compliance with the Act's requirements is placed on the employer. Pride Oil Well Serv., 15 BNA OSHC 1809, 1815 (No. 87-692, 1992) (citations omitted). Manua provided no facts to support its assertion that it had reasonably relied on APECS.

Upon review of the pleadings, deposition excerpts, interrogatory answers, and admissions submitted, the undersigned finds that there is no genuine dispute of a material fact and that the Secretary is entitled to judgment as a matter of law for Citation 1, items 1 through 4. For the reasons that follow, the Secretary's Motion is granted.

IV. THE CITATION

The Secretary's Burden

To prevail on its Motion, the Secretary must prove the prima facie case for each of the violations cited. 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., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), aff'd in relevant part, 681 F.2d 69 (1st Cir. 1982). "Reasonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations." Burford's Tree, Inc., 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010) aff'd, 413 F. App'x 222 (11th Cir. 2011) (unpublished).

A violation is classified as serious under section 17(k) of the Act if "there is substantial probability that death or serious physical harm could result." Commission precedent requires a finding

that "a serious injury is the likely result should an accident occur." Pete Miller, Inc., 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000).

Here, the Respondent took no actions to anticipate the hazards and took no action to prevent the occurrence of the violative conditions. Instead, Respondent relied, without any evidence to support this belief, that APECS would take care of all safety duties for Manua's employees. As a result, twelve employees were exposed to the cited hazards and three employees were fatally electrocuted.

I find the Secretary has proved its prima facie case with respect to the four citations at issue, as discussed below.

Citation 1, Item 1

Citation 1 Item 1 alleges Respondent violated 29 CFR § 1926.1408(a)(1), which provides:

> § 1926.1408 Power line safety (up to 350 kV)—equipment operations.
>
> (a) Hazard assessments and precautions inside the work zone. Before beginning equipment operations, the employer must:
>
> (1) Identify the work zone by either:
>
> (i) Demarcating boundaries (such as with flags, or a device such as a range limit device or range control warning device) and prohibiting the operator from operating the equipment past those boundaries, or
>
> (ii) Defining the work zone as the area 360 degrees around the equipment, up to the equipment's maximum working radius

The Secretary has proved the cited standard applies, its terms were violated, employees were exposed, and Manua had knowledge of the violative conditions for Citation 1, Item 1.

The cited standard requires an employer to assess a worksite for powerline safety and identify the crane's work zone. 29 CFR § 1926.1408(a)(1). A crane was used at this worksite and thus the cited standard applies. Twelve Manua employees, including three fatally electrocuted, were exposed to the

violative condition.[11] Further, Respondent admits it did not comply with the cited standard. "Respondent affirmatively alleges that it did not identify or define the crane's work zone because it reasonably relied on APECS to supervise and direct the unloading operation, including identifying and defining the crane's work zone and ensure that all crane safety requirements were met." (Ex. A, Admission No. 6).

Respondent had knowledge of the violative conditions through its owner, Mr. Chen. Mr. Chen knew the worksite had power lines, he determined the location of the shipping containers, knew a crane would be used to unload the containers on January 14, 2017, and he was at the worksite on January 14, 2017. With reasonable diligence, Mr. Chen could have known a work zone for the crane had not been defined. Constructive knowledge is established. The Secretary has proved its prima facie case for 29 CFR § 1926.1408(a)(1), Citation 1, Item 1.

Citation 1, Item 2

Citation 1 Item 2 alleges that Respondent violated 29 CFR § 1926.1408(a)(2), which provides:

> § 1926.1408 Power line safety (up to 350 kV)—equipment operations.
>
> (a) Hazard assessments and precautions inside the work zone. Before beginning equipment operations, the employer must: . . .
>
> (2) Determine if any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone, could get closer than 20 feet to a power line. If so, the employer must meet the requirements in Option (1) [Deenergize and ground], Option (2) [20 foot clearance], or Option (3) [Table A clearance] of this section..."

<u>The Secretary has proved the cited standard applies, its terms were violated, employees were exposed, and Manua had knowledge of the violative conditions for Citation 1, Item 2.</u>

The cited standard requires an employer to determine if the crane could get closer than 20 feet of a power line in the work zone. 29 CFR § 1926.1408(a)(2). As with Citation 1, Item 1, above, the cited

11 "Respondent affirmatively alleges that it asked certain employees to assist APECS with the unloading operation, and that Respondent did not conduct a hazard assessment because it reasonably relied on APECS to supervise and direct the unloading operation, including identifying and defining the crane's work zone and ensure that all crane safety requirements were met." (Ex. A, Admission No. 5).

standard applies and Manua employees were exposed to the hazard. Further, Respondent admitted that it made no assessment of the work zone to determine if the crane could get within 20 feet of a power line.[12] (Ex. A, Admission No. 5 and 6).

Respondent knew it had not evaluated the worksite to determine if the crane could get within 20 feet of a power line. Further, with reasonable diligence Mr. Chen could have known that APECS had not determined whether the crane would be within 20 feet of a power line. Constructive knowledge is established. The Secretary has proved its prima facie case for 29 CFR § 1926.1408(a)(2), Citation 1, Item 2.

Citation 1, Item 3

Citation 1 Item 3 alleges that Respondent violated 29 CFR § 1926.1408(g)(1), which provides:

> § 1926.1408 Power line safety (up to 350 kV)—equipment operations. . . .
>
> (g) Training. (1) The employer must train each operator and crew member assigned to work with the equipment on all of the following:
>
> (i) The procedures to be followed in the event of electrical contact with a power line. Such training must include:
>
> (A) Information regarding the danger of electrocution from the operator simultaneously touching the equipment and the ground.
>
> (B) The importance to the operator's safety of remaining inside the cab except where there is an imminent danger of fire, explosion, or other emergency that necessitates leaving the cab.
>
> (C) The safest means of evacuating from equipment that may be energized.
>
> (D) The danger of the potentially energized zone around the equipment (step potential). (E) The need for crew in the area to avoid approaching or touching the equipment and the load.
>
> (F) Safe clearance distance from power lines.
>
> (ii) Power lines are presumed to be energized unless the utility owner/operator confirms that the power line has been and continues to be deenergized and visibly grounded at the worksite.
>
> (iii) Power lines are presumed to be uninsulated unless the utility owner/operator or a registered engineer who is a qualified person with respect to electrical power transmission

12 "Respondent affirmatively alleges that it did not contact the American Samoa Power Authority about hazards involving the crane and power lines because it reasonably relied on APECS to ensure that all crane safety requirements were met." (Ex. A, Admission No. 11).

> and distribution confirms that a line is insulated. (iv). The limitations of an insulating link/device, proximity alarm, and range control (and similar) device, if used.
>
> (v) The procedures to be followed to properly ground equipment and the limitations of grounding.

The Secretary has proved the cited standard applies, its terms were violated, employees were exposed, and Manua had knowledge of the violative conditions for Citation 1, Item 3.

The cited standard requires an employer to train its employees on procedures when working around powerlines, including in the event the crane contacts a power line. 29 CFR § 1926.1408(g)(1). The crane was used within 20 feet of a power line, thus the cited standard applies. Twelve Manua employees were exposed to the hazard, including three that were fatally electrocuted. Further, Respondent admits it did not comply with the cited standard.

> Respondent affirmatively alleges that it did not train its employees on procedures to be followed in the event of electrical contact with a power line because it reasonably relied on APECS to supervise and direct the unloading operation, including identifying and defining the crane's work zone and ensure that all crane safety requirements were met.
>
> (Ex. A, Admission No. 10).

Finally, Manua had knowledge of the violative condition because it knew it had not trained its employees on power line contact procedures and its onsite supervisors, with reasonable diligence, could have known that APECS had not trained its employees on powerline safety. Thus, constructive knowledge is proved. The Secretary has proved its prima facie case for a violation of 29 CFR § 1926.1408(g)(1), Citation 1, Item 3.

Citation 1, Item 4

Citation 1 Item 4 alleges that Respondent violated 29 CFR § 1926.1428(a), which provides:

§ 1926.1428 Signal person qualifications.

(a) The employer of the signal person must ensure that each signal person meets the Qualification Requirements (paragraph (c) of this section) prior to giving any signals. This requirement must be met by using either Option (1) or Option (2) of this section.[13]

The Secretary has proved the cited standard applies, its terms were violated, employees were exposed, and Manua had knowledge of the violative conditions for Citation 1, Item 4.

The cited standard requires an employer to use a qualified signal person for crane operations when, among other things, either the operator or person handling the load determines it necessary.[14] See 29 C.F.R. § 1926.1419 (a)(3). An employee of APECS had been the signal person for the crane's operation two days before the accident. An employee of Manua, Mr. Fa'amoana was providing signals to the crane operator on the day of the accident.

> Respondent affirmatively alleges that on January 14, 2017, APECS failed to provide a signal person for the unloading operation, and that as a result, Misi Fa'amoana, without being directed to do so by Respondent, gave basic signals to the crane operator. Respondent further alleges that Mr. Fa'amoana did not monitor the crane's proximity to the power line or give any signals related to that, because APECS did not identify the powerline as a hazard and Mr. Fa'amoana was not otherwise aware that it posed a hazard.
>
> (Ex. A, Admission No. 14).

[13] Option 1 and Option 2 both concern the use of a third party qualified evaluator or employer's qualified evaluator. 29 C.F.R. § 1926.1428(a)(1) and (2).

[14] The section notes:

> (a) A signal person must be provided in each of the following situations:
> (1) The point of operation, meaning the load travel or the area near or at load placement, is not in full view of the operator.
> (2) When the equipment is traveling, the view in the direction of travel is obstructed.
> (3) Due to site specific safety concerns, either the operator or the person handling the load determines that it is necessary.
> *(b) Types of signals.* Signals to operators must be by hand, voice, audible, or new signals.
> 29 C.F.R. § 1926.1419(a) and (b).

Thus, the cited standard applies. Twelve Manua employees, including three fatally electrocuted, were exposed to the violative condition of the above cited standard. The terms of the cited standard were violated because Mr. Fa'amoana was not a qualified signal person.[15] (Ex. A, Admission No. 15).

Finally, Manua had knowledge that Mr. Fa'amoana was providing signals to the crane operator on January 14 through Manua's onsite supervisory personnel. With reasonable diligence an onsite supervisor could have known that Mr. Fa'amoana had not been trained or qualified to provide signals to the crane operator.[16] The Secretary has proved a violation of 29 CFR § 1926.1428(a), Citation 1, Item 4.

ORDER

IT IS HEREBY ORDERED THAT the Secretary is entitled to judgment as a matter of law and therefore its motion for partial summary judgement is GRANTED. Citation 1, Item 1 is AFFIRMED as a serious violation and a penalty of $8,873 is ASSESSED; Citation 1, Item 2 is AFFIRMED as a serious violation and a penalty of $8,873 is ASSESSED; Citation 1, Item 3 is AFFIRMED as a serious violation and a penalty of $8,873 is ASSESSED; and Citation 1, Item 4 is AFFIRMED as a serious violation and a penalty of $8,873 is ASSESSED.

SO ORDERED.

__/s/Covette Rooney_____

Dated: July 16, 2018 Covette Rooney Chief Judge

Washington, D.C.

15 Respondent admitted that "it did not train or qualify Mr. Fa'amoana to act as a crane signal person." (Ex. A, Admission No. 15).

16 "Respondent affirmatively alleges that it reasonably relied on APECS to provide employees with the necessary training and experience for the unloading job, including a qualified signal person. Respondent further alleges that APECS provided a signal person on the first day of the unloading operation, January 11, 2017, but failed to do so on the second day, January 14, 2017." (Ex. A, Admission No. 13).