



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

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 13-0777

TOWER MAINTENANCE CORP.,

Respondent.

**APPEARANCES:**

David M. Jaklevic, Esq.; Radha Vishnuvajjala, Esq.; U.S. Department of Labor, Office of the Solicitor, New York, NY  
For the Complainant

Michael Rubin, Esq.; Goldberg Segalla LLP, Buffalo, NY  
For the Respondent.

**REMAND ORDER**

Before: ATTWOOD, Chairman; and MACDOUGALL, Commissioner.

BY THE COMMISSION:

Before the Commission is a decision of Administrative Law Judge Carol A. Baumerich affirming two citations issued to Tower Maintenance Corporation by the Occupational Safety and Health Administration. OSHA cited Tower following a 2012 fatal accident at a New Jersey worksite where it was engaged in painting an electric transmission tower. The Secretary subsequently amended these citations twice, with the more recent amendment alleging “alternative” violations under several citation items. One of these items is Citation 2, Item 2 (characterized as Serious Repeat), for which we specifically seek clarification.

With respect to Item 2, there is a discrepancy between the order of the alleged violations described in the Secretary’s motion to amend his complaint and the order of the alleged

violations contained in the amended complaint itself. In the amended complaint, the alleged violations are as follows: 29 C.F.R. §§ 1910.132(f) (training for employees using personal protective equipment (PPE)), 1910.332(b)(1) (training for employees; electrical standard), and 1910.332(b)(2) (additional training for “unqualified persons”; electrical standard), “or in the alternative” violations of two provisions under the electric power generation, transmission, and distribution standard—29 C.F.R. §§ 1910.269(a)(2)(i) (training for employees) and 1910.269(a)(2)(ii) (additional training for qualified employees). (Amended Complaint at ¶ IX). However, in the Secretary’s motion to amend the complaint, the order of these allegations is reversed—a sequence which was reiterated in his post-hearing brief, as follows:

Tower Maintenance violated 29 C.F.R. §§ 1910.269(a)(2)(i) and (a)(2)(ii) by failing to provide each employee with fall protection training required by the standard and by failing to provide training on the work practices necessary for their safety. *In the alternative*, Respondent failed to comply with the parallel requirements in [§§] 1910.132(f) and 1910.332(b)(1) and (b)(2). As [§] 1910.269 makes clear, the training requirements in § 1910.269 apply “in addition to all other applicable standards contained in this Part 1910.” 29 C.F.R. § 1910.269(a)(1)(iii). Thus, Respondent was ultimately required to comply with both sets of training requirements because employees were performing work covered by both [§] 1910.269 and Subpart S. However, because Tower Maintenance was performing work more specifically covered by [§] 1910.269 – namely, maintenance work on a transmission tower that required the use of “qualified” employees – and because the language of [§] 1910.269 also encompasses the training requirements of Subpart S, *the Secretary cites primarily to a violation of the training provisions in [§] 1910.269.*

(Sec’y Post-Hr’g Br. at 61) (emphasis added). The Secretary also stated that “because [§] 1910.269 encompasses the requirements in Subpart S and is more specific to the work performed by Tower Maintenance, [§] 1910.269 is the more appropriate standard.” *Id.* at 63.

In her decision, the judge analyzed this citation item in the same order the Secretary set out in his post-hearing brief—noting that the Secretary alleged the § 1910.269 violations “primarily.” *Tower Maint. Corp.*, Decision and Order, No. 13-0777, May 16, 2016, slip op. at pp. 8, n.10 and 63-66. It is unclear, however, whether the judge accepted this as a further amendment of the Secretary’s amended complaint—albeit without a motion or an express ruling—or if she simply determined that the Secretary mistakenly reversed the order of the allegations as set forth in his amended pleading.

In addition, the judge also appears to have affirmed violations of almost all the provisions alleged under this citation item—including those alleged by the Secretary in the alternative.<sup>1</sup> *Tower Maint. Corp.*, slip op. at pp. 67-70. Indeed, the judge’s order states as follows: “Item 2 of Citation 2, alleging a repeat violation of 29 C.F.R. § 1910.269(a)(2)(i) is AFFIRMED. Further, Item 2 of Citation 2, alleging serious violations of 29 C.F.R. §§ 1910.269(a)(2)(ii); 1910.332(b)(1) and (b)(2), is *also* AFFIRMED.” *Id.*, slip op. at p. 77 (emphasis added). Under the Commission’s procedural rules, “[a] party may set forth two or more statements of a claim or defense alternatively . . . .” 29 C.F.R. § 2200.30(e). Where, as here, the Secretary makes an alternative allegation, only one of his allegations can prevail, i.e. the alternative allegation is moot if the first provision alleged is found to apply. *See, e.g., MasTec, N. Am., Inc.*, 20 BNA OSHC 1900, 1902 n.4 (No. 99-0252, 2004) (“Since we find compliance with the terms of [§] 1926.950(c)(1), we need not consider the alternative allegation under [§] 1926.950(c)(2).”); *Nat’l Industr. Constructors, Inc.*, 10 BNA OSHC 1081, 1086 n.8 (No. 76-4507, 1981) (where Secretary alleged alternative violations of two separate provisions of OSHA construction standards, Commission held that “resolution of the issues raised concerning the alternative allegation . . . is unnecessary[.]” once one provision is found applicable); *see also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1282 (3d ed. 2016) (“Alternative . . . pleading usually is drafted in terms of ‘either-or’ propositions . . .”).

In these circumstances, we remand this matter to the judge to clarify her decision regarding which provisions cited under Citation 2, Item 2 the Secretary ultimately alleged in the first instance, and which he alleged in the alternative. Based on her ruling on that issue and given her decision to affirm all the violations alleged under this citation item, the judge should vacate the violations she determines the Secretary alleged in the alternative. *See, e.g., Jimerson*

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<sup>1</sup> The judge vacated the Secretary’s allegation that Tower violated 29 C.F.R. § 1910.132(f) based on her finding that the provision did not apply. *Tower Maint. Corp.*, slip op. at p. 66 n.57.

*Underground, Inc.*, 21 BNA OSHC 1459, 1461-62 (No. 04-0970, 2006) (remanding case where judge had not ruled on the Secretary's motion to amend complaint to assert alternative allegations).

SO ORDERED.

/s/ \_\_\_\_\_  
Cynthia L. Attwood  
Chairman

/s/ \_\_\_\_\_  
Heather L. MacDougall  
Commissioner

Dated: July 6, 2016



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Appearances: David M. Jaklevic, Esquire  
Radha Vishnuvajjala, Esquire  
U.S. Department of Labor, Office of the Solicitor, New York, New York,  
For the Complainant

Eli J. Rogers, Esquire  
JoAnne M. Bonacci, Esquire  
Dreifuss Bonacci & Parker, PC, Florham Park, New Jersey,  
For the Respondent

Before: Carol A. Baumerich  
Administrative Law Judge

**DECISION AND ORDER**

Tower Maintenance Corporation (Tower Maintenance or Respondent) is in the business of “electric transmission tower repainting, maintenance, and related activities.” (Ex. J-1 at ¶ 10.) Tower Maintenance employs teams of painters that climb and paint electric transmission towers. On October 25, 2012, one of these painters, JV, was electrocuted while painting a transmission

tower at a height of approximately 70 feet in Edison, New Jersey.<sup>1</sup> (Tr. at 151; Ex. J-1 at ¶¶ 11, 14, 27.) Immediately after being electrocuted, JV fell. As he fell, JV hit another Tower Maintenance painter, RS, who at the time of impact was working at a height of approximately 40 feet. (Tr. at 151.) Both employees then fell to the ground. JV died as a result of the electrocution and RS suffered a broken shoulder, rib, and arm as a result of the fall. (Ex. J-1 at ¶¶ 14, 15.) Both employees were wearing personal fall arrest system (PFAS) devices.

As a result of this incident, the Occupational Safety and Health Administration (OSHA) inspected the worksite and, on April 8, 2013, issued Tower Maintenance two citations alleging violations of OSHA's electrical safety standards, fall protection standards, and training standards, and initially proposing a \$35,000 total penalty (later proposing a total penalty of \$91,000).<sup>2</sup> Tower Maintenance filed a timely notice of contest on April 12, 2013, bringing this matter before the Occupational Safety and Health Review Commission (Commission).

A hearing was held in this matter in Newark, New Jersey, on the following dates: August 26–29, 2014, and January 12–14, 2015. Deposition testimony of three witnesses, two of which

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<sup>1</sup> For personal privacy concerns, the names of the deceased, JV, and the injured, RS, have been abbreviated throughout these proceedings.

<sup>2</sup> In addition to amending the proposed penalty, the Secretary also, twice, amended the standards which Respondent allegedly violated, and amended the characterization of one of the citation items. See Complaint dated August 2, 2013 and Amended Complaint dated July 14, 2014. These amendments were unopposed by Respondent at the time the Secretary submitted his motions, and with no prejudice to Respondent having been shown by the amendments, all of which originated out of these same circumstances, they were approved. See Order Granting, In Part, and Withdrawing, In Part, the Secretary's Motion to Compel Regarding Interrogatories, and Approving the Withdrawal of the Secretary's Motion to Compel Regarding Document Requests (December 27, 2013) at 5; Order Granting the Secretary's Motion to Amend the Citations and Complaint (July 31, 2014); see also *N. Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 104 (2d Cir. 1996) (“[i]n an administrative proceeding ... pleadings are liberally construed and easily amended.”); cf. *Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 824 (3d Cir. 1978) (finding abuse of discretion when Commission allowed Secretary to amend citation, which drastically changed the legal and factual matters in dispute and therefore prejudiced Respondent, four months after original citation was issued and nine days before the hearing). The previous citation allegations are set out in detail in Appendix A.

were video recorded, is also in the record. (Exs. C-30, C-30(a), J-2 (Da Silva); C-31, C-31(a) (Fonseca Alves); R-50 (Psareas)<sup>3</sup>.) Because some witnesses did not speak English as their primary language, an interpreter was utilized at points during the hearing and depositions. (Tr. at 231-232, 235 (RS), 324-325 (Mackeivicz), 1003-1004 (Mackeivicz); Exs. C-30 at 7 (Da Silva), C-31 at 8 (Fonseca Alves).) Both parties filed post-hearing briefs and post-hearing reply briefs. As discussed below, the citations and proposed penalties are affirmed.

### **Jurisdiction**

The record establishes that Tower Maintenance filed a timely notice of contest and, at all relevant times, was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act). (Amended Complaint and Answer at ¶¶ III, XIII; Ex. J-1 at ¶¶ II.2, II.3.) The Commission has jurisdiction over the parties and subject matter in this case pursuant to section 10(c) of the Act.

### **Threshold Issues**

For each of the citation items, the Secretary alleged electrical, fall protection, and training violations of either OSHA's "electric power generation, transmission and distribution" standards found in 29 C.F.R. § 1910.269<sup>4</sup> or, in the alternative, of OSHA's general electrical standards found in subpart S starting at § 1910.301 and OSHA's general personal protective equipment (PPE) standards found in subpart I at § 1910.132.

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<sup>3</sup> By Order dated March 4, 2015, Nikolaos Psareas' deposition was received into evidence (Ex. R-50), together with Psareas' training documents (Ex. R-38), and Respondent's Response to the Secretary's first set of interrogatories (Ex. C-6 at 1 through 13).

<sup>4</sup> At the time of the violations alleged in this case the 1994 version of the standards in the relevant sections were in effect and this decision is based thereon.

To determine which standard applies, the Commission looks to the cited working conditions. *S. Pan Servs. Co.*, 25 BNA OSHC 1081, 1085 (No. 08-0866, 2014). On October 25, 2012, Tower Maintenance was engaged in repainting a lattice-type electric transmission tower. (Tr. at 468; Ex. J-1 at ¶¶ 10, 11.) The purpose of Respondent’s painting was to maintain the transmission tower. (Tr. at 469.) Section 1910.269 applies to “the operation and maintenance of electric power generation, control, transformation, transmission, and distribution lines and equipment.” 29 C.F.R. § 1910.269(a)(1)(i). Based on this evidence, I find that Respondent’s project in Edison, New Jersey was a § 1910.269 project. *See Pub. Util. Maint., Inc.*, 417 F. App’x 58 (2d Cir. 2011) (unpublished) (holding that § 1910.269 applies to painting performed as maintenance of an electric transmission tower).<sup>5</sup>

For the alleged electrical violations, however, many of the standards within § 1910.269 presuppose that only “qualified” workers will be working because the working conditions are so inherently dangerous. Therefore, many of the § 1910.269 standards explicitly state that the more protective standards under subpart S of OSHA’s general electrical standards apply in those circumstances when “unqualified” workers are working. *See* 29 C.F.R. § 1910.269(a)(1)(ii) (stating that the electrical safety-related work practices of § 1910.269 do not apply “to electrical safety-related work practices ... covered by subpart S of this part.”); *see also Electrical Power Generation, Transmission, and Distribution; Electrical Protective Equipment*, 59 Fed. Reg. 4320-01, 4334-35 (Jan. 31, 1994) (“It should be noted that, if unqualified employees are working on, near, or with electric power generation, transmission, and distribution installations, §§1910.332 through 1910.335 [in subpart S] apply in any event”; “the Agency has made application of most of the electrical requirements in [1910.269] dependent on whether or not ...

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<sup>5</sup> As the Secretary notes, whether the employees were “qualified” was not an issue in the *Pub. Util. Maint., Inc.* case. (Sec’y Br. at 26 n.23.)



the employee is qualified to perform the work.”); *Electrical Safety-Related Work Practices*, 55 Fed. Reg. 31984-01, 31990 (Aug. 6, 1990) (“[w]ork performed by other than qualified persons on, near, or with electrical installations is covered by the work practices contained in [subpart S] ... because unqualified persons, by definition, do not have the training nor the skills necessary to perform work safely very close to electrical installations.”).

Subpart S addresses the distance at which an “unqualified person” must stay from an energized power line, and, under the facts of this case, it is a longer distance (10 feet) than what is prescribed in § 1910.269 (2 feet 4 inches). 29 C.F.R. § 1910.333(c)(3)(i)(A)(1); 29 C.F.R. § 1910.269(l)(2). In other words, an “unqualified person” must stay further away from an energized power line than a “qualified person.” A threshold issue in this case, therefore, is whether Respondent’s painters on the Edison project were “qualified.”

Furthermore, with regard to the alleged fall protection and training violations, a finding of whether Respondent’s workers were “qualified” also affects the standards at issue. For the alleged fall protection violation, the cited § 1910.269 standard requires all unqualified employees “to use fall protection any time they are more than 4 feet above the ground,” as opposed to specific situations in which a “qualified person” is not required to use fall protection. 29 C.F.R. § 1910.269(g)(2)(v) Note 2.<sup>6</sup> With respect to the alleged training violation, the Secretary explains that Citation 2, Item 2 was pled in the alternative because, while the primary cited standard was the “more appropriate” standard cited in this case, Respondent was also required to comply with the requirements in subpart S. (Sec’y Br. at 62-63.) Indeed, § 1910.269 also

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<sup>6</sup> The Secretary pled an alleged violation of subpart I of part 1910 for Citation 2, Item 1 in the alternative “in the unlikely event” that § 1910.269 was found not applicable. (Sec’y Br. at 36 n.28.)

requires an employer to comply with any other applicable section 1910 standard, notwithstanding § 1910.5(c)<sup>7</sup>:

This section [1910.269] applies in addition to all other applicable standards contained in this Part 1910. Specific references in this section to other sections of part 1910 are for emphasis only.

29 C.F.R. § 1910.269(a)(1)(iii). As discussed below, the “qualified person” finding affects the applicability of the cited standards for the alleged training violation in that two of the standards cited in the alternative also apply to Respondent’s unqualified employees on the Edison tower.

The analysis of whether Respondent’s employees were “qualified” follows the findings of fact.

### **Alleged Violations**

The July 14, 2014 Amended Complaint alleges violations of the following standards, which standards are adjudicated in this case.

**Citation 1, Item 1**, the alleged electrical safety violation, alleges a serious violation of 29 C.F.R. § 1910.333(c)(3)(i)(A)(1), which provides:

The employer shall ensure that when an unqualified person is working in an elevated position near overhead lines, the location shall be such that the person and the longest conductive object he or she may contact cannot come closer to any unguarded, energized overhead line than **10 feet** for voltages to ground 50 kV or below.

29 C.F.R. § 1910.333(c)(3)(i)(A)(1) (emphasis added); Amended Complaint at ¶ VII.<sup>8</sup> The Secretary proposes a penalty of \$7,000 for this citation item.

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<sup>7</sup> 29 C.F.R. § 1910.5(c) states in pertinent part: “If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.”

<sup>8</sup> The Secretary alleged a violation, *in the alternative*, of 29 C.F.R. § 1910.269(l)(2), which provides:

**Citation 2, Item 1**, the alleged fall protection violation, alleges a serious / repeat / willful violation of 29 C.F.R. §§ 1910.269(g)(2)(iii) and (g)(2)(v), which, according to the Amended Complaint, provide:

The employer shall ensure that each employee working at elevated locations more than 4 feet (1.2 meters) above the ground on poles, towers, or similar structures uses fall arrest equipment. The employer shall inspect body belts, safety straps, lanyards, and body harnesses before use each day to determine that the equipment is in safe working condition. Defective equipment may not be used.

Amended Complaint at ¶ VIII.<sup>9</sup> The Secretary proposed a \$46,200 penalty for this citation item in the Amended Complaint, but now proposes in his post-hearing brief that the penalty for this citation item should be the maximum statutory penalty of \$70,000. (Sec’y Br. at 81.)

**Citation 2, Item 2**, the alleged training violation, alleges a serious / repeat violation of 29 C.F.R. §§ 1910.269(a)(2)(i) and (a)(2)(ii), which, according to the Amended Complaint, provide:

Employees shall be trained in and familiar with the safety-related work practices, safety procedures, and other safety requirements in this section that pertain to their respective job assignments. Qualified employees shall also be trained and competent in the skills and techniques necessary to: distinguish exposed live parts from other parts of electric equipment; determine the nominal voltage of exposed

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The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than the minimum approach distance set forth in this standard.

Amended Complaint at ¶ VII. Given the voltages of the exposed energized power lines attached to the tower (26 kV and 138 kV), the Secretary alleged that the minimum approach distance under section 1910.269 was **2 feet, 4 inches**. Amended Complaint at ¶ VII. As discussed below, I find that the primary cited standard, 29 C.F.R. § 1910.333(c)(3)(i)(A)(I), is the applicable standard for this citation item, Citation 1, Item 1.

<sup>9</sup> The Secretary alleges, *in the alternative*, that the cited conduct violated 29 C.F.R. §§ 1910.132(a) and (e), which, according to the Amended Complaint, provide:

The employer shall ensure that protective equipment is provided, used, and maintained in a reliable condition wherever it is necessary by reason of hazards of process or environment capable of causing injury or impairment. Defective or damaged personal protective equipment shall not be used.

Amended Complaint at ¶ VIII. As discussed below, however, I find that §§ 1910.269(g)(2)(iii) and (g)(2)(v) are the applicable standards for this citation item, Citation 2, Item 1.

live parts; determine the minimum approach distances correspondent to the voltages to which the qualified employee will be exposed, and; the proper use of the special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on or near exposed energized parts.

Amended Complaint at ¶ IX. Here, I find that, as discussed below, none of Respondent's employees are "qualified." To the extent that Respondent sent unqualified employees, and in some instances untrained employees, to work on the Edison tower within the minimum approach distance on this § 1910.269 project, I find that, as discussed below, Respondent violated the cited standard that addressed the training requirements for "qualified" employees. Further, I find that, as discussed below, the standards cited in the alternative also apply to Respondent's workers in this case because these workers were not "qualified."<sup>10</sup>

For Citation 2, Item 2, the Secretary also alleges a serious / repeat violation of 29 C.F.R. §§ 1910.132(f) and 1910.332 (b)(1) and (2), which, according to the Amended Complaint, provide:

The employer shall provide training to each employee who is required to use personal protective equipment in the proper use, maintenance, and care of the personal protective equipment. Employees shall also be trained in and familiar with the safety-related work practices required by §§ 1910.331 through 1910.335 that pertain to their respective job assignments. **Employees who are not qualified persons shall also be trained in and familiar with any electrically related safety practices not specifically addressed by §§ 1910.331 through 1910.335 but which are necessary for their safety.**

(Sec'y Br. at 61); Amended Complaint at ¶ IX (emphasis added). The Secretary proposes a \$14,000 penalty for this citation item.

Respondent filed its Answer to the Amended Complaint on August 8, 2014. In its Answer, Respondent denied the specific Amended Complaint allegations and asserted the

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<sup>10</sup> The Secretary alleged violations of the § 1910.269 standards, in the alternative, in the Amended Complaint, and then alleged them primarily in his post-hearing brief. Amended Complaint at ¶ IX. (Sec'y Br. at 61.)

following affirmative defenses, among others: (1) excessive penalty in light of the small size of the employer, among other factors, (2) the violations, if any, were non-serious, (3) “adequate safety program run by knowledgeable supervisory personnel” for the alleged training violation, (4) training was done prior to allowing employees to perform work for the alleged training violation, (5) “Respondent ensured the effectiveness of training and that the employees had knowledge and skills needed to perform the operations safely” for the alleged training violation, (6) unpreventable employee misconduct for the alleged training violation, (7) all of the citations were not issued with “reasonable promptness,” (8) unpreventable employee misconduct for the alleged fall protection violation, (9) infeasibility for the alleged fall protection violation, (10) unpreventable third-party and / or owner misconduct for the alleged electrical violation, (11) unpreventable employee misconduct for the alleged electrical violation, (12) unforeseeability for the alleged electrical violation, (13) “third-party and / or owner assured that Respondent’s employees would not come into contact with energized electrical lines in the course of their work, and therefore, Respondent exercised reasonable diligence to ensure compliance with the [alleged electrical] standards,” (14) impossibility for the alleged electrical violation, (15) vindictive prosecution by the Secretary.<sup>11</sup> Answer at ¶¶ IV-XXVIII.

## **Factual Background**

### **I. The Company – Tower Maintenance**

#### **A. Officers and Employees**

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<sup>11</sup> Although raised in its Answer, many of these defenses were not addressed by Respondent as the proceedings progressed. Many were not addressed in Respondent’s post-hearing briefs. This decision adjudicates the defenses addressed in Respondent’s post-hearing briefs. Those defenses not addressed in Respondent’s post-hearing briefs have been deemed abandoned. *L & L Painting Co.*, 23 BNA OSHC 1986, 1989 n.5 (No. 05-0055, 2012) (item not addressed in post-hearing briefs deemed abandoned).

Tower Maintenance was created in 2008 by Elizabeth Vlahopoulos, Tower Maintenance's President and sole owner. (Tr. at 783, 831, 908.) Ms. Vlahopoulos has worked for more than twenty years in the construction industry, working mainly in the office. (Tr. at 903-905.) Ms. Vlahopoulos' husband, Peter Vlahopoulos, is Tower Maintenance's project manager / supervisor and has been working for Tower Maintenance since it was created. (Tr. at 938-939.) Peter Vlahopoulos has always worked in the construction industry, has over 25 years of experience painting electrical towers, and has supervised "thousands" of painters. (Tr. at 1037, 1053.)

Tower Maintenance employs mainly seasonal workers, having only three year-round, office-staff employees. (Tr. at 833-834.) Its work is seasonal. Its seasonal staff of painters and project supervisors fluctuates with the work load, sometimes ranging from 10 - 30 employees. (Tr. at 833-835. *See* Tr. at 723.) According to Elizabeth Vlahopoulos, "everyone goes where the work is. That's why we always share workers,<sup>12</sup> like the guys from Morris [Painting]<sup>13</sup>, they go to public utilities, they come to us, and everybody trains them." (Tr. at 835.)

During the months of August to October of 2012, it was the "busy season" for painting. (Tr. at 696, 723.) Additionally, during the Edison project, Tower Maintenance experienced employee turnover and employees taking unscheduled days off. (Tr. at 698-699.) Some painters did not show up to work because of the nature of the job – it was intensive labor, in hot weather, and some workers needed a break. (Tr. 721-723.) As a result, Tower Maintenance continued to

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<sup>12</sup> Tower Maintenance does not staff tower painting jobs with union labor. Ms. Vlahopoulos testified "[t]he union does not train tower painters, so they can't give us painters to paint towers." (Tr. at 835. *See* Tr. at 838).

<sup>13</sup> Several of the painters who worked on the Edison project for Tower Maintenance previously worked for Morris Painting. (Tr. at 239, 693, 1006; Ex. C-30 at 19-20; Ex. C-31 at 50, 112-117.) According to RS, Morris Painting's headquarters was located in Ohio and its jobs were located in Michigan. (Tr. at 239.) The jobs and work were similar to the job at issue here, painting electric transmission towers. (Tr. at 239-240, 303-304.)

hire painters during the project in an effort to fully staff the crews. Some painters, including the deceased JV, were hired several weeks after the project began. (Tr. at 697-698, 722-723.)

The workers for the Edison project at issue here consisted of two teams, one led by supervisor Nikolaos Psareas and the other led by foreman Josimar Mackeivicz.<sup>14</sup> (Tr. at 705-706.) On October 25, 2012, the Tower Maintenance employees engaged in tower painting work on the PSE&G Edison transmission tower painting project were JV, RS, Alessandro De Almeida, Alan Fonseca Alves,<sup>15</sup> Marcelo Silva, Marcelo Leiroz, Ederson Trizotte, Osias Figugiredo, Caio Resende, Domingos Da Silva, and Euflates Passos. (Ex. J-1 at ¶¶ 12-13, 17-27.) The painters that testified in this case spoke primarily Portuguese, so they required an interpreter during depositions and at the hearing. (Tr. at 231-232, 235 (RS); Exs. C-30 at 7 (Da Silva), C-31 at 8 (Fonseca Alves).) Peter Vlahopoulos speaks no Portuguese, only English and Greek. (Tr. at 937.) Supervisor Psareas speaks English, Greek, and “some Spanish,” but “not much” Portuguese. (Tr. at 682.) Foreman Mackeivicz speaks Portuguese and “intermediate” English, and also required an interpreter at the hearing.<sup>16</sup> (Tr. at 324-325, 1003-1004.)

## **B. History of OSHA Violations**

Tower Maintenance has a history of OSHA violations. (Ex. J-1 at ¶¶ 4, 5, 6; Exs. C-25, 26, 27; R-45, 46.) In 2011, Tower Maintenance settled an OSHA citation alleging violations of OSHA’s construction training and fall protection standards, after one of its employees fell from

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<sup>14</sup> RS testified that at times, prior to the day of the accident, there sometimes were three crews, one crew without a supervisor present at that tower job. (Tr. at 313.)

<sup>15</sup> The parties stipulated that Alan Fonseca Alves is also known as “variations of” Alan Alves, Alan “Gettes,” and Alan Fonseca. (Tr. at 716-718.) The spelling of “Gettes” throughout the record also varies to include “Gedes” and “Kedis.” *See, ex.*, Ex. C-23 at 4-5. For consistency, Alan Fonseca Alves will be referred to as Fonseca Alves in this decision.

<sup>16</sup> Josimar Mackeivicz was also known by a nickname “Pollacko.” (Tr. 1018).

the tower he was painting in Macungie, Pennsylvania in 2010.<sup>17</sup> (Tr. at 787, 896, 958-959, 961-962.) That employee was improperly tied off on a step bolt on a pole tower when he fell and died as a result of the fall. (Tr. at 787, 896, 958-962, 988-991.) Peter Vlahopoulos was the project manager on that project. (Tr. at 958.)

Tower Maintenance crafted a corrective action plan as a consequence of the 2010 Macungie accident. (Tr. at 784-788, 896, 927-928; Ex. R-3.) In the corrective action plan, which was submitted as part of its bid for the Edison project at issue here, Tower Maintenance stated that, due to the 2010 Macungie fall accident, Tower Maintenance has taken the following steps, among 5 steps, to prevent future occurrences:

- 1) The competent person is to remain onsite at all times when workers are working at height;
- 2) The competent person is to inspect each worker's harness and lanyard not only at the start of each day; inspection of all safety equipment will be made again as each worker comes down from working at height. This inspection shall be done routinely and repeatedly throughout the day and not only morning and at day's end.

(Tr. at 787-788; Ex. R-3 at TMC00731.) The corrective action plan is dated June 12, 2012. (Ex. R-3 at TMC00730.)

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<sup>17</sup> In the settlement agreement and Commission Final Order violations of the following standards were affirmed:

- (1) 29 C.F.R. § 1926.501(b)(1), which states in pertinent part: “Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems”;
- (2) 29 C.F.R. § 1926.502(d)(21), which states in pertinent part: “Personal fall arrest systems shall be inspected prior to each use for wear, damage and other deterioration, and defective components shall be removed from service”;
- (3) 29 C.F.R. § 1926.503(b)(1), which states in pertinent part: “The employer shall verify compliance with paragraph (a) of this section [Fall Protection “Training Program”] by preparing a written certification record.”

(Ex. J-1 at ¶¶ 4-6; Exs. C-25, 26, 27.)



Before the creation of Tower Maintenance in 2008, Peter Vlahopoulos was the vice-president of another company, Tower Painting Company, Inc. (Tr. at 964-967, 971.) Elizabeth Vlahopoulos was also employed by Tower Painting Company, Inc., prior to the creation of Tower Maintenance. (Tr. at 906-907.) Tower Painting Company, Inc., also employed teams of painters and, in March 2007, also was cited for OSHA violations. (Tr. at 964-965, 980; Exs. C-46, C-47.) Tower Painting Company, Inc. received citations for failure to provide employees with adequate fall protection, failing to inspect employees' PFAS devices for damage prior to each use, and failing to remove defective PFAS devices from service, among other citations.<sup>18</sup> (Tr. at 980-85; Exs. C-46 at 2; C-47 at 13.) The citations were affirmed in a Commission final order. (Ex. C-47.) *See Tower Painting Co., Inc.*, 22 BNA OSHC 1368 (No. 07-0585, 2008). Peter Vlahopoulos participated in the informal conference discussions with OSHA for that proceeding.<sup>19</sup> (Tr. at 980; Ex. C-51.)

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<sup>18</sup> The standards that were violated in that case included the following:

- 1) [Citation 1, Item 9] 29 C.F.R. § 1926.501(b)(15), which states in pertinent part: “each employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system.”
- 2) [Citation 1, Item 10] 29 C.F.R. § 1926.502(d)(21), which states in pertinent part: “Personal fall arrest systems shall be inspected prior to each use for wear, damage and other deterioration, and defective components shall be removed from service.”

(Exs. C-46 at 1-2; C-47 at 4, 16-17.)

<sup>19</sup> Counsel for Respondent made an offer of proof that Tower Painting Company, Inc. was not a predecessor to Tower Maintenance. (Tr. at 910.) However, whether Tower Painting Company, Inc. is a predecessor to Tower Maintenance is not the relevant inquiry. The repeat characterizations alleged in the citations in the instant case are based on previous citations to Tower Maintenance, not to Tower Painting Company, Inc. The previous citations affirmed against Tower Painting Company, Inc. are relevant in the instant case because Peter Vlahopoulos was involved in the settlement discussions for those citations. (Ex. C-51.) His awareness of the previous violations, even violations by Tower Painting Company, Inc., is relevant, as discussed *infra*, to the knowledge element and to the willful characterization allegation of Citation 2, Item 1 at issue here. *MJP Constr. Co., Inc.*, 19 BNA OSHC 1638, 1648 (No. 98-0502, 2001), *aff'd without published opinion*, 56 F. App'x 1 (D.C. Cir. 2003) (holding that supervisors can be

## **C. The Project – Edison, New Jersey**

### **1. Contract and Scope of Work**

Tower Maintenance contracted with New Jersey franchise utility company, Public Service Electric and Gas (PSE&G), to paint 214 steel “lattice-type transmission support structures,” also known as “electric transmission towers,” along highway Route 1 from Trenton to Edison, New Jersey. (Tr. at 468-469.) PSE&G wanted these structures painted as a maintenance function, to protect the towers from weathering, and to “extend the life of the structure.” (Tr. at 469.) As part of the bid process, PSE&G required companies to submit a proposal package that included a site-specific safety plan and a job hazard analysis. (Tr. at 478.) As part of its proposal, Tower Maintenance submitted a site-specific safety plan, entitled Health and Safety Plan (HASP) for PSE&G: Transmission Structure Painting Project & Lead Paint Remediation RFP 31368 Various PSE&G Transmission ROW – New Jersey. (Tr. at 478; 942-943; Ex. C-3.) It was dated June 11, 2012. (Ex. C-3 at 1.) PSE&G requires bidders to submit such a plan as part of the bid package so that PSE&G has “a level of confidence that they have a plan and they know the work that they’re [d]oing and the hazards of the work that they’re doing.” (Tr. at 478.) Tower Maintenance also submitted a PSE&G Contractor Safety

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“chargeable with knowledge of the requirements of the standard based on their prior work experience, wherever that experience originates.”).

Counsel for the Secretary submitted a motion during the trial to amend the Amended Complaint “to include any potential successor entities as Respondents in this matter.” (Tr. at 18.) Respondent objected to the motion. (Tr. at 20.) The motion was received, but the ruling was withheld pending briefing on the matter. (Tr. at 20, 406-408; Ex. C-48.) The Secretary has not addressed this issue in his post-hearing briefs. Consequently, the matter is deemed abandoned. *L & L Painting*, 23 BNA OSHC at 1989 n.5 (item not addressed in post-hearing briefs deemed abandoned).

Qualification Questionnaire as part of PSE&G's vendor approval process.<sup>20</sup> The safety questionnaire was signed by Elizabeth Vlahopoulos. (Tr. at 477-478, 785; Ex. R-3.)

After Tower Maintenance was awarded the contract, PSE&G held a "pre-construction" meeting with Tower Maintenance to go over:

...bringing them on the property, reviewing the scope of work, talking about expectations, safety, you know, they're expected to follow, their health and safety plan, wear all the proper PPE. We also covered, you know, a hundred percent attachment. We covered the lines would be energized. We covered where they would be staging from. We covered how they're going about collecting the paint chips that are scraped off of the structures. We talked about general housekeeping in and around the PSE&G right-of-way. We talked about, you know, there'd be a PSE&G representative at the assigned project and that would be their point of communication for anything that they needed. We talked about that person would also be there to escort them on and off the right-of-way in a legal fashion and so forth.

(Tr. at 480-481.) The record shows that Tower Maintenance's project manager / supervisor Peter Vlahopoulos and supervisor Nikolaos Psareas attended this meeting. (Ex. C-1 at 4.)

The towers that were to be painted were made of steel and were similar, but varied slightly, in design. (Tr. at 468, 506; Ex. C-30 at 72.) Each tower had a "body" or "cage" that consisted of the main structure itself, and also "arms," on which the energized power lines were attached. (Tr. at 469, 483. *See, e.g.*, Ex. C-14.) This "lay-out" of the energized power lines varied by the tower, *i.e.*, some towers had energized power lines attached to the arms located nearer to the tower body than others. (Ex. C-30 at 37.) The tower at issue had a total of 10 arms (two arms on either side of the tower, at five different levels) that supported 12 insulators

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<sup>20</sup> As discussed above, Tower Maintenance's corrective action plan, formulated as a result of the 2010 Macungie, Pennsylvania fatal accident, was included in this safety questionnaire. (Ex. R-3 at TMC00731.)

carrying power lines attached to the arms<sup>21</sup>. (Tr. at 485-495; Ex. C-40.) As relevant to this case, the power line of interest, power line No. 3, was attached to the subject tower's arm about 2-3 feet from the edge of the tower body. (Tr. at 153, 155-156, 285, 537-538; Exs. C-9, C-14, C-14B, C-14D, C-15A, C-15C, C-30 at 6-19, C-31 at 105-108, C-40.) Power line No. 3 was energized at 26 kV and was attached to the arm that was approximately 60 feet above the ground. (Tr. at 487, 495; Exs. C-14F, C-40.)<sup>22</sup> Also on the tower was a ladder made up of step bolts that ran up one leg of the tower to the tower's mid-level, and then the step bolt ladder ran up the centerline of the cage to the top of the tower. (Tr. at 138-139; Exs. C-14A; C-31 at 66.) Power line No. 3 was 6 feet 5 and ½ inches from the centerline of the tower. (Tr. at 492.)

Tower Maintenance contracted with PSE&G to paint only the tower body, not the arms where the power lines were attached. (Tr. at 431, 455, 483, 1044; Ex. C-1.) When beginning to paint a tower, the painters would climb up the step bolt ladder to their designated position within the truss structure, and then they would paint the truss structure of the tower around them. During the painting of a tower, members of the painting team would therefore be positioned at varying levels along the height of the tower. The painters first applied red colored primer to the towers and then painted the towers greenish-gray, twenty-four hours after the primer had been applied. (Tr. at 253-254, 259). The Keeler and Long paint, containing zinc dust, used by the painters on this project was conductive. (Exs. C-19, C-29).

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<sup>21</sup> A review of the photographs and the blueprint of this tower, in the record, reveals that there is an additional sixth level of arms located at the very top of the tower, but no insulators are attached to it. (Tr. at 506; Exs. C-14, C-40).

<sup>22</sup> A review of the blueprint of this model tower shows that the second level arm, on which power line No. 3 is attached, is 60 feet above the ground and the first level arms are 53 feet above the ground. (Ex. C-40.) This finding conflicts with the testimony from the PSE&G representative that the first level arms are 70 feet above the ground. (Tr. at 495.) Given the single question asked about the height of the arms, and the fact that the witness was reading the blueprint which stated “[7’ 0”]” as the distance between the first and second level arms, I find that his testimony was mistaken based on a misreading of the blueprint. (Tr. at 495; Ex. C-40.)

The method by which they painted was as follows: each painter carried two paint buckets, one on each hip, up the tower to his location. (Tr. at 254-255; Exs. C-30 at 45; C-31 at 66-67.) The painter stowed one paint bucket as reserve on a nearby step bolt or open area, and then proceeded to paint the tower using the other bucket. (Ex. C-31 at 66-67, 106-107.) By using a personal fall arrest system (PFAS) device, each painter had a certain amount of flexibility with his hands. They wore painting mitts on each hand, dipped their hands into the bucket of paint, and hand-painted the truss structure using their painting mitts. (Tr. at 256-257, 699-700, 1040-1042; Exs. C-30 at 46; C-31 at 69.) No brushes were used. Pictures and testimony in the record show that the painters got covered with paint head-to-toe as the painting job progressed. (Tr. at 257-259; Exs. C-28, C-30 at 63-66.) The painters got covered in paint because they were leaning against the freshly painted tower cage out of necessity to reach other parts of the tower cage. (Tr. at 305, 1052-1053; Ex. C-30 at 65.) The painters would latch and re-latch their PFAS device as they moved around the truss to paint the entire structure with their painting mitts. (Tr. at 891-892.) Because they were latching and re-latching their PFAS device, the clips on their PFAS device also got covered in paint because they could not take their painting mitts off during the repositioning. (Tr. 348, 700; Ex. C-30 at 66.)

According to Tower Maintenance, each painter was instructed to stay within the cage, or the truss structure, and not to venture out onto the arms where the electric distribution lines were attached. (Resp't Br. at 11, 17.) The testimony from the painters, however, indicates that this was not clearly, effectively, communicated to them. According to Da Silva, they painted the arms on some towers, and by doing so, emerged out of the tower cage. (Ex. C-30 at 50.) Da Silva, however, testified that the arms for the tower at issue here were not to be painted. (Ex. C-

30 at 74.) Fonseca Alves, on the other hand, testified that all of the arms for this tower were to be painted. (Ex. C-31 at 104.)

Each tower took about one to two hours to paint. By the end of October, the painters typically painted eight to ten towers per day. (Tr. at 256; 425-426.) On October 25, 2012, the team was on their third tower for that day when the accident occurred. (Tr. at 287.)

## **2. Project Supervision and Project Safety**

Neither Elizabeth nor Peter Vlahopoulos directly supervised the painters on the worksite. Elizabeth Vlahopoulos visited the Edison project once between August and October 25, 2012. (Tr. at 911.) Peter Vlahopoulos visited the Edison project once or twice per week, dividing his time between the Edison project and another project. (Tr. at 1020-1021.) The two leaders on the Edison project were supervisor Nikolaos Psareas<sup>23</sup> and foreman Josimar Mackeivicz. (Tr. at 705-706.)

As the supervisor, Psareas had the duty and responsibility to “follow through on the work and make sure we all work safely, and coordinate all the jobs through PSE&G.” (Tr. at 685.) He also was responsible for overseeing the progress of the job, making sure the job was done properly, and making sure everyone was following the safety rules. He had the authority to discipline employees and direct the work being performed. (Tr. at 685-686.)

As the foreman, Mackeivicz would supervise his painters from the ground, looking up at the painters using binoculars. (Tr. at 1011-1012.) He testified that if he saw a painter working without being tied off, he would yell up to him and give him a verbal warning. (Tr. at 1012.) After that, according to Mackeivicz, the employee would have to leave the job site if he saw him working without being tied off again. (Tr. at 1012.) Mackeivicz testified that he had to give two

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<sup>23</sup> Nikolaos Psareas’ wife’s cousin is Peter Vlahopoulos. (Tr. 687).

verbal warnings on the project at issue. (Tr. at 1012.) However, foreman Mackeivicz testified that he was not responsible for the safety of the employees. “I was responsible for telling them the details of the job, what was supposed to be done by them, but not for their safety.” (Tr. at 333.) He had the authority to discipline employees and to recommend to his superiors “for someone to be fired.” (Tr. at 333.)

The only formal Tower Maintenance safety policy in the record is the Health and Safety Plan (HASP) that was submitted to PSE&G as part of Tower Maintenance’s bid package. (Ex. C-3.) In the HASP, Peter Vlahopoulos and Nikolaos Psareas are noted as safety supervisors: Peter Vlahopoulos as the Project Director and Psareas as the Health and Safety Officer. (Ex. C-3 at 4-5.) Both were responsible for safety on the project worksite. Peter Vlahopoulos was ultimately responsible for complying with the OSHA regulations. (Tr. at 944; Ex. C-3 at 4-5.) Although required by the HASP, the record does not contain any evidence that Tower Maintenance reviewed the HASP with its painters or required them to fill out an agreement stating that they would comply with its requirements. (Ex. C-3 at 6.) Foreman Mackeivicz testified that he was never shown the HASP before or during the Edison project at issue. (Tr. at 336.)

At the beginning of a typical workday, supervisor Psareas and foreman Mackeivicz met their crews in the morning, at about 6:00 a.m., at a staging site. (Tr. at 262-263.) At this staging site, the crew cleaned and gathered their supplies, which included a PFAS device, and listened to instructions, if any, from Mackeivicz, who translated Psareas’ instructions from English to Portuguese. (Tr. at 263, 353, 737, 1008, 1013.) Accounts differed on whether the instructions included safety – but the weight of the evidence establishes that the painters experienced and expressed safety concerns on the worksite. Regarding the power lines, painters reported that if

they got too close to the power lines the hair on their skin would stand up. (Tr. at 252-253; C-31 at 84.) Regarding their PFAS device, all of the painters in this case testified that they had concerns about their PFAS device operating correctly and frequently brought concerns regarding their PFAS device to the attention of supervisor Psareas and foreman Mackeivicz. The painters were concerned about their paint-covered “pelican” clips because the paint would cause the clips to jam and not close all the way.<sup>24</sup> (Tr. at 144; 279-280, 347-348, 701-702; Ex. C-30 at 58-60; Ex. C-31 at 79-81.) Most of the time, the request for a new PFAS was rejected and the painters were instead told to clean their PFAS device more thoroughly. (Tr. at 279-280; Ex. C-30 at 58-60; Ex. C-31 at 79-81.)

Additionally, all of the painters, and the supervisors, including Peter Vlahopoulos, testified that accepted uses on the Tower Maintenance worksite of the PFAS device included: (1) wrapping the lanyard around a cross-bracing and attaching the clip back onto the lanyard itself, and (2) clipping onto step bolts. (Tr. at 272-274, 346-347, 703-704, 958, 990-991; Exs. C-30 at 87-90, C-31 at 76-77, 109-111; Ex. R-50 at 37-38.) Sometimes, “on rare occasions,” painters did not tie off at all when their PFAS device prohibited them from reaching certain areas of the tower to paint. (Resp’t Br. at 14; Exs. C-30 at 88-89; C-31 at 76.)

### **3. Training**

The training evidence in the record is illuminating, revealing the employees who had received training, the type of training received, and the employees who had not received any training. (*See* App’x B.) Elizabeth Vlahopoulos took construction courses at Baruch University

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<sup>24</sup> Based on the “pelican clip” description in the record, I find that the pelican clips are “snaphooks” as defined in subpart M of part 1926 and used in the section devoted to the requirements of a PFAS. 29 C.F.R. §§ 1926.500(b)(“Definitions: snaphook”); §1926.502(d)(“Personal fall arrest systems”); 1910.269(g)(2)(i) (“Personal fall arrest equipment shall meet the requirements of Subpart M of Part 1926”); (Ex. R-50 at 36-37.)



after high school, including estimating and construction management. (Tr. at 911-912.) According to Ms. Vlahopoulos, she is “a C3 of a NACE Inspector level 2,” meaning that she is authorized to inspect paint coatings, for example on a bridge project.<sup>25</sup> (Tr. at 912.) She has no degree in electrical engineering or physics. (Tr. at 912.) Ms. Vlahopoulos also testified:

Q: So you have no real formal education in the field of electrical behavior, how electricity behaves; correct?

A: I believe I have what I'm required to have for painting, yes. If the requirements -- if I'm required to have more at some point, I will get more.

(Tr. at 912.) The record shows that she attended a “C-5 Supervisor / Competent Person Refresher Training for Deleading of Industrial Structures” training course on June 11, 2012.<sup>26</sup> (Ex. C-22 at 14-16.)

Peter Vlahopoulos took a certified climbing course, and also attended the “C-5 Supervisor / Competent Person Refresher Training for Deleading of Industrial Structures” training course on June 11, 2012. (Tr. at 991; Ex. C-22 at 14-15, 18.) He did not personally provide training to any employee on the Edison project at issue. (Tr. at 941.)

Supervisor Psareas and foreman Mackeivicz took training courses in the following subject areas in the spring of 2012 and in August 2012: Fall Protection, OSHA 10, Electrical Arc Flash Safety, Authorized Climber, and Sub Station Awareness. (Tr. at 1013; Exs. C-2; C-22 at 5-7; C-23 at 4-6; C-24 at 4, 5-13, 86, 91-99, 107). In addition, foreman Mackeivicz took Tower Rescue & Competent Climber training (Ex. C-24 at 108-121). After the October 25, 2012 fatal accident supervisor Psareas took a Competent Tower Climber / Rescuer Training in November

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<sup>25</sup> Although the record does not indicate what “NACE” stands for, a cursory search reveals that Ms. Vlahopoulos was likely referring to NACE International, The Worldwide Corrosion Authority. <http://www.nace.org/About-NACE/>

<sup>26</sup> The documentation for this course indicates that it was most likely associated with The Society for Protective Coatings (SSPC). (Ex. C-22 at 16); <http://www.sspc.org/about-us/about-us-home>.

2012. Supervisor Psareas also previously took the following training courses: Boots on the Roof (2009), OSHA 10 (2010), Lead Contractor and Lead Supervisor (1996). (Ex. R-38; Ex. R-50 at 19-24.) Neither supervisor Psareas nor foreman Mackeivicz personally trained or checked previous training certificates of the Tower Maintenance painters for the Edison project. (Tr. at 335-336; 688-689.)

With regard to JV, RS, Fonseca Alves, and Da Silva, the four workers central to this case, the record shows the following training occurred in the spring – fall of 2012: Fall Protection (Fonseca Alves, Da Silva, RS), OSHA 10 (Fonseca Alves), Electrical Arc Flash Safety (Fonseca Alves), and Authorized Climber (Fonseca Alves).<sup>27</sup> (Exs. C-22, 23, 24.) The record does not contain any training certificates for the deceased JV.

The parties stipulated that on October 25, 2012, the day of JV’s electrocution and RS’ fall, Tower Maintenance employed at least twenty-five employees. (Ex. J-1 ¶¶ 11, 19.) The parties further stipulated that eleven employees were employed that day engaged in tower painting work on the PSE&G transmission tower painting project.<sup>28</sup> (Ex. J-1 ¶¶ 17 through 27; App’x B.) Of those, the record reveals that six of the tower painters had received no training from Respondent. The record does not contain any training certificates for Marcelo Leiroz, Ederson Trizotte, Osias Figugiredo, Domingos Da Silva, Euflates Passos, or JV. (Ex. J-1 ¶¶ 21-23 and 25-27.)

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<sup>27</sup> The certificates for Fonseca Alves notate the name “Alan Kedis Fonseca.” Fonseca Alves’ testimony is consistent with these certificates and their timing, supporting a finding that these certificates are his. (Ex. C-31 at 32-42; App’x B); *see also* Ex. R-50 at 28, 31 (Psareas testified that Alan Kedis is also known as Alan Fonseca Kedis; also known as Alan Kedis Fonseca); Tr. at 717-718 (parties’ stipulated resolution of confusion regarding employee’s name.) *See* p. 11 n.15 *supra*.

<sup>28</sup> The record contains the following training certificates for the other Tower Maintenance painters “engaged in tower painting work” on October 25, 2012: Fall Protection (Almeida), Authorized Climber (Resende), and Sub Station Awareness (Resende). (Exs. C-2, 22; J-1 at ¶¶ 12-13, 17-27; App’x B.)

#### 4. The Accident

The painting crew for a single tower consisted of approximately three to six painters and one supervisor. (Tr. at 255.) On October 25, 2012, there were two crews. (Tr. at 705-706.) After the morning meeting was over, the crews loaded up into a truck and headed over to a tower. (Tr. at 264.) Supervisor Psareas' crew went to the tower at issue. Foreman Mackeivicz and his crew went to another tower about a mile away. (Tr. at 345.)

Once they got to the tower, Psareas' crew waited until the representative from PSE&G gave them permission to ascend the tower and start painting. (Ex. C-30 at 70-71.) While they were waiting for Psareas to talk with the PSE&G representative, the painters prepared their paint. Once given permission, the painters ascended the tower to their designated positions. The record establishes that the painters designated their positions themselves. (Tr. at 264; Exs. C-30 at 70-71; C-31 at 93-97.) Psareas left the worksite to make a telephone call after two painters began ascending the tower, "some of the guys were doing the floor," and before the other painters started ascending the tower. Psareas did not see the accident. (Tr. at 706.)

Psareas' crew included the following painters positioned from the top of the tower on down: Fonseca Alves, JV, Da Silva, and RS. (*See, e.g.*, Ex. C-30 at 71; Ex. 14B). According to OSHA Compliance Officer (CO) Lonnia Simmons, she was told that JV was working at an approximate 70 feet height and that RS was at a 40 feet height at the time of the accident. (Tr. at 151.) JV and Da Silva were stationed closest to each other. According to Da Silva, he was sitting down inside the tower getting ready to paint when he watched JV climb the ladder and step off to the other side within the tower cage near the No. 3 power line. (Ex. C-30 at 75-76.) Da Silva turned his head, and in a matter of seconds, heard a loud noise like a bomb. (Ex. C-30 at 85-87.) He then saw JV fall and hit RS, who was climbing below, according to Da Silva. (Ex.

C-30 at 85.) According to Fonseca Alves, JV followed him up the step ladder. (Ex. C-31 at 100-101.) As he was getting off the ladder at his designated location, JV asked Fonseca Alves what section to paint. (Ex. C-31 at 100-101.) Fonseca Alves then continued up ten step bolts, and then heard a loud explosion. (Ex. C-31 at 98.) He did not recognize at first what happened, but then he saw both JV and RS on the ground below. (Ex. C-31 at 98-99.) RS could not recall the events leading up to the accident. (Tr. at 288-289.)

Fonseca Alves identified, in a photograph, a strip of green paint, the color they were using that day, on the tower cage that JV had painted. (Exs. 15C; C-31 at 106.)<sup>29</sup> According to Fonseca Alves, the No. 3 power line would have been 2 – 2 ½ feet from a painter’s back when he painted that green strip. (Ex. C-31 at 108.)

## **5. Post-Accident Investigation**

At 12:02 p.m. on October 25, 2012, the Edison police department investigated the accident to ensure that it was an accident and not a crime. (Tr. at 73-74.) Upon arrival, the police department investigator saw emergency vehicles from the police department, fire department, the New Jersey state police, and emergency medical services. (Tr. at 75.) The investigator spent forty minutes at the worksite and took photographs of the accident scene. (Tr. at 78, 88; Exs. C-10, C-14, C-15, C-16.) He then collected safety harnesses and took them back to the police department headquarters as evidence. (Tr. at 86-87.) An autopsy performed on JV concluded that the cause of his death was electrocution. (Ex. C-12 at 5; J-1 ¶ 14.)

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<sup>29</sup> Da Silva testified that he thought Fonseca Alves would have painted that strip of paint, although he did not see Fonseca Alves paint it. (Ex. C-30 at 80-81.) Fonseca Alves testified that JV painted that strip, indicating that he, Fonseca Alves, did not paint that strip. (Ex. C-31 at 106.) Based on this testimony and the fact that the strip was painted green, the color the painters were using that day, it is reasonable to conclude and the evidence supports a finding that JV painted that strip.

As a result of a media referral, OSHA CO Simmons conducted an investigation of the worksite. (Tr. at 113-114.) She arrived at the worksite at 1:30 p.m. on the day of the accident. (Tr. at 114.) When she arrived, only the PSE&G representative and two police officers were there. (Tr. at 115.) Debris, including paint buckets, was on the ground. (Tr. at 115.) The Tower Maintenance employees had been taken to the Edison police department to be interviewed. (Tr. at 117.) CO Simmons spoke with Elizabeth and Peter Vlahopoulos by telephone the following day, and eventually spoke with Nikolaos Psareas and Robert Palermo.<sup>30</sup> (Tr. at 119.) In June 2013, several months after the October 2012 accident, CO Simmons went to the police department and took pictures of the harnesses that had been taken into evidence on the day of the accident. (Tr. at 171-172; Exs. C-17, C-18.)<sup>31</sup>

## **Discussion**

### **Were Respondent's employees "qualified"?**

As discussed above, the threshold issue in this case is whether Respondent's employees were "qualified" persons to work on the tower at issue here. For the following reasons, I find that the record evidence establishes that these painters were not "qualified," as defined in the

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<sup>30</sup> Mr. Palermo was the controller of Tower Maintenance. (Tr. at 121.)

<sup>31</sup> Respondent contends that RS and Fonseca Alves lack credibility and therefore their testimony should be accorded less weight. (Resp't Br. at 12-13.) Respondent claims that RS was evasive and swayed by a private lawsuit, and that Fonseca Alves was also swayed by a private lawsuit. Respondent also claims that portions of Fonseca Alves's testimony were in direct contradiction to other witness testimony.

I find RS and Fonseca Alves to be credible witnesses. RS and Fonseca Alves answered the questions they were asked. RS was not evasive, he was forthcoming with his knowledge of the traumatic events he experienced and what he remembered of his training. Both RS and Fonseca Alves testified in an overwhelmingly consistent manner with each other as well as with Da Silva. To the extent that Fonseca Alves' testimony regarding his understanding that the tower arms were to be painted differed from the testimony of the PSE&G representative regarding the project scope, I find that Fonseca Alves' honestly testified regarding his personal understanding of the project scope. As discussed above, the scope of the painting job was not clearly communicated to the tower painters. *See p. 17-18 supra.*

cited standards. Furthermore, I find that supervisor Psareas and foreman Mackeivicz also were not “qualified.”

The term “qualified person” is defined in both subpart S at 29 C.F.R. § 1910.399, “Definitions applicable to this subpart,” and at 29 C.F.R. § 1910.269(x), “Definitions.” Subpart S defines the term “[q]ualified person” as “[o]ne who has received training in and has demonstrated skills and knowledge in the construction and operation of electric equipment and installations and the hazards involved.” 29 C.F.R. § 1910.399.<sup>32</sup> Section 1910.269 provides that a “[q]ualified employee (qualified person) [is] one knowledgeable in the construction and operation of the electric power generation, transmission, and distribution equipment involved, along with the associated hazards.” 29 C.F.R. § 1910.269(x).<sup>33</sup> I find that, under either

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<sup>32</sup> This definition is followed by the following note:

Note 1 to the Definition of ‘Qualified person:’ Whether an employee is considered to be a ‘qualified person’ will depend upon various circumstances in the workplaces. For example, it is possible and, in fact, likely for an individual to be considered ‘qualified’ with regard to certain equipment in the workplace, but ‘unqualified’ as to other equipment. (See 1910.332(b)(3) for training requirements that specifically apply to qualified persons.)

29 C.F.R. § 1910.399.

Section 1910.332(b)(3), *Training: Additional requirements for qualified persons* provides:

Qualified persons (i.e., those permitted to work on or near exposed energized parts) shall, at a minimum, be trained in and familiar with the following: (i) The skills and techniques necessary to distinguish exposed live parts from other parts of electric equipment, (ii) The skills and techniques necessary to determine the nominal voltage of exposed live parts, and (iii) The clearance distances specified in section 1910.333(c) [the standard under which the Secretary alleges a violation here] and the corresponding voltages to which the qualified person will be exposed.

This is followed by: “Note 1: For the purposes of sections 1910.331 through 1910.335, a person must have the training required by paragraph (b)(3) of this section in order to be considered a qualified person.”

<sup>33</sup> This definition is followed by the following note: “Note 1: An employee must have the training required by paragraph (a)(2)(ii) of this section in order to be considered a qualified employee.” 29 C.F.R. § 1910.269(x).

definition, the Secretary has established that painters RS, Da Silva, and Fonseca Alves, and the deceased JV, were not qualified persons with regard to the electric safety-related hazards involved with the electric transmission tower they were painting on October 25, 2012.

The Secretary asked three of these employees questions related to aspects of the qualifications of a “qualified person,” as defined in both subpart S and § 1910.269. Both definitions require, at a minimum, familiarity with “nominal voltage” and knowledge of “clearance distances / minimum approach distances” with respect to a specified voltage. 29 C.F.R. § 1910.332(b)(3); 29 C.F.R. § 1910.269(a)(2)(ii). With regard to “nominal voltage,” the Secretary asked RS, Da Silva, and Fonseca Alves whether they were “familiar with the term nominal voltage,” and whether they knew how to calculate the “nominal voltage” of an overhead electrical / transmission power line or a circuit.<sup>34</sup> (Tr. at 250-251; Ex. C-30 at 33; Ex. C-31 at

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29 C.F.R. § 1910.269(a)(2)(ii) provides:

Qualified employees shall also be trained and competent in: (A) The skills and techniques necessary to distinguish exposed live parts from other parts of electric equipment, (B) The skills and techniques necessary to determine the nominal voltage of exposed live parts, (C) The minimum approach distances specified in this section corresponding to the voltages to which the qualified employee will be exposed, and (D) The proper use of the special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on or near exposed energized parts of electric equipment.

<sup>34</sup> Section 1910.399 defines the term “Voltage, nominal” as:

[a] nominal values assigned to a circuit or system for the purpose of conveniently designating its voltage class (As 120/240 volts, 480Y/277 volts, 600 volts). The actual voltage at which a circuit operates can vary from the nominal within a range that permits satisfactory operation of equipment.

Section 1910.269(x) defines the term “voltage” as:

[t]he effective (rms [root-mean-square]) potential difference between any two conductors or between a conductor and ground. Voltages are expressed in nominal values unless otherwise indicated. The nominal voltage of a system or circuit is the value assigned to a system or circuit of a given voltage class for the purpose of convenient designation. The operating voltage of the system may vary above or below this value.

42-43.) None of them answered in the affirmative. (*Id.*) The Secretary also asked them if they knew what the “minimum approach distance” was for a 26 kilovolt power line. (Tr. at 252; Ex. C-30 at 35; Ex. C-31 at 45-46.) None of them testified that they knew the answer. (*Id.*) Da Silva testified that he has never known the answer to that question. (Ex. C-30 at 35.) Da Silva testified that he was told that the minimum approach distance for a 138 kilovolt power line was 6 feet, and that in any case, he always stayed within “the box” and would never “get near” any power lines. (Ex. C-30 at 35-36.) Fonseca Alves testified that he was told to stay at least 6 feet from any cable on the arms of a power tower. (Ex. C-31 at 43-44.)

The answers to the Secretary’s questions establish that painters RS, Da Silva, and Fonseca Alves lack the requisite familiarity with regard to determining the nominal voltage of an exposed power line, as well as the appropriate clearance distance / minimum approach distance for an exposed 26 kilovolt power line. 29 C.F.R. § 1910.332(b)(3); 29 C.F.R. § 1910.269(a)(2)(ii). These painters therefore were not “qualified persons” at the Tower Maintenance worksite on October 25, 2012.

With regard to JV, there is little evidence in the record regarding his familiarity with “nominal voltage” or the requisite clearance distance / minimum approach distance with respect to a given voltage. The record, however, establishes that JV was never trained in this area. JV was hired two weeks before the incident on October 25, 2012. (Tr. at 183.) Tower Maintenance did not train JV during that two-week period. He was scheduled to take training in November 2012. (Tr. at 183. *See* App’x B.) According to the CO, Tower Maintenance alleged that JV presented them with a training certificate from where he worked prior to joining Tower Maintenance before he was hired. (Tr. at 183.) The certificate was not produced to the Secretary during this proceeding because, according to Respondent, the record allegedly was lost during



Hurricane Sandy. (Tr. at 184; Resp't Br. at 14.) Instead, Respondent produced the names of the training providers it used to train its employees. (Ex. C-6 at ¶ 9, Responses to Secretary's Interrogatories.) All of the training providers provided affidavits denying that they had any records that they trained JV.<sup>35</sup> (Exs. C-22, C-23, C-24; App'x B.)

Respondent also stated that "to ensure the adequacy of training, the main office verifies the completion of training and completion of new hire orientation documents." (Ex. C-6 at ¶ 9, Responses to Secretary's Interrogatories.) Respondent claimed that foreman Mackeivicz and supervisor Psareas were in charge of ensuring adequate training of its employees. (Ex. C-6 at ¶ 5.) Respondent further claimed that "[t]he competent person verifies [the new hire's] work ability and knowledge directly in the field." (Ex. C-6 at ¶ 9.) However, both foreman Mackeivicz and supervisor Psareas testified at the hearing (1) that they were not responsible for safety training and (2) that they did not check the training certificates of their employees. (Tr. at 335-336; 688-689.) This testimony not only contradicts Respondent's claim, but it also supports

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<sup>35</sup> None of these training providers claimed that their records were incomplete due to Hurricane Sandy. (Exs. C-22, C-23, C-24.) I give these statements great weight and find that their records are complete. Fed. R. Evid. 803(7), 902(11); *see also* Tr. at 746-750 (discussing application of hearsay exception and authentication with regard to the training records). I also give the absence of training records great weight, and draw the inference – based on the absence of training records - that some employees on the Edison worksite, including JV, were not trained regarding the hazards present at this worksite (working at great heights, working on towers supporting uninsulated, live, high voltage electrical circuits). The bald, unsubstantiated, claim in Respondent's Brief that training records for the employees working on the PSE&G Edison project were destroyed due to Hurricane Sandy is given no weight. (Resp't Br. at 14.) No documents (such as insurance claims or business records subpoenaed from other alleged training providers or alleged prior employers who provided training) or witnesses (trainers, employees who observed or participated in the training) were presented by Respondent.

Respondent's argument that the training documentation in the record is not indicative of the complete amount of training provided to Tower Maintenance's employees is also rejected. No inference is drawn that additional training was provided to Respondent's employees. Respondent had ample opportunity to gather training documents from alternative sources such as training providers or alleged prior employers, or to elicit direct witness testimony regarding the specific training provided, but failed to do so. Accordingly, this uncorroborated, unsubstantiated claim is unbelievable and not credited.

the Secretary's claim that Respondent did not check for JV's training certificates before letting him work on the transmission tower.

Based on this record evidence, the Secretary has established a *prima facie* showing that JV was not trained or certified in the work he was performing on the Tower Maintenance Edison project worksite. Respondent failed to rebut this showing with any supportive evidence even though it is in the best position to provide such evidence. *Well Solutions, Inc., Rig No. 30*, 17 BNA OSHC 1211, 1214-15 (No. 91-340, 1995)(holding that the Secretary can rely on "best available evidence" to establish decedents' lack of training and that slim showing of *prima facie* case is sufficient absent rebuttal by party who has "full possession of all the facts.") Therefore, I find that the Secretary has established based on the evidence above that JV was also not a "qualified person" as used in 29 C.F.R. § 1910.332(b)(3) and 29 C.F.R. § 1910.269(a)(2)(ii), because he was never trained in the hazards under these standards.<sup>36</sup>

Moreover, the record does not establish that supervisor Psareas and foreman Mackeivicz had the requisite training and competence of a "qualified person" as required under 29 C.F.R. § 1910.269(a)(2)(ii). Although their training certificates reflect recent training in fall protection and arc flash (two courses directly applicable in this instance), both Psareas' and Mackeivicz's answers to questions at the hearing did not reflect competence in these areas. (*See App'x B*.) Their answers were non-committal or evasive, and in some instances, self-incriminatory. For example, Psareas knew that to work within 10 feet of an exposed 26 kV power line, a worker had to be qualified. (Tr. at 743.) Yet, he passed off to PSE&G the responsibility of determining whether a "qualified" person should be able to calculate nominal voltage. (Tr. at 743.)

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<sup>36</sup> Further, as discussed above, the record reveals that on October 25, 2012, six of Respondent's painters, including JV, working on the Edison project also had received no training from Respondent in the inherently dangerous working conditions to which they were exposed painting electric transmission towers supporting energized electric lines. *See p. 22 supra; App'x B*.

Similarly, with Mackeivicz, he knew that the calculation of a minimum approach distance depended on voltage, which could vary by the tower. (Tr. at 349.) Yet, he did not know how to answer the following question: “How do you calculate the nominal voltage of a power line?” (Tr. at 349.) The responses by both Psareas and Mackeivicz, the supervisor and foreman on Respondent’s Edison project, illustrate knowledge of what is required, but not competence to be able to implement what is required. Therefore, I find that supervisor Psareas and foreman Mackeivicz also were not qualified to paint the Edison electric transmission tower supporting energized electric lines, raising questions about whether they were suitable to supervise the unqualified painters working on the Edison project tower on October 25, 2012.

### **Merits of the Alleged Violations**

To prove a violation of an OSHA standard, the Secretary must establish that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff’d in relevant part*, 681 F.2d 691 (D.C. Cir. 1980).

#### **I. Serious Citation 1, Item 1: Alleged Electrical Safety Violation**

The Secretary alleges that Tower Maintenance violated 29 C.F.R. § 1910.333(c)(3)(i)(A)(1), which provides:

When an unqualified person is working in an elevated position near overhead lines, the location shall be such that the person and the longest conductive object he or she may contact cannot come closer to any unguarded, energized overhead line than the following distances: (1) for voltages to ground 50 kV or below – 10 ft.

29 C.F.R. § 1910.333(c)(3)(i)(A)(1). The Secretary claimed the following:

(a) Tower Maintenance Corporation / Route 1 North Edison, NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. 131 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: on or about

10/25/2012, the employer failed to ensure that unqualified employees who performed work from an elevated position near overhead lines were located in a position such that the employee, or any conductive object used by the employee, did not come within 10 feet of any unguarded, energized overhead line.

Amended Complaint at ¶ VII.<sup>37</sup>

**A. The Secretary has established that 29 C.F.R. § 1910.333(c)(3)(i)(A)(1) applies**

As noted above, the working conditions cited for this alleged violation fall under §1910.269. However, a threshold issue is whether the Tower Maintenance painters were “qualified” employees as defined in the cited standard. As discussed above, I find that the record evidence establishes that the painters were not “qualified.” Therefore, the cited standard under subpart S applies to the electrical safety-related hazards in this case. These painters were obligated to keep at least a 10 foot distance from the energized 26 kilovolt power line at issue in this case in compliance with 29 C.F.R. § 1910.333(c)(3)(i)(A)(1).<sup>38</sup>

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<sup>37</sup> As discussed above, the Secretary alleges *in the alternative* a violation of 29 C.F.R. § 1910.269(l)(2), which provides:

*Minimum approach distances.* The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than set forth in Table R-6 through Table R-10 unless [the employee is insulated from the energized part, or the energized part is insulated from the employee and from any other conductive object at a different potential, or the employee is insulated from any other exposed conductive object.].

The Secretary claimed the following:

(a) Tower Maintenance Corporation / Route 1 North Edison, NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. 131 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: the employer failed to ensure that no employee or conductive object approached within 2 feet, 4 inches, of exposed energized electrical lines while performing a repainting operation on or about 10/25/2012.

Amended Complaint at ¶ VII. Given the voltages of the exposed energized power lines attached to the tower (26 kV and 138 kV), the minimum approach distance under this standard cited in the alternative (section 1910.269), was 2 feet, 4 inches. (Amended Complaint at ¶ VII.)

<sup>38</sup> Other aspects of the cited standards unquestionably apply. It is undisputed that, at the time of the accident, Tower’s employees, including JV and RS, were in an elevated position on the

Respondent claims that the citation should be vacated because the Secretary has not established that any standard applies to the facts of this case. (Resp't Br. at 8.) With regard to the cited standard and the standard cited in the alternative, Respondent claims that they "lack clarity" and are "contradictory in terms of what behavior is required for compliance." (Resp't Br. at 9.) Respondent seems to argue that the standards are contradictory because each standard has a different approach distance for "qualified persons." (Resp't Br. at 9-10.) Respondent's unsupported argument in this regard is rejected. First, as discussed above, the employees at issue here are not "qualified persons," so Respondent's argument is not dispositive. Second, § 1910.269 applies to qualified persons on transmission towers, a situation that is more specific than the general provisions for "qualified persons" set forth in subpart S. The standards are therefore not contradictory.

Respondent further argues that the entire citation should be vacated because, as evidenced by the Secretary's multiple amendments to the citation, Respondent lacked fair notice and "[w]as left to guess for itself which of three separate standards needed to be adhered to[.]" (Resp't Br. at 11.) For the following reasons, Respondent's arguments are rejected.

First, Commission rules allow for filing alternative claims. 29 C.F.R. § 2200.30(e). The Secretary followed the Commission's rules in filing an unopposed motion to amend the citation to allege alternative claims under different standards, and the unopposed motion was approved after finding no evidence of prejudice to Tower Maintenance. *See* Order Granting the Secretary's Motion to Amend the Citations and Complaint (July 31, 2014). Respondent

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power tower. Respondent also does not dispute that: power lines were located above (*i.e.*, overhead) all of the employees working on the tower; the power lines themselves were unguarded, exposed and not insulated; and the power lines that were energized were operating at more than 50 volts. 29 C.F.R. § 1910.333(c)(3)(i)(A)(1); 29 C.F.R. § 1910.269(l)(2); 29 C.F.R. § 1910.269(l)(1)(i).

subsequently stipulated that 29 C.F.R. Part 1910, as opposed to the original cited standards under Part 1926, applied to the work that was performed at the worksite at issue in this case. (Ex. J-1 at II ¶ 4.)

Second, as the Secretary points out, the applicability of the cited standard depended on a factual issue, whether Tower Maintenance's employees were "qualified," that was to be litigated. (Sec'y Reply Br. at 2.) It was not because, as Respondent claims, "the government cannot decide upon which regulation was violated[.]" (Resp't Br. at 8.) And, as discussed above regarding the amendments to this citation, the record shows that Respondent had the opportunity and did fully litigate the factual and legal issues in the Amended Complaint. *Nat'l Realty & Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) ("So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue.").

Finally, it is noted that Respondent's own HASP includes a table of minimum approach distances that is almost identical to OSHA's Table R-6, which is incorporated by reference to the standard cited in the alternative, *i.e.*, the standard that would apply if the evidence showed that Tower Maintenance's employees were "qualified." 29 C.F.R. § 1910.269(l)(2). (Ex. C-3 at 19 "App'x A.") Respondent's due process claim is rejected.

The Secretary has established that the cited standard, 29 C.F.R. § 1910.333(c)(3)(i)(A)(1), applies.

**B. The Secretary has established that Respondent violated the cited standard**

The Secretary argues that Respondent violated the cited standard when its employees came within 10 feet of the energized power line while painting the transmission tower. (Sec'y Br. at 26.) There is no evidence in the record that shows the accident itself, or that establishes

the precise distance between any one Tower Maintenance employee and any one power line. Respondent relies on this lack of evidence to claim that the Secretary failed to establish a showing of noncompliance with the standard. Respondent claims that the Secretary has failed to: (1) show “any evident causal link between the violations charged and the proffered cause of the accident,” and (2) “provide a reliable measurement” of the distance between JV and the energized line. (Resp’t Br. at 8.) For the following reasons, Respondent’s arguments are rejected.

With regard to Respondent’s first argument, that the Secretary failed to show a causal link between the alleged violation and the accident itself, the record does not support Respondent’s claim. Both the cited standard and the standard cited in the alternative restrict not only an employee from approaching too close to an energized power line, but also any conductive object that is connected to that employee. *See* 29 C.F.R. § 1910.333(c)(3)(i)(A)(1) (“the location shall be such that the person *and the longest conductive object he or she may contact* cannot come closer to any unguarded, energized overhead line than the following distances: (1) for voltages to ground 50 kV or below – 10 ft.)(emphasis added); 29 C.F.R. § 1910.269(l)(2) (“no employee approaches *or takes any conductive object closer to* exposed energized parts than [2 feet 4 inches].” (emphasis added)).

The Secretary’s expert opined that the most likely cause of the electrocution was that JV brought the conductive paint he was using too close to an energized power line.<sup>39</sup> (Tr. at 620-

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<sup>39</sup> David Wallis was qualified as an expert in electrical engineering and electrical safety. (Tr. at 587.) The Secretary introduced Wallis, former OSHA Director of Standards and Guidance, as an expert in this case “on the limited issues of how the minimum approach distance was calculated, the maximum arcing distance of electric currents, and possible causation of the accident at issue in this case.” (Tr. at 541, 562; Ex. C-29.) He is the “primary author” of OSHA’s electrical safety standards found in subpart S of 1910, § 1910.268, § 1910.269, subpart K of 1926 and subpart V of 1926. (Tr. at 544-545.) He retired one month before the hearing in this case and

625.) He came to this opinion based on his review of the nature of JV's burns from the autopsy report and the nature of burns from JV's PFAS device. He ruled out the possibility of direct contact between JV and a power line because his burns were not severe enough. (Tr. at 621.) He ruled out the possibility that JV's lanyard contacted the power line because he did not see any burn marks on the lanyard or lanyard clip. (Tr. at 621.) Rather, JV had less severe burns on his thumb and another finger, and a more severe burn on his thigh. (Tr. at 622.) Therefore, he concluded that an arc, rather than direct contact, with the power line must have occurred, and it must have occurred through the conductive paint. (Tr. at 622.) The electricity then travelled to and through JV, and then grounded, through JV's thigh, with the tower, which JV was most probably straddling. (Tr. at 623-624.) The expert ruled out the possibility that JV fell first and then fell into an energized power line because JV's burns were inconsistent with such a situation. His burn injuries would most probably have been more numerous, "[t]here would be entry and exit burns with every part that contacted the line[,]" and would have been more severe, such as "amputations of at least a finger" through the direct contact. (Tr. at 625-626.) Respondent does not dispute this portion of the expert's testimony.

Respondent, instead, claims that the Secretary's expert testified that "there was no maximum limit to the distance that the electrical arc could have traveled from the circuit in question before coming to ground via contact with JV," seeking to argue that the expert's opinion cannot establish that JV was within the restricted distance to the energized power line. (Resp't Reply Br. at 3.) Respondent, however, misunderstands the expert's testimony. The expert testified, "[a]fter the arc is established," there is no limit to the distance "you can move

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was being compensated for his services at \$135 per hour. (Tr. at 550.) He has a bachelor of Electrical Engineering degree from Stevenson Institute of Technology and has attended graduate-level courses in electrical engineering. (Tr. at 550-551.) Wallis' testimony was detailed, well supported, and very helpful. His testimony is given great weight.



through the ionized air.” (Tr. at 648.) The cited standard seeks to prevent establishing the arc in the first place, which according to the Secretary’s expert, unfortunately occurred here.

The Commission case, *Par Electrical Contractors, Inc.*, 20 BNA OSHC 1624, 1626 (No. 99-1520, 2004) is similar to this case because it involved an electrocution, no eyewitness to the actual incident, and a minimum approach distance.<sup>40</sup> In *Par*, the Commission used “reasonable inferences from circumstantial evidence” and found a breach of a 2 foot approach distance based on the decedent’s wounds in the autopsy report. Respondent claims that *Par* is not applicable here because *Par*’s employees were not painters but were manually installing electrical wire only 2 and 1/4 inches from the approach distance’s outer limit. (Resp’t Reply Br. at 2.) Respondent, however, has not addressed the Secretary’s point: that the Commission has previously relied on reasonable inferences based on circumstantial evidence to find a violation of a minimum approach distance based on the electrocuted decedent’s injuries. Additionally, Respondent does not offer any evidence to contradict the Secretary’s expert’s opinion as to the cause of the electrocution. It is reasonable to infer in this case that JV, and a conductive object he was in contact with, came within the minimum approach distance of 10 feet to the 26 kV transmission line because he was electrocuted.<sup>41</sup> This finding is also based on the expert witness’ opinion regarding JV’s burn marks.

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<sup>40</sup> The standard at issue in *Par* was 29 C.F.R. § 1926.950(c)(1)(i), regulating electrical safety approach distances at a power transmission and distribution construction worksite.

<sup>41</sup> The Secretary persuasively points out that the minimum approach distance, even the shorter 2 feet 4 inch distance prescribed in the standard cited in the alternative, takes into account inadvertent movement by employees and the potential for human error, and therefore has a factor of safety incorporated into it. (Sec’y Br. at 29 n.24.) Even with this factor of safety, JV and an object he was connected to came so close to the power line that he was electrocuted. Therefore, it is also reasonable to infer that JV and a conductive object he was in contact with came within 2 feet 4 inches of the energized power line under these same circumstances.

With regard to Respondent's second argument, that the Secretary failed to provide a reliable measurement of how close JV came to an energized power line, the record also does not support Respondent's claim. Precise evidence is not required to establish a violation here. The Secretary relies on the evidence in the record that establishes the range at which JV, and a conductive object he was in contact with, could have been from the No. 3 power line, and it is less than 10 feet.

It is undisputed that Tower Maintenance's employees climbed up the tower using a ladder made of step bolts that ran up one leg of the tower to the tower's mid-level, and then the step bolts ran up the center line of the cage to the very top of the tower. (Tr. at 138-139; Exs. C-14a; C-31 at 66.) The record shows that the energized power line No. 3 was located above mid-level, so that the step bolt ladder at the horizontal level of power line No. 3 ran up the center line of the tower. (Ex. C-14a.) Power line No. 3 was 6 feet 5 and ½ inches from the centerline of the tower. (Tr. at 492.)

Therefore, any Tower Maintenance employee who scaled the ladder came within the restricted distance when passing the No. 3 power line, and therefore violated the 10 foot minimum approach distance. The record shows that painter Fonseca Alves climbed up the step bolts past power line No. 3 on his way to the top of the tower. (Ex. C-31 at 97, 100; Ex. C-14C.) JV also dismounted the step bolt ladder and went to the side of the tower cage closest to power line No. 3. (Ex. C-30 at 76, 80-81; 104; C-31 at 97-98.) At a minimum, both employees Fonseca Alves and JV were 6 feet 5 and ½ inches from the power line No. 3 while they were scaling the step ladder up past power line No. 3 – well within the restricted distance, 10 feet, of the cited standard.

Moreover, from the center line of the tower body (which is the furthest any employee could be, in the power line's horizontal plane, from a given power line due to the symmetric nature of the power lines attached to either side of the electric transmission tower), most of the power lines were less than 10 feet; two were 12 feet. (Tr. at 490-494; Exs. C-14F, C-40.) The narrowest width of the tower cage was 4 feet 8 inches. (Tr. at 495; *see also* Ex. C-40.) It follows that, from the edge of the tower cage, none of the power lines were more than 10 feet. (Tr. at 495.) Therefore, any employee painting the edge of the tower cage would have been closer than 10 feet, horizontally, to any one of the power lines.<sup>42</sup>

The record also supports a finding, based on circumstantial evidence, that JV breached the 2 feet 4 inch restricted distance provided under the standard cited in the alternative. Testimonial accounts place JV within the tower cage near power line No. 3, the line that was closest to, and only 2-3 feet from, the edge of the tower cage, moments before the explosion. (Ex. C-30 at 71-81; Ex. C-31 at 100-101; Exs. 14B, 14C.) One witness, Fonseca Alves, testified that JV had just finished painting a portion of the tower right before the explosion. (Ex. C-31 at 105-109. *See* p. 24 n.29 *supra*.) This testimony is supported by pictures in the record that show that the vertical portion of the tower cage nearest to power line No. 3 was green, which was the color that the painters were using that day. (Ex. C-15C; Tr. at 131 (painters previously primed the tower in red and were about to paint the tower in green on the date of the accident)). Additionally, as described above, the Secretary's expert witness places JV, and a conductive object connected to him, well within 10 feet, or even 2 feet, 4 inches, of the No. 3 power line. It

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<sup>42</sup> Respondent argues that, instead of this horizontal distance, a straight line distance between a point-of-interest (presumably, JV's location on the tower) and the power line should be used. (Resp't Br. at 6; *see also* Tr. at 511-513.) Respondent is correct that this straight line distance should be used for a precise measurement between any point and the power line. However, as described herein, precise measurements are not required here when the evidence places JV well within the minimum approach distance in any direction of the No. 3 power line.

is therefore reasonable to infer that, while painting the edge of the tower, JV, through inadvertent movement of his hands covered in conductive paint, breached the 2 feet 4 inch approach distance when the No. 3 power line was only 2-3 feet away.

The Secretary has established non-compliance.

**C. The Secretary has established that Tower Maintenance's employees had access to the violative condition**

The Secretary argues that Tower Maintenance's employee, JV, had access to the violative condition because "the location of his assigned work placed him in a position where inadvertent movements could cause his person, or conductive objects connected to his person, to approach within the relevant clearance distance[,] whether it be 10 feet or 2 feet 4 inches. (Sec'y Br. at 31.) The Secretary claims that the fact that JV was electrocuted establishes access to the violative condition. Respondent does not address the Secretary's claims that JV, or any other Tower Maintenance employee, had access to the violative condition. Respondent's main assertion, if any, related to this prong of the Secretary's burden of proof is that, by failing to provide a precise measurement of JV's distance to the power line and also accounting for the possibility that an indeterminate amount of "paint spill" caused the electrocution, the Secretary failed to establish that JV had access to the violative condition. (Resp't Reply Br. at 4.)

Respondent's arguments are rejected. The fact that JV died by electrocution is strong evidence that he was exposed to the hazard of breaching the minimum approach distance, which takes into account inadvertent movement. (Tr. at 593-620; Ex. C-29.) Also, as discussed above, all of the power lines were located within 10 feet of the edge of the tower cage. As it is undisputed that the painters were expected to paint the tower cage, including the tower cage edges, then all of the painters were exposed to the hazard of breaching the minimum approach distance in this case.

The Secretary has established exposure to the violative condition.

**D. Tower Maintenance had knowledge that its employees were approaching within the restricted distance to the power lines**

The Secretary argues that Respondent had actual and constructive knowledge that its employees were breaching the minimum approach distance of the cited standard. (Sec’y Br. at 31.) Respondent claims that it did not have knowledge of the alleged violations of this citation item because “there was no need or even colorable reason for Tower Maintenance’s employees to venture onto the arms of the transmission towers.”<sup>43</sup> (Resp’t Br. at 11, 17.)

“The knowledge element of a violation does not require a showing that the employer was actually aware that it was in violation of an OSHA standard; rather it is established if the record shows that the employer knew or should have known of the conditions constituting a violation.” *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1199 (No. 90-2304, 1993), *aff’d*, 26 F.3d 573 (5th Cir. 1994). To establish whether the employer should have known of the conditions constituting a violation, the Secretary must show whether the employer:

constructively knew of it--that is, the employer could have known with the exercise of reasonable diligence. ... Whether an employer was reasonably diligent involves a consideration of several factors, including the employer’s obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.

*Par*, 20 BNA OSHC at 1627 (citations omitted); *see also N.Y. State Elec. & Gas Corp. v. Sec’y of Labor*, 88 F.3d 98, 108 (2d Cir. 1996) (holding that Secretary bears the burden of proof regarding the issue of knowledge “even when knowledge charged to an employer is predicated

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<sup>43</sup> Respondent placed this claim within its discussion of the unpreventable employee misconduct defense. (Resp’t Br. at 17.) It is addressed here, as well as below, to the extent that the arguments raised relate to knowledge.

on its alleged inadequate safety policy.”). “The knowledge of a supervisory employee may be imputed to his or her employer.” *Par*, 20 BNA OSHC at 1627.

The cited standard was violated whenever an unqualified Tower Maintenance employee scaled the step bolt ladder up past the No. 3 power line because the No. 3 power line was only 6 feet 5 and ½ inches away from the center line of the tower, where the ladder was located. The record establishes that Tower Maintenance’s management knew, or could have known with reasonable diligence, that its unqualified employees would be breaching the minimum approach distance when they worked on the tower at issue.

The record establishes that Elizabeth Vlahopoulos, Peter Vlahopoulos, and Nikolaos Psareas knew that the power lines on the Edison tower were energized during the painting project. Elizabeth Vlahopoulos bid on the project using a reduced estimate for the amount of paint and labor because the arms of the tower, where the energized power lines were located, were not to be painted. (Tr. at 431, 454-455, 1044; Ex. R-1.) As part of its bid package submitted to PSE&G, Tower Maintenance provided the HASP that would be followed for the project. (Ex. 478, 943-944; C-3.) The HASP stated explicitly: “The Contractor shall perform all specified Work on energized transmission lines and equipment. If the structure or line configuration prohibits painting safely while lines are energized, the Contractor shall notify the Field Representative 48 hours in advance so that an outage may be scheduled.” (Ex. C-3 at 9. *See* Tr. at 952-953.) It is undisputed that no one from Tower Maintenance notified PSE&G that the configuration of the Edison tower, where the painters worked on October 25, 2012, prohibited Tower Maintenance’s employees from painting it safely. (Tr. at 344, 431, 477.)

The record also establishes that Tower Maintenance management knew that power line No. 3, the closest energized power line to the side of the tower body, was energized. The

representative of PSE&G at the worksite testified that he had discussed with supervisor Nikolaos Psareas the close proximity of power line No. 3, on either the tower at the Edison location or a similar tower on a previous day, specifically:

Q: What was the nature of that discussion?

A: I suggested to Nick that the guys, once they climbed and got close to that circuit, that they go inside the body of the tower and do their painting from inside the body, so their backs aren't exposed to that circuit where they could accidentally back into it.

(Tr. at 439, 458-59.) Consistent with the representative's testimony, supervisor Psareas testified that he conveyed these instructions, by way of interpretation by foreman Mackeivicz, to the painters.<sup>44</sup> (Tr. at 737-738.)

Tower Maintenance does not claim that it did not know that power line No. 3 was energized on the day of the accident. Rather, Tower Maintenance asserts that "certain circuits on the transmission towers were 'idle' circuits" and only "a limited number of the transmission towers on the Edison project ha[d] the same 'lay-out' of circuits as the tower where the incident occurred." (Resp't Br. at 13-14.) According to Respondent, these facts show that the Secretary "is not entitled to a presumption that, simply because an individual was an employee of Tower

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<sup>44</sup> The evidence in the record strongly suggests that some information was lost in translation between supervisor Psareas and foreman Mackeivicz and the painters. For instance, foreman Mackeivicz testified that he thought at the time of the accident that the cables on the Edison tower were de-energized. (Tr. at 342-343.) However, Mackeivicz also testified that when the painters gathered each morning at the staging location for the Edison project a safety meeting was held, during which the instruction was to maintain a safe distance from the power cables: "Q: And what was a safety meeting on the Edison project? A: It was to keep a safe distance between the cables always during the tie outs. That was it basically. Q: And when you say 'doing tie offs,' is that the same thing as clipping onto the metal of the tower? A: Yes." (Tr. at 1008.)

Confusion by employees regarding the scope of the project and their assignment also is revealed in the testimony of the painters regarding whether the arms on the electric transmission towers were to be painted. *See* p. 17-18 *supra*.

Maintenance (or even, simply because he worked on the Edison Project) that individual came within the minimum approach distance of an energized circuit.” (Resp’t Br. at 13.)

The evidence in the record specific to the No. 3 power line, and whether JV, or another unqualified Tower Maintenance employee who scaled the step bolt ladder up past the No. 3 power line, is relevant to whether the Secretary met his burden of proof. With regard to Tower Maintenance’s claim that some of the circuits were “idle” on the day of the accident, the PSE&G representative specifically testified that circuit Nos. 4, 5, and 6, not circuit No. 3, happened to be de-energized on the day of the accident. (Tr. at 487-489.) He also testified that to Tower Maintenance’s knowledge all of the circuits were energized, because that is what PSE&G told Tower Maintenance throughout the project. (Tr. at 508-509.)

As an employer responsible for OSHA regulation compliance, Tower Maintenance is responsible for “adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.” *Par*, 20 BNA OSHC at 1627. The only way to anticipate the minimum approach distance for each power line was to conduct an inspection of the tower to determine the voltage of each power line. *Id.* Only then could Tower Maintenance know the minimum approach distance for each power line. This is especially true for energized power line No. 3, which was closest to the edge of the tower and 26 kV. It is undisputed that no one from Tower Maintenance did these inspections, despite this requirement in its own HASP. (Tr. at 710, 949, 953; Ex. C-3 at 8-9.)

The testimony from project director Peter Vlahopoulos and from supervisor and health and safety officer Nikolaos Psareas indicates that there may have been confusion with respect to conducting the tower inspections. Both seemed to suggest that they relied on PSE&G to tell



them it was safe to paint the tower. Project director Vlahopoulos testified: “We don't inspect the actual tower. That's why the representative for PSE&G is there, to make sure that the tower has been inspected by him and reported back to his ‘glass tower,’ as they call it in Newark, which is their main office. We're not electricians, we're painters.” (Tr. at 949.) Supervisor Psareas testified:

Q: To work on a tower within 10 feet of a power line, you have to be a qualified employee, correct?

A: Yes.

Q: And to be a qualified employee, you have to be able to calculate the nominal voltage, correct?

A: No. That's what PSE&G rep is there for.

Q: So to work on a tower, you don't have to know the -- how to calculate the nominal voltage?

A: I mean, no, we have the PSE&G rep there. He will tell us it was good to climb. It was, you know, that was the job he gave us. We got the clearance and we did what we had to do.

(Tr. at 743.) Both of these statements are in direct conflict with Respondent's HASP, which provides that Tower Maintenance would perform daily inspections of the worksite for compliance with the HASP as well as with “OSHA.” (Ex. C-3 at 4-5, 8.) Even if there was some confusion regarding this issue, project director Vlahopoulos and supervisor Psareas were responsible for safety on the worksite, not PSE&G, and should have inspected the tower to determine the voltages and locations of the energized power lines, including power line No. 3, so as to determine the minimum approach distances for their painters.

The record also establishes that Tower Maintenance's management should have known that employees JV and Fonseca Alves were not “qualified” and, therefore, should have maintained a 10 foot minimum approach distance from the 26 kV No. 3 power line. With regard

to JV's qualifications, record evidence is devoid. Tower Maintenance does not even claim that JV was "qualified." Moreover, supervisor Psareas' testimony conflicts with foreman Mackeivicz's testimony with regard to who was in charge of checking JV's qualifications. (Tr. at 335-336; 688-689.) Psareas' testimony also conflicts with the HASP, which states that Psareas is responsible for reviewing training records to ensure OSHA compliance. (Ex. C-3 at 5.) With regard to JV specifically, Psareas "believed" based on conversations with Mackeivicz that JV came from Morris Painting, but he did not know what training JV had from Morris Painting. (Ex. R-50 at 54-56.) Instead, Psareas' testimony reflects an assumption that JV was qualified:

Q: Did you ever give instruction to the painters with respect to painting of the tower?

A: Did I ever give instructions? Josimar [Mackeivicz] will -- I would talk to Josimar and Josimar will be the one telling them exactly. And he'll be the one, you know, what they would need to do in the tower. And if I -- if he wasn't, you know, nearby or I will be explaining to them, but they all, from painting so many towers, because they are all similar, you know, they all know how to do it. It was a rhythm they followed.

(Tr. at 737.) Psareas' reliance on an assumption that his painters were qualified conflicts with his express duty and responsibility under the HASP to ensure that his painters were qualified. (Ex. C-3 at 5.)

With regard to Fonseca Alves, the record establishes that Tower Maintenance should have known that he also was not qualified. Even though Fonseca Alves attended an "Electrical Arc Flash Safety Training" course with supervisor Psareas, the training was conducted in English. (Ex. C-23 at 5; Ex. C-31 at 33-34, 40-42.) When asked how much English does Fonseca Alves speak, Psareas testified "a very little bit." (Tr. at 691-692.) He therefore should have known, in accordance with the HASP, to follow up with Fonseca Alves to make sure he understood the training. (Ex. C-3 at 5.) Instead, Fonseca Alves testified that he did not fully

understand portions of the training due to the language barrier, and that Tower Maintenance did not check to make sure he understood the training. (Ex. C-31 at 40-42.) As he testified: “They didn’t test us, just grab the belt – the bucket and go to work.” (Ex. C-31 at 42.)

The Secretary has shown that Psareas had constructive knowledge that his painters would be using their arms and hands, covered in conductive paint, only 2-3 feet from an energized power line on the Edison tower. *Par*, 20 BNA OSHC at 1626-1627. Psareas knew this type of tower, where the No. 3 power line came within 2-3 feet of the edge of the tower body, and he testified that he had been on a tower with a similar layout approximately ten times previous to the tower at issue. (Tr. at 737.) Psareas also knew that, to work within 10 feet of an energized power line, you have to be a qualified employee. (Tr. at 743.) Psareas, however, never measured the distance between power line No. 3 and the edge of the tower body nor the distance between No. 3 and the center of the tower cage. (Tr. at 710.) Psareas therefore had constructive knowledge of the violative conditions imposed on the painters in this case, and this knowledge is imputable to Tower Maintenance. *Par*, 20 BNA OSHC at 1626-1627.

The Secretary has also shown that the painters’ breach of the minimum approach distance in this case was reasonably foreseeable and therefore preventable by Tower Maintenance. *Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 357–58 (3d Cir. 1984) (holding that the Secretary must show that the violative conduct was reasonably foreseeable and thus preventable to establish a violation of a general safety standard...“The courts of appeals have consistently held that the adequacy of a company's safety program, broadly construed, is the key to determining whether an OSHA violation was reasonably foreseeable and preventable.”). Tower Maintenance’s own HASP provided, for its employees, that the minimum approach distance to a 26 kV energized power line was 2 feet 4 inches. (Ex. C-3 at 19 “App’x A”). The table

referenced in the HASP [Exhibit C-3] contains the same information as OSHA's Table R-6, which is incorporated by reference to the standard cited in the alternative, *i.e.*, the standard that would apply if the evidence showed that Tower Maintenance's employees were "qualified." 29 C.F.R. § 1910.269(1)(2). This portion of the HASP reveals that Tower Maintenance expected its painters, without reference to whether they were "qualified," to breach the 10 foot minimum approach distance of the cited standard.

Indeed, the painters on the Edison tower breached the 10 foot minimum approach distance to energized power line No. 3 as they passed it while scaling the ladder, or as they painted the tower body right next to it. The tower at issue here was primed just two days prior to the incident and it is undisputed that the employees scaled the ladder to get to their painting positions. (Tr. at 1037-1038.) It is also undisputed that Tower Maintenance expected the painters to paint the tower body, from which the No. 3 power line was only 2-3 feet. It is also undisputed that the paint, which covered the painters and their painting mitts, was conductive. It was reasonably foreseeable and preventable that the "unqualified" painters on the Edison tower breached the 10 foot minimum approach distance to the No. 3 power line.

The Secretary has established knowledge for this citation item.

#### **E. Unpreventable Employee Misconduct Defense**

Respondent claims that it "adduced ample evidence that the painters were instructed to maintain a safe distance from the energized circuits, and to perform their painting from within 'the box' of the transmission towers." (Resp't Br. at 17.) Respondent therefore claims that "there was no need or even colorable reason [for JV] to venture onto the arms of the transmission towers." (Resp't Br. at 17.) This claim is construed as an unpreventable employee misconduct (UEM) defense.

After the Secretary has set forth a *prima facie* case, the employer may set forth the UEM defense. *N. Y. State Elec. & Gas Corp.*, 88 F.3d at 106. For this defense, the employer has the burden to establish that: (1) the employer has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *Precast Servs. Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995); *see also Pa. Power & Light Co. v. OSHRC*, 737 F.2d at 357 (holding that “[i]n cases where the Secretary proves that a company supervisor had knowledge of, or participated in, conduct violating the Act, we do not quarrel with the logic of requiring the company to come forward with some evidence that it has undertaken reasonable safety precautions.”).

Respondent claims that it had a rule that no employee was to paint the arms of a tower. Respondent also had a work rule in Appendix A of its HASP that no employee would approach an energized 26 kV power line within 2 feet 4 inches. (Ex. C-3 at 19 “App’x A”.) With respect to the No. 3 power line, which was 2-3 feet from the edge of the tower body, I find that neither of these rules was adequate to prevent a violation. The cited standard required that the painters stay 10 feet from the power line, not “2-3 feet” or “2 feet 4 inches.” I also find that neither of these rules was communicated to the painters adequately. The record shows that the HASP was never provided to the painters – even foreman Mackeivicz had not seen it. The record also shows evidence of instructions being lost in translation between supervisor Psareas, who speaks no Portuguese, and the painters.<sup>45</sup> Additionally, there is no evidence in the record of how and whether Respondent enforced these rules. Finally, supervisor Psareas left the worksite before the painters ascended the tower and was making a telephone call a mile away when the accident

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<sup>45</sup> *See* p. 43 n.44 *supra*.

occurred. In this instance, supervisor Psareas did not take steps to discover a violation of its work rule on the day of the accident, as he was not even on the worksite when the accident occurred. Respondent has failed to establish the UEM defense for this citation item.

Citation 1, Item 1 is affirmed.

## **F. Characterization**

The Secretary alleged a serious violation of the cited standard. A violation is “serious” if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). The hazards associated with a violation of the cited standard, or the standard cited in the alternative, include amputations, burns, or as shown in this case, death by electrocution. (Tr. at 618-619.) This citation item is properly characterized as serious.

## **II. Serious, Willful, Repeat Citation 2, Item 1: Alleged Fall Protection Violation**

The Secretary alleges a violation of 29 C.F.R. §§ 1910.269(g)(2)(iii) and (g)(2)(v). (Amended Complaint at ¶ VIII.)<sup>46</sup> Section 1910.269(g)(2)(iii) “Fall Protection,” provides that

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<sup>46</sup> The Secretary cited in the alternative violations of 29 C.F.R. § 1910.132(a) and (e), which state in pertinent part: “protective equipment ... shall be provided, used and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards ... encountered in a manner capable of causing injury or impairment[.] Defective or damaged personal protective equipment shall not be used.” 29 C.F.R. §§ 1910.132(a), (e); Amended Complaint at ¶ VIII.

The Secretary claimed the following:

- (a) Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. 131 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels. The employer failed to ensure that employees wore appropriate fall protection equipment and failed to remove defective equipment from service. Employees performing work from elevated locations on an electric transmission tower were not protected from falls through the use of a functional fall protection system on / or about 10/25/2012. Employees were using lanyards with defective snap hooks which were covered in paint and incapable of closing securely. Employees were also required to perform work in elevated positions where their personal fall arrest systems were not capable of providing fall protection.

“Body belts, safety straps, lanyards, lifelines, and body harnesses shall be inspected before use each day to determine that the equipment is in safe working condition. Defective equipment may not be used.” Section 1910.269(g)(2)(v) provides in relevant part: “Fall arrest equipment ... shall be used by employees working at elevated locations more than 4 feet (1.2 m) above the ground on ... towers[.]”<sup>47</sup> The Secretary claims the following:

(a) Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. 131 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels. The employer failed to ensure that employees wore appropriate fall protection equipment and failed to remove defective equipment from service. Employees performing work on an electric transmission tower from elevated locations more than 4 feet above the ground level were not protected from falls through the use of a functional fall protection system on or about 10/25/2012. Employees were using lanyards with defective snap hooks which were covered in paint and incapable of closing securely. Employees were also required to perform work in elevated positions where their personal fall arrest systems were not capable of providing fall protection.

Amended Complaint ¶ VIII.

**A. The Secretary has established that the cited standards apply**

As discussed above, § 1910.269, entitled “Electric power generation, transmission, and distribution,” applies to “the operation and maintenance of electric power generation, control, transformation, transmission, and distribution lines and equipment.” 29 C.F.R. § 1910.269(a)(1)(i). The parties stipulated that Tower Maintenance “was engaged in repainting an electric transmission tower” on the day of the accident. (Ex. J-1 at ¶ 11.) The representative for PSE&G testified that PSE&G considers painting as maintenance for its towers because, “it extends the life of the structure.” (Tr. at 469.) *See Pub. Utils. Maint., Inc.*, 417 F. App’x 58.<sup>48</sup>

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Amended Complaint at ¶ VIII.

<sup>47</sup> Section 1910.269(g)(2)(v), Note 2, states in relevant part: “[U]nqualified employees ... are required to use fall protection any time they are more than 4 feet (1.2 m) above the ground.”

<sup>48</sup> *See* p. 4 n.5 and accompanying text *supra*.

The record clearly discloses that Tower Maintenance painters were working at heights substantially greater than 4 feet above the ground on a transmission tower. The cited standards under § 1910.269 apply.<sup>49</sup>

**B. The Secretary has established that Tower Maintenance violated the cited standards**

All of the painters at the hearing testified that they had frequent concerns about their PFAS devices and that they brought their concerns to supervisor Psareas and foreman Mackeivicz. (Tr. at 279-280; Ex. C-30 at 58-60; Ex. C-31 at 79-81.) Supervisor Psareas confirmed that the employees would bring their equipment to him in the mornings and that he knew the paint would cause the harness clips to jam, rendering the PFAS defective. (Tr. at 701-702.) But then he testified that he would “always replace them.” (Tr. at 701-702.) This testimony is in direct conflict with the testimony of all the painters who testified. I credit the painters’ testimony for the following reasons.

Foreman Mackeivicz testified that each painter was responsible, at the end of the day, to clean his PFAS device and to put it away. (Tr. at 355.) Project director Peter Vlahopoulos admitted that dry paint on a clip rendered the clip defective. (Tr. at 958.) The HASP even required Tower Maintenance (Vlahopoulos and Psareas) to ensure that personal protective equipment “is maintained in a sanitary and reliable condition.” (Ex. C-3 at 7.) All of the supervisors on the worksite therefore knew of the risk of a PFAS device being rendered defective during the project. However, none of the supervisors claimed that they ensured that any of the PFAS devices worked – not at the beginning of the workday and, notably, not during the

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<sup>49</sup> Just as for Citation 1, Item 1, Respondent claims that the Secretary has failed to carry his burden to show the applicability of the cited standards for this citation item because the Secretary also cited in the alternative. (Resp’t Br. at 10.) Respondent, however, has not expounded on this argument with respect to this citation item. Indeed, all of the facts supporting the applicability of the cited standard for this citation item are undisputed. Respondent’s claim in this regard is rejected.



workday. In fact, the only mention in the record when a painter received a harness was in the morning at the staging area. While the painters were on the tower or in between towers, sometimes the painters were left unsupervised, as here, when supervisor Psareas left the worksite to make a telephone call. I therefore credit the painters' testimony regarding their defective equipment, and find that the defective harnesses were not replaced and that the painters were working with defective personal protective equipment in violation of § 1910.269(g)(2)(iii).

All of the painters, and the supervisors, including Peter Vlahopoulos, testified that accepted uses on the Tower Maintenance worksite of the PFAS device included: (1) wrapping the lanyard around a cross-bracing and attaching the clip back onto the lanyard itself, and (2) clipping onto step bolts. (Tr. at 272-274, 346-347, 703-704, 958; Exs. C-30 at 87-90, C-31 at 75-78, 109-111.) Use of the PFAS device in this manner is non-compliant with OSHA regulations.<sup>50</sup> As the OSHA CO noted, wrapping the lanyard and clipping back onto the lanyard itself subjects the lanyard to abrasion and tear, and undermines the weight capacity of the PFAS device. (Tr. at 181-182.) The lanyard was therefore not a secure anchor point. (Sec'y Br. at 40.) Step bolts also are not secure anchor points because the clip can slide off the end of the step bolt. (Tr. at 163-164.) Because Tower Maintenance permitted its painters to use PFAS devices in manners that were not compliant with OSHA regulations, it follows that Tower Maintenance did not ensure that the painters used fall arrest equipment on this worksite, in violation of § 1910.269(g)(2)(v). Furthermore, some of the painters testified that, at certain points on a tower, it was impossible to use the PFAS device. In those areas, the painters did not use the PFAS device at all, in direct violation of the § 1910.269(g)(2)(v). (Ex. C-30 at 88-90; Ex. C-31

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<sup>50</sup> The PFAS device must include a secure anchorage point and be protected from damage and abrasion during use. 29 C.F.R. § 1910.269(g)(2)(i) (requiring conformance with subpart M of part 1926); 29 C.F.R. § 1926.502(d)(11); *see also* Tr. at 181-182 (CO testifying about Respondent's incorrect usage of the PFAS.)

at 110-11.) Finally, the fact that two employees fell is strong evidence that neither was actually using a PFAS device, even though they were wearing them. The Secretary has established non-compliance with the cited standards.

**C. The Secretary has established that Tower Maintenance’s employees had access to the violative condition**

The hazard associated with the violations of the cited standards is falling from a height of 4 or more feet. It is undisputed that all of the employees on the worksite worked at heights greater than 4 feet. It has been found that the painters in this case worked with defective PFAS devices, and used PFAS devices improperly. The Secretary has established exposure.

**D. Tower Maintenance knew that its employees were using defective PFAS devices and that the employees were not using their PFAS devices properly**

The Secretary has established that Respondent had both actual and constructive knowledge of the violative condition. It is undisputed that the paint in this project caused the clips to jam, and that the painters would inform supervisor Psareas and foreman Mackeivicz of their defective equipment. It is also undisputed that the remedy was to clean the PFAS device, not to replace the PFAS device. While there is evidence in the record that the painters frequently had issues with the PFAS devices working properly, there is no evidence in the record of supervisor Psareas or foreman Mackeivicz ensuring that the each PFAS device worked properly. Respondent’s HASP required that the PFAS device be kept in a “sanitary and reliable condition” and, notably, that the painters “would be supervised continually by the HSO [health and safety officer Psareas] to ensure compliance with [Respondent’s fall protection] policy.” (Ex. C-3 at 7, 11.) Supervisor Psareas left the worksite before the painters ascended the tower, and did not continually monitor their usage of fall protection on the day of the accident. This evidence constitutes constructive knowledge of the violative condition. *Par*, 20 BNA OSHC at 1626-1627 (holding that constructive knowledge is based on showing of lack of reasonable diligence, which

“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 to which employees may be exposed, and to take measures to prevent the occurrence of violations.”).

Supervisor Psareas and foreman Mackeivicz also testified that they were aware that painters wrapped their PFAS device lanyard around the tower beam and clipped it back onto itself, that the painters used the clips on step bolts, and, most importantly in the case of Mackeivicz, that he knew these methods of using the PFAS device were improper. (Tr. at 346-347, 703-704.) Both Psareas and Mackeivicz therefore had actual knowledge of the violative condition. Project manager Peter Vlahopoulos also knew that the painters used the step bolts to tie off. (Tr. at 958.) Peter Vlahopoulos, Psareas and Mackeivicz are supervisors for Tower Maintenance. These supervisors knew that their painters worked at great heights with potentially defective PFAS devices and they knew of the improper ways the painters used the PFAS devices. These supervisors therefore had actual knowledge of the violative condition underlying this citation item. *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC at 1199.

Furthermore, while supervisor Psareas was not on the worksite at the time of the accident, and therefore did not actually see the state and use of the fall protection that the painters used on the Edison tower, I find that the accident was foreseeable based on the lax manner in which Tower Maintenance implemented its safety program. *Pa. Power & Light Co. v. OSHRC*, 737 F.2d at 358 (“The courts of appeals have consistently held that the adequacy of a company’s safety program, broadly construed, is the key to determining whether an OSHA violation was reasonably foreseeable and preventable.”). The record is replete with evidence establishing how these supervisors did not enforce Tower Maintenance’s own safety rules set forth in the HASP –

they did not ensure during the workday that the PFAS devices worked properly and they knowingly allowed the painters to use their PFAS devices improperly. This lax safety rule enforcement supports a finding that the painters' violation of the cited standard at the Edison worksite was reasonably foreseeable and preventable.

Finally, Respondent's supervisors' actual and constructive knowledge is imputed to Tower Maintenance. *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1732 (No. 93-373, 1996), *aff'd*, 122 F.3d 437 (7th Cir. 1997) (holding that supervisory knowledge is imputable to the employer). Knowledge for this citation item has been established.

Citation 2, Item 1 is affirmed.

## **E. Characterization**

### **1. Serious**

The Secretary has alleged a serious violation of the cited standard. A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). The hazard associated with violating this standard includes serious bodily harm or death, as evidenced by RS' serious injuries. This violation is properly characterized as serious.

### **2. Willful**

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety.)' " *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

[I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation .... A willful violation is differentiated by

heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference ....

*Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993); *see also Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 208 (3d Cir. 2005) (A willful violation of the OSH Act “constitutes an act done voluntarily with either an intentional disregard of, or plain indifference to, the OSH Act's requirements.”)(internal quotes omitted).

There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it.

*Williams Enters. Inc.*, 13 BNA OSHC 1249, 1257 (No. 85-355, 1987). “[A]n employer's prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are all relevant considerations in determining whether a violation is willful in nature.” *MJP Constr. Co.*, 19 BNA OSHC at 1648. The state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful.” *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000).

#### *Heightened Awareness*

The record establishes that Respondent had a heightened awareness of the requirements of the cited standards and the illegality of its conduct and conditions of its worksite. In 2010, at a worksite in Macungie, Pennsylvania, Tower Maintenance had a previous fatality related to a fall, and was cited by OSHA in that instance. Peter Vlahopoulos was the jobsite project manager for Tower Maintenance at the Macungie worksite. The fatally injured employee fell from a pole tower. At the time of the fatal accident, the employee had been tied off on a “step bolt.” (Tr. at 958-962.) The citation, which alleged violations of OSHA’s construction fall protection

standards, was settled, and the violations of the cited standards were affirmed.<sup>51</sup> (Ex. J-1 at ¶¶ 4-5; Exs. C-25-27.) As a result of this citation, Elizabeth Vlahopoulos was aware of the OSHA requirement that her employees “absolutely” must use fall protection at elevated heights, that employers must inspect an employee’s PFAS device, and that defective equipment should not be used, and that the previous violation was “on [her] OSHA log and on [her] record.” (Tr. at 882, 917-918.) As a result of this fatal accident, Respondent knew that employees must tie-off on secure anchor points when working at heights. Respondent knew that “step bolts’ were an inadequate anchor point. (Tr. 958-962, 988-991.)

Similarly, Peter Vlahopoulos participated in previous OSHA discussions relating to violations of fall protection standards at a worksite for a previous company.<sup>52</sup> (Tr. 980-985; Exs.

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<sup>51</sup> In the settlement agreement and Commission final order violations of the following standards were affirmed:

- (1) 29 C.F.R. § 1926.501(b)(1), which states in pertinent part: “Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems”;
- (2) 29 C.F.R. § 1926.502(d)(21), which states in pertinent part: “Personal fall arrest systems shall be inspected prior to each use for wear, damage and other deterioration, and defective components shall be removed from service.”;
- (3) 29 C.F.R. § 1926.503(b)(1), which states in pertinent part: “The employer shall verify compliance with paragraph (a) of this section [Fall Protection “Training Program”] by preparing a written certification record.” *See* note 56 *infra* for full text of standard.

(Ex. J-1 at ¶¶ 4-6; Exs. C-25, 26, 27.)

<sup>52</sup> The standards violated in that case were the following:

- 1) [Citation 1, Item 9] 29 C.F.R. § 1926.501(b)(15), which states in pertinent part: “each employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system.”
- 2) [Citation 1, Item 10] 29 C.F.R. § 1926.502(d)(21), which states in pertinent part: “Personal fall arrest systems shall be inspected prior to each use for wear, damage and other deterioration, and defective components shall be removed from service.”

(Exs. C-46 at 1-2; C-47 at 4, 16-17.)

C-49 at 9, 11-13; C-50). His knowledge of the requirements of fall protection travelled with him when he began working for Respondent. *MJP Constr. Co., Inc.*, 19 BNA OSHC at 1648 (holding that supervisors can be “chargeable with knowledge of the requirements of the standard based on their prior work experience, wherever that experience originates.”).

Although supervisor Psareas did not know of Respondent’s previous OSHA history (Ex. R-50 at 44), both he and foreman Mackeivicz were trained in fall protection earlier that year. (Ex. C-22, p. 5-7; R-11; App’x B.) Both were aware of the methods the Tower Maintenance painters used with their PFAS devices at the Edison worksite. Mackeivicz testified that he knew that the methods that the painters used with their PFAS devices were improper. (Tr. at 346-347. *See also* Tr. 703-704.)

The above evidence supports a finding that Respondent had a heightened awareness of the fall protection requirements, the violative conditions, and the illegality of its conduct on Edison project worksite. *MJP Constr. Co.*, 19 BNA OSHC at 1648 (employer’s prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are relevant to finding willfulness); *Branham Sign Co.*, 18 BNA OSHC at 2134 (imputing supervisor’s knowledge for willfulness).

#### *Plain Indifference*

The evidence in the record establishes that Respondent was plainly indifferent to the safety of its painters with regard to fall protection. The record establishes that Respondent systematically sent painters, including JV, up towers without first taking a fall protection class or even having any training certificates on file, and less than two years after a similar fall fatality in

Macungie.<sup>53</sup> Although each painter was provided with a PFAS device, the record shows that all supervisors were aware that the PFAS devices were rendered ineffective frequently and yet no supervisor ensured that the painters' PFAS devices worked throughout the day. Additionally, all of the supervisors knowingly disregarded the improper methods by which the painters used their PFAS devices, including anchoring their PFAS devices to step bolts. Respondent's HASP required supervisor / health and safety officer Psareas to continually monitor the painters and their use of fall protection, but Psareas left the worksite on the day of the accident. No supervisor was on the worksite to monitor compliance with fall protection on the day of the accident even though Respondent knew that their painters would be working at great heights with potentially ineffective PFAS devices and using them improperly.

Under these circumstances, the Secretary has established that Respondent was plainly indifferent to its painters with regard to fall protection. *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2116-17 (No. 07-1578, 2012) (finding plain indifference when supervisor knew from prior experience and the day of the accident that carbon monoxide would be present and yet failed to monitor for it); *Adrian Constr. Co.*, 7 BNA OSHC 1172, 1175 (No. 15414, 1979) (“A violation is willful if the evidence shows that the employer ignored an obvious and grave danger . . . ”); *Branham Sign Co.*, 18 BNA OSHC at 2134 (imputing supervisor's knowledge for willfulness).

This citation item is properly characterized as willful.

### **3. Repeat**

“A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a

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<sup>53</sup> As discussed above, Respondent had no training certificates on file for the following painters engaged in tower painting work, on the PSE&G transmission tower painting project, on October 25, 2012: Marcelo Leiroz, Ederson Trizotte, Osias Figugiredo, Domingos Da Silva, Euflates Passos, and JV. (Ex. J-1 at ¶¶ 17 through 27; App'x B.) See p. 22 *supra*.



substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979); *see also Reich v. D.M. Sabia Co.*, 90 F.3d 854, 856 (3d Cir. 1996) (adopting *Potlatch* test). “[T]he principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards.” *Amerisig Se., Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996). “ ‘[S]ubstantially similar’ must be defined sufficiently narrowly that the citation for the first violation placed the employer on notice of the need to take steps to prevent the second violation.” *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998).

The Secretary claims that the predicate for the repeat characterization of Citation 2, Item 1, alleging violations of 29 C.F.R. §§ 1910.269(g)(2)(iii) and (g)(2)(v), is Tower Maintenance’s previous violation of OSHA’s construction fall protection standards at 29 C.F.R. §§ 1926.501(b)(1) and 1926.502(d)(21).<sup>54</sup> (Amended Complaint at VI, VIII; Sec’y Br. at 60.) Tower Maintenance’s violation of these standards, in connection with the fatal accident in Macungie, Pennsylvania, became a final order of the Commission on July 15, 2011. (Exs. J-1 at ¶¶ 4, 5; C-27.) However, § 1926.502(d)(21) was not included in the alleged violation description of Citation 2, Item 1 in the Amended Complaint and, even though the parties stipulated to Tower Maintenance’s prior violation of this standard, the Secretary never amended the Complaint to add 29 C.F.R § 1926.502(d)(21) as a predicate standard for the repeat characterization of

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<sup>54</sup> I find the correct predicate citation for the repeat characterization alleged in Citation 2, Item 1 to be Citation 1, Item 2, in OSHA Inspection No. 314720780, stating a violation of § 1926.501(b)(1), as set forth on Citation 2, Item 1 as issued in the instant case on April 8, 2013, and attached to the July 14, 2014 Amended Complaint. (Exs. C-25, C-27).

I find the reference in the Amended Complaint, at paragraph VI, that the predicate citation for the repeat characterization alleged in Citation 2, Item 1 to be Citation 1, Item 1 in OSHA Inspection No. 314720780, to be an inadvertent typographical error. Citation 1, Item 1, in OSHA Inspection No. 314720780 was vacated in its entirety in the formal settlement agreement. (Ex. C-27.)

Citation 2, Item 1 in the instant case. This repeat characterization analysis is therefore limited to 29 C.F.R. §§ 1926.501(b)(1) as a predicate for this citation item.<sup>55</sup>

Respondent claims that this citation item cannot be characterized as repeat based on the previous violations because the predicate standard was “separate and distinct” and has “substantive differences” from the cited standards here. (Resp’t Br. at 15-16.) Respondent further claims that the previous final order was not a violation of 29 C.F.R. § 1926.501(b)(1) “in any event” because it was reduced from a serious to an other-than-serious violation in the settlement agreement. (Resp’t Br. at 16.) Respondent’s claims are rejected.

First, the settlement agreement establishes that Tower Maintenance violated 29 C.F.R. § 1926.501(b)(1) as a serious violation.<sup>56</sup> (Exs. C-25, C-27.) Second, the test for determining substantial similarity for purposes of repeat characterization is comparing the hazard, not the standards. *Amerisig Se., Inc.*, 17 BNA OSHC at 1661. Both Tower Maintenance worksites – Macungie and Edison – revealed the noncompliant use by employees of step-bolts as anchor points when working at heights, which resulted in a fall hazard.

In Macungie, Tower Maintenance violated standard 1926.501(b)(1) because one of its employees used a step bolt as an anchor point for his PFAS, which caused him to fall to his death. (Tr. 958-62; Ex. J-1 ¶ 3 (“On October 10, 2010 a Tower Maintenance Corporation employee sustained fatal injuries after falling from a transmission tower at a project located in

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<sup>55</sup> 29 C.F.R. § 1926.501(b)(1), states in pertinent part: “Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.”

<sup>56</sup> Respondent incorrectly asserts that its violation of § 1926.501(b)(1) was “reduced to a lesser violation” in the settlement agreement. (Resp’t Br. at 16.) Tower Maintenance’s violation of § 1926.502(d)(21), within Citation 1, Item 3 of OSHA Inspection number 314720780, was “reclassified from ‘serious’ to ‘other than serious[.]’ ” (Exs. C-25, C-27 at 1.)

Macungie, PA.”).) The alleged violation description for the Macungie job site citation states the following:

Throughout Work Area – Even though a proper fall arrest system was provided to the employee, the employer did not ensure that the subject employee that fell was protected from falls through the use of fall protection systems on or about 10/10/10.

(Ex. C-27 at 1.) Based on this language, Tower Maintenance was on notice to ensure that its employees were wearing and using fall protection systems, and specifically not tying off on inadequate anchor points. *Caterpillar, Inc. v. Herman*, 154 F.3d at 403.

However, as noted above, all of the painters, and the supervisors, including Peter Vlahopoulos, testified that accepted uses on the Tower Maintenance worksite of the PFAS device included: (1) wrapping the lanyard around a cross-bracing and attaching the clip back onto the lanyard itself, and (2) clipping onto step bolts. (Tr. at 272-74, 346-47, 703-04, 958; Exs. C-30 at 87-90; C-31 at 75-78, 109-111.) Supervisor Psareas and foreman Mackeivicz testified that they were aware that painters wrapped their PFAS device lanyard around the tower beam and clipped it back onto itself, that the painters used the clips on step bolts, and, most importantly in the case of Mackeivicz, that he knew that these methods of using the PFAS device were improper. (Tr. at 346-347, 703-704.)

At both worksites, Macungie and Edison, Tower Maintenance violated OSHA standards for fall protection and Tower Maintenance employees fell and either died or sustained serious injuries due to Respondent’s failure to comply with the fall protection standards. The hazard for this citation item is substantially similar to the hazard for the predicate citation item.

This citation item is properly classified as repeat.

### **III. Serious, Repeat Citation 2, Item 2: Alleged Training Violation**

As discussed above, the standards in this citation item alleged to have been violated are affected by the finding that Respondent's painters were not "qualified." Regarding Citation 2, Item 2, all of the standards cited are therefore adjudicated in this section.

The Secretary alleges that Tower Maintenance violated 29 C.F.R. §§ 1910.269(a)(2)(i) and (a)(2)(ii). (Amended Complaint at ¶ IX.) Section 1910.269(a)(2)(i) provides in relevant part:

Employees shall be trained in and familiar with the safety-related work practices, safety procedures, and other safety requirements in this section that pertain to their respective job assignments. Employees shall also be trained in and familiar with any other safety practices . . . that are not specifically addressed by this section but that are related to their work and are necessary for their safety.

29 C.F.R. § 1910.269(a)(2)(i). Section 1910.269(a)(2)(ii) provides in relevant part:

Qualified employees shall also be trained and competent in: (A) The skills and techniques necessary to distinguish exposed live parts from other parts of electric equipment, (B) The skills and techniques necessary to determine the nominal voltage of exposed live parts, (C) The minimum approach distances specified in this section corresponding to the voltages to which the qualified employee will be exposed, and (D) The proper use of the special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on or near exposed energized parts of electric equipment.

29 C.F.R. § 1910.269(a)(2)(ii). The Secretary claims the following:

(a) Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. [1]31 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: on or about 10/25/2012, the employer did not ensure that employees were trained in the safety-related work practices, procedures, and requirements associated with painting energized transmission towers. Employees that were required to use personal fall arrest systems were not trained in the proper use and operation of personal fall arrest systems, and were not trained in the correct procedures for maintaining and inspecting the personal fall arrest systems. The employer also failed to ensure the effectiveness of training that was provided by previous employers prior to allowing employees to perform work on transmission towers.

(b) Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. [1]31 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: on or about 10/25/2012, the employer did not ensure that employees were trained in and

familiar with the safety-related work practices, safety procedures, and other safety requirements that pertain to the work of re-painting energized electric transmission towers. Employees were not trained in or informed about the safe use of conductive tools and objects, including primer and paint.

(c) Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. [1]31 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: on or about 10/25/2012, the employer did not ensure that employees who were required to perform work limited to qualified employees were trained and competent in the skills and techniques necessary to determine the nominal voltage of exposed live parts and the appropriate minimum approach distances.

Amended Complaint at ¶ IX.

The Secretary also alleges violations of 29 C.F.R. §§ 1910.132(f) and 1910.332(b)(1) and

(2). (Amended Complaint at ¶ IX.) Section 1910.132(f) provides in relevant part:

The employer shall provide training to each employee who is required by this section to use PPE [personal protective equipment].

29 C.F.R. § 1910.132(f)(1). Section 1910.332(b)(1) provides in relevant part:

*Content of training – (1) Practices addressed in this standard.* Employees shall be trained in and familiar with the safety-related work practices required by §§ 1910.331 through 1910.335 that pertain to their respective job assignments.

29 C.F.R. § 1910.332(b)(1). Section 1910.332(b)(2) provides in relevant part:

*Additional requirements for unqualified persons.* Employees who are covered by paragraph (a) of this section but who are not qualified persons shall also be trained in and familiar with any electrically related safety practices not specifically addressed by §§ 1910.331 through 1910.335 but which are necessary for their safety.

29 C.F.R. § 1910.332(b)(2). The Secretary claimed the following:

(a) Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. [1]31 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: on or about 10/25/2012, the employer did not ensure that employees were trained in and familiar with the safety-related work practices and electrically related safety practices associated with painting energized electric transmission towers. Employees were not trained in or informed about the safe use of conductive tools and objects, including primer and paint. Employees were required to perform work near energized overhead power lines and were not informed about the

amount of voltage passing through the power lines and were not trained to determine the appropriate distance to maintain from the energized power lines.

(b) Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. [1]31 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: on or about 10/25/2012, the employer did not ensure that each employee was trained in the safety-related work practices associated with repainting energized electric transmission towers. Employees who were required to use personal fall arrest systems were not trained in the proper use, care, and operation of the personal fall arrest systems, and were not trained in the correct procedures for caring for and maintaining their personal fall arrest systems. The employer also failed to ensure the effectiveness of training that was provided by previous employers prior to allowing employees to perform work on transmission towers.

Amended Complaint at ¶ IX.

**A. The Secretary has established that the cited standards apply**

The Secretary alleges that Tower Maintenance failed to train its employees in the areas of fall protection and electrical safety. Both of these areas fall under the broadly written language of all of the cited standards. Respondent sent unqualified employees, and in some instances untrained employees, to work on the Edison tower on this section 1910.269 project. To the extent that the section 1910.269 training standards cited here regulate the training of persons, regardless of whether they were qualified or unqualified, I find that section 1910.269 applies to the working conditions in this case.<sup>57</sup> *S. Pan Servs. Co.*, 25 BNA OSHC at 1085.

However, as the Secretary argues, §§ 1910.332(b)(1) and (b)(2) cited in the alternative also apply in this case due to the finding that the painters on the Edison project were “unqualified” and the express requirement in §1910.269(a)(1)(iii) that “all other applicable standards contained in this part 1910” also apply. (Sec’y Br. at 61). *See also Morrison-Knudsen*

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<sup>57</sup> Because of this, § 1910.132(f) does not apply in this case because I find that § 1910.269(a)(2)(i) covers the requirement of fall protection training as it applies to “unqualified” persons as well as “qualified.” All of the painters had to work at great heights while painting the Edison tower; therefore they were subjected to a fall hazard in their respective job assignments.

*Co. / Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1108 (No. 88-572, 1993)(in regulatory context, explaining that Commission construes “each part or section . . . in connection with every other part or section so as to produce a harmonious whole”) (internal citations omitted). Under these circumstances, §§ 1910.332(b)(1) and (b)(2) apply and cover the training requirement gap that is formed due to the training standards in § 1910.269 that do not cover “unqualified” persons.

**B. The Secretary has established that Respondent violated 29 C.F.R. §§ 1910.269(a)(2)(i) and (a)(2)(ii)**

**1. Section 1910.269(a)(2)(i)**

Section 1910.269(a)(2)(i) requires Tower Maintenance painters to be trained in and familiar with “safety-related work practices.” The Secretary claims that the use and maintenance of the PFAS device was such a safety-related work practice on the Tower Maintenance worksite and that Tower Maintenance failed to train its employees in this practice. (Sec’y Br. at 63-68.) Respondent claims that the Secretary failed to establish that its employees were not trained. (Resp’t Br. at 13-15; Resp’t Reply Br. at 4-5.)

As discussed above regarding Citation 1, Item 1, the Secretary has established that JV as well as several other Respondent painters was not trained in the hazards of the work they performed on the Edison tower project.<sup>58</sup> With regard specifically to fall protection, the record shows that, on the day of the accident, two weeks after he had already started working, JV had no fall protection training record on file at any of the vendors Tower Maintenance relied upon to provide fall protection training to its employees.<sup>59</sup> (Tr. at 183-84; Exs. C-6 at ¶ 9; C-22; C-23; C-24; Resp’t Br. at 14.) Indeed, JV was scheduled to take training in November 2012. (Tr. at

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<sup>58</sup> See p. 22 *supra*; App’x B.

<sup>59</sup> As discussed above, Respondent’s argument that it lost JV’s training record due to Hurricane Sandy is unsupported and not credited. See p. 29 n.35 *supra*.

183.) This evidence supports a finding that Tower Maintenance failed to comply with this standard with regard to JV and his necessary fall protection training. *Well Solutions, Inc., Rig No. 30*, 17 BNA OSHC at 1214-15.

I also find that Respondent violated the training standard with regard to RS. Although the record establishes that RS was trained in fall protection on September 5, 2012, RS started working for Tower Maintenance before this training, in August 2012. (Tr. at 114; Ex. C-22 at 22; App'x B.) The training RS attended was in English. His primary language is Portuguese. Tr. at 231-232, 235). RS testified that he used the PFAS device improperly by wrapping it around an iron beam and clipping back onto the cord, or clipping onto the step bolts, or not clipping off at all. These methods are all inconsistent uses with any fall protection training he received. (Tr. at 272-274.) This evidence discloses that Tower Maintenance did not ensure that RS understood the fall protection training that was provided to him, in violation of the cited standard.

Finally, there were no training certificates on file for several painters engaged in tower painting work on the PSE&G transmission tower painting project on October 25, 2012: Marcelo Leiroz, Ederson Trizotte, Osias Figugiredo, Domingos Da Silva, Euflates Passos, and JV. (Ex. J-1 at ¶¶ 17, 21 through 27.)<sup>60</sup> As discussed above, I give the absence of any training records for these workers great weight as Respondent was in the best position to provide these training documents. *Well Solutions, Inc., Rig No. 30*, 17 BNA OSHC at 1214-15.

The Secretary has established non-compliance with § 1910.269(a)(2)(i).

## **2. Section 1910.269(a)(2)(ii)**

Section 1910.269(a)(2)(ii) delineates the training requirements for “qualified persons” on the Tower Maintenance worksite. Only qualified employees should have been painting the tower

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<sup>60</sup> See p. 22 *supra*; App'x B.



cage in areas near electric power lines above 50 volts, such as the No. 3 power line. 29 C.F.R. § 1910.269(l)(1). As discussed above, however, the record evidence establishes that none of the painters had the familiarity or competence to be considered a qualified person on the Tower Maintenance Edison worksite.<sup>61</sup> It therefore follows that Tower Maintenance did not train its painters, including JV who worked closest to the No. 3 power line, in compliance with the requirements of this standard while working on the Edison tower. Moreover, as discussed above, the record does not establish that supervisor Psareas and foreman Mackeivicz had the requisite training and competence as required under this standard.

The Secretary has established non-compliance with § 1910.269(a)(2)(ii).

### **3. Sections 1910.332(b)(1) and (2)**

Sections 1910.332(b)(1) and (2) require, in relevant part, that “unqualified” employees be trained in electrical “safety related work practices” regarding potential hazards related to their job assignments.

The Secretary claims that working with conductive paint near energized power lines was a safety-related work practice in which Tower Maintenance painters should have been trained. (Sec’y Br. at 68.) Using conductive paint on their hands brought the painters closer to the minimum approach distance than if they did not use conductive paint. This hazard, covered under 29 C.F.R. § 1910.333(c)(3)(i)(A)(1), required training so that the painters knew how to paint safely and knew the minimum approach distance. As found above, however, JV as well as several other painters had no electrical training before being sent to work on the Edison tower in such close proximity to a 26 kV power line. Respondent directed its painters to work on a project that only “qualified” persons were appropriately trained and qualified to safely perform.

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<sup>61</sup> See pp. 25-31 *supra*.

As found above, none of the Tower Maintenance painters working on the Edison tower, on October 25, 2012, were qualified. Some did not even have basic training to work safely on the Edison tower.

The Secretary has established non-compliance with §§ 1910.332(b)(1) and (2).

**C. The Secretary has established that JV had access to the violative condition**

The record establishes that JV, as well as several of Respondent's other painters working on October 25, 2012, worked at a height of at least 60 feet and were required to wear a PFAS device for the fall hazard to which they were exposed. JV and Marcelo Leiroz, Ederson Trizotte, Osias Figugiredo, Domingos Da Silva, and Euflates Passos had not been trained in fall protection. The record also establishes that on the day of the accident, JV, as well as the other painters working on the Edison tower, including RS, Fonseca Alves and Da Silva, were not trained as "qualified persons." Some of the Tower Maintenance painters working, on October 25, 2012, on the PSE&G transmission tower painting project had no electrical training at all, and were working where only a "qualified person" should have been working – near areas of exposed, uninsulated power lines energized at more than 50 volts.<sup>62</sup> 29 C.F.R. § 1910.269(l)(1).

The Secretary has established exposure for this citation item. *Bardav, Inc.*, 24 BNA OSHC 2105, 2112 (No. 10-1055, 2014) (concluding that exposure is established for training citation item when worker "engaged in excavation work without first receiving required training") citing *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1030 (No. 91-2834E, 2007)(consolidated)("finding it unreasonable to require that employee be exposed to a hazard before requiring that he be trained to recognize and avoid that hazard.").

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<sup>62</sup> See pp. 25-31, p. 30 n.36 *supra*; App'x B.

**D. Tower Maintenance knew or should have known that its painters were not trained in fall protection or electrical hazards and that its painters were not trained as “qualified” persons**

The evidence in the record establishes that Respondent knew or should have known that JV, as well as several of Respondent’s other painters working on October 25, 2012 were not trained in fall protection or electrical hazards, and that they were not trained as “qualified” persons to work on the Edison project. Respondent is in charge of its training program and so it is in the best position to know who is trained and who is not. *Pressure Concrete Constr.*, 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992) (“[t]he fact that [the company] failed to train [employees] in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program.”). Even if JV, or any other painter, presented a training certificate to Tower Maintenance before beginning work on the Edison project transmission tower, Respondent’s duty to train was not obviated. *Danis-Shook Joint Venture XXV v. Sec’y of Labor*, 319 F.3d 805, 811 (6th Cir. 2003) (“Employers cannot count on employees’ common sense and experience to preclude the need for instructions.”). Knowledge has been established for this citation item.

Citation 2, Item 2 is affirmed.

**E. Characterization**

**1. Serious**

The Secretary alleges that this citation item can be characterized as serious. (Sec’y Br. at 71.) A violation is “serious” if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). The evidence shows that JV was electrocuted and fell at least 60 feet. JV was not trained in fall protection or electrical hazards. JV was working in an area where only trained “qualified persons” should

have been working. Therefore, he was untrained for the electrical hazards he faced. As a result of his lack of training, he died. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011) (finding violation serious because evidence showed that failure to provide training could, and did, result in death).

This citation item is properly characterized as serious regarding the violations of the following cited standards: 29 C.F.R. § 1910.269(a)(2)(i), 29 C.F.R. § 1910.269(a)(2)(ii), 29 C.F.R. § 1910.332(b)(1), and 29 C.F.R. § 1910.332(b)(2).

## **2. Repeat**

The Secretary also alleges that this citation item can be characterized as repeat. (Sec’y Br. at 71.) As discussed above, “[a] violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC at 1063. “[T]he principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards.” *Amerisig Se., Inc.*, 17 BNA OSHC at 1661. “[S]ubstantially similar’ must be defined sufficiently narrowly that the citation for the first violation placed the employer on notice of the need to take steps to prevent the second violation.” *Caterpillar, Inc. v. Herman*, 154 F.3d at 403.

To determine whether a violation is repeated based on a previous violation of a different training standard, the Commission compares the two training standards that were violated and the resulting hazards. *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1345 (No. 00-1986, 2003) (comparing hazards that “two roofers were not trained to recognize and avoid” to hold that they were “largely the same,” resulting in a repeat characterization.)

The Secretary claims that the predicate for the repeat characterization of this citation item is Respondent's previous violation of a fall protection training standard found at 29 C.F.R. § 1926.503(b)(1), which the parties stipulated became a final order of the Commission on July 15, 2011.<sup>63</sup> (Amended Complaint at ¶¶ VI; Sec'y Br. at 71; Ex. J-1 at ¶ 6.) Tower Maintenance's violation of this standard became a final order of the Commission as a result of the fatal accident in Macungie, Pennsylvania. (Exs. J-1 at ¶¶ 4, 6; Ex. C-27.) Respondent claims that the previous violation of section 1926.503(b)(1) cannot be used as a predicate for a repeat characterization here because the two standards are "distinct." (Resp't Br. at 16.)

In the settlement agreement for the predicate standard, the alleged violation description was amended. (Ex. C-27.) As noted above, it was grouped with the other violations and given the same violation description:

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<sup>63</sup> Section 1926.503(b)(1) provides in pertinent part:

The employer shall verify compliance with paragraph (a) of this section by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer. If the employer relies on training conducted by another employer or completed prior to the effective date of this section, the certification record shall indicate the date the employer determined the prior training was adequate rather than the date of actual training.

29 C.F.R. § 1926.503(b)(1). Notably, paragraph (a) states in pertinent part:

(1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards;

(2) The employer shall assure that each employee has been trained, as necessary, by a competent person qualified in the following areas: (i) the nature of fall hazards in the work area; (ii) the correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used; (iii) the use and operation of personal fall arrest systems . . . .

29 C.F.R. § 1926.503(a)(1), (2).

Throughout Work Area – Even though a proper fall arrest system was provided to the employee, the employer did not ensure that the subject employee that fell was protected from falls through the use of fall protection systems on or about 10/10/10.

(Ex. C-27 at 1.)

In the formal settlement agreement and, in the final order, the violation of training standard 1926.503(b)(1) was affirmed, even though the grouped violation description in the settlement agreement does not specifically mention training.

The circumstance that led to the previous training violation was, as the Secretary points out, nearly identical to the circumstance here: an employee fell and died as a result of the fall. (Sec’y Br. at 72; Ex. J-1 at ¶ 3.) In Macungie, Respondent was cited for violating a training standard that required Respondent to “verify compliance” with a fall protection training program. 29 C.F.R. § 1926.503(b)(1). By not verifying compliance with a fall protection training requirement, Respondent did not ensure that its employees were trained in fall protection. As a result, one of Tower Maintenance’s employees at the Macungie worksite attached to a step bolt and fell, and died as a result of that fall. Respondent was therefore on notice that it had to verify that its painters were trained in fall protection.

In the instant case, regarding the Edison transmission tower painting project, Respondent sent several employees to work at great heights on electric transmission towers without certification of that they had received fall protection training. (*See App’x B.*) It was accepted by top management that a routine way to attach or anchor a PFAS was to use a step bolt, which is an improper method of fall protection. Additionally, both JV and RS fell from great heights. RS suffered serious bodily injury as a result of his fall. Respondent does not deny that the resulting hazard from the violations of these different standards was the same: a fall from a great height that resulted in death or serious bodily injury. (Resp’t Br. at 16-17.)

This citation item regarding the violation of cited standard 1910.269(a)(2)(1) is properly characterized as repeat.

### **Penalties**

“Section 17(j) of the [OSH] Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give ‘due consideration’ to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations.” *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994). When determining gravity, typically the most important factor, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Id.* When evaluating good faith:

[t]he Commission focuses on a number of factors relating to the employer's actions, ‘including the employer's safety and health program and its commitment to assuring safe and healthful working conditions[,]’ in determining whether an employer's overall efforts to comply with the OSH Act and minimize any harm from the violations merit a penalty reduction.

*Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013) (citations omitted). The Commission is the “final arbiter” of penalties. *Hern Iron Works*, 16 BNA OSHC at 1622 (citation omitted).

For serious Citation 1, Item 1, the Secretary proposed the maximum statutory penalty of \$7,000. 29 U.S.C. § 666(b). For willful Citation 2, Item 1, the Secretary initially proposed a penalty of \$46,200 in the Amended Complaint, however, the Secretary now claims that the maximum statutory penalty of \$70,000 should be assessed for this citation item. (Amended Citation at ¶ VIII; Sec’y Br. at 81.) For serious / repeat Citation 2, Item 2, the Secretary proposed a penalty of \$14,000. For the following reasons, I find the Secretary’s proposed penalties appropriate.

While Respondent has few permanent employees, and relatively few seasonal employees, the gravity for each of the violations is high. All of the painters who testified worked at great heights while using defective fall protection and, at times, working without fall protection. No Tower Maintenance painter working on the Edison tower, on October 25, 2012, was a “qualified person,” but they all worked in areas restricted to work by qualified persons only, exposing themselves to extreme hazards they were not trained to even recognize. JV was electrocuted on the job, fell, and hit RS, who suffered serious bodily injury as a result of his fall of 40 feet.

Respondent claims that it “attempted to comply with its training and safety requirements in good faith.” (Resp’t Br. at 18.) The evidence reveals otherwise. Although Respondent had a written safety statement, it was only provided as part of a bid package to secure a job. It was not provided to or posted for the painters to see. Foreman Mackeivicz had never seen it. Supervisor Psareas, the safety supervisor, did not follow it – he left the worksite, which was against Respondent’s safety policy, to make a telephone call and was not on the worksite when the accident occurred.

Moreover, the record establishes that Respondent’s management knowingly disregarded the unsafe, noncompliant, fall protection methods its painters were using on the Edison transmission tower painting project even after the Macungie incident, which occurred only two years prior to the Edison incident. Furthermore, the fact that there were absolutely no training certificates on file for several painters who were working on the Edison project towers on October 25, 2012, shows that Respondent has not learned from its previous violations or that its actions were irrefutably reckless, and not in good faith.

The Secretary’s proposed penalties for each citation item are assessed as proposed.



## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

### ORDER

Based on these findings of fact and conclusions of law, it is ordered that:

- 1) Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1910.333(c)(3)(i)(A)(1), is AFFIRMED and a penalty of \$7,000 is ASSESSED.
- 2) Item 1 of Citation 2, alleging a willful violation of 29 C.F.R. §§ 1910.269(g)(2)(iii) and (g)(2)(v), is AFFIRMED and a penalty of \$70,000 is ASSESSED.
- 3) Item 2 of Citation 2, alleging a repeat violation of 29 C.F.R. § 1910.269(a)(2)(i) is AFFIRMED. Further, Item 2 of Citation 2, alleging serious violations of 29 C.F.R. §§ 1910.269(a)(2)(ii); 1910.332(b)(1) and (b)(2), is also AFFIRMED. A penalty of \$14,000 is ASSESSED.

/s/ Carol A. Baumerich

Carol A. Baumerich  
Judge, OSHRC

Date: May 16, 2016

**Tower Maintenance Corp.**

**Docket No. 13-0777**

**Decision Appendices**

## Appendix A: Procedural Background

The previous citation allegations set out in detail in this appendix are provided to describe the procedural background and to focus the analysis in the Decision and Order on the standards in the Amended Complaint that are solely at issue now.

### *Alleged Violations in the Initial Citation*

In the initial citation, issued on April 8, 2013, the Secretary alleged violations of OSHA's construction standards found at 29 C.F.R. Part 1926. The citation items were as follows:

**Citation 1, Item 1** alleged a serious violation of 29 C.F.R. § 1926.416(a)(1), which states:

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

29 C.F.R. § 1926.416(a)(1). The alleged violation description states:

Tower Maintenance Corporation / Route 1 North Edison, NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. 131 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: Employee(s) were not protected from contact with electrical line(s) while performing a painting operation on or about 10/25/2012.

Ex. C-4. The Secretary proposed a penalty of \$7,000 for this citation item.

**Citation 2, Item 1** alleged a repeat violation of 29 C.F.R. § 1926.501(b)(1), which states:

Each employee on a walking / working surface 6 feet (1.8 meters) or more above lower levels was not protected from falling by a guardrail system, safety net system, or personal fall arrest system.

29 C.F.R. § 1926.501(b)(1). The alleged violation description states:

Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. 131 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels. The employees were not protected from falls through the use of a fall protection system on or about 10/25/2012.

Tower Maintenance Corporation was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent, 1926.501(b)(1), which is contained in OSHA Inspection Number 314720780, Citation 1, Item Number 2, and was affirmed as a final order on July 15, 2011, with respect to a workplace located at 456 Glen Cove Ave., Seacliff, NY 11579.

Ex. C-4. The Secretary proposed a \$14,000 penalty for this citation item.

**Citation 2, Item 2** alleged a repeat violation of 29 C.F.R. § 1926.503(b)(1), which states:

Where the employer relies on training conducted by another employer or completed prior to the effective date of this section paragraph (a), the employer did not verify compliance with this section by preparing a written certification record that indicate[s] the date the employer determined the prior training was adequate.

29 C.F.R. § 1926.503(b)(1). The alleged violation description states:

Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. 131 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels:

1 – The employer did not evaluate and /or maintain records to indicate that

**(a)** The training provided by previous employer(s) and /or training contractor(s) was done prior to allowing employees to perform work (specifically on transmission towers)

**(b)** To ensure the effectiveness of that training and that the employee(s) has the knowledge and skills needed to perform the operation safely.

Tower Maintenance Corporation was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent, 1926.503(b)(1), which is contained in OSHA Inspection Number 314720780, Citation 1, Item Number 4(a), and was affirmed as a final order on July 15, 2011, with respect to a workplace located at 456 Glen Cove Ave., Seacliff, NY 11579.

Ex. C-4. The Secretary proposed a \$14,000 penalty for this citation item.

Respondent filed its timely Notice of Contest to this citation on April 12, 2013.

#### *Alleged Violations in the Initial Complaint*

In the initial complaint, filed on August 2, 2013, the Secretary amended the citation items to allege violations of other OSHA electrical safety standards, fall protection standards, and training standards, some of which fell under OSHA’s standards for “Electric Power Generation,

Transmission, and Distribution,” found in 29 C.F.R. Part 1910. Among other amendments, the Secretary amended the characterization of Citation 2, Item 1 to a “willful,” in addition to being a “repeat,” violation. The Complaint increased the total proposed penalty to \$67,200.

**Citation 1, Item 1** was amended to allege a serious violation of 29 C.F.R. § 1926.416(a)(1) and, in the alternative 29 C.F.R. § 1910.269(1)(2), which states:

The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than the minimum approach distance set forth in this standard.

29 C.F.R. § 1910.269(1)(2). The alleged violation description states:

Tower Maintenance Corporation / Route 1 North Edison, NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. 131 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: the employer failed to ensure that no employee approached within 3 feet, 7 inches, of exposed energized electrical lines while performing a painting operation on or about 10/25/2012.

Complaint at ¶ VII. The Secretary did not amend the proposed a penalty of \$7,000 for this citation item.

**Citation 2, Item 1** was amended to allege a serious/repeat/willful violation of 29 C.F.R. §§ 1926.28(a) and 1926.501(b)(1), or, *in the alternative*, that the cited conduct violated 29 C.F.R. § 1910.269(g)(2). According to the Complaint, sections 1926.28(a) and 1926.501(b)(1) provide that:

The employer failed to ensure that each employee on a walking / working surface 6 feet (1.8 meters) or more above lower levels was protected from falling by a guardrail system, safety net system, or personal fall arrest system.

Complaint at ¶ VIII. The alleged violation description states:

Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. 131 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels. The employer failed to ensure that employees wore appropriate fall protection equipment. The employees were not protected from falls through the use of a functional fall protection system on or about 10/25/2012. Employees were using lanyards with

defective D rings which were covered with paint and incapable of closing securely.

Complaint at ¶ VIII. The Secretary amended the proposed penalty for this citation item from \$14,000 to \$46,200.

**Citation 2, Item 2** was amended to allege alleged a serious/repeat violation of 29 C.F.R. § 1926.503(b)(1), and, *in the alternative* 29 C.F.R. § 1910.269(a)(2), which provides:

Employees shall be trained in and familiar with the safety-related work practices, safety procedures, and other safety requirements in this section that pertain to their respective job assignments.

Complaint at ¶ IX. The alleged violation description states:

Tower Maintenance Corporation / Route 1 North Edison NJ Site – Electric Transmission Tower – Lattice Steel Structure – Approx. [1]31 ft. in height 26 kV at the lower level and 138 kV from the middle to the upper levels: the employer did not ensure that employees were trained in the safety-related work practices, procedures, and requirements associated with painting energized transmission towers.

Complaint at ¶ IX. The Secretary did not amend the proposed \$14,000 penalty for this citation item.

Respondent filed its Answer to the Complaint on August 19, 2013. In its Answer to this initial Complaint, Respondent denied the specific allegations and asserted the following affirmative defenses, among others: (1) excessive penalty in light of the small size of the employer, (2) all of the citations were not issued with “reasonable promptness,” (3) the violations, if any, were non-serious, (4) Respondent did in fact have an “adequate safety program run by knowledgeable supervisory personnel” for the alleged training violation, (5) “training provided by previous employer(s) and/or third party(s) and/or training contractor(s) was done prior to allowing employees to perform work” for the alleged training violation, (6) “Respondent ensured the effectiveness of training and that the employee(s) has the knowledge and skills needed to perform the operations safely” for the alleged training violation, (7) unpreventable

employee misconduct for the alleged training violation, (8) unpreventable employee misconduct defense for the alleged fall protection violation, (9) impossibility or infeasibility for the alleged fall protection violation, (10) unpreventable third party / owner misconduct for the alleged electrical violation, (11) unforeseeability for the alleged electrical violation, (12) unpreventable employee misconduct for the alleged electrical violation, (13) “third-party and/or owner assured that Respondent’s employees would not come into contact with energized electrical lines in the course of their work and, therefore, Respondent did exercise reasonable diligence to ensure” compliance with the alleged electrical standard, (14) impossibility or infeasibility for the alleged electrical violation, and (15) vindictive prosecution by the Secretary. Answer to Initial Complaint at ¶¶ IV-XI, XIII-XXVII.

**Appendix B – Tower Maintenance Employee and Supervisor Training Records**

On October 25, 2012, Tower Maintenance employed at least twenty-five employees. (Ex. J-1 ¶ 9). Tower Maintenance was engaged in repainting an electric transmission tower located at Route 1 North in Edison, New Jersey. (Ex. J-1 ¶ 11).

On October 25, 2012, the following Tower Maintenance employees were employed and engaged in tower painting work on the PSE&G transmission tower painting project: Alessandro De Almeida, Alan Kedes Fonseca Alves, Marcelo Silva, RS, Marcelo Leiroz, Ederson Trizotte, Osias Figugiredo, Caio Resende, Domingos Da Silva, Euflates Passos, and JV. (Ex. J-1 ¶¶ 17 through 27). It is undisputed that Nikolaos Psareas and Josimar Mackeivicz also worked on the Edison project on October 25, 2012. A summary of their training records follows.

<b>Ex. J- 1</b>	<b>Name</b>	<b>Training - CCS Consulting Services, Inc., between 01/01/12 – 10/25/12. Ex. C-22</b>	<b>Training – The Jacman Group, between 01/01/12- 10/25/12. Ex. C-23.</b>	<b>Training – Communications Industry Training and Certification Academy, LLC (CITCA), between 01/01/12-12/31/12. Ex. C-24.</b>	<b>PSE &amp; G Ex. C-2</b>
¶ 17	Alessandro De Almeida	C-22, p. 21 Fall Protection, Fall Arrest Systems, & Fall Hazard Awareness Training – 09/05/12 [Alejandro Almieda]	C-23, p. 2 - none	C-24, p. 3 - none [Allesandro De Almeida]	None
¶ 18	Alan Fonseca [Alves] – See Decision n.13.	C- 22, p. 5, 11; R-11 Alan Kedis – Fall Protection Training 04/03/12.  C-22, p. 12; R-11 OSHA 10 – Hour Training Course –	C-23, p. 4, 5, 9 [Alan Kedis Fonseca] NFPA 70E Electrical Arc Flash Training – 04/05/12.	C-24, p. 92, 100-107. [Alan Kedes Fonseca Alves] Authorized Climber – 03/26/12.	None



<b>Ex. J- 1</b>	<b>Name</b>	<b>Training - CCS Consulting Services, Inc., between 01/01/12 – 10/25/12. Ex. C-22</b>	<b>Training – The Jacman Group, between 01/01/12- 10/25/12. Ex. C-23.</b>	<b>Training – Communications Industry Training and Certification Academy, LLC (CITCA), between 01/01/12-12/31/12. Ex. C-24.</b>	<b>PSE &amp; G Ex. C-2</b>
		04/04/12.			
¶ 19	Marcelo Silva	C-22, p. 20 Fall Protection, Fall Arrest Systems, & Fall Hazard Awareness Training – 09/05/12.	C-23, p. 2 - none	C-24, p. 3 - none	None
¶ 20	RS	C-22, p. 22 Fall Protection, Fall Arrest Systems, & Fall Hazard Awareness Training <sup>65</sup> – 09/05/12.	C-23, p. 2 - none	C-24, p. 3 - none	None
¶ 21	Marcelo Leiroz	C-22, p. 3 - none	C-23, p. 3 - none	C-24, p. 3 - none	None
¶ 22	Ederson Trizotte	C-22, p. 3 - none	C-23, p. 3 - none	C-24, p. 3 - none	None
¶ 23	Osias Figugiredo	C-22, p. 3 - none	C-23, p. 3 - none	C-24, p. 3 - none	None
¶ 24	Caio Resende	C-22, p. 3 - none	C-23, p. 3 - none	C-24, p. 4, 32-40, 91 Authorized Climber – 08/07/12. [Caio Nunes Resende]	C-2 Sub Station Awareness 08/02/12
¶ 25	Domingos Da Silva	C-22, p. 3 - none	C-23, p. 3 - none	C-24, p. 3 - none	None
¶ 26	Euflates Passos	C-22, p. 3 - none	C-23, p. 3 - none	C-24, p. 3 - none	None
¶ 27	JV	C-22, p. 3 - none	C-23, p. 3 - none	C-24, p. 3 - none	None

<sup>65</sup> C-22, pp 1-2, ¶ 4 “The Fall Protection Training Course provides a comprehensive overview of OSHA’s fall protection requirements and includes training on the use of fall arrest systems and fall hazard awareness.” The course summary does not include an electrical component.

Ex. J- 1	Name	Training - CCS Consulting Services, Inc., between 01/01/12 – 10/25/12. Ex. C-22	Training – The Jacman Group, between 01/01/12- 10/25/12. Ex. C-23.	Training – Communications Industry Training and Certification Academy, LLC (CITCA), between 01/01/12-12/31/12. Ex. C-24.	PSE & G Ex. C-2
	Josimar Mackeivicz	C- 22, p. 5, 7; R-11 Fall Protection Training 04/03/12.  C-22, p. 12; R-11 OSHA 10 – Hour Training Course – 04/04/12.	C-23, p. 4, 5, 6 NFPA 70E Electrical Arc Flash Training – 04/05/12.	C-24, p. 92, 93-99, 107. Authorized Climber – 03/26/12.  C-24, p. 108 - 121  Tower Rescue / Competent Climber – 03/27/12 – 03/29/12.	C-2 Sub Station Awareness 08/02/12
	Nikolaos Psareas <sup>66</sup>	C- 22, p. 5, 6; R-11; R-38. Fall Protection Training 04/03/12.  C-22, p. 12; R-11; R-38. OSHA 10 – Hour Training Course – 04/04/12.	C-23, p. 4, 5; R-38. NFPA 70E Electrical Arc Flash Training – 04/05/12.	C-24, p. 4, 5-13, 86, 91; R-38. Authorized Climber <sup>67</sup> – 08/07/12.	C-2 Sub Station Awareness 08/02/12

<sup>66</sup> The record includes the following additional training documents for Nikolaos Psareas: Competent Tower Climber / Rescuer Training presented by Ellis Fall Safety Solutions, LLC – 11/26/12-11/28/12 (this training post-dates the October 25, 2012 fatal accident); OSHA 10 Hour Construction Course presented by 360 Training - 02/10/10; Boots on the Roof presented by Unitek Education - 06/20/09; Lead Contractor presented by Senagryph Training Facilities – 11/25/96-11/30/96. Ex. R-38.

<sup>67</sup> Tr. 694-95. Authorized climber training was presented in English, without an interpreter. This course did not include an electrical component.

Below is a summary of additional training documents, in the record, for Tower Maintenance employees and supervisors.

Name	Training - CCS Consulting Services, Inc., (01/01/12 – 10/25/12). Ex. C-22	Training – The Jacman Group, (01/01/12-10/25/12). Ex. C-23.	Training – CITCA, (01/01/12-12/31/12). Ex. C-24.	PSE & G Ex. C-2
Elizabeth Vlahopoulos	C-22, p. 2, 14, 15, 16 C-5 Supervisor/Competent Person Refresher Training for Deleading of Industrial Structures – 06/11/12.	None	None	None
Peter Vlahopoulos	C-22, p. 2, 14, 15, 18 C-5 Supervisor/Competent Person Refresher Training for Deleading of Industrial Structures – 06/11/12.	None	None	None
Juan Alvarenga	None	None	C-24, p. 4, 59-65, 88, 91. Authorized Climber – 08/07/12.	C-2 Sub Station Awareness 08/02/12
Alexandre Alves	C- 22, p. 5, 8; R-11 Fall Protection Training 04/03/12.  C-22, p. 12; R-11 OSHA 10 – Hour Training Course – 04/04/12.	C-23, p. 4, 5, 11 NFPA 70E Electrical Arc Flash Training – 04/05/12.	None	C-2 Sub Station Awareness 08/02/12
Carlos Aquino	C- 22, p. 5, 10; R-11 Fall Protection Training 04/03/12.  C-22, p. 12; R-11 OSHA 10 – Hour Training Course – 04/04/12.	C-23, p. 4, 5, 10 NFPA 70E Electrical Arc Flash Training – 04/05/12.	None	C-2 Sub Station Awareness 08/02/12

<b>Name</b>	<b>Training - CCS Consulting Services, Inc., (01/01/12 – 10/25/12). Ex. C-22</b>	<b>Training – The Jacman Group, (01/01/12- 10/25/12). Ex. C-23.</b>	<b>Training – CITCA, (01/01/12-12/31/12). Ex. C-24.</b>	<b>PSE &amp; G Ex. C-2</b>
Evaristo Jr. Concepcion	None	None	C-24, p. 4, 23-31, 90, 91 Authorized Climber – 08/07/12.	C-2 Sub Station Awareness 08/02/12.
Jose Neves Da Paz	C- 22, p. 5, 9; R-11 Fall Protection Training 04/03/12.  C-22, p. 12; R-11 OSHA 10 – Hour Training Course – 04/04/12.	C-23, p. 4, 5, 8 NFPA 70E Electrical Arc Flash Training – 04/05/12.	None	C-2 Sub Station Awareness 08/02/12.
Valdeir De Souza	None	None	C-24, p. 4, 66-74, 84, 91 Authorized Climber – 08/07/12.	C-2 Sub Station Awareness 08/02/12.
Jose M. Felix	None	None	C-24, p. 4, 14-22, 91. Authorized Climber – 08/07/12.	C-2 Sub Station Awareness 08/02/12.
Fabio Cassimino Ferreira	None	None	C-24, p. 4, 75-81, 85, 91 Authorized Climber – 08/07/12.	C-2 Sub Station Awareness 08/02/12.
Jeff Goykhmad	C-22, p. 2, 14, 15, 17 C-5 Supervisor/Competent Person Refresher Training for Deleading of Industrial Structures – 06/11/12.	None	None	None
Edivaldo C. Medeiros	None	None	C-24, p. 4, 41-49, 91 Authorized Climber – 08/07/12.	C-2 Sub Station Awareness 08/02/12.

Name	Training - CCS Consulting Services, Inc., (01/01/12 – 10/25/12). Ex. C-22	Training – The Jacman Group, (01/01/12-10/25/12). Ex. C-23.	Training – CITCA, (01/01/12-12/31/12). Ex. C-24.	PSE & G Ex. C-2
Elvis Pimentel	C-22, p. 24 OSHA 30 – Hour Training – 08/18/12.  C-22, p. 26. C-5 Supervisor/Competent Person Refresher Training for Deleading of Industrial Structures – 08/13/12.	None	None	None
Gilbert Roman	None	C-23, p. 4 NFPA 70E Electrical Arc Flash Training – 04/05/12.	None	None
Alvaro Renso Salazar	None	None	C-24, p. 4, 50-58, 91 Authorized Climber – 08/07/12.	C-2 Sub Station Awareness 08/02/12.