



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

SECRETARY OF LABOR, :
 :
Complainant, :
 :
v. :
 :
SHAW ENVIRONMENTAL & :
INFRASTRUCTURE, INC., :
 :
Respondent. :

OSHRC DOCKET NO. 04-1198

Appearances:

Francine A. Serafin, Esquire
U.S. Department of Labor
Arlington, Virginia
For the Complainant.

Carl B. Carruth, Esquire
McNair Law Firm, P.A.
Columbia, South Carolina
For the Respondent.

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Shaw Environmental & Infrastructure, Inc. (“Shaw”) on May 26, 2004, after an electrical accident in which a Shaw employee was badly burned; the site was located at Ft. Detrick, Maryland, and Shaw’s work at the site involved biological and chemical waste removal. As a result of the inspection, on June 25, 2004, Shaw was issued a serious citation alleging various

violations of OSHA's electrical standards for construction work.¹ Shaw contested the citation, and the hearing in this matter was held in Baltimore, Maryland, on February 2 and 3, 2005. Both parties have submitted post-hearing briefs.

Jurisdiction

The Secretary alleges and Shaw admits that it is an employer engaged in biochemical recovery, stabilization and disinfection and that it had a work site during May and June of 2004 at 1500 Porter St., Area B-11, Ft. Detrick, Maryland 21702. Shaw also admits it uses tools, equipment and supplies that have moved in interstate commerce. I find that Shaw is engaged in a business affecting interstate commerce. *See Answer*, ¶¶ I, II(B), IV-VI. Based on the foregoing, I conclude Shaw is an employer within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that the Commission has jurisdiction over the parties and the subject matter of this proceeding.

Background

As noted above, Shaw's work at the site involved biological and chemical waste removal; however, the project, which began in September 2000 and ended in July 2004, also involved other miscellaneous work, such as electrical work. Phillip Teszner, a Shaw employee, was an electrician, and while he had other jobs at the site, like monitoring the supplied-air system, he also did electrical work on the project as needed. One of the on-going assignments that Mr. Teszner had in the time period preceding the accident, in that the project was beginning to wind down, was the dismantling of electrical panel boxes. On the morning of May 25, 2004, Mr. Teszner went to dismantle a particular panel box located near the HVAC area. After parking his van, Mr. Teszner approached the panel box and then opened its door, whereupon there was a bright flash and a loud explosion. Ronnie

¹One item, Item 1, did not involve OSHA's electrical standards for construction; rather, that item alleged a violation of 29 C.F.R. 1926.95(a), the general standard requiring the use of proper protective equipment. Upon Shaw's motion, this item was vacated at the hearing based upon my finding that Item 1 was redundant and that there was a more specifically applicable standard. In particular, I found that 29 C.F.R. 1926.416(a)(1), which requires protection against electrical shock by de-energizing and grounding of the circuit or by guarding it by insulation or other means, as alleged in Item 2a of the citation, was the more specifically applicable standard to the circumstances of the accident. My finding was supported by the testimony of the CO that protective rubber gloves would have abated the hazard under either of the standards. (Tr. 115-17, 185-86, 193-205). *See also* 29 C.F.R. 1926.20(d)(1).

DiPalo, another employee who was working nearby and had seen Mr. Tesznar get out of his van and go to the panel box, heard the explosion. He ran over to the box, where he saw that Mr. Tesznar was engulfed in flames from the waist up, and Mr. DiPalo got on his radio and called "911." William Clawson, Shaw's safety coordinator at the site, had also arrived at the scene, as he too had been nearby and had heard the explosion, and Mr. Clawson got on his radio and called the command center and said that an ambulance was needed and a man was severely burned. By this time, Mr. DiPalo had gotten a fire extinguisher, and Mr. Clawson directed him to spray Mr. Tesznar. Mr. DiPalo did so, and, as the flames were being extinguished, Mr. Tesznar told Mr. DiPalo and Mr. Clawson that all he had done was open the door to the panel box. Once the flames were put out, Mr. DiPalo and Mr. Clawson walked Mr. Tesznar to the job site trailer. From there, an ambulance took him to an area where a helicopter had arrived, and Mr. Tesznar was taken to a hospital, where he was put in a coma for six weeks. Mr. Tesznar survived, but he was severely burned, from the waist up, over 38 percent of his body. (Tr. 79-83, 90-91, 224-27, 235-36, 255, 289-94, 350).

Rob Madey, the site superintendent, arrived at the scene right after the accident, and Mr. Clawson told him to rope off the area and to make sure that nothing was touched. As Mr. Clawson was involved with contacting Mr. Tesznar's family and Shaw's safety hotline, Mr. Madey went with some Ft. Detrick personnel to the scene so they could view it. About an hour after the accident, Barry Schmidt, Ft. Detrick's electrical section leader, arrived with other Ft. Detrick officials, and they also investigated the accident. Mr. Schmidt and the other Ft. Detrick officials determined Mr. Tesznar had worked in the panel box while it was energized. Specifically, they concluded that Mr. Tesznar, while wearing leather gloves, had used an Allen wrench set to loosen the top left lug bolt in the panel box, that the other end of the wrench had contacted the top right lug bolt, and that this caused an arc or flash-over that resulted in the explosion and fire.² OSHA Compliance Officer ("CO") Mark Austin arrived on May 26, 2004, to conduct an inspection in regard to the accident. He spoke to officials of both Ft. Detrick and Shaw. He also took photos of the accident scene, and he measured the distance between the two lug bolts and the distance between the two ends of the wrench. Based upon his investigation, he reached the same conclusion as the Ft. Detrick officials had. Mr. Clawson began

²The wrench was laying on the ground after the accident, as were the hard hat and gloves that Mr. Tesznar had been wearing. (Tr. 20-21, 42, 297, 318-20).

his own investigation of the accident after the Ft. Detrick officials had done theirs, and he continued his investigation even after Shaw left the site in July 2004.³ He determined that Mr. Tesznar had not worked in the panel box while it was energized. Based on his investigation, which included conversations with the Ft. Detrick personnel, he concluded that the Allen wrench set, which someone had left sitting on top of the panel box, had caught on the door and fallen when the door was opened; when the wrench fell, one end contacted the top right lug bolt in the panel box and the other end contacted the door interlock lever, causing the arc or flash-over and the resulting explosion and fire. (Tr. 12-13, 16-21, 42-43, 96-113, 160-63, 287, 295-98, 301-02, 313-14).

The Cited Standards

Items 2a and 2b of the citation allege violations of 29 C.F.R. 1926.416(a)(1) and 29 C.F.R. 1926.416(a)(3), respectively. Those standards provide as follows:

29 C.F.R. 1926.416(a)(1) - 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)(3) - Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit.

Items 3a and 3b of the citation allege violations of 29 C.F.R. 1926.417(a) and 29 C.F.R. 1926.417(c), respectively. Those standards state as follows:

29 C.F.R. 1926.417(a) - Controls that are to be deactivated during the course of work on energized or deenergized equipment or circuits shall be tagged.

29 C.F.R. 1926.417(c) - Tags shall be placed to identify plainly the equipment or circuits being worked on.

Items 2a and 2b have been grouped and propose a total penalty of \$4,500.00. Items 3a and 3b also have been grouped and also propose a total penalty of \$4,500.00.

³Mr. Clawson testified that the accident scene remained roped off until June 21, 2004, and that he was going to make a final report to Shaw following the hearing. (Tr. 297-98).

The Parties' Contentions

The Secretary contends that Mr. Tesznar was working in the energized panel box, that the wrench contacting the top left and top right lug bolts was the cause of the accident, and that Shaw was therefore in violation of the cited standards. In support of her contention, the Secretary points to the investigations of Mr. Schmidt and the CO and their conclusions about what happened. Shaw contends that it did not violate the cited standards. It asserts that Mr. Tesznar only opened the door of the panel box to look at it to see what tools he needed before obtaining a lockout/tagout (“LOTO”) authorization, de-energizing the box and locking and tagging out the circuit, and then beginning work. Shaw further asserts, based on the investigation of Mr. Clawson, that the accident was caused by the wrench, which someone had left on top of the box, falling when the door was opened and contacting the top right lug bolt and the door interlock lever. Alternatively, Shaw asserts that the accident was a result of unpreventable employee misconduct.

The Relevant Testimony

Three individuals who investigated the accident, that is, Mr. Schmidt, CO Austin and Mr. Clawson, testified at the hearing about what they believed had been the cause of the accident. The Commission has held that the cause of an accident in a particular case is not the issue, but, rather, whether the cited OSHA standard was violated; however, the Commission has also recognized that “the circumstances of an accident may provide probative, or even dispositive, evidence of whether a standard was violated.” *Georgia-Pacific Corp.*, 16 BNA OSHC 1171, 1176 (No. 89-2806, 1993). In this case, it is clear that the cause of the accident is directly related to whether violations of the cited standards occurred. The testimony of the above-noted individuals therefore follows.

Barry Schmidt, the leader of the electrical section of Ft. Detrick at the time of the accident, testified that Allegheny Power provided the electrical power and secondary equipment for Shaw’s work at the site.⁴ He further testified that after being notified of the accident, he and other Ft. Detrick officials went to Shaw’s trailer, where they were told that an electrician had been working on a 480-volt panel box and had been severely burned by an electrical arc. Upon arriving at the accident scene, Mr. Schmidt observed the box where the arc occurred. He noted the box was energized, that there

⁴Mr. Schmidt worked as an electrician for 27 years at Ft. Detrick, with the last 14 years of his service being in a supervisory/leader capacity; he has since retired. (Tr. 12-14).

was severe arc and burn damage in the box, and that there was damage to the inside of the door of the box; further, he saw that the plastic shield that had covered the three electrical connectors was sitting on top of the box.⁵ He also noted that on the ground in front of the box was an open Allen wrench set of the size that would have been used to loosen the lug bolts on the electrical connectors.⁶ Mr. Schmidt saw severe burn marks on the Phase A lug bolt and on the Phase C lug bolt, and he also saw that the Phase A lug bolt had been loosened and that both ends of the wrench were burned.⁷ Mr. Schmidt viewed a tool bag on the nearby generator and a pair of leather gloves, one of which was severely burned, near the box. Based on what he saw, Mr. Schmidt concluded that Mr. Tesznar was loosening the Phase A lug bolt with the wrench and that the accident occurred when the wrench's other end contacted the Phase C lug bolt. (Tr. 12-34, 42-43, 51-53, 57-59, 71, 75).

CO Mark Austin testified that upon arriving at the site, he met with Ft. Detrick and Shaw personnel; he was told that an electrician had been working in a 480-volt panel box, that an arc or flash-over had occurred, and that the electrician had been burned over the top half of his body and had been taken to a hospital.⁸ The CO further testified that he went to the accident scene with Mr.

⁵Mr. Schmidt said that Exhibit C-13 showed the plastic cover as it normally would have been in place over the three connectors and that Exhibit C-16 showed the inside of the door of the panel box; both photos were taken by the CO. (Tr. 30-33)

⁶Mr. Schmidt explained that the Allen wrench, also called a "hex key set," consisted of several keys of different sizes that were attached together; the keys could all be folded together, such that the wrench was one piece, but to use the wrench, the key of the desired size would be pulled out. Mr. Schmidt testified that Exhibit C-15, a photo the CO had taken, was an accurate depiction of the Allen wrench, in an open position, that he saw at the site. He also testified he used a ballpoint pen to determine that the distance between the Phase A and Phase C lug bolts was approximately the same as that between the two ends of the open Allen wrench. (Tr. 25-29).

⁷Mr. Schmidt testified that the panel box was three-phase current, and he characterized the three electrical connections, from left to right, respectively, as Phase A, Phase B and Phase C. He further testified that Exhibit C-10, a photo the CO had taken, was an accurate depiction of the box when he (Schmidt) saw it and that C-10 showed the three connections, or phases, and the lug bolts holding the wires in place. The actual panel box and Allen wrench were used at the hearing as demonstrative exhibits, D-1 and D-2, respectively, and Mr. Schmidt utilized these exhibits to illustrate certain parts of his testimony; for example, using D-1, he explained that the lug is "the whole connector" and that the lug bolt is the "screw" going into the lug. (Tr. 51-52, 56-63).

⁸Mark Austin has been an OSHA CO for about eight and one-half years. (Tr. 96).

Clawson, where he saw a temporary wooden wall that had been built that had three panel boxes on either side; the subject box was on the west side, and the other two boxes on that side had already been gutted, and the panels on the east side were the disconnect switches. Upon viewing the subject box, the CO noted there was burn damage to the Phase A and Phase C lug bolts, indicating contact at those two points. He also noted burn marks and extensive molten material in the area of all three connections, splatter marks on the back of the panel, and singeing in the top part of the box. CO Austin saw a pair of burned gloves and an Allen wrench set laying on the ground in the area, and he also saw that both ends of the wrench were burned and that the Phase A lug bolt had several threads showing; he measured the distance between the Phase A and Phase C lug bolts and the distance between the two open ends of the Allen wrench set and found both to be about 6.5 inches. The CO concluded Mr. Tesznar had been trying to remove parts from the inside of the box, that there was an arc or flash-over, and that Mr. Tesznar was severely burned.⁹ (Tr. 96-113, 160-63).

William Clawson testified that he had known Mr. Tesznar for 17 years, as they both were hired by Shaw at about the same time, and that he had worked on several projects with him; in his experience, Mr. Tesznar had an exemplary reputation for safety within the company.¹⁰ He further testified that Mr. Tesznar previously had done work at the Ft. Detrick site that had required him to use Shaw's LOTO procedure. Mr. Clawson stated that it was for these reasons, and because of the statement Mr. Tesznar made to him at the time of the accident, that he simply could not believe Mr. Tesznar had worked in the energized panel box; he therefore spent much more time than he normally would have in investigating the matter, and he considered everything he saw at the accident scene and what the Ft. Detrick personnel had told him, in addition to Mr. Tesznar's safety reputation and statement to him on the day of the accident. (Tr. 279-80, 283-89, 296-98, 301-02).

⁹The CO discussed what various of the photos he took showed, that is, C-10 (the subject box and phases), C-11 (a close-up of the lugs), C-12 (the burned gloves), and C-14 and C-15 (his measurements of the distance between the two bolts and the distance between the two ends of the wrench). The CO also used D-1 and D-2 to illustrate part of his testimony. (Tr. 101-11, 163-64).

¹⁰Mr. Clawson has been a safety coordinator with Shaw for 17 years, and he had extensive safety and health experience prior to beginning his job with Shaw. (Tr. 255-58).

Mr. Clawson stated that the Ft. Detrick officials' conclusion about the accident was based on the fact that the Phase A lug bolt appeared to have been loosened and the fact that the Allen wrench was found on the ground in front of the box. Mr. Clawson believed that the Phase A lug bolt could have had threads showing because it could not be screwed in any further or that it could have worked itself loose over time, due to expansion and contraction of the metal from heat and cold and due to the vibration of the nearby generator. He further believed that someone had left the wrench sitting on top of the panel and that when Mr. Tesznar opened the door the wrench fell and one end contacted the Phase C lug bolt and the other end contacted the door interlock lever ("lever").¹¹ Mr. Clawson said the Phase C lug bolt was badly burned, indicating contact, while the Phase A lug bolt did not have the kind of damage he would have expected from contact; in addition, the top of the lever was burned away and charred, also indicating contact. He also said that the wrench had been found in front of and to the right of the box, and not directly in front, another indication that the wrench made contact as Mr. Clawson thought.¹² Mr. Clawson believed that Mr. Tesznar, wearing his hard hat and gloves, had bent over with his left side to the door and used his right hand¹³ to open the latch at the bottom of the box and his left hand to pull down the red-knobbed lever¹⁴ that was up above on the door; he also believed the door protected Mr. Tesznar from the initial blast or explosion, but not, unfortunately,

¹¹Mr. Clawson used D-1 and D-2 as he testified, and he indicated the lever was down and to the right of the Phase C lug bolt. (Tr. 298-302, 306). The lever, and its burned aspect, is shown in D-9, one of 16 photos (D-5 through D-20) that Shaw submitted as demonstrative exhibits after the hearing. The Secretary has objected to various of the photos, claiming they are improper and go beyond the court's order. I agree that D-17 is not appropriate, in that it depicts an individual opening the panel box, and that D-10 and D-12 are also inappropriate, in that they show someone taking measurements in the area of the lug bolts and lever. These exhibits are rejected. The other exhibits are admitted, as being helpful to the court and not improper, but, due to the Secretary's complaint about the labels in some of them, the undersigned will disregard the labels.

¹²Photo R-13 shows the wrench's location near the box, while photo R-11 shows the box as it was mounted on the temporary wall at the site. (Tr. 329-30).

¹³The record shows that Mr. Tesznar was right-handed. (Tr. 90).

¹⁴This lever, shown in C-10, is different from the door interlock lever, shown in D-9.

from the subsequent fire.¹⁵ The molten metal splatters concentrated on the left side of the hard hat were consistent with his belief, as was the fact that Mr. Tesznar had relatively minor burns to his face; if he had been facing the box to loosen the bolt, the hard hat would have had more damage in the front and his face would have been more seriously injured.¹⁶ Also consistent with Mr. Clawson's belief were Mr. Tesznar's other burn injuries, the damage to his gloves, and the wrench's condition.¹⁷ Mr. Clawson noted that Mr. Tesznar's body was more seriously burned on the left side than on the right and that the outside of Mr. Tesznar's lower right arm was not as seriously burned as other areas, such as the inside of that arm and his other arm. Mr. Clawson also noted that the back of the left-hand glove had been burned away, while the back of the right-hand glove was not burned. Finally, Mr. Clawson noted that the Allen wrench was charred all over, besides being burned on the ends, and it was his belief that, if Mr. Tesznar had been holding onto the wrench to turn the lug bolt, the part he had held onto would have had a cleaner appearance. For all of these reasons, Mr. Clawson concluded that the accident had occurred in the way he had described it. (Tr. 296-333).

In comparing the testimony of the above three witnesses, I note the extensive nature of Mr. Clawson's investigation and the fact that it continued even after June 21, 2004, when Shaw left the site. (Tr. 297-98). The investigation of Mr. Schmidt, in contrast, was 30 to 45 minutes, and while the record does not indicate how long the CO was at the site on March 26, 2004, or if he returned another day, I conclude his investigation was not as comprehensive as Mr. Clawson's. (Tr. 53). I note also that Mr. Schmidt spoke to Shaw personnel, and that the CO spoke to Ft. Detrick and Shaw personnel, before they began their respective investigations; in my view, and although the CO denied it, both Mr. Schmidt and the CO formed certain ideas about what had happened before they observed the accident scene.¹⁸ (Tr. 18, 98-99, 161-63). Finally, and most importantly, I note that Mr. Schmidt agreed that the accident could have happened the way Mr. Clawson described it, and he and the CO both agreed

¹⁵Mr. Clawson noted the molten metal splatters on the door's interior. (Tr. 322-25).

¹⁶Photos D-14, D-15 and D-16 depict the condition of the hard hat.

¹⁷The gloves are shown in D-18 and D-19, and the wrench is shown in D-13.

¹⁸The CO also spoke to Mr. Schmidt after his own investigation, a further indication that the CO may have been influenced by the views of others in this matter. (Tr. 72).

that the lever was burned, that it and the Phase C lug bolt could have been the two contact points, and that the wrench's spacing, as it was found, matched that between the lever and the Phase C lug bolt.¹⁹ (Tr. 64-68, 171-72). Mr. Schmidt also agreed with other aspects of Mr. Clawson's testimony, *i.e.*, he agreed that if Mr. Teszner had been in front of the box to loosen the Phase A lug bolt, he would have gotten the full force of the initial blast on his face and body. (Tr. 70-71).

Besides the foregoing, I note Mr. Clawson's familiarity with Mr. Teszner and his reputation for safety, while Mr. Schmidt and the CO were unable to speak to Mr. Teszner as he was taken to the hospital before they arrived. (Tr. 71, 99, 124, 279-80, 302). I further note that both Mr. DiPalo and Mr. Clawson testified that Mr. Teszner told them, as the fire was being put out, that all he did was open the door. (Tr. 225, 293). In addition, although Mr. Teszner could not recall what took place after the accident, due to his severe injuries, he testified at the hearing that all he did was open the door and that he did not reach into the box with anything. (Tr. 80-81, 90-91). I observed the demeanor of these three individuals on the stand, including their body language and facial expressions, and I found all three to be sincere and believable witnesses. I therefore credit their testimony, and I find as fact that Mr. Teszner did nothing more than open the door to the box, whereupon the accident occurred, and that he was not actually working in the box. I further find, based on the evidence of record, that the accident occurred in the manner in which Mr. Clawson believed it had.

Other evidence in the record supports my conclusion that Mr. Teszner did not work in the energized panel box. Mr. Clawson and Stephen Iseri, Shaw's project manager at the site, both testified about how employees were chosen for the job and how they were supervised; they also testified about Shaw's discipline policy. Taken together, their testimony was that due to the dangerous nature of the work, in that it involved the removal of hazardous biological and chemical waste, the employees were handpicked from among those that had worked at a previous site in Maryland; the selected employees were chosen based on their safety records and teamwork abilities, and besides the ten or so labor or craft workers who were on the job, there was also the project manager, the site superintendent, the safety coordinator, two safety technicians, a field engineer, a quality assurance technician and a

¹⁹As to the wrench spacing, Mr. Schmidt conceded that it was not particularly instructive because it could have changed when the wrench fell to the ground. (Tr. 68). On the basis of this evidence, I find that the wrench's spacing is not probative in regard to the contact points at issue.

chemist.²⁰ The superintendent and safety technicians conducted daily safety inspections of the site, and the superintendent and the project manager performed a detailed monthly safety inspection. R-25, Shaw's progressive discipline policy, was in effect at the site, but there were no actual disciplinary actions on the job due the caliber of the employees.²¹ (Tr. 234-47, 251-54, 275-77, 335-40, 346).

Mr. Clawson also testified about training the employees received. Each employee, upon first reporting to the site, received a site-specific safety briefing, which addressed any existing or potential hazards, such as chemical and biological hazards, any special procedures, and emergency operations and equipment. Following the briefing, each employee received at least a week of hands-on training, and employees also attended daily safety meetings held at the beginning of each shift that covered the day's activities and any safety concerns. In addition, Shaw had a "safety observer" program in effect at the site, which involved a labor or craft worker being assigned to observe his fellow workers for the day; a different worker was so assigned every day, and he would report his findings and any safety issues at the next day's safety meeting. (Tr. 270-75, 280-81).

Mr. Clawson noted that the initial safety briefing included training in R-3, Shaw's LOTO program for the Ft. Detrick site. He identified R-4 and R-5 as the attendance rosters for the initial safety briefing and the LOTO program training, respectively, and he pointed out that Mr. Tesznan's signature appeared on both; Mr. Tesznan's signature was also on R-8, a March 2, 2004 safety meeting that addressed commonly-made LOTO errors. He identified R-2 as Shaw's electrical safety procedure, which was in effect at the site, and he said that the procedure, on page 3, prohibits work on energized circuits unless corporate authorization is first obtained; he also said that all of the electrical work at

²⁰Mr. Clawson said the Maryland job had received Shaw's President's Award for working accident free for 1,000 days, that he was asked to work at the subject site due to his performance on the Maryland job, and that he and Mr. Iseri picked the employees for the site. (Tr. 275-77).

²¹The witnesses noted there were a few verbal warnings for some minor infractions, such as frayed extension cords and hard hat violations, but that there were no violations that merited written disciplinary actions. Mr. Clawson, however, said he had a reputation of "zero tolerance" for noncompliance with safety rules among employees and that he had both suspended and fired workers in the past for committing safety violations. (Tr. 242-47, 251-54, 335-40, 346).

the Ft. Detrick site involved de-energized equipment and that rubber gloves and other protective equipment were therefore not necessary.²² (Tr. 263, 270-74, 281-83, 340-42).

Mr. Clawson described the LOTO procedures set out in R-3. An employee who needed to work on energized equipment would first contact Mr. Madey, the site superintendent. Mr. Madey and the employee would complete the LOTO form, which required detailing the date and time and the equipment to be locked out, the isolation procedures and the LOTO devices to be used, and how the equipment would be tested to verify the procedure was effective, after which the employee and Mr. Madey would sign the form; the form also had a checklist the employee and Mr. Madey would have to initial at each step of the process, *i.e.*, applying the lock(s) after de-energization and testing the equipment.²³ Mr. Clawson also described how the subject panel box would be locked out. The employee and Mr. Madey would first review the scope of the work. They would then go to the box on the opposite side of the subject box, disengage the lever on the box providing power to the subject box, and put a red padlock and a tag on the lever; a red padlock and tag would also be put on the lever on the subject box (the tags would say “danger, do not energize”), and the date and names of the employees would be written on the tags so that anyone looking at them would know who locked out the equipment. Mr. Madey and the employee would then take the keys from the red padlocks and put them in a lock box, after which Mr. Madey and the employee would each put his own individually-assigned lock on the lock box.²⁴ After the work was done, the employee would go to Mr. Madey for approval to remove the locks from the equipment; the employee and Mr. Madey would each remove his lock from the lock box, after which the employee would take the red padlocks off of the equipment. Mr. Clawson noted that Mr. Madey had a log book in which he kept a record of each LOTO procedure and that in the LOTO station at the site there was a large blackboard on which any ongoing LOTO procedure was noted so that he or anyone else on the job could tell what equipment if any was locked out and being worked on. (Tr. 263-70, 346-49).

²²Mr. Iseri testified that Shaw did not generally perform “hot work” and usually had a subcontractor do such work; if hot work was necessary, authorization was required. (Tr. 250-51).

²³The LOTO form and checklist are set out on pages 11-13 of R-3.

²⁴Mr. Clawson said the short-term lock boxes were in the LOTO station at the site, while the long-term lock box, for any work lasting more than one shift, was in his office. (Tr. 270).

Despite the above, the Secretary contends that Mr. Tesznar worked on the subject box on the day of the accident. First, she notes Mr. Schmidt's testimony that besides the wrench on the ground and the bag of tools on the nearby generator, the plastic shield that should have been over the three connectors was sitting on top of the box. (Tr. 20-21). Second, she asserts that, in light of the tools, it is unreasonable to conclude that Mr. Tesznar was just observing the box. Sec. Brief pp. 19-20. Third, she asserts that R-7, one of the LOTO records Shaw presented, shows that Mr. Tesznar had worked on the same panel box the day before the accident; she also asserts that he had worked on other boxes in the same area and that he was the only employee who was dismantling panel boxes. Sec. Brief p. 19. Fourth, she asserts that Mr. Tesznar was a qualified technician who could work on "hot" or "live" equipment, that he had done such work before, and that he had never been provided or used rubber gloves for any of his electrical work for Shaw. Sec. Brief pp. 23-24. In this regard, she notes Mr. Tesznar's own testimony indicating, in her view, that he had worked on live equipment without protection and thus had been exposed to the hazard of electrical shock. (Tr. 83-86, 94). Fifth, the Secretary notes that while Mr. Clawson testified that no rubber gloves were necessary at the site, Shaw's LOTO program and electrical safety procedure provided for work on energized equipment and for the use of protective equipment. (Tr. 342-46). Finally, the Secretary notes Mr. Tesznar's testimony indicating that he tested equipment with a meter after he de-energized it to make sure that power was not going to it and that he did not wear rubber gloves to do so. (Tr. 86-87).

As to the Secretary's first and second assertions, it is clear that the Allen wrench was found on the ground in front of the box, that there was a bag of tools on the nearby generator that apparently was Mr. Tesznar's, and that the plastic shield was sitting on top of the box. (Tr. 20-21, 224-27). However, Mr. Schmidt conceded that he did not know when the shield was put on the top of the box, and he admitted that the subcontractor who installed the panel boxes might have left it there and never put it in place over the connectors. (Tr. 54). Moreover, the issue of the wrench has been addressed *supra*, and I have credited Mr. Tesznar's testimony that he did not reach into the box with anything.²⁵

²⁵Mr. Tesznar indicated he would not have tried to loosen the lugs with the wrench while wearing just leather gloves as he could have gotten electrocuted. (Tr. 91). Mr. Schmidt basically agreed, indicating that while the leather gloves might have provided some insulation, no qualified electrician would have taken the risk of doing such work with only leather gloves. (Tr. 76-77).

(Tr. 91). I also credit his testimony that he opened up the box to see what tools he needed, in that he did not have everything with him, that he would have called his supervisor for LOTO authorization before doing any work on the box, and that this was the normal way this work was done. (Tr. 92-93). Finally, I credit Mr. Clawson's testimony that opening a panel box to observe it in order to determine what tools were necessary, before getting permission to work on it, would not be a violation of Shaw's safety policy. (Tr. 333-34). The Secretary's first and second assertions are rejected.

As to the Secretary's third assertion, R-7 shows Mr. Tesznar, with Mr. Madey's authorization, locked out a "100 HP Panel" on March 24, 2004. However, the Secretary points to no evidence in the record to establish that this was the same box involved in the accident on March 25, 2004.²⁶ Further, Mr. Tesznar testified that he had not worked on the panel boxes in that area before the day of the accident.²⁷ (Tr. 83, 92). In addition, the record does not establish that Mr. Tesznar was the only employee dismantling panel boxes. Mr. Clawson did, in fact, testify that the project did not require a full-time electrician, that Mr. Tesznar performed electrical work as needed, and that one of his jobs was to dismantle panel boxes. (Tr. 290, 350). Regardless, the CO himself testified that management told him that it was known that "employees," including Mr. Tesznar, had worked on or in close proximity to live unguarded parts in panel boxes.²⁸ (Tr. 125-27). This evidence suggests that at least one other employee besides Mr. Tesznar worked on panel boxes at the site. Accordingly, based on

²⁶Mr. Schmidt testified that "he was told" that the box was powering a "100 horsepower motor." (Tr. 55). I do not view this testimony as being probative of the Secretary's assertion, as Mr. Schmidt had no first-hand knowledge of what the box was powering, and, just as significant, he did not identify who had given him the information. In any case, there is no proof in the record that I am aware of that the "100 HP Panel" was the same box that was involved in the accident.

²⁷In my opinion, R-7 undercuts the Secretary's claim that Shaw's employees did not lock out equipment as required. Mr. Clawson specifically testified that Mr. Tesznar had done work at the site using Shaw's LOTO procedures before the accident; he noted that besides R-7, R-26 and R-6 showed, respectively, that Mr. Tesznar had locked out equipment on March 14 and April 29, 2004. (Tr. 286-89). The record thus demonstrates that Shaw did in fact follow its LOTO program and utilize its LOTO permit forms at the subject site.

²⁸According to the CO, management also told him they had seen Mr. Tesznar "demilling" the panel boxes that were next to the subject box in the days before the accident. (Tr. 127). Based on the record and my findings, I conclude management was mistaken or the CO misunderstood what they told him.

the record, I find that while Mr. Tesznar had worked on panel boxes at the site, he had not worked on the panel boxes in the area where the accident occurred until the day of the accident. (Tr. 83, 87-89, 92). The Secretary's third assertion is therefore rejected.

With respect to the Secretary's fourth assertion, the record does establish that Mr. Tesznar was a qualified employee who could work on live equipment. (Tr. 192, 344). The CO testified that Mr. Iseri, Mr. Clawson and Mr. Madey were the management officials who told him that employees had worked on or in close proximity to live unguarded parts in panel boxes; he also testified that they told him that employees had observed or worked on unguarded panel boxes. (Tr. 125-27). Mr. Clawson, on the other hand, testified that he had told the CO that Mr. Tesznar had worked on live equipment on other jobs, but he was adamant that no work on energized equipment was done at the subject site and that he had not told the CO that Mr. Tesznar had done such work at Ft. Detrick.²⁹ (Tr. 342-44). I credit the testimony of Mr. Clawson. I also credit the CO's testimony, to the extent it agrees with that of Mr. Clawson; however, I reject the CO's testimony to the extent that it indicates he was told that employees had actually worked on live unguarded panel boxes or that they had worked in such proximity to them as to be exposed to a hazard.³⁰ Thus, taken together, the testimony of Mr. Clawson and the CO demonstrates what Shaw itself asserts, that is, that employees, including Mr. Tesznar, had opened panel boxes to observe them and to determine what tools they needed.

As set out above, the Secretary notes the testimony of Mr. Tesznar in support of her claim that he had worked on live equipment without using protective gloves. That testimony is as follows:

- Q: So it's your testimony today that you've never worked on a piece of energized equipment?
A: Not on the energized part.
Q: Okay, but my question was have you ever worked on energized equipment?
A: I've done work on panels that have power coming to them.
Q: And if they have power coming to them, they're energized aren't they?

²⁹Mr. Clawson said the CO's questions sometimes were general and did not differentiate between the subject site and other sites; for example, when the CO asked him whether Shaw ever worked on energized equipment, to which Mr. Clawson replied "yes," the CO apparently took his answer to mean that employees worked on energized equipment at the subject site. (Tr. 342-45).

³⁰The Secretary's contention that Mr. Tesznar's act of opening the door of the panel box to observe its contents exposed him to a hazard is addressed *infra*.

A: Well, you shut the main off, and they're de-energized.

(Tr. 83-84).

Q: So, Mr. Tesznar, can you explain what you mean when you say that the exact part that you're working on is not energized?

A: Well, the power didn't come into the top lugs, that if you shut the main off, it's disconnected to the point from there down to possible arcing.

Q: Have you ever observed any other employees at Shaw working on equipment that had not been de-energized?

A: No.

Q: During the course of your employment with Shaw Environmental, were you ever provided with any voltage gloves, or high voltage or low voltage?

A: No.

(Tr. 86).

Shaw agrees that the record shows that Mr. Tesznar in the past had worked on equipment that had power coming to it without the use of protective rubber gloves. (Tr. 83-86). However, as Shaw points out, "energized equipment" can have different meanings, depending on the situation, and there is nothing in Mr. Tesznar's testimony to indicate he ever worked in such proximity to an energized circuit that contact with the circuit could have taken place. As Shaw further points out, there are other types of protective equipment besides gloves, but the issue of what work Mr. Tesznar might have done on equipment at other sites and what other protective measures might have been used was not addressed in this matter. Accordingly, as Shaw contends, there is no evidence in the record that Mr. Tesznar or any other Shaw employee was ever exposed to an energized circuit such that contact with the circuit could have occurred. The Secretary's fourth assertion is rejected.

As to the Secretary's fifth assertion, Mr. Clawson testified there was no need for rubber gloves at the subject site as no work on energized equipment was required. He agreed, however, that section 9.2.3 of R-3, the LOTO program for Ft. Detrick, indicated that some work on energized equipment might be necessary; he also agreed that section 5.3 of R-2, Shaw's electrical safety procedure, provided for the use of protective equipment for electrical work. (Tr. 342-46). The Secretary's counsel made much of this testimony during the hearing, but Mr. Clawson was adamant that, despite the statements in R-2 and R-3, protective equipment such as rubber gloves was not necessary at the Ft. Detrick site; he was also adamant that he and Mr. Iseri had discussed the matter and had decided that no work on energized equipment would take place as there was no reason for it. (Tr. 343-46). The

aforementioned provisions in R-2 and R-3 are not probative of the Secretary's position, in my view, particularly in light of the record showing that Shaw occasionally did work on energized equipment. (Tr. 250-51). Regardless, based on Mr. Clawson's testimony and my findings as to his credibility, *supra*, I credit his statement that no work on energized equipment was required at the Ft. Detrick site and that rubber gloves were thus unnecessary. The Secretary's fifth assertion is rejected.

In regard to the Secretary's final assertion, I disagree with her suggestion that Mr. Tesznar was exposed to a hazard when he tested equipment with a meter after it had been de-energized without wearing protective rubber gloves. Mr. Clawson testified that rubber gloves were not required for testing equipment after de-energization because the testing devices that Shaw employees used had "patch shielding" built right into them by the manufacturer. (Tr. 341-42). I understand Mr. Clawson's testimony to mean that the testing meters employees used provided the necessary protection. Based on my credibility findings *supra*, I credit his testimony, and the Secretary's final assertion is rejected.

Serious Citation 1 - Items 2a and 2b

Items 2a and 2b allege violations of 29 C.F.R. 1926.416(a)(1) and 29 C.F.R. 1926.416(a)(3), respectively, and the terms of these standards are set out on page 4 of this decision. The Secretary contends that both of these standards were violated because Mr. Tesznar was attempting to loosen the Phase A lug bolt in the energized panel box without any protection from electrical shock. This contention is rejected, based on my findings *supra*. Alternatively, the Secretary contends that even assuming that Mr. Tesznar had just opened the box to observe it to see what tools he needed, the standards were violated because of his exposure to the energized parts in the box.

To prove a violation of an OSHA standard, the Secretary must show that the standard applies, that its terms were not met, that employees had access to the violative condition, and that the employer had actual or constructive knowledge of the condition. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). In addition, the Commission has held, in a case involving a standard equivalent to the one at issue here, that:

The clear meaning and evident purpose of the standard is therefore that an employee shall not work so close to an energized power circuit that he may inadvertently contact it in the course of his work. Thus, the standard, when read in its entirety, prescribes a specific and ascertainable standard of conduct, for an employer can determine by objective means whether employees are within reach of, and therefore may contact, an energized power circuit while they work.

Cleveland Consolidated, Inc., 13 BNA OSHC 1114, 1117 (No. 84-696, 1987).³¹

As to Item 2a, I read the foregoing to mean that the Secretary, to establish the applicability of 29 C.F.R. 1926.416(a)(1) to this case, must prove that Mr. Tesznar, in simply observing the contents of the panel box, was so close that he could have contacted energized parts inadvertently. CO Austin indicated that Mr. Tesznar could have taken a misstep in front of the box and fallen forward and thus contacted the energized parts. (Tr. 119-20). I find this scenario implausible, and, as Shaw points out, an employee is not likely to have accidental contact with an energized part merely by standing and looking into a panel box. Moreover, the Secretary presented no other evidence in this regard, and the factual circumstances in the cases she has cited are sufficiently dissimilar to the situation here as to make them irrelevant.³² See Sec. Brief p. 22. I conclude, accordingly, that the Secretary has not met her burden of showing that the standard applies in this matter. I further conclude that the Secretary likewise has not met her burden of showing that Mr. Tesznar, in simply opening and observing the box, was exposed to the cited hazard. This item is vacated.³³

As to Item 2b, CO Austin testified that the standard was violated, even if Mr. Tesznar had just opened the box to look at the contents, because the employer had not determined whether the box was energized. (Tr. 130-31). However, in light of my findings set out above, the record shows that Mr. Tesznar, before he actually began working in the box, would have contacted his supervisor to obtain LOTO authorization, and that, following that authorization, Mr. Tesznar and his supervisor would have determined what isolation measures were necessary and then would have proceeded to lock out the panel box according to Shaw's LOTO procedure. (Tr. 91-93, 263-70, 346-49). The CO also testified that this citation item was appropriate, even if the tool fell off of the top of the box and

³¹The standard at issue in *Cleveland* was 29 C.F.R. 1926.400(c)(1), the language of which corresponds to that of 29 C.F.R. 1926.416(a)(1).

³²As Shaw notes, the cases the Secretary has cited involved employees performing work activities that clearly could have resulted in an accidental contact with an energized part. I find the Secretary's citation to *Thompson Elec., Inc.*, Docket No. 01-1544, a case I decided in 2002, particularly inappropriate; there, the employee was actively working on a de-energized circuit when his elbow contacted an energized circuit. *Thompson* is summarized at 19 BNA 2057.

³³In her brief, the Secretary requests, if Item 2a is vacated, that Item 1 be reinstated and a violation of that standard be found. This I decline to do, for the reasons set out in this decision.

contacted live parts in the box, because the employer was responsible for ascertaining whether an employee or a tool could come into physical contact with an energized part. (Tr. 187-89). I do not agree. Based on my findings in this matter, the record shows the wrench was left on top of the box by someone else, and it would seem that Mr. Tesznar simply failed to notice it before he opened the door to the box. (Tr. 301-02, 313-14). The record also shows that the accident happened fairly early in the morning and that Mr. Madey, Mr. Tesznar's supervisor, had not been in that area yet that day. (Tr. 127, 132). In these circumstances, it is unreasonable to conclude that the employer should have detected the condition that led to the accident. This item is also vacated.

Serious Citation 1 - Items 3a and 3b

Items 3a and 3b allege violations of 29 C.F.R. 1926.417(a) and 29 C.F.R. 1926.417(c), respectively, and the terms of these standards are set out on page 4 of this decision. The Secretary contends that these standards were violated based on the testimony of CO Austin that the power source going to the subject panel box had not been de-energized and locked out and tagged out; the CO also testified that de-energizing the equipment, and locking and tagging it out, was required before Mr. Tesznar opened the box.³⁴ (Tr. 135-44). The CO's testimony is rejected. The discussion relating to Item 2, *supra*, shows that the Secretary did not prove either that the standard applied or that Mr. Tesznar was exposed to a hazard in simply opening the box to observe its contents. Further, Mr. Clawson's testimony, which I have credited, was that opening the box while it was energized to look at its contents to determine what tools were needed did not violate Shaw's safety policy. (Tr. 333-34). I find that the panel box was not required to be de-energized and locked out and tagged out when Mr. Tesznar opened the door to the box. Items 3a and 3b are therefore vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Serious Citation 1, Item 1, alleging a violation of 29 C.F.R. 1926.95(a), is VACATED.

³⁴The CO testified that he had asked to see a completed LOTO permit form for Mr. Tesznar's work on May 25, 2004, and that such a form was not available. (Tr. 131-32).

2. Serious Citation 1, Items 2a and 2b, alleging violations of 29 C.F.R. 1926.416(a)(1) and 29 C.F.R. 1926.416(a)(3), respectively, are VACATED.

3. Serious Citation 1, Items 3a and 3b, alleging violations of 29 C.F.R. 1926.417(a) and 29 C.F.R. 1926.417(c), respectively, are VACATED.

/s/

Covette Rooney
Judge, OSHRC

Dated: May 17, 2005
Washington, D.C.