

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Solares Electrical Services, Inc.,

Respondent.

OSHRC Docket No. **16-0605**

Appearances:

Yasmin K. Yanthis-Bailey, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Terri Guttman Valdes, Esquire, Terri Guttman Valdes, LLC, Coral Gables, Florida
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Solares Electrical Services, Inc. is an electrical contractor who was under contract to update the energy monitoring and control system of Jackson Memorial Hospital in Miami, Florida. An employee who was troubleshooting the system was burned when an arc flash occurred as he worked near energized electrical parts. Solares reported the employee injury to the Occupational Safety and Health Administration. OSHA Compliance Safety and Health Officer (CSHO) Wildelys Colon-Jusino initiated an inspection of the jobsite on October 6, 2015.

As a result of the inspection, on February 17, 2016, the Secretary issued a Citation and Notification of Penalty to Solares alleging violations of § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act), and the standards found at 29 C.F.R. §§ 1910.335(a)(1)(i) and 1910.335(a)(2)(i). Penalties totaling \$14,700.00 were proposed for the alleged violations. Solares timely contested the Citation. A hearing was held in Miami, Florida, on December 15, 2016, addressing only Items 2 and 3 of the Citation and penalties of \$4,900.00 for each item.¹ Both parties filed post-hearing briefs on February 6, 2017.

¹ Prior to the hearing, the Secretary withdrew Citation 1, Item 1 which alleged a violation of § 5(a)(1) of the Act.

For the reasons that follow, the Court vacates Items 2 and 3 of the Citation. No penalty is assessed.

Jurisdiction

The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 11). Solares also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 11). Based upon the parties' stipulations and the record, the Court finds Solares is a covered employer and the Commission has jurisdiction under the Act.

Background

Solares was hired to install a monitoring system that would determine whether sufficient energy was being produced to sustain energy needs for the new wing being built for Jackson Memorial Hospital (Tr. 23). The contract for the installation was to be completed in approximately one year (Tr. 14). Solares had been working on the project for approximately one year and four or five months at the time of the accident (Tr. 103). A crew of three employees, including supervisor/foreman Daniel Moriyon,² was working at the jobsite on October 2, 2015. One of the tasks they were to perform that day was to troubleshoot the system to address a negative reading on the transfer switch,³ which meant the polarity on the wiring in the system was inverted (Tr. 14, 76-77). A Solares engineer (not a part of the three person crew) also was onsite that day (Tr. 103).

The crew began work between 6:45 a.m. and 7:00 a.m. on October 2, 2015 (Tr. 105; Exh. P-4). They were scheduled to work a full 8-hour day (Tr. 105). In addition to reversing the polarity on the shorting block, the work that day was to include cleaning and conducting a walk-through of ten or eleven rooms to determine whether any walls needed patching (Tr. 105-106, 110). When the crew arrived at the work area, they unloaded wires in preparation for the work to be done the next day, a Saturday (Tr. 104). Moriyon testified he "mentioned to the crew that eventually, during the day, we need to reverse the polarity of the, of that gear." (Tr. 104) According to Moriyon, reversing the polarity on the shorting block would take approximately 5

This withdrawal was announced formally at the hearing on December 15, 2016. As a result, Item 1 is not at issue in this proceeding.

² At the time of the hearing, Moriyon had been employed by Solares for approximately 8 years (Tr. 102).

³ Also identified as a "shorting block" and "gear."

minutes to complete (Tr. 106).

The shorting block was located inside of ATS-C9⁴ (an ASCO Power Technologies 7000 Series automatic open transition transfer switch). The ATS-C9 was approximately 8 feet high and 4 feet wide⁵ (Tr. 106; Exhs. P-6, R-4, p.2). A label on the front of it provides:

Arc flash warning. Wear appropriate PPE [personal protective equipment].
Follow all safety procedures and wear proper PPE in accordance to NFPA 70E.
Failure to comply can result in serious injury or death.

(Tr. 32-33; Exh. P-9). ATS-C9 contained energized parts and had to be opened in order to work on the shorting block (Tr. 43). The voltage in ATS-C9 was 208 V, 800 Amps (Exhs. P-2, P-3, R-4). The hospital required that electricity be maintained for machinery. Advance notice was required to de-energize equipment. Therefore, Solares worked on live parts (Tr. 29, Exh. R-4). Triggers for the fire alarm system were located directly above ATS-C9 (Tr. 32; Exh. P-8).

While Moriyon and Employee #1⁶ worked in the electrical/mechanical room where ATS-C9 was located, the other crew member worked in another room doing the final walk-through on some of the rooms (Tr. 109). Moriyon and Employee #1 had been working in the mechanical/electrical room approximately 3 hours when Moriyon stepped away to make a telephone call, leaving Employee #1 alone (Tr. 86; Exhs. P-4, R-4, p. 2). When questioned on direct examination about what directions he gave to Employee #1 before leaving the room, Moriyon testified “We was unrolling wires to do the work that we have to do on Monday. That was just unrolling wires and we were sitting the wire on the floor to take measurements of the wire.” (Tr. 108)

A spark occurred after Moriyon left Employee #1 alone in the work area (Tr. 62). This spark triggered the fire alarm (Tr. 79; Exh. R-3). Employee #1 exited the work area in response to the fire alarm. Once he exited, the door to the work area closed and locked. Once outside of the work area, Employee #1 called Moriyon and told him the fire alarm had sounded. Moriyon testified Employee #1 told him “I was working on the transfer switch and I see the smoke coming out of the transfer switch and the alarm triggered, so I left the room and I’m outside the

⁴ Also referred to as Cabinet C9 and “gear”.

⁵ The CSHO estimated the dimensions were 3 feet wide and 3 to 4 feet long (Tr. 30).

⁶ The injured employee will be referred to as “Employee # 1 or “injured employee.” Employee #1 did not testify at the hearing. He had been employed with Solares for approximately 10 or 11 years as an electrician (Tr. 114; Exh. R-4).

room.” (Tr. 111) Moriyon testified he told Employee #1 “[D]on’t do anything, wait for me, I’m on my way. I’m going to call the hospital so they can trick [sic] the alarm.” (Tr. 111)

Instead of waiting for Moriyon to return, Employee #1 asked hospital personnel for entry into the electrical/mechanical room, telling them he could fix the fire alarm issue. Hospital personnel allowed him access to the electrical/mechanical room. Employee #1, again alone in the work area, opened the door to access the shorting block equipment located inside of ATS-C9. An arc flash occurred, burning him on his face and ears (Tr. 29, 30, 49, 62, 86-87, 89; Exhs. R-4, R-7, P-11). ATS-C9 was not de-energized prior to accessing the system. Employee #1 was hospitalized as a result of his injuries (Tr. 49). Project Manager Herminio Pulido prepared a Supervisor’s Investigation report of the accident which provides:

[I]t appears that an energized power wired adjacent to the CT connection block came loose and in contact with grounded parts of the gear enclosure causing a first short circuit accompanied by smoke that triggered the FA System. . . The employee explained he was fixing some wiring and he would take care of it. He walked back in the room and while opening the Electrical Gear Door a second short circuit event happens generating an arc flash[.]

(Tr. 55; Exh. P-4)

CSHO Colon-Jusino⁷ initiated an inspection of the jobsite on October 6, 2015, several days after Solares reported the employee injury to OSHA (Tr. 20; Citation). She visited the jobsite three times during her inspection, on October 6 and 27, 2015, and December 15, 2015 (Tr. 21, 58, 63). Initially, she met with Andres Solares,⁸ owner of Solares, at the company headquarters. She then proceeded to the jobsite accompanied by Solares’s jobsite supervisor/foreman Moriyon and OSHA Compliance Officer Luis San Miguel⁹ to observe and photograph the area where the accident occurred (Tr. 20-22).

Mr. Solares had informed CSHO Colon-Jusino PPE was available for employees although it was not used the day of the accident and that it was company policy to use PPE when

⁷ At the time of the hearing, CSHO Colon-Jusino had been employed as a compliance officer with OSHA for three years (Tr. 18). She holds a bachelor’s degree in chemistry with a minor in microbiology (Tr. 19). She received training from the OSHA Training Institute and has conducted 100 to 120 inspections during her employment with OSHA (Tr. 19).

⁸ For clarity, references to Andres Solares, company owner will be “Mr. Solares” or “Andres Solares”. When referring to the company only “Solares” will be used. Mr. Solares has owned the company for approximately 19 years (Tr. 145).

⁹ Colon-Jusino asked Luis San Miguel to accompany her on the inspection because he has experience specifically with electrical work (Tr. 24).

doing the type of work being performed at the time of the accident (Tr. 23). During her walk around inspection of the jobsite, CSHO Colon-Jusino asked Moriyon if she could see the PPE. Moriyon took her to the job trailer approximately 100 feet away from the work area and retrieved the PPE, consisting of an arc flash protection hood and an arc flash protection suit, from the company van (Tr. 24, 36). Moriyon confirmed to the CSHO the PPE was not taken to the area where the employees were performing work activity on the day of the accident (Tr. 24).

CSHO Colon-Jusino continued her inspection a second day. At that time, Solares was performing demolition work at the hospital (Tr. 25, 59). CSHO Colon-Jusino observed and photographed the tools being used on that day and discovered Solares's employees bought their own tools (Tr. 25, 27, 28). CSHO Colon-Jusino testified she questioned Moriyon and Employee #2,¹⁰ who was onsite on that day, about the tools. She stated she asked,

“[I]s this the same type of tool that is being used, or that is allowed to be used, with the incident with the shorting block?” That’s how the question went, and he said, “Yes.” Both of them said yes, that they can use this type of equipment[.]

(Tr. 25) On December 15, 2015, CSHO Colon-Jusino interviewed the injured employee after he had returned to work. At that time, she concluded the tools in his tool belt were not insulated (Tr. 39) She testified:

So I asked him, “Are those your tools?” He says, “Yes.” Okay, so did you use those tools to work on the shorting block? And he said “Yes.”

(Tr. 28)

Did you use those tools on the day of the incident? “Yes”

(Tr. 39) CSHO Colon-Jusino did not ask Employee #1 to remove the tools from the tool belt so she could examine them (Tr. 71).

Based on her investigation findings, CSHO Colon-Jusino concluded Solares's employees had worked on energized equipment without insulated tools and without required PPE. She recommended the issuance of the Citation alleging violations of 29 C.F.R. §§ 1910.335(a)(1)(i) and 1910.335(a)(2)(i), as set forth in Items 2 and 3 of the Citation.

The Citation

The Secretary issued a three-item Citation to Solares on February 17, 2016, alleging Solares violated OSHA's standards found in *Subpart S – Electrical*, which addresses electrical

¹⁰ Employee #2 did not testify at the hearing.

safety requirements necessary for the practical safeguarding of employees in their workplaces. Only Items 2 and 3, alleging violations of §§ 1910.335(a)(1)(i) and 1910.335(a)(2)(i) are at issue in this proceeding. These standards are a part of the Safety-Related Work Practices of *Subpart S*, which provides in division (b), electrical safety-related work practices for both qualified and unqualified persons in avoiding the electrical hazards of working on or near exposed energized parts. 29 C.F.R. § 1910.331(a).

Burden of Proof

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees had access to the violative conditions; and (4) the cited employer had actual or constructive knowledge of those conditions. *Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Item 2: Alleged Serious Violation of § 1910.335(a)(1)(i)

In Item 2, the Secretary alleges “On or about October 2, 2015 at the above addressed job site, employer did not provide electrical protective equipment to employees who were performing troubleshooting in shorting block for an electrical monitoring system located in ATS-C9 in proximity of live electrical parts thereby, exposing employees to electrical hazards.”

The cited standard, § 1910.335(a)(1)(i), provides:

Employees working in areas where there are potential electrical hazards shall be provided with, and shall use, electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed.

Applicability

Solares does not dispute applicability of the cited standard (Solares’s brief, p. 12). It was engaged in work activities at Jackson Memorial Hospital where its employees, while troubleshooting the newly installed monitoring system on October 2, 2015, worked in proximity to energized parts of the system. Solares was cited for a violation of a subsection of the standard found at 29 C.F.R. § 1910.335 which provides safeguards for personnel protection, requiring the use of PPE and insulated tools when working in proximity to energized parts. Section 1910.335 (a)(1)(i) specifically provides for the use of PPE where there are potential electrical hazards. The citation alleges Solares did not provide PPE for its employees working in proximity to energized parts. Applicability of the cited standard found at § 1910.335(a)(1)(i) is established.

Noncompliance with Standards

Solares disputes the injured employee was not wearing appropriate PPE at the time of the accident, in violation of § 1910.335(a)(1)(i). However, it does not dispute that ATS-C9 was energized at the time the injured employee worked on the shorting block. Solares argues the work performed on October 2, 2015, required only level zero PPE (hard hat, safety glasses, long sleeve cotton shirt, long pants and boots), which its employees were wearing that day (Solares's brief, pp. 10-11; Tr. 16). Solares relies on Attachment "A" of the Arc Flash Analysis, which it contends provides for level zero PPE for ATS-C9 (Tr. 75; Exh. R-5).

Attachment "A" is a part of the Jackson Memorial Hospital Energy Monitoring and Control System project documentation. This documentation provides, "Attachment 'A' to the EMCS specification identifies the Personal Protective Equipment PPE classification at each ATS location under *Normal and Emergency Operation*" (Exh. R-5, pp. 4-5) (emphasis added). It does not, as Solares asserts, provide that level zero PPE is appropriate when performing work, maintenance or troubleshooting operations on the system, as was being done here. Attachment "A" is silent on the type of protection required when performing maintenance or troubleshooting work on the system. Solares's argument that level zero PPE was adequate is rejected.

The cited regulation requires an employer to assess the conditions to determine the appropriate level of PPE for employees to use. Moriyon testified that level 4 PPE is the highest level of protection. It is not disputed that Solares had level 4 PPE, consisting of an arc flash protection hood and an arc flash protection available at the jobsite (Tr. 35, 72, 113; Exhs. P-12, P-13). According to Moriyon, this PPE would protect the whole body (Tr. 113). He also testified it would be appropriate when working on the shorting block near energized parts (Tr. 125-128; Exh. P-2).

To protect employees working on the shorting block, Solares had to either de-energize ATS-C9 or require employees working in proximity to the energized parts to use appropriate PPE. § 1910.335(a)(1)(i). A preponderance of the evidence shows ATS-C9 was not de-energized and Employee #1 did not wear appropriate PPE when he worked in proximity to the energized parts of ATS-C9 on October 2, 2015. The Court finds the standard found at §1910.335(a)(1)(i) was violated.

Access to Violative Condition

To establish access under Commission precedent, the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is “reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, pp. 44,506-07 (No. 93-1853, 1997) (citing *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶20,448, p, 24,425 (No. 504, 1976)).

S & G Packaging Co., LLC, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001).

When working on the shorting block inside of ATS-C9, Employee #1 was 18 inches from the energized parts of the system. As a result of his proximity to the energized parts while performing work activity, a spark was generated and later an arc flash occurred, which caused burns to Employee #1’s face and ears. Employee access to the violative condition is established.

Knowledge

[T]he Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer. *See Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir.1979); *New York State Elec. & Gas Corp.*, 88 F.3d at 105; *see also Secretary of Labor v. Access Equip. Sys., Inc.*, 18 O.S.H. Cas. (BNA) 1718, at (1999). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.*, 5 O.S.H. Cas. (BNA) 1202, at (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, “his knowledge and approval of the work methods employed will be imputed to respondent”).

ComTran Grp., Inc. v. U.S. Dep’t of Labor, 722 F.3d 1304, 1307–08 (11th Cir. 2013). It is the Secretary’s burden to adduce sufficient evidence to establish the knowledge element of his case.

Here, the Secretary contends Solares had actual knowledge of the cited violative conditions through its supervisor/foreman (Secretary’s brief, p. 6). Solares asserts it could not have foreseen the violative conditions (Solares’s brief, p.12).

With regard to the Secretary’s assertion that Moriyon had actual knowledge of the violative condition, the evidence shows he made the assignment for the work on October 2, 2015. He testified he told the employees that at some point during the day they would reverse the polarity of the shorting block (Tr. 104). In order to do the work on the shorting block they were required to open ATS-C9, which contained energized parts. Moriyon told the CSHO the employees wore no PPE and had not worn the arc flash protective suit at any moment on that day

(Tr. 44, 45). He also told the CSHO the employee should have worn the PPE for opening the transfer switch (Exh. P-2).

Although Moriyon knew employees were to work on energized equipment and knew there was no PPE available in the immediate work area prior to the accident on October 2, 2015, the record does not show he had actual knowledge Employee #1 had begun work on the system without appropriate PPE. Moriyon had left the work area to make a telephone call and was in another location away from the electrical/mechanical room when Employee #1 worked on the system without appropriate PPE. He did not see this violative conduct. He had not instructed Employee #1 to work on the shorting block in his absence. Actual knowledge is not established.

Neither did Moriyon have constructive knowledge of the violative condition.¹¹ The Secretary did not establish he should have known Employee #1 would work on the system without appropriate PPE.

An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have. *See, e.g., Secretary of Labor v. Hamilton Fixture*, 16 O.S.H. Cas. (BNA) 1073, at *17–19 (1993) (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, *see New York State Elec. & Gas Corp.*, 88 F.3d at 105–06 (citations omitted), with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable.

ComTran, 722 F.3d at 1308.

There is insufficient evidence in the record to find Moriyon should have known Employee #1 would work on the shorting block without appropriate PPE. He was not in the electrical/mechanical room and therefore was not close enough to see what was occurring. Furthermore, there is no evidence Moriyon expected Employee #1 to work on the shorting block in his absence, or that he told the employee to work on the shorting block while he was away making a telephone call. Rather, Moriyon told Employee #1 to wait for him and to not do anything after the fire alarm (Tr. 92, 111). Moriyon testified he planned to seal the room, have the power turned off, and wear appropriate PPE before entering the room to investigate after the alarm (Tr. 128). Employee #1 refused to tell the CSHO why he defied Moriyon's order to stop work and wait for him (Tr. 39, 63-64, 69-70).

¹¹ The Secretary does not argue Solares had constructive knowledge of the violative conduct.

The only instruction given regarding work to be performed on the shorting block was that, at some point during the day, the crew would reverse the polarity on the shorting block. When Moriyon left to make a telephone call, the only direction he gave to Employee #1 was regarding unrolling and measuring the wire for the next day (Tr. 108). Employee #1 was not cooperative during OSHA's investigation. CSHO Colon-Jusino testified he did not want to talk about the incident, he did not want her to take notes of her interview with him, he refused to provide a written statement, and he would not allow her to photograph his tools or tell her what tools he used. The record does not support a finding that Moriyon reasonably could have expected Employee #1 to work on the shorting block (Tr. 39, 63-64, 69-70).

In addition, although there was no PPE in the work area, it was located in the van only 100 feet from where the employees were working in the electrical/mechanical room (Tr. 24; Exhs. P-2, P-3, P-5, R-4). The record does not establish the PPE was unavailable to the employees to use when work on the shorting block was to begin. The company policy was to use PPE when performing the work scheduled for that day on the shorting block. There is no evidence that Moriyon expected Employee #1 to work without appropriate PPE.

The Secretary also has not established Solares failed to implement an adequate safety program. Solares had a policy requiring employees to use PPE. The CSHO notes in her Inspection Narrative that the employees are trained in hazards relating to electrical work and notes only that its safety manual was lacking specifics regarding what PPE is required for each job task (Exh. R-4). The Court finds this insufficient to show Solares's safety program was inadequate. Constructive knowledge is not established.

The Secretary has not established knowledge of the violative condition cited in Item 2 and therefore has failed to prove a prima facie case. Item 2 is vacated.

Item 3: Alleged Serious Violation of § 1910.335(a)(2)(i)

The Secretary alleges in Item 3, "On or about October 2, 2015, at the above addressed job site, employer did not provide insulated tools or handling equipment to employees who were performing troubleshooting in shorting block for an electrical monitoring system located in ATS-C9 in proximity of live electrical parts thereby, exposing employees to electrical hazards."

The cited standard, § 1910.335 (a)(2)(i), provides:

When working near exposed energized conductors or circuit parts, each employee shall use insulated tools or handling equipment if the tools or handling equipment might make contact with such conductors or parts. If the insulating capability of

insulated tools or handling equipment is subject to damage, the insulating material shall be protected.

Applicability

Solares does not dispute applicability of the cited standard (Solares's brief, p. 12). Its employees, while troubleshooting the newly installed monitoring system at Jackson Memorial Hospital, worked in proximity to energized parts of the system. The standard found at 29 C.F.R. § 1910.335 provides safeguards for personnel protection, requiring the use of PPE and insulated tools when working in proximity to energized parts. Solares was cited for violating § 1910.335 (a)(2)(i), alleging Solares did not provide insulated tools or handling equipment for its employees working in proximity to energized parts. Applicability of § 1910.335(a)(2)(i) is established.

Noncompliance with Standards

Solares contends it used insulated tools on the day of the accident and that the Secretary cannot establish insulated tools were not used when its employees worked on the shorting block (Solares's brief, p.11; Exhs. P-15 and P-16).

On October 2, 2015, only Moriyon and Employee #1 worked in the area where ATS-C9 was located. Although Moriyon testified he worked on the gear, no details were elicited regarding the nature of the work he performed or any tools he used on the gear.¹² Only the work done by Employee #1 and the tools he used are described briefly in the record.

The evidence shows Employee #1 was working on the shorting block when smoke from the ATS-C9 set off the fire alarm. It also shows he accessed the system a second time when he received burns from an arc while attempting to remedy the problem which triggered the alarm. Employee #1 used his own tools the day of the accident. The evidence shows he used a screw driver and pliers (Exh. P-2). The CSHO observed Employee #1's tool belt the third day of her inspection, but did not take photographs of his tools (Tr. 63-64, 68, 69). Nor did she have him remove his tools from his tool belt so she could examine them (Tr. 71). Instead, she observed Employee #1's tools while they were in the tool belt and, based on this observation, determined none of them was insulated (Tr. 94, 98-99). According to Moriyon, tools are placed in a tool belt handles up (Tr. 138-139). The CSHO asked Employee #1 if the tools in his tool belt were used to work on the shorting block and he said yes (Tr. 28).

In an effort to prove Employee #1's tools were not insulated on October 2, 2017, the

¹² The record does not reflect Moriyon engaged in any violative conduct on October 2, 2015, relating to the citations issued to Solares.

Secretary relies on evidence regarding the tools examined by the CSHO when Solares was engaged in demolition work. The testimony about these tools was confusing. CSHO Colon-Jusino testified she observed and photographed the tools of Employee #2 the day Solares was engaged in demolition work and she stated she asked Moriyon and Employee #2:

“[I]s this the same type of tool that is being used, or that is allowed to be used, with the incident with the shorting block?” That’s how the question went, and he said, “Yes.” Both of them said yes, that they can use this type of equipment –

(Tr. 25)

Q. And what did [Moriyon] tell you with regard to the tools?

A. So, I asked him about, if he has a supervisor to inspect the tools. Apparently, he told me through the injury that, yes, that he verifies that that’s the correct tool that was used for the job. We had the tools, like I was saying, spread out in the floor. And I asked him, these tools, are these the same type of tools that are used to work on the shorting block? And he said, “Yes.” All of the tools that were on the floor were not insulated. These tools are, also, bought by the employees, they’re not provided by the employer. All of these tools, they provide themselves. Same thing happened when I spoke to the injured employee - -

Q. Okay. If I could just ask you –

A. Sure.

Q - - one follow-up question. You said that Mr. Moriyon said those were the correct tools for the job. The correct tools, were those the uninsulated tools?

A. Correct, the tools that I had spread on the floor, were all not insulated.

(Tr. 27)

Q. And just for clarification, to be precise, when you talked with Moriyon about the tools that the employees were using working at the Cabinet C9, did he confirm that employees were using uninsulated tools?

A. The question went along the lines, okay, so, I asked him, “so, these tools, are they -- are they the correct tools to work on, on the shorting block?” And he said, “Yes.” So, from that, we went to, “do you inspect the tools before they work?” So, yes. So, in my mind, after I heard that, well, okay, they’re using these uninsulated tools to work on a shorting block in proximity of live parts.

(Tr. 28) At most, this testimony shows the tools observed at that time were the type that *could* be used on the shorting block (Tr. 25, 27, 28; Exhs. P-15, P-16). It does not show they were used by Employee #1 when he worked on the shorting block in proximity to energized parts on the

day of the accident. Nor does it show that the tools used by Employee #1 were not insulated when he accessed the system. Moriyon testified those tools were not the tools used on the day of the accident (Tr. 119). The Secretary has failed to establish by a preponderance of the evidence that Employee #1's tools were not insulated at the time he worked in proximity to the energized parts in ATS-C9. Accordingly, the Secretary has failed to establish the terms of the standard found at § 1910.335(a)(2)(i) were violated and has failed to establish a prima facie case regarding item 3. Item 3 is vacated.

Unpreventable Employee Misconduct Defense

Solares alleges Employee #1 engaged in unpreventable employee misconduct by not following the instructions of Moriyon to wait for him to enter the work area (Solares's brief, p. 12). Since the Court finds the Secretary has failed to establish a prima facie case regarding the cited standards found at §§ 1910.335(a)(1)(i) and 1910.335(a)(2)(i), it is not necessary for the Court to address Solares's unpreventable employee misconduct defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of the Citation, alleging a violation of § (5)(a)(1), is withdrawn by the Secretary;
2. Item 2 of the Citation, alleging a violation of § 1910.335(a)(1)(i), is VACATED and no penalty is assessed; and
3. Item 3 of the Citation, alleging a violation of § 1910.335(a)(2)(i), is VACATED and no penalty is assessed.

SO ORDERED.

/s/

Date: May 3, 2017

SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia