



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

Secretary of Labor,
Complainant

v.

Century Communities d/b/a Century
Communities of GA, LLC,
Respondent.

OSHRC Docket No.: **17-0455**

Attorneys and Law Firms:

Lydia J. Chastain, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia,
for Complainant

Edwin G. Foulke, Esquire; Michelli Rivera, Esquire; Collin Warren, Esquire and Angie
Yeremiah, Esquire, Fisher & Phillips LLP, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

Century Communities, Inc., dba Century Communities of GA, LLC (Century), a general contractor, contests a one-item Citation and Notification of Penalty issued February 16, 2017, by the Secretary. The Secretary issued the Citation following a fatality investigation by the Occupational Safety and Health Administration in response to a residential construction site accident that killed one worker and seriously injured another. The accident occurred when a crane operator brought the boom of the crane too close to energized overhead power lines, causing an electrical arc. The Secretary cited Century, as the controlling employer, for a serious violation of 29 C.F.R. § 1926.1408(a)(2) for failing to protect employees from electrical shock hazards. The Secretary proposes a penalty of \$12,675.00.

Century timely contested the Citation. I held a hearing in this matter on February 22 and 23, 2018, in Atlanta, Georgia. The parties filed briefs on April 30, 2018. Century argues the Secretary failed to establish the company's employees had access to the hazardous condition or the company knew of the violative conduct.

For the reasons that follow, I **AFFIRM** the cited item and assess a penalty of \$12,675.00.

JURISDICTION AND COVERAGE

Century timely contested the Citation and Notification of Penalty on March 14, 2017. The parties agree the Commission has jurisdiction over this action and Century is a covered business under the Act (Complaint, ¶¶ I and II; Answer, ¶ 3; Exh. J-1, p. 11, ¶¶ A, B, and C). Based on the stipulations and the record evidence, I find the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Century is a covered employer under § 3(5) of the Act.

BACKGROUND

Stipulations

The Secretary and Century stipulated to a *Statement of Agreed Facts*, which “will require no proof at the hearing.” (Exh. J-1, p. 6) Summarized, the relevant agreed facts establish the following (Exh. J-1, pp. 6-11, ¶¶ C through XX):

Century acted as developer and construction manager of a residential subdivision called Moss Creek Estates in Alpharetta, Georgia. Century had general supervisory authority over the subdivision worksite, including the power to correct identified safety or health hazards, either by acting on its own or requiring subcontractors to correct them. For this project Century employed three construction managers (Andy Gaddis, James McGinnis, and Daniel Schlosberg) and a finishing manager, Mike Harden. The construction managers inspected each of the active home site lots to which they were assigned at least twice a day.

Moss Creek Estates comprises 61 residential lots. By October 12, 2016, Century and its subcontractors had completed approximately 47 of the lots. The remaining lots were either still under construction or vacant. Century assigned construction manager Andy Gaddis to oversee Lot 51, but Century authorized all its construction managers to identify and correct perceived safety hazards on any of the lots within the subdivision.

Century contracted with JLNC, Inc., owned by Jeff Nelson, to perform crane services at the Moss Creek Estates. Century engaged E&N Construction Group, LLC, (E&N) as the framing contractor for the project. In turn, E&N, which was owned by foreman and competent person Ezequiel Pulido, contracted with JP General Construction, LLC, (JPGC) to perform framing services at the worksite. Jesus Palma was the owner of JPGC, and he acted as supervisor and competent person at the worksite.

The construction plan for all of the houses built in the Moss Creek Estates subdivision required the use of a crane to lift and position the trusses during the framing phase of the construction. Unlike the other lots, overhead electrical lines crossed over portions of Lots 50 and 51. The overhead electrical lines were rated at approximately 119.15kV.

Century construction manager Andy Gaddis ordered the wood framing and truss materials for construction of the house on Lot 51. On or before October 10, 2016, the framing and truss materials were delivered and placed to the front far left (looking from the street towards the site for the house) of Lot 51.

On October 12, 2016, JLNC crane operator Jonathon Shadwick arrived at Lot 51 with a Manitex Hydraulic Boom Truck Crane. Shadwick was an experienced crane operator and a competent person. He had authority to stop operation of the crane if he had a concern for safety. He arrived at Lot 51 at approximately 7:00 a.m. and set up the crane for operation, including deploying the outriggers and stabilizers.

All of Century's construction and finishing managers were at the Moss Creek Estates worksite the morning of October 12, 2016. James McGinnis arrived before 6:45 a.m. Mike Hardin arrived at approximately 7:00 a.m. and Andy Gaddis arrived between 7:00 and 7:20 a.m. Daniel Schlosberg arrived between 7:30 and 7:45 a.m. Also present was E&N owner Ezequiel Pulido, who was onsite to supervise the work performed by the JPGC employees.

JPGC owner Jesus Palma arrived at approximately 8:20 a.m. with five employees to install trusses on the house under construction on Lot 51. Four JPGC employees began working inside on different levels of the house. Shadwick worked with the Decedent and Employee #1 on the ground outside the house to lift the small trusses (known as Little Fingers) on the left side of the crane (viewed from the street). These lifts were completed without incident.

Shadwick then moved the crane boom to the right side of the crane near the area where some of the large trusses were located. The large trusses originally had been delivered to the street and then moved to the far left side of Lot 51. They were later moved to the far right side of Lot 51 and placed underneath the overhead power lines. The Decedent and Employee #1 were working on the ground preparing to connect the chain and wire slings to the large trusses on the ground.

At approximately 8:52 a.m., Shadwick began operating the crane to lift one of the large trusses. As the boom moved to lift the truss, the hoist cable or the boom came within 20 feet of

the overhead power lines. This proximity resulted in the electrocution of the Decedent and serious electrical shock to Employee #1.

Several employees called 911 at approximately 8:53 a.m. Emergency medical personnel arrived and eventually airlifted the Decedent and Employee #1 to Grady Memorial Center. The Decedent died more than two weeks later, on October 28, 2016.

After OSHA's Atlanta East Area Office received notification of the accident on October 12, 2016, CSHO Maurice Starks was assigned to conduct a fatality investigation at the worksite. He was assisted by CSHO Joel Batiz, who provided Spanish interpretation as needed during employee interviews.

Withdrawn Stipulation and Deposition of Jonathon Shadwick

The parties filed their *Joint Prehearing Statement*, which includes the *Statement of Agreed Facts*, on February 7, 2018. On February 20, 2018, two days before the scheduled hearing, Century moved to amend the *Joint Prehearing Statement*, seeking to remove ¶ YY from the *Statement of Agreed Facts*. Paragraph YY states, "Respondent is no longer asserting the affirmative defense of unpreventable employee misconduct." (Exh. J-1, p.11) Century had asserted unpreventable employee misconduct (UEM) as its "Third Defense" in its answer.

At the hearing, counsel for Century stated it had newly discovered evidence indicating Jonathon Shadwick, the crane operator, may have engaged in employee misconduct (Tr. 11). The Secretary's counsel objected based on prejudice (she had not seen the newly discovered evidence (Tr. 10-11)) and because, as she stated, Mr. Shadwick "was not an employee of Century Communities, and I struggle to see how his misconduct could be relevant to the employee misconduct defense in this case." (Tr. 13) I granted Century's motion to amend the *Joint Prehearing Statement* by deleting ¶ YY, and I allowed the company to reassert the UEM defense (Tr. 13-14).

The newly discovered evidence came to Century in the form of a deposition of Jonathon Shadwick, taken January 29, 2018, for a separate civil proceeding (Tr. 12). I informed Secretary's counsel she would have the opportunity to review the deposition before Mr. Shadwick testified (Tr. 13). Century's counsel had subpoenaed Mr. Shadwick as a witness at the hearing, but Mr. Shadwick failed to honor the subpoena (Tr. 413). At the end of the hearing, Century's counsel moved to admit the deposition in lieu of Mr. Shadwick's testimony and "reserve[d] the right to enforce the subpoena." (Tr. 418) I held the record open to allow the

parties to brief the admissibility of the deposition (Tr. 418). Subsequently, the Secretary responded he “consents to the admission of Mr. Shadwick’s deposition transcript, [so] there is no need for the Commission to enforce the subject subpoena.” (*Response to Respondent’s Motion to Enforce the Subpoena to Appear for Jonathon Shadwick*, p.1) On March 28, 2018, I issued an order admitting Mr. Shadwick’s deposition and closing the record. Consequently, the deposition of Jonathon Shadwick is part of the record in this proceeding. Century did not pursue the UEM defense during the hearing and does not address the defense in its brief. I deem Century’s UEM defense waived.

Deposition Testimony of Jonathon Shadwick

Mr. Shadwick testified he received an assignment the evening of October 11, 2016, via text message from JLNC owner Jeff Nelson, to bring a crane to Lot 51 at the Moss Creek Estates the next morning. Mr. Shadwick had never worked at Moss Creek Estates before, but he had operated cranes numerous times for Century. He stated, “[P]retty much all [JLNC’s] work came from Century.” (*Deposition*, p. 48). Usually, Mr. Shadwick was accompanied on his assignments by a JLNC employee he identified as Angel. “[H]e would basically be my negotiator and my rigger.” (*Id.* at 40) Angel speaks Spanish, which Mr. Shadwick does not, so Angel acted as translator when Mr. Shadwick was working with Spanish-speaking crews. Angel did not accompany Mr. Shadwick on October 12, 2016, due to the illness of his child. Mr. Shadwick undertook the Moss Creek Estates assignment alone (*Id.* at 41-42).

JLNC required crane operators to arrive at the yard where the cranes were kept by 6:15 a.m. the day of an assignment. Mr. Shadwick arrived at the yard at 6:15 a.m. on October 12, 2016, to pick up the crane and arrived at Lot 51 between 6:30 and 6:45 a.m.¹ He backed into the driveway for the house under construction and parked. It was dark when he arrived. He waited until about 7:30 to start setting up the crane in anticipation of the framing crew arriving at 8:00 a.m. (*Id.* at 44-46, 51, 54-55).²

Before setting up, Mr. Shadwick exited the crane and walked around the site. He noted the overhead power lines and determined in order to avoid the lines, he “wasn’t going to work on

¹ This testimony conflicts with the parties’ stipulation that Mr. Shadwick arrived at the worksite at approximately 7:00 a.m. (Exh. J-1, p. 8, ¶ BB). The discrepancy does not affect the outcome of this decision.

² I take judicial notice sunrise occurred at 7:40 a.m. on October 12, 2016, in Alpharetta, Georgia, according to the National Oceanic and Atmospheric Administration. See <https://www.esrl.noaa.gov/gmd/grad/solcalc/sunrise.html>.

the right side of the house.” (*Id.* at. 59) Mr. Shadwick observed he had parked “directly under the line,” so he backed the crane up to where he thought it “was okay” (*Id.* at 57) Mr. Shadwick knew he was required to ensure no part of the crane was closer than 20 feet to an energized power line. He did not measure the distance from the overhead power line to the crane, but just “eyeballed it.” (*Id.* at 100)

Shortly after arriving at Lot 51, he saw one other man in the area, whom he took to be a member of the framing crew. They spoke briefly and the man left (*Id.* at 52-53, 67). After Mr. Shadwick had set up the crane, but before the accident, he saw a man walking past wearing a hard hat and a polo shirt bearing the Century logo. Mr. Shadwick had seen Century employees on other jobs wearing the same kind of logoed shirt (*Id.* at 68-70). Mr. Shadwick had not seen him before and did not know his name. He described the man as having “short hair, white guy.” (*Id.* at 69) They did not interact. Mr. Shadwick saw him again at Lot 51 after the accident (*Id.* at 70).

Mr. Shadwick described the moment the crane’s boom either made contact with the overhead power line or caused an electrical arc flash. Two of JPGC’s employees, the Decedent and Employee #1, were walking toward a truss to the right of the house and Mr. Shadwick followed them with the boom. As he did so, the boom came within 20 feet of the overhead power line (*Id.* at 82). He heard an explosion and “everything went black and there was a blue ball in front of me. And it hit and—it hit. I looked up and it, boom, hit again.” (*Id.* at 82) Mr. Shadwick jumped off the crane and ran over to the two crew members, then ran across the street and called 911 (*Id.* at 84).

Q.: What condition were the two workers in that were injured?

Mr. Shadwick: Horrible. They were on fire.

Q.: Literally?

Mr. Shadwick: Yeah.

Q.: Both of them were on fire?

Mr. Shadwick: They were.

Q.: Were they on fire for just kind of a split second or a flash or—

Mr. Shadwick: They were on fire.

Q.: On fire burning?

...

Mr. Shadwick: Yes.

(*Id.* at 84)

He stated no one from Century warned him about setting up the crane too close to the overhead power lines the day of the accident or held a safety meeting with him (*Id.* at 104). Had

a Century representative told him to reposition the crane, he “would have seen them as the ultimate authority.” (*Id.* at 104)

Testimony of Century Managers

James McGinnis

James McGinnis is a construction manager for Century (Tr. 367). He testified he tried to visit his assigned lots at the Moss Creek Estates twice a day, and would inspect for safety hazards during his visits (Tr. 367-368). He scheduled subcontractors for his lots and he knew that once the trusses were delivered, the framers would install them with the help of a crane in a day or two. Either Mr. McGinnis or E&N framing contractor Ezequiel Pulido would call JLNC to send out a crane when the framers were ready to install the trusses (Tr. 371).

Mr. McGinnis was the construction manager for Lot 50, over which the energized power lines also crossed (Exh. C-12; Tr. 374). He did not know the voltage of the overhead power lines crossing over Lots 50 and 51, and at the time of the accident he was not aware of the minimum safe distance that should be maintained between energized power lines and cranes (Tr. 372-373).

Mr. McGinnis arrived at approximately 6:45 a.m. the day of the accident, driving a black Chevy Silverado. He drove past Lots 50 and 51 on his way to visit Lots 43 and 45. He did not see the crane. At the time of the accident, he was in the house on Lot 49 with a house inspector. Mr. McGinnis stated he could not see the crane set up on Lot 51 from the sidewalk on his way to the house on Lot 49 (Tr. 376-77, 382).

Daniel Schlosberg

Daniel Schlosberg is a Century construction manager. He was working as a finish manager to assist Mr. McGinnis at the Moss Creek Estates. He was authorized to identify and correct safety hazards at the worksite (Tr. 387-388). He was aware of the overhead power lines crossing Lots 50 and 51 at the worksite. He did not know the voltage. Mr. Schlosberg arrived at the Moss Creek Estates between 7:30 and 7:45 a.m. the day of the accident (Tr. 389). When asked if he had seen the crane parked at Lot 51, Mr. Schlosberg responded, “I wasn’t paying attention to a crane.” (Tr. 391)

Michael Harden

Michael is a finish manager for Century. He stated he was working with Andy Gaddis the morning of the accident, on Lots 16 and 17, from where Lot 51 was not visible (Tr. 400-01).

Andy Gaddis

Andy Gaddis is a construction manager for Century who was assigned Lot 51. He visited each of his assigned lots twice a day, once in the morning and once in the afternoon. He estimated that on a normal day, to get to his assigned lots he drove by Lot 51 eight to ten times (Tr. 282). Mr. Gaddis drove a blue Toyota Tacoma truck while working at the Moss Creek Estates (Tr. 281, 305, 334). He agreed he is responsible for recognizing potential hazards on contracts before work starts, including the site-specific hazard of the presence of overhead energized power lines (Tr. 284). He stated he did not see the crane at Lot 51 the morning of the accident (Tr. 338-39).

Mr. Gaddis agreed he is responsible for scheduling the subcontractors on his assigned lots. Framers usually take five to seven days to frame the house, and between the fifth and seventh day, the trusses should be delivered. Once the trusses are delivered, the framers install them within a few days (Tr. 289). Mr. Gaddis scheduled the delivery of the trusses to Lot 51 (Tr. 290). He inspected Lot 51 the afternoon before the accident and saw the trusses were onsite (Tr. 301).

Mr. Gaddis did not know the voltage of the overhead power lines (Tr. 295). He believed “the crane would be safe if it stayed 10 feet away from the power line,” rather than the 20 feet required by Table A of § 1926.1048(a)(2) (Tr. 295). He did not discuss the overhead power lines with E&N before construction on the house started (Tr. 298). He intended for the trusses to be delivered to an area to the left of the house so the crane operator could lift them without approaching the overhead power lines (Exh. C-34; Tr. 303-04). He instructed the delivery company he wanted the trusses placed as “far left as they could get them on the lot. . . [s]o that the trusses would be away from the high cable lines as far as possible when they did the lift. That way I was anticipating the crane guys [sic] to actually operate the crane from the left side of the house.” (Tr. 344) He did not communicate this plan to E&N, JPGC, or JLNC (Tr. 299-300). When asked why he did not tell them of his plan, Mr. Gaddis stated, “I had no knowledge that the crane was coming.” (Tr. 304-05) He did not ask Mr. Pulido when he expected the crane operator to arrive or ask to be notified when he did (Tr. 360).

Testimony of Safety Consultant Robert Masterson

Robert Masterson is a safety consultant hired by Century in 2016 “[t]o help them focus their safety program and improve on the areas out on the job site.” (Tr. 405) Mr. Masterson

“coached” area managers and site supervisors on safe work practices (Tr. 405). He made onsite visits to Moss Creek Estates (Tr. 407).

He testified bringing a crane onto a site with overhead energized power lines is “a site-specific hazard, absolutely,” and he would check to make sure the crane was a safe distance from the line (Tr. 409).

Q.: So working too close to a power line is a big mistake?

Mr. Masterson: Yes.

Q.: And something that you would look for in your safety inspections?

Mr. Masterson: Yes.

Q.: Something you would expect Century Communities would look for in their safety inspections?

Mr. Masterson: Yes.

(Tr. 410)

Testimony of Subcontractor Employees³

Ezequiel Pulido

Ezequiel Pulido owned E&N, which Century had hired as the framing contractor.⁴ E&N hired approximately ten different subcontractors to perform the framing on the houses at the Moss Creek Estates. E&N hired JLNC for crane services “because they were the crane [company] that Century had designated to lift the trusses on the house.” (Tr. 235) The day of the accident, the JPGC framing crew and the JLNC crane operator were the only subcontractors on site, other than Mr. Pulido (Tr. 213, 227).

Century construction managers did not meet with Mr. Pulido for preconstruction safety meetings prior to starting new houses at the Moss Creek Estates. Sometimes he would meet a construction manager to go over the house plans, but other times “they would put [the plans] on the permit box that went with that house.” (Tr. 223) Neither Mr. Gaddis nor anyone else from Century had discussed the overhead power lines crossing Lots 50 and 51 with Mr. Pulido (Tr. 214).

Mr. Pulido arrived at the worksite around 8:10 a.m. the day of the accident. He drove past Lot 51 and saw the JLNC crew and the crane set up in the driveway (Tr. 215, 217-19). When asked if he had any concerns regarding the proximity of the crane to the overhead power lines, Mr. Pulido stated, “The thing is that I hadn’t noticed the cables. I’d gone by there, but I

³ The three subcontractor employee witnesses testified with the assistance of an interpreter.

⁴ At the time of the hearing, Mr. Pulido owned a new company under a different name (Tr. 225).

had not noticed the lines. . . [The power lines] were there, but it's kind of like I didn't notice them." (Tr. 220)

Employee #1

Employee #1 is the JPGC employee who was seriously injured the day of the accident. No one from Century or JPGC spoke with the framing crew about the overhead power lines crossing Lot 51. He was not aware of the minimum safe distance required for cranes operating near power lines (Tr. 263). He did not notice the power lines prior to the accident (Tr. 273).

On October 12, 2016, before the accident occurred, Employee #1 spoke with a Century construction manager who stopped by in his blue truck as the JPGC crew was working. "A builder passed by, and he just told us if everything was okay, if we needed something or stuff like that. I just told him we were okay, but he never got out or [said] something to all the guys or stuff like that." (Tr. 267) "[H]e just stopped by and just asking if everything was okay. And I just told him, yes, you know, everything's okay." (Tr. 269)

Employee #1 had seen him at the Moss Creek Estates before (Tr. 267). When asked what vehicle the man was driving, Employee #1 responded, "I remember it was a blue car, a blue truck." (Tr. 267) Employee #1 knew he was "a builder" because he was wearing a Century logoed shirt (Tr. 269).⁵

Employee #2

Employee #2 worked as a carpenter for JPGC. His brother was the JPGC employee who was killed the day of the accident (Tr. 243). No one from Century or JPGC discussed the

⁵ In its brief, Century twice states Employee #1 could not remember whether his conversation with the Century construction manager occurred before or after the accident (Century's brief, pp. 16, 24). Century bases this contention on Employee #1's testimony regarding the timing of the conversation:

Q.: When was this [conversation]?

Employee #1: Like after the accident happened.

Q.: It was after the accident happened?

Employee #1: Like before, before.

(Tr. 269)

It was evident at the hearing that Employee #1, who at that point was not using the interpreter but was testifying in English, his second language, had initially misspoken, and he quickly corrected himself. This was made even clearer when he was asked where the rest of the JPGC crew was when the conversation occurred. He responded, "They were already on the house. . . The boom [of the crane] was already extended and everything." (Tr. 269) I find the conversation between Employee #1 and the Century construction manager occurred before the accident. I base this finding on the unequivocal testimony of Employee #1. I also base this finding on the fact that after the accident, Employee #1 was on fire, and the casual conversation to which he attested ("[H]e just stopped by and just asking if everything was okay. And I just told him yes, you know, everything's okay." (Tr. 269)) would not take place in the real world under these circumstances.

overhead power lines crossing Lots 50 and 51 with JPGC before the accident. Employee #2 did not know the minimum safe distance to keep between the crane and the power lines (Tr. 246).

The day of the accident, JPGC's crew all arrived at the worksite in the same vehicle. They were supposed to be at the site at 8:00 a.m., but were running late and did not arrive until 8:25 or 8:30. They knew the crane was scheduled to be at Lot 51 (Tr. 247). Employee #2's assignment was to stand on the third floor of the house under construction in order to position the trusses being lifted by the crane. He described the moment the accident occurred.

[REDACTED]

(Tr. 249-50)

Employee #2 noticed the overhead power lines crossing Lot 51. He did not know the voltage of the lines, but was aware "when the cables are that high up, they're usually pretty high voltage." (Tr. 255) He did not check to see how close the crane was to the overhead lines the day of the accident. "Since we arrived late, the truth is that we didn't even think about that." (Tr. 256)

THE CITATION

Item 1: Alleged Serious Violation of § 1926.1408(a)(2)

Alleged Violation Description

Item 1 of the Citation alleges,

On or about 10/12/2016 at the Moss Creek Estates lot 51, Alpharetta, GA: Century Communities, Inc. dba Century Communities of GA, LLC[,] the Controlling employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them; failed to protect the employees engaged in truss connecting and lifting from the electrical hazards by de-energizing and/or ensuring that no part of the crane, rigging, and lifting equipment got closer than 20 feet from the live overhead power lines rated at about 119.15kV. One employee was fatally injured and another employee was seriously injured from the crane coming closer than 20 feet or without de-energizing the overhead power lines in the area.

Cited Standard

Section 1926.1408(a)(2) provides:

Before beginning equipment operations, the employer must:

...

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), Option (2), or Option (3) of this section, as follows:

Option (1)--Deenergize and ground. Confirm from the utility owner/operator that the power line has been deenergized and visibly grounded at the worksite.

Option (2)--20 foot clearance. Ensure that no part of the equipment, load line, or load (including rigging and lifting accessories), gets closer than 20 feet to the power line by implementing the measures specified in paragraph (b) of this section.

*Option (3)--Table A clearance.*⁶

DISCUSSION

The Secretary's Burden of Proof

The Secretary has the burden of establishing the employer violated the cited standard. "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) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition." *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Century concedes the first two elements of the Secretary's case. It "does not contest that 29 C.F.R. 1926.1408(a)(2) of the Occupational Safety and Health Act of 1970 applies to the cited condition or that the requirements of the standard were not met." (Century's brief, p. 201,

⁶

TABLE A—MINIMUM CLEARANCE DISTANCES

Voltage (nominal, kV, alternating current)	Minimum clearance distance (feet)
up to 50	10
over 50 to 200	15
over 200 to 350	20
over 350 to 500	25
over 500 to 750	35
over 750 to 1,000	45
over 1,000	(as established by the utility owner/operator or registered professional engineer who is a qualified person with respect to electrical power transmission and distribution).

Note: The value that follows "to" is up to and includes that value. For example, over 50 to 200 means up to and including 200kV.

n. 10) Century contends the Secretary failed to establish employees had access to the violative condition because Century's own employees were not exposed, and because Century, as the controlling employer, had exercised reasonable care to prevent and detect safety violations at the worksite. Century also argues the Secretary failed to establish Century knew or could have known of the violative condition. For ease of analysis, I will address the element of employer knowledge first.

Century's Knowledge of the Violative Condition

[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 *9 (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 *3 (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).

The morning of the accident, four Century managers were at the Moss Creek Estates site. Mr. Pulido of E&N was also present at the site, as were JLNC crane operator Jonathon Shadwick and JPGC's crew. No other subcontractor employees were present (Tr. 227).⁷ Mr. Shadwick testified that, after he had positioned and set up the crane the morning of the accident, he saw a man walking past Lot 51 wearing a Century polo shirt (*Deposition*, pp. 69-70). Mr. Shadwick testified setting up the crane "probably took me pretty close to 8:00." (*Id.* at 55) At that point, the sun had risen and the proximity of the crane to the overhead power lines was in plain view. The JPGC crew arrived approximately half an hour later. Between 8:30 a.m. and 8:53, when the accident occurred, Employee #1 spoke with a man in a blue truck who was wearing a Century shirt. Employee #1 was standing in the yard of Lot 51. He testified the rest of the crew was "already on the house. . . The boom [of the crane] was already extended and everything." (Tr. 269) Several trusses were lying directly under the overhead power lines, which were in plain view.

⁷ The only other person identified in the record as being at the Moss Creek Estates the morning of October 12, 2016, is a home inspector meeting with Century construction manager James McGinnis.

It is not possible based on the record to determine whether the Century manager Mr. Shadwick saw walking by Lot 51 at approximately 8:00 a.m. was the same Century manager Employee #1 spoke with later. It is possible, however, to determine the most likely identity of the construction manager who spoke with Employee #1.

Mr. Gaddis drove a blue Toyota Tacoma truck the day of the accident. Other than JPGC's vehicle and the crane, the only other vehicles mentioned in the record at the worksite that day are Mr. McGinnis's black Chevy Silverado and a white Silverado observed by some of the JPGC employees (Tr. 191-93, 376-77). Employee #1 twice stated the Century construction manager he spoke with was driving a blue truck (Tr. 267, 271-72). Although appearing nervous, he was straightforward and unwavering in his testimony. His testimony was candid; he sounded unrehearsed. I find him a thoroughly credible witness and give great weight to his testimony.

Mr. Gaddis arrived in his blue truck at the Moss Creek Estates between 7:00 and 7:20 a.m. the day of the accident (Tr. 281, 305, 334). He was the construction manager assigned to Lot 51. He had observed the trusses that had been delivered to the lot when he had inspected it the previous afternoon (the trusses had been delivered at least by October 10, 2016, two days before the accident). Based on the framing that had already been completed on the house and the delivery of the trusses, Mr. Gaddis knew the arrival of the crane was imminent. As the construction manager in charge of Lot 51, he is the most likely manager to stop by Lot 51 and ask the framing employees "if everything was okay, if [they] needed something." (Tr. 267)

Mr. Gaddis denied driving past Lot 51 the day of the accident (Tr. 334). Mr. Gaddis was Century's representative at the hearing and was present in the courtroom when Employee #1 was questioned about the manager he saw.

Q.: What did he look like?

Employee #1: I don't remember. Like since the accident, I've just kind of had problems, you know, remembering since then.

Q.: Would you recognize him if you saw him again?

Employee #1: Maybe.

Q.: Do you see him in this room?

Employee #1: No.

(Tr. 268)

Despite Employee #1's inability to identify Mr. Gaddis at the hearing and Mr. Gaddis's denials, the record supports a finding it is more likely than not that the Century manager with whom Employee #1 spoke was Andy Gaddis. Employee #1 spoke with the Century manager

“less than a minute or two” the morning of the accident (Tr. 270). The Century manager was in a truck, stopped in the street, as Employee #1 paused in his work to speak with him. The Century manager did not get out of the truck. A few minutes later, Employee #1 experienced a horrific accident and sustained serious injuries. I do not find it significant he was unable to identify the Century manager under these circumstances.

Mr. Gaddis testified repeatedly he did not go past Lot 51 the morning of October 12, 2016, and he “had no knowledge that the crane was coming.” (Tr. 304-05) I find Mr. Gaddis’s testimony conflicting and self-serving. The Secretary’s counsel impeached him numerous times when he made statements inconsistent with his deposition testimony (Tr. 297-302). He testified he had discussed the presence of the overhead power lines on Lot 51 in preconstruction safety meetings with the subcontractors (Tr. 296). This statement was contradicted by Mr. Pulido, Mr. Shadwick, the JPGC employees, and Mr. Gaddis’s own deposition testimony (Tr. 297-98). He stated he had communicated his plan for safe installation of the trusses to the subcontractors; Mr. Pulido, the JPGC employees, and Mr. Shadwick testified no one from Century ever addressed the issue of the overhead power lines with them. Mr. Pulido, owner of E&N, was not even aware the power lines were there (Tr. 220). When confronted with his deposition testimony answering “No” to the question, “Did you on that day or any time prior to that day discuss with [Mr. Pulido] or any of the other subcontractors your plan for safely installing the trusses?,” Mr. Gaddis stated he “must have been confused” regarding a written plan versus a verbal plan (Tr. 301). I find Mr. Gaddis’s testimony to be unreliable and untrustworthy. I give it no weight.

Although I find the Secretary has established by a preponderance of the evidence that Mr. Gaddis was the Century construction manager who stopped and spoke with Employee #1, his identity is not crucial to the Secretary’s case. Century’s construction managers have the authority to correct a safety hazard even if they are not assigned to a particular lot (Tr. 285). The only Century employees at the Moss Creek Estates the day of the accident were James McGinnis, Daniel Schlosberg, Michael Harden, and Andy Gaddis. All were supervisory employees. Mr. Shadwick testified he saw a man walk by wearing a Century shirt around 8:00 a.m., when the crane was set up in proximity to the overhead power lines, with several trusses lying directly below the lines. Employee #1 testified he spoke with a man wearing a Century shirt between 8:25 and 8:53 a.m., when the boom of the crane was extended. Whether Mr. Shadwick and Employee #1 saw the same Century manager or two different ones, the Secretary

has established at least one Century supervisory employee had actual knowledge the JLNC crane was positioned so that parts “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.” As a supervisor, his actual knowledge is imputed to Century.⁸

Access to the Violative Condition

The tragic facts of this case establish the employees present at Lot 51 the morning of October 12, 2016, had access to the violative condition created by the proximity of the crane boom to the energized overhead wires. Century’s initial argument, however, is “the citation should be vacated because the evidence presented at trial showed that no Century Community employees were exposed to the hazard.” (Century’s brief, p. 22) This argument ignores the Commission’s multi-employer worksite doctrine, which holds, “[A]n employer owes a duty under § 5(a)(2) of the Act not only to its own employees but to other employees at the worksite when the employer creates and/or controls the cited condition.” *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010).⁹ “[A]n employer's duty to exercise reasonable care where its own employees are not exposed to the hazard ‘is less than what is required of an

⁸ I would also find the Secretary established Century had constructive knowledge of the violative condition. Mr. Gaddis conceded he was responsible “for informing superintendents of site-specific safety requirements and verifying that this information is passed on to subcontractors before they’re allowed to start work,” and he agreed the presence of overhead power lines over a construction worksite is a site-specific hazard (Tr. 284). He was aware of the presence of the overhead power lines crossing Lot 51 (Tr. 290-91). He was aware the trusses had been delivered to Lot 51 and thus realized the crane would be arriving soon. Had he been reasonably diligent, he would have asked Mr. Pulido whether he had scheduled the crane and he would have stopped by Lot 51 the morning of October 12, 2016.

⁹ Chairman MacDougall has, on several occasions, most recently in *Evergreen Constr. Co.*, 26 BNA OSHC 1615, 617, n. 2 (No. 12-2385, 2017), “expressed concerns about whether the Secretary has the authority to cite an employer for a violation when its own employees are not exposed to the hazard.” I am bound by current Commission precedent on this issue which holds,

[When] (1) a contractor that has either created a hazard or controls a hazardous condition and (2) the only employees having access to the hazard are those of different contractors engaged in the common undertaking[, w]e consider such a contractor to have a duty under section 5(a)(2) of the Act to comply fully with the standards.

Anning-Johnson Co., 4 BNA OSHC 1193, 1199 (Nos. 3694 and 4409, 1976); *See also McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 n.3 (No. 97-1918, 2000) (“[T]he Commission and the Courts have previously held general contractors liable under the multi-employer worksite doctrine, notwithstanding the fact that none of their own employees were exposed and notwithstanding the fact that the standards under which the general contractors were cited did not, by their terms, impose a specific duty on the general contractor.” *Citing Universal Constr. Co. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 819-20 (6th Cir. 1998); *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127 (No. 92-0851, 1994); *Gil Haugan d/b/a Haugan Constr. Co.*, 7 BNA OSHC 2004 (No. 76-1512, 1979); *Knutson Constr. Co.*, 4 BNA OSHC 1759 (No. 765, 1976), *aff’d*, 566 F.2d 596 (8th Cir. 1977).).

employer with respect to protecting its own employees,' such that a general contractor need not inspect the worksite as frequently as an employer whose own employees are exposed to the hazard. *See Summit Contractors Inc.*, 22 BNA OSHC 1777, 1781 (No. 03-1622, 2009) (citing OSHA's Multi-Employer Citation Policy, OSHA Instruction CPL 02-00-124 § X.E.2 (Dec. 10, 1999))." *Evergreen Constr. Co.*, 26 BNA OSHC 1615, 1618 (No. 12-2385, 2017).

A controlling employer is one "who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice." *OSHA's Multi-Employer Citation Policy*, OSHA Instruction CPL 02-00-124 (Dec. 10, 1999) (CPL). Here, the parties stipulate Century had "general supervisory authority over the Worksite, including the power to correct identified safety and/or health hazards itself or require others to correct them." (Exh. J-1; p. 6, ¶ H) I find Century was a controlling employer, and it owed a duty "to other employees at the worksite," including the employees present on Lot 51 on October 12, 2016, because Century controlled the cited condition.

Century next argues that, as a controlling employer, it met the standard of "reasonable care" set out in the CPL.

A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

The CPL lists the pertinent factors in determining reasonable care.

Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:

- a. The scale of the project;
- b. The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;
- c. How much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise;

- d. More frequent inspections are normally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer had never before worked with this other employer and does not know its compliance history;
- e. Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.

Century addresses each factor of the reasonable care standard (Century's brief, pp. 31-35) and concludes it "met all reasonable care requirements set forth in the multi-employer doctrine and the citation cannot stand." (*Id.* at 35) These factors, however, are relevant in determining whether the controlling employer exercised "reasonable care to prevent and detect violations on the site." Reasonable care is not an issue in this case because, as established in the previous section addressing employer knowledge, Century had actual knowledge the crane was positioned so that it could be operated closer than 20 feet to the overhead power lines, creating a hazardous condition. The frequency of the inspections is not at issue because the Secretary has established Century had actually detected the violative condition, yet did nothing to prevent it.¹⁰

Century argues it reasonably relied on JLNC, as the supplier of the crane and its operator, to set up and operate the crane safely, citing *Sasser Electric and Manufacturing Co.*, 11 BNA OSHC 2133, 2136 (No. 82-178, 1984) ("[W]hen some of the work is performed by a specialist, and 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

¹⁰ In its brief, Century argues it had a written safety and health program and engaged Safety Consultant Robert Masterson to coach supervisors and make onsite visits (Century's brief, pp. 16-18). Century's *Safety Manual* provides an incorrect and confusing rule regarding cranes and overhead power lines.

A distance of at least ten feet shall be maintained between any part of any operating crane, its load or attachments or any overhead power line. When lines rated over 50 kV are encountered, minimum clearance between the lines and any part of the crane or load shall be ten feet plus 0.4 inch for each 1 kV over 50 kV, or twice the length of the line insulator but never less than ten feet. (Exh. C-21, p. 99).

As CSHO Starks testified, both the minimum safe distance for power lines when the voltage is unknown and the equation for determining the minimum safe distance when the voltage is known in Century's *Safety Manual* are incorrect (Tr. 82-85); see § 1926.1408(a)(2). I find Century's safety rule addressing the proximity of cranes to overhead power lines is inadequate and contrary to the requirements of the cited standard.

foresee that the work will be performed unsafely.”). *Sasser* is inapposite here.¹¹ Century’s reliance on JLNC was not reasonable because Century had every reason to foresee the crane operation would not be performed safely—the Century construction manager could plainly see the crane was set up too close to the overhead power lines and several trusses were lying directly under the lines. *Sasser* “does not apply when an employer has reason, by way of expertise, control, and time, to foresee a danger to its employees.” *Fabi Construction Co., Inc. v. Secretary of Labor*, 508 F.3d 1077, 1083 (D.C. Cir. 2007). Century’s construction manager could foresee the danger to the subcontractors’ employees of the crane’s boom or cable contacting the energized power lines or coming close enough to create an electrical arc flash.

I find the employees working on Lot 51 the morning of October 12, 2016, had access to the violative condition of the crane coming within 20 feet of the energized power lines. Century, as controlling employer, owed the subcontractors’ employees a duty of care.

Conclusion

Century stipulated the cited standard applies to the cited condition and the standard was violated. The Secretary has established Century had actual knowledge of the violation and the employees of two of its subcontractors, to whom Century owed a duty of care, had access to the violative condition. The Secretary has proven Century committed a violation of § 1926.1408(a)(2).

CHARACTERIZATION OF THE VIOLATION

The Secretary characterized the violation of § 1926.1408(a)(2) as serious. A serious violation is established when there is “a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” 29 U.S.C. § 666(k). Here, one employee died and another was seriously injured as a result of the crane coming within 20 feet of the energized power lines. The violation is serious.

PENALTY DETERMINATION

“In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith.” *Burkes Mech., Inc.*, 21 BNA

¹¹ By its own terms, *Sasser* limits its holding to situations in which a single employer hires another employer for a specific service, and the hiring employer’s employees are exposed to a hazard. “We do not consider an employer’s duty when its own employees are not exposed to the hazard or when it is engaged in work at a multi-employer worksite, but limit our concern to the situation here under review.” *Id.* at n. 4.

OSHC 2136, 2142 (No. 04-0475, 2007). “Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005) (citation omitted).

N. E. Precast, LLC; & Masonry Servs., Inc., 26 BNA OSHC 2275, 2282 (Nos. 13-1169 and 13-1170, 2018).

The Secretary and Century stipulate Century “employs approximately 500 employees.” (Exh. J-1, p. 6, ¶ C) Century has a history of violations of OSHA standards (Tr. 113). A written safety and health program is often grounds for crediting an employer with good faith. In this instance, the relevant work rule is incorrect and confusing as previously found. I give no credit for good faith.

The gravity of the violation is high and its severity outweighs the other factors. “Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors.” *Natkin & Co. Mech. Contractors*, 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973).” *Id.*

One employee was killed, one was seriously injured, and the four other JPGC employees and Mr. Shadwick were exposed to hazards of electrocution and fire. The duration of exposure was approximately half an hour (from when the JPGC employees arrived at the site until the accident occurred). The likelihood of injury was high. Century took no precautions against injury. Based on these factors, I assess a penalty of \$12, 675.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

Item 1 of the Citation, alleging a serious violation of § 1926.1408(a)(2), is **AFFIRMED**, and a penalty of \$12,675.00 is assessed.

SO ORDERED.

/s/ _____

Date: July 16, 2018

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia