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. NORTH EASTERN PRECAST, LLC; and MASONRY SERVICES, INC. dba MSI, Respondent.	OSHRC Docket Nos. 13-1169 & 13-1170

ON BRIEFS:

Scott Glabman, Senior Appellate Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Jonathan W. Greenbaum, Esq., Coburn & Greenbaum PLLC, Washington, DC
For the Respondent

DECISION

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

BY THE COMMISSION:

After conducting a non-enforcement intervention that was converted into an inspection and subsequently re-inspecting Respondent's worksite,[1] the Occupational Safety and Health Administration cited Respondent for multiple violations of construction safety standards as well as two willful violations that address work in proximity to high-voltage power lines (Willful

[1] The parties have stipulated that Northeastern Precast, LLC ("NEP") and MSI are a single employer for purposes of this proceeding under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. The companies have overlapping ownership and were both involved in the events that formed the basis for the citations at issue. For ease of reference, we use "Respondent" to refer to the cited single employer and use either MSI or NEP when referencing information specific to one of the companies.

Citation 2, Items 1 and 2).[2] Following a hearing, Administrative Law Judge Keith E. Bell affirmed both violations as willful and rejected Respondent's argument that the violations were duplicative. The judge assessed the $61,600 proposed penalty for each violation.

The only issues on review are whether the judge erred in his determination that these violations were not duplicative and the appropriateness of the penalty assessed.[3] For the reasons that follow, we reverse the judge's finding that the two violations were not duplicative, vacate Item 2, and assess a penalty of $70,000 for Item 1.

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[2] OSHA issued MSI and NEP separate citations that allege violations of the same standards and are largely identical. In stipulating that MSI and NEP constitute a single employer, the parties agree that they are "subject to a single set of citations and proposed penalties." Specifically, the parties have stipulated that the citations issued to NEP (Docket No. 13-1169) are "consolidated with the analogous citation items that [were] issued to MSI in this matter, with the resulting consolidated citation items being against [Respondent] as a single employer, and with the resulting proposed penalty for each consolidated citation item consisting of the penalty originally proposed against MSI." Thus, only the citations issued to MSI (Docket No. 13-1170) remain at issue. In this respect, we consider the citations issued to NEP withdrawn by the Secretary.

[3] The judge's decision to affirm both violations as willful is not at issue on review. Thus, the "chilling" nature of the facts, upon which our colleague unduly focuses at the expense of established case law, is relevant only to the extent that they bear on whether the violations are duplicative. Our colleague's biggest issue seems to be with these facts, not our application today of the law to them. In an exercise of what appears to be judicial activism, our colleague not only misconstrues Commission precedent and disregards the Secretary's concession, but she raises arguments relating to the Commission's authority to vacate duplicative violations that have not been raised or briefed by either party.

Further, while our colleague claims in her dissenting opinion that our decision today fails to "confront the Commission's confusing and conflicting precedent" on duplicativeness and "exceeds the Commission's limited authority under the Act" to apply the duplicativeness doctrine, it is she who appears to propose a new test made up out of whole cloth by suggesting that the Commission may vacate duplicative citations only where the employer has proven that affirming both violations would violate its due process rights—a concept not previously discussed in Commission precedent on this issue. In fact, the Secretary notes only that there is "tension" on this issue in our precedent, but then he expressly states that "[t]he Commission need not resolve this tension to decide this case[.]" As such, we question the prudence of raising these issues sua sponte and without the benefit of the parties' views, particularly where those issues implicate longstanding Commission precedent. To borrow from Justice Blackmun, "the adversary process functions most effectively when we rely on the initiative of lawyers" to raise and address issues. *New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (Blackmun, dissenting from order).

BACKGROUND

In the summer of 2012, Respondent was engaged by Vordonia Contracting & Supplies Corp./Alma Realty Corporation to erect steel, set precast concrete planks, and lay block and brick at a mixed retail/residential construction project in Valley Stream, New York. The plans called for Respondent to use a crane to hoist and install concrete planks that would form the floors of a five-story building.

Respondent had employees working in several locations near the corner of Brooklyn Avenue to the north and Fourth Street to the east. Power lines owned by the Long Island Power Authority ("LIPA") ran along both streets and shared a common utility pole at the corner of Fourth Street and Brooklyn Avenue. The corner utility pole was approximately ten degrees out of plumb, causing the power lines at the northeast corner to encroach over the footprint of the building under construction. The power lines in question consisted of both "primary" and "secondary" power circuits. The primary power circuit, located along the top of the utility poles, consisted of three separate wires or "phases" that carried up to 13.2 kilovolts of electricity. The secondary power circuit, located lower on the utility poles, consisted of one wire that carried up to 240 volts.

In the spring of 2012, before Respondent's work began on the project, James Sal Herrera, one of Respondent's owners, met with Patricio Solar, Vordonia's in-house architect and designated representative for the project. Herrera noted that the power lines on both Fourth Street and Brooklyn Avenue appeared to be less than ten feet from the building, and therefore, they needed to be addressed to enable Respondent to perform its work in compliance with OSHA standards. Solar raised the matter with LIPA in a May 25, 2012 letter, in which he requested an on-site inspection of the power lines in question. Guerson Carelus, a design planner and customer planning representative for LIPA, subsequently visited the worksite and informed Solar that the Brooklyn Avenue line could be de-energized, but the Fourth Street line would have to be relocated because de-energizing it would result in cutting power to other customers along the street. Carelus also informed Solar that LIPA required payment of the fees associated with both de-energization and relocation of the power lines before it would take any action.[4]

[4] LIPA representatives testified that both as a matter of company safety policy and in compliance with New York state law, LIPA would not insulate live power lines where workers would be working within ten feet of them. Such lines had to be either de-energized or relocated.

In the months preceding OSHA's inspection, Respondent received two cease-and-desist orders from LIPA. In July 2012, Jermaine Clarke, a design engineer supervisor for LIPA, visited the worksite and noticed that Respondent's crane, which was located on Brooklyn Avenue, was operating closer than ten feet from the energized power line along Brooklyn Avenue. Clarke issued a cease-and-desist order to Solar requiring that work be stopped. Shortly thereafter, Vordonia paid LIPA to de-energize and place grounding devices on the Brooklyn Avenue line.[5] In August 2012, Carelus again visited the worksite and observed the crane, now located on Fourth Street, lifting loads over the energized Fourth Street power line. Carelus requested that the work stop because the crane was being operated in dangerous proximity to the live power line. On August 23, 2012, Carelus issued a second cease-and-desist order to Solar, stating that all work should be ceased "in proximity to high voltage electric lines located on Fourth Street . . . ." That same day, LIPA issued a "notice to proceed with activities in proximity to high voltage electric lines" on Brooklyn Avenue, which were now de-energized. The crane was subsequently moved back to Brooklyn Avenue and work resumed.

Around this time, Solar had discussions with LIPA regarding the cost of relocating the Fourth Street power line, which was estimated to be $70,000. Vordonia's owner attempted to negotiate the price with LIPA while the line remained energized and work continued. According to Solar, Respondent frequently raised the status of the Fourth Street power line with Vordonia between August and December 2012 because the building had begun to encroach on the wires at its northeast corner after it rose higher than two stories. Solar spoke with Respondent about halting construction until the issue of de-energization or relocation of the live power line was resolved and suggested that employees work on the opposite side of the building for the time being. Solar testified that Respondent stated in response that "the building needs to come up as one, based on how steel gets strapped in together and how the [concrete] planks tie in."[6] Respondent stated to Solar that it would have to stop working if the issue was not resolved.

[5] The parties stipulated that the power lines located on the Brooklyn Avenue side of the worksite were de-energized by September 2012.

[6] According to James Sal Herrera, after LIPA's December 6, 2012 referral to OSHA, Respondent asked the project engineers about the possibility of continuing construction on only one half of the building, and the engineers advised against it. Because of the way the steel was designed to tie in together, the engineers recommended that each level of the building rise simultaneously.

On December 1, 2012, OSHA CO Brian Calliari conducted a follow-up visit to the project to determine whether hazards that OSHA had previously identified during a "non-enforcement intervention" following Hurricane Sandy—none of which related to the power lines—had been addressed.[7] By that point, Respondent had completed foundation and steel erection work, and it was engaged in masonry block and precast concrete plank installation on the building's third floor. The crane, still located on Brooklyn Avenue, was lifting planks over the de-energized line on Brooklyn Avenue and bringing them within eight feet of the energized Fourth Street power line, before setting them in place. The CO testified that such electrical hazards exceeded the scope of OSHA's non-enforcement intervention; therefore, the intervention was converted into an enforcement inspection.

Before conducting an opening conference, the CO informed Respondent's superintendent, Manuel Herrera, that the energized Fourth Street power line posed an imminent danger to employees engaged in crane operations and requested that the employees be removed. After the employees were removed, the CO held an opening conference initially with Manuel Herrera and then later with James Sal Herrera. A phone conference was also held with Solar. The CO told both Herreras that, until the power line was moved, the planks should not be installed along the Fourth Street side of the building but instead staged outside the worksite or installed in another part of the building where employees and equipment could be kept at a safe distance from the energized line. The CO testified that James Sal Herrera told him that the planks, which were still on the delivery trucks, could not be staged outside the worksite and a return of the planks to the plant would result in additional expense. James Sal Herrera also told the CO that Respondent would continue to install the planks in other areas of the project and would not encroach upon the Fourth Street power line.

Despite this representation, after the CO left the worksite on December 1, 2012, Respondent continued to install planks on the third floor along the Fourth Street side of the building, moving from the south side of the project towards the northeast corner, where a portion of the live Fourth Street power line crossed directly over the building. As the plank installation

[7] In the aftermath of the hurricane, which hit Long Island, New York, at the end of October 2012, OSHA states that it assumed a non-enforcement role and conducted "interventions," where COs observed recovery operations, identified hazards, and familiarized employees and employers with OSHA standards.

progressed toward the northeast corner, the crane got progressively closer to the line. In addition, on December 3, four employees began installing an engineered fall protection system along the Fourth Street side of the building in preparation for masonry work that was to take place.[8]

From December 4 to 5, 2012, employees built up the block masonry wall on the third floor along Fourth Street, moving from the south side of the project towards the northeast corner. Respondent also continued to build the masonry wall at the northeast corner of the building. As the masonry wall was vertically erected, it too came closer to the energized Fourth Street power line. At that point, the innermost of the three wires that made up the primary Fourth Street circuit crossed the plane of the wall under construction. Not letting that stand in the way of construction of the wall, Respondent encircled the innermost wire of the energized line (forming a ten-square-inch hole in the wall) and then continued building the wall above the energized power line! Where the wire passed through the wall, the wire was covered with an insulation-like material of a type normally used on water pipes in plumbing systems. The material provided no protection against the risk of electrocution posed by the power line. James Sal Herrara testified it was "more than likely" that one of Respondent's employees placed it on the line.

When LIPA representative Clarke arrived at the site on December 5, 2012, to his dismay, he observed that the wall had been constructed around part of the live Fourth Street line. Concerned that his earlier warnings had been ignored and that Respondent would again resume work after he left, Clarke called the police to shut down the worksite. Clarke also issued a third cease-and-desist order to Solar, requiring that all work activity be stopped "immediately." After LIPA referred the matter to OSHA, CO Calliari returned to the site on December 6. He observed that work had continued along the Fourth Street side of the building after the December 1 OSHA inspection and that part of the energized Fourth Street line was captured within the masonry wall. He also observed that the fall protection system erected along the north and east sides of the third floor was immediately adjacent to the Fourth Street power line. The CO re-opened his inspection, which resulted in the Secretary alleging additional violations, including the two willful citation items at issue here. At some time after December 6, 2012, Vordonia paid LIPA $70,000 to relocate the Fourth Street power line.

[8] This fall protection system consisted of cables that employees strung across metal stanchions they installed near the edge of the building.

DISCUSSION

A. Duplicativeness

Under Item 1, the Secretary alleges a violation of 29 C.F.R. § 1926.416(a)(1). This provision, which is part of OSHA's construction electrical standards, provides:

> 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.

The Secretary alleges four separate instances of employee proximity to the live Fourth Street power line: one of which occurred on December 3, 2012, during the installation of the fall protection system when the power line was about three feet above employees' heads; the remaining three instances relate to the construction of the masonry block wall on December 4 and 5, 2012, when employees came within 4 to 14 inches of the power line.

Under Item 2, the Secretary alleges a violation of 29 C.F.R. § 1926.1408(a)(2), for failing to determine if any part of the crane, load line, or load could get closer than 20 feet of an overhead power line. If the crane could get closer than 20 feet, employers have three options under the cited provision for compliance: de-energize and ground the power line; ensure that no part of the equipment, load line, or load (including rigging and lifting accessories) comes closer than 20 feet to the power line; or utilize a table in the provision to determine the minimum approach distance to the power line based on its voltage.[9] 29 C.F.R. § 1926.1408(a)(2)(i)-(iii). The Secretary alleges that this violation occurred on December 1, 2012, when Respondent did not comply with any of the cited provision's three options and the crane came within approximately 8 feet of the energized Fourth Street power line.[10]

Violations are duplicative where the abatement of one violation necessarily results in the abatement of the other. *See Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2056-57 (No. 90-2873, 1992). The Commission has also found that violations are duplicative where they require

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[9] In this case, the minimum approach distance utilizing the table would have been ten feet from the Fourth Street power line, based on the power line having a capacity of 13.2 kV of electricity. *See* 29 C.F.R. § 1926.1408, Table A.

[10] Our dissenting colleague repeatedly contends that Respondent failed to comply with the crane standard for many months. However, the Secretary limited the cited conduct for this alleged violation to one day; thus, any broader period of time of noncompliance has no relevance here.

the same abatement conduct, *see J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207 (No. 87-2059, 1993); where they involve substantially the same violative conduct, *see Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1118 (No. 84-696, 1987); or where they involve the same abatement. *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1561 (No. 94-1979, 2009) (citing *Capform, Inc.*, 13 BNA OSHC 2219, 2224 (No. 84-0556, 1989), *aff'd*, 901 F.2d 1112 (5th Cir. 1990)). Violations are not duplicative where they involve standards directed at fundamentally different conduct, *J.A. Jones Constr.*, 15 BNA OSHC at 2207, or where the conditions giving rise to the violation are separate and distinct. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981). Here, the inquiry falls within the category of duplicative violations that may involve the same abatement.[11] *Capform*, 13 BNA OSHC at 2224.

In rejecting Respondent's claim of duplicativeness, the judge found that the violations at issue addressed the same general hazard of electrocution but the conditions giving rise to the violations were separate and distinct. In considering whether the same abatement measure could abate both violations, the judge relied on Commission precedent regarding the multi-employer worksite defense to conclude that because Respondent lacked the authority or ability to relocate the Fourth Street power line, the company neither controlled nor created the conditions underlying the violations. *See, e.g.*, *Electric Smith, Inc. v. Sec'y of Labor*, 666 F.2d 1297, 1298 (9th Cir. 1982); *Capform, Inc.*, 16 BNA OSHC 2040, 2041-42 (No. 91-1613, 1994). As a result of his

[11] While our dissenting colleague claims that our opinion "latches on to the line of cases that focus exclusively on abatement" without "acknowledging . . . conflicting precedent," she ignores the evolution of our case law that has led to defining violations as duplicative solely in terms of abatement: "violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in the abatement of the other item as well." *Rawson Contractors*, 20 BNA OSHC 1078, 1082 (No. 99-0018, 2003); *General Motors Corp.*, 22 BNA OSHC 1019, 1024 (No. 91-2834E & 91-2950, 2007; *AKM LLC*, 23 BNA OSHC 1414,1425 (No. 06-1990, 2011), *vacated*, 675 F.3d 752 (D.C. Cir. 2012). Indeed, despite her attempt to portray the case law as lacking consistency, as she describes it in "Appendix A" to her dissenting opinion, our precedent has reached a common conclusion that violations are not duplicative when "abatement of one of the violative conditions . . . would not have abated the other violative condition." *Westar Mechanical, Inc.*, 19 BNA OSHC 1568, 1572 (No. 97-0226, 2001) (consolidated). Our opinion here today neither adds anything nor subtracts anything from this jurisprudence. However, our colleague's dissenting opinion, which attempts to make a quagmire out of an orderly and fair test for determining duplicativeness, would read better in the pages of a law review than in the context of a judicial opinion. Further, our decision today better serves the regulated community than our colleague's view, which if adopted by the Commission would be sure to create more uncertainty than answers.

finding, the judge rejected relocating the line as a method of abatement for purposes of analyzing duplicativeness; instead, he considered whether Respondent had "take[n] feasible alternative measures to protect its employees from the energized line." *See, e.g.*, *Peterson Brothers Steel Erection Co. v. Sec'y of Labor*, 26 F.3d 573, 579 (5th Cir. 1994); *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1228 (No. 88-821, 1991). With respect to the crane violation, the judge considered the two measures presented by the CO to Respondent while the Fourth Street power line remained energized: staging the planks in another area of the worksite or keeping the crane a safe distance from the energized power line. With respect to the electrical violation, the judge stated that the violative condition could have been partially abated by staging the planks at another part of the project; however, abatement would also require halting construction of the wall. Since one of these measures alone could not have fully abated both violations, he concluded that the violations were not duplicative.

On review, Respondent claims that this was error because the hazardous condition for both items was the proximity of the overhead power line and the abatement for both items consisted of removing and relocating the power line. In response, the Secretary concedes that the violations were ultimately abated by removing and relocating the Fourth Street power line, but he contends, as the judge found, that because Respondent lacked the ability and authority to remove the line, this method of abatement is irrelevant to determining whether the violations were duplicative. The Secretary also echoes the judge's conclusion that the abatement measures within Respondent's control were separate and distinct for each citation item.

We find that the judge, in considering the violations at issue, erred in limiting his consideration of what constituted abatement. Abatement is defined as "action by an employer to comply with a cited standard." 29 C.F.R. § 1903.19(b)(1). Here, that action was removing and relocating the energized power line. This is the very measure the Secretary expressly concedes on review abated both violations.[12] That Respondent itself could not implement this abatement in no

[12] Our dissenting colleague claims that "even if the power lines were relocated to the opposite side of Fourth Street, the crane's boom would still have been able to come within 20 feet of the lines[.]" Given that there are no measurements or scaled drawings of the worksite in the record, there is no evidentiary basis for this conclusion. Furthermore, the Secretary's concession that relocating the line would have abated both violations means the Secretary also concedes that the relocated line *would have* been beyond the 20-foot zone. The Secretary's concession on this issue does not permit our colleague's contrary conclusion. *See Christian Legal Soc. Chapter of the University of*

way limits its assertion of duplicativeness or our analysis of the issue. Indeed, there is no precedent that restricts this defense to abatement methods the cited employer alone controls. Applying the judge's rationale here would mean that only Vordonia, which was cited for the same violations under the same standards as Respondent, could claim duplicativeness on the basis of the single method the Secretary admits constituted abatement for both violations.[13] Not only does logic defy that result, it would be patently unfair.

Moreover, neither of the actions considered by the judge as "feasible alternative measures" would have permitted Respondent to continue work along the Fourth Street side of the building while the energized line remained in place. The measures offered to Respondent by the CO were only available until the line was either de-energized (which the Secretary concedes was not feasible) or relocated. Like the CO, Solar also suggested that Respondent work on the "opposite side" of the building (along Rockaway Avenue), but he admitted that this was simply a way for Respondent's employees to keep doing the installation work until the live power line was "resolved" (i.e., de-energized or relocated); in the end, working on the opposite side of the building was not a viable option because, as Solar explained, "the building need[ed] to come up as one, based on how the steel gets strapped in together and how the planks tie in." Likewise, "staging" the planks in a different part of the worksite would only have delayed the installation work that had to be done along Fourth Street. To complete construction of each successive level of the building, the planks had to eventually be installed by the crane, including the area adjacent to Fourth Street. Not even moving the crane from its location on Brooklyn Avenue would have abated the crane violation because the crane's load line and rigging still had to hoist planks to the work area in proximity to the energized power line. In short, none of these measures would have constituted abatement of the crane violation.

California, Hastings College of Law v. Martinez, 561 U.S. 661, 677-8 (2010) ("[F]ormal concessions . . . have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission . . . is conclusive in the case."). Our opinion today gives effect to the Secretary's promulgated definition of what constitutes "abatement" and the Secretary's concession herein; it does not seek to expand the Commission's authority under the Act.

[13] Vordonia was cited for three violations, two of which were characterized as willful and alleged under the same provisions at issue here: §1926.416(a)(1) and § 1926.1408(a)(2). These citations (Docket No. 13-1167) were settled on December 19, 2014.

Abatement of the electrical violation was subject to the same constraint. Building the wall *and* setting the concrete planks for installation required Respondent's employees to work adjacent to the energized Fourth Street power line—changes in the timing or, in the case of the planks, the location of the materials, would have merely delayed the inevitable proximity to the energized power line. Since the Fourth Street power line not only came within a few feet of this part of the project but actually crossed the plane of what was to be the building's exterior wall, the only way for Respondent to comply with the cited electrical standard was to either de-energize or relocate the Fourth Street line. Since de-energization was not feasible, relocation of the line was again the only available abatement method. Therefore, we find that both violations could be abated by the same (and only) method.[14]

Based upon the foregoing, we conclude that these violations are duplicative.[15] Accordingly, we vacate the crane violation and affirm the electrical violation.[16] *See, e.g., E. Smalis*

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[14] Our dissenting colleague, while stating that our conclusion is not supported by Commission precedent, goes on to craft what would be new precedent by listing a "panoply of factors" previously not articulated under our case law that she would consider on the issue of duplicativeness. As previously noted, it appears that our colleague's dissenting opinion embarks on an odyssey of policy, particularly given that her contentions venture beyond the parties' arguments and stipulations.

[15] Our finding of duplicativeness should not be construed as a conclusion that condones the Respondent's flagrant violations and course of conduct that flouts the requirements of the Act.

[16] Our dissenting colleague states that by vacating the crane violation, we have "immunized the company from being cited for a repeat violation of the crane standard in the future" and that preventing OSHA from using this tool in a future enforcement action against this employer "undermines the most fundamental purpose of the Act." We disagree. A violation is properly classified as 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. *See, e.g.*, *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167-68, (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3rd Cir. 1994). Although the Secretary typically establishes a prima facie case of substantial similarity by showing that both violations are of the same standard, the Secretary may also show substantial similarity when violations are not of the same standard by presenting "evidence that the violations involve similar hazards." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). With the issuance of this decision, Respondent's violation of § 1926.416(a)(1) (the employee proximity standard) becomes a Commission final order against Respondent. Therefore, if Respondent is cited for a violation of § 1926.1408(a)(1) (the crane proximity standard) in the future, the Secretary could prove that the crane violation should be characterized as repeat by establishing that it involves a hazard similar to that of the previously affirmed § 1926.416(a)(1) violation—proximity to electrical power lines.

Painting Co., 22 BNA OSHC at 1584 (vacating 20 out of 203 willful allegations as duplicative; affirming 51 willful allegations and assessing penalties; and vacating 132 willful allegations on other grounds); *Manganas Painting Co., Inc.*, 21 BNA OSHC 1964, 1996 (No. 94-0588, 2007) (vacating 8 out of 28 willful allegations as duplicative; affirming 15 willful allegations and assessing penalties; and vacating 3 willful allegations on other grounds).

B. Penalty

"In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005) (citation omitted).

Here, the Secretary proposed a penalty of $61,600 for each willful violation. In assessing the proposed penalty amounts, the judge relied on testimony from the CO that the severity was "high" because, given the voltages involved, death or serious physical injury was likely to result.[17] The CO rated the probability of an accident occurring as "greater," based on the number of employees exposed and the duration of exposure. As a result, the CO considered the overall gravity to be "high," resulting in a gravity-based penalty of $70,000 for each violation. This amount was then reduced by 20 percent based on MSI's size (51 employees) and the resulting amount was increased by 10 percent based on MSI's prior violation history—the CO testified that since 2000, MSI has been inspected 28 times and issued 96 citations, including multiple citations

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Moreover, a future citation involving the hazards identified in this case might also be characterized as willful. Given the company's record of prior citations, along with the item affirmed here, the Secretary would certainly be able to show that Respondent was well aware of the requirements of both proximity standards. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1188 (No. 89-2883 & 89-3444, 1993). Furthermore, indifference as well as disregard would presumably exist if, for example, the company made a conscious decision not to comply with the Act for economic reasons, as it did in this case. *Id.*

[17] The judge also specifically rejected Respondent's argument that assessing the proposed penalty amounts would cripple it, finding that Respondent "introduced no financial statements to support its contention . . . [and] [i]n any event, financial hardship . . . is not a statutory criterion for determining the appropriateness of a penalty."

for serious and repeat violations, all of which were settled. Given that the inspections in this case resulted in citations for serious, repeat, and willful violations, Respondent was given no credit for good faith.

We agree that the gravity of the electrical violation was high and under the circumstances present in this case, accord that factor more weight than the other penalty factors. *Natkin & Co. Mech. Contractors*, 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973) ("Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors."); *see also E.R. Zeiler Excavating, Inc.*, 24 BNA OSHC 2050, 2057 (No. 10-0610, 2014); *E. Smalis Painting Co., Inc.*, 22 BNA OSHC at 1582; *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished); *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1734 (No. 93-373, 1996), *aff'd* 122 F.3d 437 (7th Cir., 1997); *Valdak Corp.*, 17 BNA OSHC 1135,1138 (No. 93-0239, 1995), *aff'd* 73 F. 3d 1466 (8th Cir., 1996); *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). In addition, we see no reason to adjust the penalty for either size or prior history. Specifically, any reduction that might be considered for size is offset by the evidence of a substantial prior citation history. Finally, for the same reasons identified by the CO, a reduction for good faith is not warranted. Therefore, we find that a penalty of $70,000 is appropriate.

ORDER

We vacate Willful Citation 2, Item 2, affirm Willful Citation 2, Item 1, and assess a penalty of $70,000.

SO ORDERED.

/s/
Heather L. MacDougall
Chairman

/s/
James J. Sullivan, Jr.
Commissioner

Dated: February 28, 2018

ATTWOOD, Commissioner, dissenting:

Because I have concluded that, in the circumstances of this case, the Commission lacks authority to vacate either of the proven willful citation items on the grounds that they are duplicative, I dissent.

BACKGROUND

The facts of this case are chilling—and, at this stage of the proceeding, largely undisputed.[1] Respondent was the masonry subcontractor on a construction project located at the corner of Brooklyn Avenue and Fourth Street in Valley Stream, New York. Over a four-month period, from July until early December 2012, Respondent periodically operated a crane within mere feet of energized power lines in flagrant violation of OSHA's crane standard, exposing employees to an

[1] The "chilling" nature of this case relates to the fact that many human lives were put at grave risk due to Respondent's egregious violation of two separate safety regulations at the worksite. The majority's failure to understand the importance of *this* fact speaks for itself.

electrocution hazard.[2] And on three days in December, Respondent also exposed a number of its employees to an electrocution hazard in violation of the proximity to electrical power circuits' standard.

The relevant facts begin in the spring of 2012. In May, a representative of the Long Island Power Authority (LIPA) informed the general contractor, Vordonia Contracting & Supplies Corp./Alma Realty Corporation, that it must have the power lines along Brooklyn Avenue de-energized before it commenced work in proximity to those lines. He also informed Vordonia that the Fourth Street power lines could not be de-energized and would have to be relocated if work were to be conducted near those lines. Apparently because of cost considerations, Vordonia—with the full knowledge of Respondent—did not have the lines de-energized (Brooklyn Avenue) or moved (Fourth Street) prior to beginning construction.

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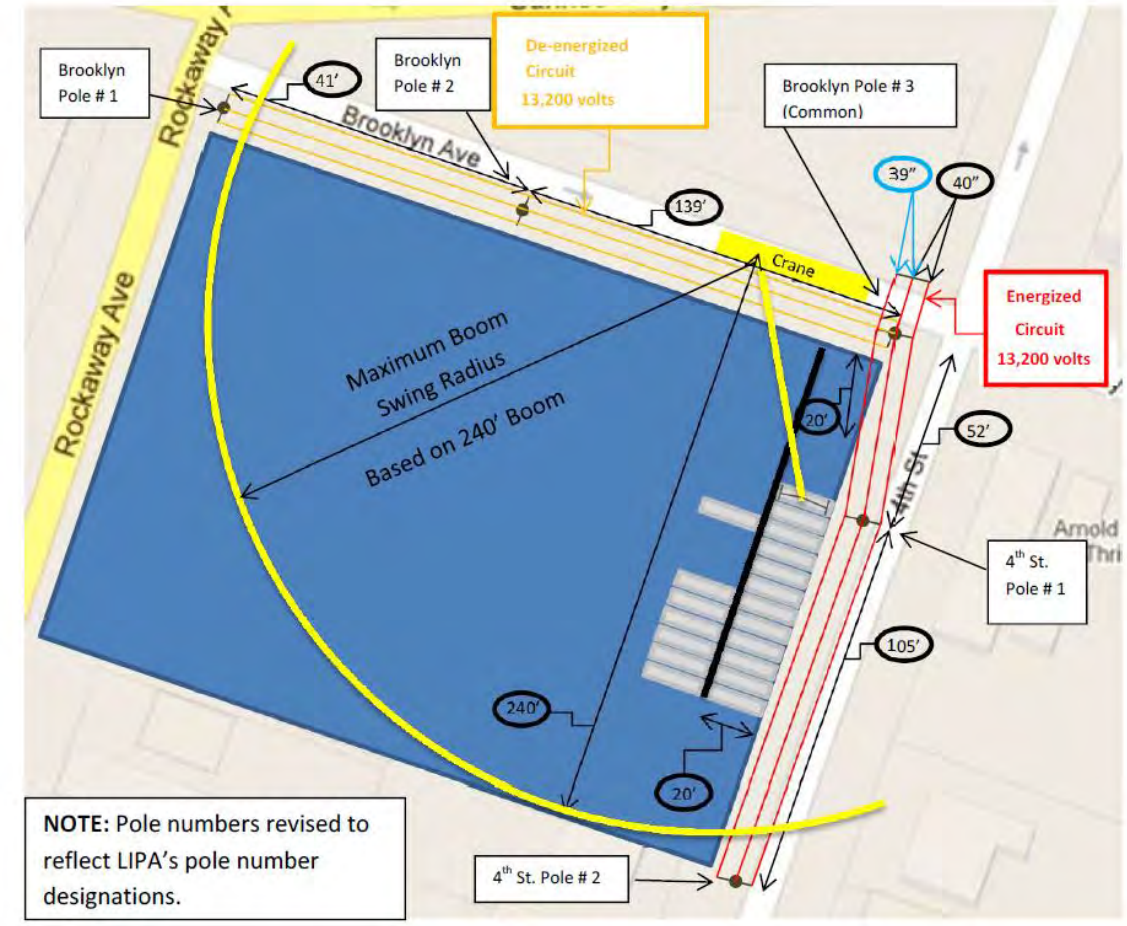
[2] This is the unscaled depiction of the worksite contained in DOL Exhibit 26a.



In July, a LIPA representative observed Respondent operating a crane (which was then situated on Brooklyn Avenue) within 10 feet of the energized Brooklyn Avenue power lines and issued a cease-and-desist order requiring that the Brooklyn lines be de-energized before work proceeded. Sometime thereafter Vordonia paid to have a section of the Brooklyn Avenue power lines de-energized. Inexplicably, however, Respondent relocated the crane to the Fourth Street side of the project, which also had energized power lines, and proceeded to lift materials over the Fourth Street lines. This action resulted in LIPA issuing Respondent a second cease-and-desist order on August 23rd, barring it from using the crane within 10 feet of the energized Fourth Street lines. On the same date, because the Brooklyn Avenue power lines had been de-energized, LIPA lifted the July cease-and-desist order, thus allowing Respondent to return the crane to its previous Brooklyn Avenue location.[3]

On December 1st, two OSHA compliance officers initiated an inspection of the construction site, where Respondent was in the process of using the crane to hoist precast concrete floor planks to be installed on the third floor of the project. The COs observed that Respondent was lifting the concrete planks over the (de-energized) Brooklyn Avenue lines and bringing them within 8 feet of the (energized) Fourth Street lines before setting them down. Photographic evidence shows employees placing their hands on the load to guide it as it was lowered into place. The COs informed Respondent's superintendent/foreman that the Fourth Street lines posed an imminent danger to employees and asked that Respondent cease operation of the crane and remove all employees working in dangerous proximity to the lines. The COs then proceeded to inspect the site, which resulted in the issuance of citations for several violations, including the crane violation at issue here.[4] Respondent's owner assured the COs that the crane would not lower any

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[3] Therefore the parties' stipulation that the Brooklyn Avenue lines were de-energized in September 2012 cannot be accurate.

[4] The citation, as amended, provides:

> 29 C.F.R. 1926.1408(a)(2): The employer, where any part of the equipment, load line, or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone, could get closer than 20 feet to a power line, failed to meet the requirements in Option (1), Option (2), or Option (3) of this section:
>
> (a) Worksite, east side of building, third floor – Employees hoisted and set precast concrete floor planks with a Liebherr Mobile Crane . . .

more planks near the Fourth Street lines but would work elsewhere on the project. However, after the COs left the site, Respondent continued to lift and place planks progressively closer to the northeast corner of the building and the Fourth Street power lines, one of which, because the supporting power pole located at the corner was out of plumb, ran directly over the northeast corner of the building.

Between OSHA's visit on December 1st and December 5th, Respondent completed laying the floor planks for the third floor along the Fourth Street side of the building and started building a masonry block wall along the northeast corner where Brooklyn Avenue intersected Fourth Street. Incredibly, when the height of the wall exceeded the height of the Fourth Street power lines, Respondent's employees merely covered a portion of the energized line that intersected the wall with the type of insulation plumbers use to protect water lines from the cold and, creating a 5-by-5 inch hole in the wall, *built the wall around the intruding energized power line*! Respondent's employees also installed a fall protection system along the Fourth Street side of the building, which again required coming within inches of the energized power lines.

On December 5th, a LIPA representative arrived at the site and discovered the energized Fourth Street power line running through the wall of the building. Shocked by what he saw, and concerned that Respondent would resume work after he left the site, he called the police to shut down the project.[5] He also issued a third cease-and-desist order to the general contractor requiring that it "MUST IMMEDIATELY CEASE AND DESIST ALL WORK ACTIVITY." In addition, he referred the matter to OSHA, and an OSHA CO returned on December 6th and continued the inspection begun on December 1st. As a result, OSHA issued a second set of violations to Respondent, including the other willful violation at issue in this case, which alleged that on

> where the rigging came within approximately 8 feet of the overhead primary and secondary power lines operating up to 13,200 volts (13 Kv) phase to phase, on or about 12/1/12. The employer did not confirm that the powerlines had been deenergized and visibly grounded at the worksite; nor did the employer follow the requirements of 29 CRF 1926.1408(b) to ensure that either 20 foot clearance or applicable minimum approach distance was maintained from the power lines.

[5] One LIPA representative testified that he "had never seen anything so horrendous" in his life.

December 3rd, 4th, and 5th employees on the third floor were working variously within 3 feet, 12 inches, 14 inches, and 4 inches of the energized Fourth Street power lines.

DISCUSSION

Review in this case is limited to a single issue: whether the crane violation and proximity to electrical power circuits violation, both of which the judge affirmed as willful, are duplicative of each other.[6] The majority concludes that because in the circumstances of this case the two violations could only have been abated by the same action—relocating the Fourth Street lines across the street from the construction project—the violations are duplicative and one must be vacated.[7]

I disagree with the majority's conclusion for two principal reasons. First, their opinion does not confront the Commission's confusing and conflicting precedent on this issue. As a result, the majority analyzes whether the violations are duplicative using a framework that lacks a sound legal foundation. Second, given the only legal foundation upon which the duplicativeness doctrine must rest, the majority, in vacating one of these proven violations on duplicativeness grounds, exceeds the Commission's limited authority under the Act—a statute that vests the Secretary, not the Commission, with the type of prosecutorial discretion that is really at issue here.[8]

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[6] I note that unlike the majority, the discussion throughout my dissent is *not* tailored to "better serve[] the regulated community," but is instead properly focused on upholding Commission precedent and effectuating the principal purpose of the Act. *See* 29 U.S.C. § 651(b) ("The Congress declares it to be the purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . .").

[7] The Secretary has conceded that relocating the power lines would have abated both violations. But a close examination of the record evidence reveals that relocating the power lines could not possibly have abated the crane violation. This is because even if the power lines were relocated to the opposite side of Fourth Street, the crane's 240-foot boom would obviously still have been able to come within 20 feet of the lines, and thus Respondent would have been required to take additional actions under the standard beyond relocating the lines *before* it began crane operations at the worksite. *See* 29 C.F.R. § 1926.1408(a)(2). Despite the majority's assertion to the contrary, I acknowledge the Secretary's concession and assume for purposes of my analysis that relocating the power lines would have actually abated both violations.

[8] Though cited only for its conduct over three days in December, it cannot be ignored that over a period of many months, until LIPA had the police shut down the site, Respondent had used the crane in close proximity to energized powerlines and therefore exposed numerous employees to an electrocution hazard. Indeed, had Respondent taken action on December 1st to protect the employees exposed to electrocution as a result of the crane violation, the employees working along

I. Commission Precedent

Let there be no doubt: the majority's decision to vacate the crane standard violation as duplicative of the proximity to electrical power circuits standard violation is without precedent, and if followed, would vastly expand the reach of the duplicativeness doctrine. As the following analysis demonstrates, Commission precedent provides no rational justification for finding duplicativeness here.

As early as 1974, the Commission analyzed whether two violations of closely related standards were duplicative of each other. *Koppers Co., Inc.*, 2 BNA OSHC 1354, 1354-55 (No. 3449, 1974) (finding violations of two standards related to respiratory protection not duplicative because allegations were made with respect to different individuals and on different bases). However, in the ensuing years, the Commission has neither articulated the source of its authority to vacate a violation as duplicative nor been consistent in its approach to potentially duplicative citations. In some decisions, the Commission has framed its analysis purely in terms of abatement—finding that violations were duplicative because abatement of one necessarily abated the other. *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1561 (No. 94-1979, 2009); *Manganas Painting Co., Inc.*, 21 BNA OSHC 1964, 1976 (No. 94-0588, 2007); *Capform, Inc.*, 13 BNA OSHC 2219, 2224 (No. 84-0556, 1989).[9] In other cases, the Commission largely ignored abatement, but found the violations were duplicative because the standards regulated substantially the same violative conduct. *Lee Way Motor Freight*, *Inc.*, 4 BNA OSHC 1968, 1970 (No. 10699, 1977); *Alpha Poster Serv., Inc.*, 4 BNA OSHC 1883, 1884-85 (No. 7869, 1976); *Safeway Stores, Inc.*, 2 BNA OSHC 1439, 1440 (No. 454, 1974) (consolidated), *vacated on reconsideration on other grounds*, 3 BNA OSHC 1123 (1975). And, in yet another line of cases, the Commission has found that abatement of one violation would abate the other violation, but nonetheless concluded that the violations were not duplicative because either the standards addressed fundamentally different conduct or because the Secretary had the authority under section 5(a)(2) of the Act to cite

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the Fourth Street side of the building on December 3rd-5th would not have been exposed to the hazard. It is Respondent's *inaction* regarding the crane violation that led inextricably to the proximity to power circuit violation.

[9] To avoid cluttering this opinion with lengthy footnotes describing the specific circumstances of each Commission decision that discusses the duplicativeness issue, I have attached as "Appendix A" a chart of all of those decisions, together with brief descriptions of the duplicativeness issues addressed in each.

both violations notwithstanding that abatement was the same. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981); *Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1112 (No. 76-256, 1981); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2085-86 (No. 88-523, 1993); *Burkes Mech., Inc.*, 21 BNA OSHC 2136 (No. 04-475, 2007); *see also Hoffman Constr. Co.*, 6 BNA OSHC 1274, 1275 (No. 4182, 1978).[10]

Three decisions dramatically illustrate the Commission's historical failure to engage in a rigorous analysis of the duplicativeness issue. In *Stimson Contracting Co.*, 5 BNA OSHC 1176, 1178 (No. 13812, 1977), the employer was cited for exposing its employees to a trench that was not properly shored, sheeted, braced, sloped, or otherwise supported in violation of 29 C.F.R. § 1926.652(b), and for failing to sheet-pile, shore, or brace the trench to resist extra pressure due to a superimposed load caused by heavy equipment located near the trench, in violation of 29 C.F.R. § 1926.651(q). Two Commissioners held that, because § 1926.651(q) requires shoring, sheeting, bracing, or sloping precautions that go beyond those required by § 1926.652(b), when both standards are cited regarding the same trench, compliance with § 1926.651(q) presupposes compliance with § 1926.652(b). The Commission held that "[w]hen both standards are violated the failure to comply with § 1926.652(b) is included within the violation of 29 C.F.R. §1926.651(q). Citing an employer [for] noncompliance with both standards is, therefore, duplicative." *Stimson*, 5 BNA OSHC at 1178. The Commission therefore vacated the item alleging noncompliance with §1926.652(b).

Four years later, the Commission overruled *Stimson* in *H.H. Hall*, 10 BNA OSHC at 1046, which involved the same fact pattern as *Stimson* and violations of the same two standards. The Commission overruled *Stimson* "to the extent that it requires the Commission to vacate a citation or an item of a citation on the grounds that one violation is included within another cited violation":

> Although a worksite condition may violate more than one standard, section 5(a)(2) of the Act requires an employer to comply with all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards *may* be satisfied by compliance with the more comprehensive standard. Thus, there is no unfair burden imposed on an employer when the same or closely related conditions are the subject of more than one citation item and a single action may bring an employer into compliance with the cited standards. . . . Despite the

[10] In what might be considered a fourth line of cases, the Commission has analyzed abatement as a means of determining whether the standards at issue were aimed at fundamentally different conduct. *Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1118 (No. 84-696, 1987); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207-08 (No. 87-2059, 1993).

> fact that the violations alleged in this case, operation of heavy equipment near an excavation and improper support of trench walls, result in the same general hazard—collapse or cave-in—the conditions giving rise to the violations are separate and distinct. Accordingly, we conclude that Hall's simultaneous noncompliance with two standards is not necessarily duplicative.

H.H. Hall, 10 BNA OSHC at 1046.[11]

In 1989, the Commission, for the third time, faced a fact pattern identical to *Stimson* and *H.H. Hall* and violations of nearly identical standards. *Capform,* 13 BNA OSHC at 2219. Capform's employees were working in a 25- to 30-foot deep excavation, while a 100-ton crane was positioned at the top of the unshored side of the excavation. That side collapsed, killing one employee. Capform was cited under §1926.651(c)[12] for not guarding the unshored wall and under §1926.651(q) for not protecting the excavation from the extra pressure exerted on it by the crane. Although the Commission relied on *H.H. Hall* for the proposition that §1926.651(q) does not require additional proof that the presence of the crane actually created extra pressure, it ignored the unmistakable holding in that case when it came to ruling on the duplicativeness question. Using language reminiscent of the overruled part of *Stimson*, the Commission held: "If Capform had complied with section 1926.651(q) by sheet-piling, shoring, or bracing the wall, Capform would also necessarily have been in compliance with the less stringent requirements of section 1926.651(c)." *Capform*, 13 BNA OSHC at 2224. The Commission therefore vacated the § 1926.651(c) violation as duplicative.

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[11] The Commission stated, however, that it "has wide discretion in the assessment of penalties for distinct but potentially overlapping violations and it is appropriate to assess a single penalty for overlapping violations as the Commission has done in the past." *H.H. Hall*, 10 BNA OSHC at 1046. *See* footnote 22 for my discussion of grouping for penalty purposes.

[12] Section 1926.651(c), which applied to "excavations," was similar to 29 C.F.R. § 1926.652(b) (cited in *Stimson* and *H.H. Hall*), which applied to "trenches"—a specific type of excavation.

Although many subsequent decisions have cited *H.H. Hall*,[13] and a few have cited *Capform*,[14] no Commission decision has attempted to reconcile the two cases. Thus, if it were not irrational to assume so, one might think that both cases are good law, and the same two violations of nearly identical sets of standards are either duplicative because compliance with one standard "would also necessarily [be] compliance with the less stringent standard," *Capform*, 13 BNA OSHC at 2224, or not duplicative because "the conditions giving rise to the violations are separate and distinct." *H.H. Hall*, 10 BNA OSHC at 1046. The Commission's decision in *Flint Engineering & Construction*, 15 BNA OSHC 2052 (No. 90-2873, 1992), as well as the majority's opinion here, would appear to support this result by citing *both* cases. Thus, in *Flint* the Commission stated, with no apparent sense of irony:

> In *H.H. Hall* . . . the Commission held that the fact that [non]compliance with two standards resulted in the same general hazard does not render them duplicative. In *Capform* . . . the Commission vacated one of the two citations under the former

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[13] *Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1112 (No. 76-256, 1981); *R&R Builders Inc.*, 15 BNA OSHC 1383, 1391-92 (1991) (quoting duplicativeness discussion in "leading case" *H.H. Hall*, but distinguishing it in assessing separate penalties for two citation items that require different forms of abatement "and use of one form does not necessarily provide complete abatement in the circumstances"); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2086 (No. 88-0523, 1993) (quoting *H.H. Hall* and affirming separate but related violations and assessing combined penalty); *A.J. Baumgartner Const.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (noting that under *H.H. Hall* "the Commission is not required to vacate duplicative items," finding separate violations of the same standard, and assessing separate penalties); *S.A. Healy*, 17 BNA OSHC 1145, 1158 (No. 89-1508, 1995) (directing judge on remand to determine whether two citation items that both allege a "non-approved light fixture at segment 479" are "in fact duplicative as they appear to be and if so, he shall make an appropriate disposition to ensure that a double penalty is not assessed for a single instance of violation."); *Andrew Catapano Enters.*, 17 BNA OSHC 1776, 1786 n.20 (No. 90-0050,1996) (consolidated) (distinguishing *H.H. Hall* regarding grouping for penalty purposes and assessing separate penalties for each cited violation); *The Halmar Corp.*, 18 BNA OSHC 1014, 1019 (No. 94-2043, 1997) (citing *H.H. Hall* for proposition that "there is no requirement to group penalties even when closely related conditions are the subject of more than one citation item and a single action may bring an employer into compliance with the cited standards."); *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007) (citing *H.H. Hall* for proposition that "items [are] not duplicative even though the abatement requirements of two applicable standards may be satisfied by compliance with more comprehensive standard").

[14] *Trinity Indus.*, 20 BNA OSHC 1051, 1064 (No. 95-1597, 2003) *aff'd*, 107 F. App'x 387 (5th Cir. 2004) (unpublished) (citing *Capform* for proposition that citations are duplicative when they involve substantially same violative conduct and require same means of abatement); *MJP Constr. Co.*, 19 BNA OSHC 1638, 1647 (No. 98-0502, 2001) *aff'd*, 56 F. App'x 1 (D.C. Cir. 2003) (unpublished) (distinguishing *Capform*).

> trench standards since compliance with one necessarily resulted in compliance with the other.

Flint, 15 BNA OSHC at 2057.

Without acknowledging this conflicting precedent and the Commission's historical failure to engage in reasoned or consistent analysis of the duplicativeness issue, the majority latches on to the line of cases that focus exclusively on abatement and proclaims that is the framework that applies here.[15] I disagree. Although the Commission's approach to potentially duplicative violations has been inconsistent, the circumstances underlying every case in which duplicativeness has been found (as well as the cases in which duplicativeness has been rejected) point to the relevance of factors *in addition* to abatement, even in those cases in which the Commission discussed nothing else. Thus, in *every case* in which the Commission has found violations to be duplicative, the standards at issue were closely related, usually sister-standards (i.e., sub-provisions of the same parent standard), and regulated the same or very similar workplace conditions and conduct. *See Alpha Poster Serv.*, 4 BNA OSHC at 1884-85; *Lee Way Motor Freight*, 4 BNA OSHC at 1970; *Stimson*, 5 BNA OSHC at 1178; *U.S. Steel*, 10 BNA OSHC 2123,

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[15] The majority argues that my discussion of Commission precedent analyzes issues "not raised or briefed by either party." This, frankly, is nonsense. The Secretary argued the following in his brief before the Commission:

> *Gen. Motors* [22 BNA OSHC 1019, 1024 (Nos. 91-2834, 2007] is in tension with the *Hall – Dec Tam* line of cases, which holds that violations arising from separate and distinct conditions are not duplicative, even if they could have been cured by the same abatement measures. The Commission need not resolve this tension to decide this case since the willful violations are not duplicative under either the same violative conditions or the same abatement test. To the extent that the Commission must choose between these conflicting precedents, the *Hall – Dec Tam* line of cases should prevail since it is based on the statutory requirement in the specific duty clause that employers shall comply with all applicable OSHA standards. 29 U.S.C. § 654(a)(2); *Hall*, 10 BNA OSHC at 1046.

Moreover, my discussion below of the Commission's authority to vacate a citation on duplicativeness grounds is an issue that is *always* before the Commission. This is because administrative agencies, like the Commission, possess only those powers conferred upon them by statute. *See Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974) ("[A]n administrative agency is a creature of statute, having only those powers expressly granted to it by Congress or included by necessary implication from the Congressional grant."). Thus, the absence of objection by the Secretary cannot possibly serve as authorization to vacate either of the citations in this case on duplicativeness grounds.

2131-33 (No. 77-3378, 1982); *Cleveland Consol.*, 13 BNA OSHC at 1118; *Capform*, 13 BNA OSHC at 2224; *Trinity Indus.*, 20 BNA OSHC 1051, 1064 (No. 95-1597, 2003); *Manganas*, 21 BNA OSHC at 1964; *E. Smalis*, 22 BNA OSHC at 1561. *See* Appendix A. Therefore, the Commission has never, before today, found that two violations of separate and distinct standards—that regulate completely different workplace conduct—are duplicative solely because they could have been abated by the same action.

The majority's proclamation that the inquiry here "falls within the category of duplicative violations that may involve the same abatement" vastly expands upon the very limited circumstances in which the Commission has previously found violations to be duplicative. Put simply, abatement may be relevant to the inquiry, but many Commission cases show that abatement alone does not dictate the outcome. *See Trinity*, 20 BNA OSHC at 1064 (violations duplicative where they involve substantially same violative conduct and require the same means of abatement); *see also H.H. Hall*, 10 BNA OSHC at 1046 (employer's "simultaneous noncompliance" with two related standards "not necessarily duplicative" where "conditions giving rise to the violations are separate and distinct"); *Hoffman*, 6 BNA OSHC at 1275 (separate citations affirmed where violations involved two separate scaffolds); *Koppers*, 2 BNA OSHC at 1354-55 (separate citations appropriate where they involve "different factual situations").[16] As I discuss in

[16] The majority, in an attempt to counter my argument that Commission case law on this issue is conflicting and confusing, states that "our precedent has reached a common conclusion that violations are not duplicative when "abatement of one of the violative conditions . . . would not have abated the other violative condition" and cites to *Westar Mechanical, Inc.*, 19 BNA OSHC at 1572. This selective quotation, however, fails to acknowledge the Commission's full analysis of all the facts it relied on to reach its conclusion that two citations for violation of the very same standard were not duplicative. The Commission's full analysis is as follows:

> Although . . . the excavations here were not "entirely different and separate," we conclude that there were sufficient distinctions between the two alleged violations of section 1926.652(a)(1) to warrant the conclusion that the Secretary acted within the scope of her discretion in treating them as separate violations of the standard and of the Act . . . . Essentially, the distinctions we rely on are . . . the excavation at issue in [one citation] and the trench at issue in [the other citation] had been dug on two separate days in two different locations; with some relatively minor exceptions, the excavation had been backfilled and that operation had been completed before digging of the trench began; and, again with relatively minor exceptions, the work and the work environment differed significantly on July 16 and July 17 (digging a rectangular excavation and installing a manhole in it, as compared to digging a long, narrow trench and laying and connecting piping in it).

detail below, the two violations at issue here arise out of entirely different conditions and involve such different factual situations that to vacate one on duplicativeness grounds constitutes plain error.

In the first item, the Secretary cites Respondent for willfully violating § 1926.416(a)(1) by allowing employees to work in close proximity to energized power lines. Section 1926.416(a)(1) is located in "Subpart K—Electrical," which contains the "electrical safety requirements that are necessary for the practical safeguarding of employees involved in construction work." The standard 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.

Thus, the standard regulates the conditions associated with employee proximity to energized electrical circuits at construction worksites.

In the second item, the Secretary cites Respondent for willfully violating § 1926.1408(a)(2), which is located in an entirely separate subpart of the C.F.R., "Subpart CC—Cranes and Derricks in Construction," and applies to equipment, specifically "power operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load." The standard requires that "*[b]efore beginning equipment operations*, the employer must":

> Determine if any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone could get closer than 20 feet to a power line. If so, the employer must meet the requirements in Option (1), Option (2), or Option (3) in this section . . . .

> In addition, as emphasized by the Secretary in her arguments on review, abatement of the cave-in hazard that existed in the excavation on July 16 would not have abated the cave-in hazard that existed in the trench on July 17. Under these circumstances, we conclude that the two contested citations clearly "do not involve 'the same offense . . . and that the Secretary accordingly acted within the scope of her authority in issuing them.

Westar Mechanical, 19 BNA OSHC at 1572 (citations omitted). Differences in the work being performed, in the work environment, and in the days on which the violations occurred are a few of the "panoply of factors" that I cite and which the majority criticizes.

The standard then lists the options.[17] Thus, this standard regulates the conditions associated with operation of a crane in proximity to energized power lines and sets out a number of steps that an employer must take *before* crane operations begin and while they continue.

There is simply no way to read these two standards as substitutes for one another.[18] Section 1926.1408(a)(2) requires proactive action by employers "before" the work begins—thus a violation occurs when, prior to beginning work, an employer fails to determine whether any part of a crane could come within 20 feet of a power line.[19] And where an employer does determine that part of a crane can come within 20 feet of a power line, it is required to comply with one of the standard's three options, each of which impose additional obligations and duties on the employer. Section 1926.416(a)(1), on the other hand, requires no proactive steps before work begins and provides a relatively simple instruction: ensure that employees cannot contact energized electrical circuits during the course of their work.

Beyond the obvious differences between the requirements of the cited standards, there are two other significant ways in which these proven violations do not duplicate each other. First is the manner in which the violations occurred. In all the Commission cases in which citations were found duplicative, the violations occurred at the same time. *See* Appendix A. Here, however, the violative conditions existed on different days and in different areas of the worksite. The violations of § 1926.416(a)(1) occurred on December 3rd, 4th, and 5th, whereas the violation of § 1926.1408(a)(2) occurred "on or about" December 1st. Because, as the photographic evidence

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[17] The full text of the standard can be found in Appendix B to this opinion.

[18] In all the cases cited by the majority, compliance with one of the cited standards would also ordinarily presuppose or substitute for compliance with the other cited standard. *See E. Smalis*, 22 BNA OSHC at 1561; *J.A. Jones*, 15 BNA OSHC at 2207; *Flint*, 15 BNA OSHC at 2056-57; *Capform*, 13 BNA OSHC at 2224; *Cleveland Consol.*, 13 BNA OSHC at 1118; *H.H. Hall*, 10 BNA OSHC at 1046. As discussed below, however, it is clear from the terms of the standards at issue here that compliance with one would not ordinarily presuppose or substitute for compliance with the other.

[19] As the record in this case establishes, Respondent violated this standard beginning at least as early as July 2012, when LIPA issued its first cease-and-desist order regarding Respondent's operation of the crane in close proximity to the energized Brooklyn Avenue power lines. The record does not establish just how many days thereafter Respondent was in violation of the crane standard, but it was in violation when, in August 2012, LIPA issued another cease-and-desist order regarding Respondent's operation of the crane in close proximity to the energized Fourth Street lines, and again on December 1, 2012, when OSHA began its inspection.

establishes, Respondent had not even begun to construct the masonry wall on the northeast corner of the third floor on December 1st, the violation of § 1926.416(a)(1) did not even exist when the violation of § 1926.1408(a)(2) occurred. Second, not all of the same employees were exposed to both violations. The violation of § 1926.416(a)(1) exposed only those employees installing the fall protection system or constructing the building's north wall, whereas the violation of § 1926.1408(a)(2) exposed every employee working in proximity to the crane, including the crane operator and those employees guiding the crane's loads.

The Commission has made clear that, where violations occur on different dates and in different locations, or expose different employees to the violative conditions, the Secretary may issue a separate citation for each violation. *MJP Constr. Co.*, 19 BNA OSHC 1638, 1647 (No. 98-0502, 2001), *aff'd*, 56 F. App'x 1 (D.C. Cir. 2003) (unpublished) (holding that the Secretary may appropriately cite separate violations of the same standard where each individual instance occurred on separate dates, times, and locations); *Westar Mech., Inc.*, 19 BNA OSHC 1568, 1572 (No. 97-0226, 2001) (consolidated) (finding "sufficient distinctions between the two alleged violations" to "warrant the conclusion that the Secretary acted within the scope of her discretion in treating them as separate violations of the [same] standard and of the Act"); *Andrew Catapano Enters.*, 17 BNA OSHC 1776, 1786 n.20 (No. 90-0050,1996) (consolidated) (distinguishing "multiple-prosecution cases" relied upon by Catapano because they involved a respondent being tried more than once for what courts found to be "the same offense"); *Hoffman*, 6 BNA OSHC at 1275-76 (finding it within Secretary's discretion as prosecutor under Act to cite separate violations of the same standard where conditions occurred at separate parts of worksite); *J.A. Jones*, 15 BNA OSHC at 2207 (affirming separate violations of standard where judge found violations on different floors and at different locations on floors). If, as the Commission has held, the Secretary may cite employers for violations of the same standard when the violative conduct occurs on separate dates or locations, or when the conduct exposes different employees to a hazard, it seems a forgone conclusion that the Secretary may also cite Respondent for violating two *different* standards on different dates, in different locations, and exposing different employees to an electrocution hazard.

In sum, contrary to the majority's assertion, their holding today is not supported by Commission precedent. The Commission has never held that two willful violations of separate and distinct standards aimed at different conduct, that occurred on different dates, and exposed

employees working in entirely different circumstances, are duplicative solely because they could only have been abated by the same action.

II. Commission Authority

Today the majority votes to vacate a proven willful citation item. As I have argued above, it does so based on its application of an unsupported, inconsistently applied, and thus fundamentally incoherent theory—that, because abatement of the two citation items would have been the same, those citation items necessarily duplicate each other. Although I do not quarrel with the assertion that in appropriate circumstances—which do not exist here—the Commission may vacate "duplicative" citations, I conclude that it can do so only when to affirm both citations would violate due process.[20] In the absence of a showing that substantive due process rights have been violated, the Secretary's broad power of prosecutorial discretion in issuing both proven citations items must prevail. Here, there is no evidence to support a conclusion that it would be fundamentally unfair to hold Respondent liable for both violations. Moreover, vacating the crane citation item in the circumstances of this case undermines an essential purpose of the Act. Therefore, I conclude that the Commission lacks the authority to vacate the crane citation item on duplicativeness grounds.

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[20] The Commission has asserted the authority to vacate an otherwise proven citation in other circumstances, all of which similarly share a due process or fundamental fairness element or involve an assertion that compliance with a standard would be contrary to the purposes of the Act: (1) when compliance with a regulation would result in a greater hazard to employees, *see Gen. Steel Fabricators, Inc.*, 5 BNA OSHC 1768, 1770-71 (No. 13646, 1977) (requiring that employer prove that hazard of compliance with standard is greater than hazard of noncompliance, alternative means of protecting employees are unavailable, and variance application would be inappropriate); (2) when compliance is infeasible, *see Atl. & Gulf Stevedores, Inc.*, 534 F.2d 541, 555 (7th Cir. 1976) (respondent must prove that literal compliance with terms of cited standard was infeasible under existing circumstances, and alternative protective measure was used or there was no feasible alternative measure); (3) when the violation is the result of unpreventable employee misconduct, *see Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979) (requiring that employer prove "that it has established work rules designed to prevent the violation, has adequately communicated th[ose] rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered"); and (4) when principles of collateral estoppel or res judicata dictate, *see Caterpillar Tractor Co.*, 12 BNA OSHC 1768, 1769 (No. 80-4061, 1986) (purpose of collateral estoppel is to foreclose relitigation of issues already litigated and decided); and *Copomon Enters., LLC*, 601 F. App'x 823, 827 (11th Cir. 2015), (unpublished) (citation barred by res judicata).

Although the Act grants the Commission substantial fact-finding authority, its ability to vacate an otherwise proven citation is limited by the Act's unique administrative structure. Unlike most other federal regulatory programs, in which rulemaking, enforcement, and adjudication are combined into a single administrative authority, the Act separates enforcement and rulemaking from adjudication and assigns these functions to two different agencies. The Secretary of Labor, through OSHA, is charged with setting and enforcing workplace health and safety standards, and the Commission is charged with carrying out adjudicatory functions under the Act. *See* 29 U.S.C. §§ 655, 657, 658, 661.

Unlike other adjudicatory panels that exist within a unitary, or non-bifurcated structure (e.g., the Securities and Exchange Commission, the Federal Trade Commission, the National Labor Relations Board, and the Federal Communications Commission), this Commission cannot use "its adjudicatory power to play a policymaking role" because, unlike those other agencies, "Congress did not invest the Commission with the power to make law or policy." *Martin v. Occupational Safety & Health Review Comm'n* (*CF&I*), 499 U.S. 144, 154 (1991). The Commission's authority therefore is a narrow one; it is charged with "making authoritative findings of fact" and "applying the Secretary's standards to those facts in making a decision." *Id.* In other words, it serves only as a "neutral arbiter" of disputes arising out of the Secretary's enforcement action. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3,7 (1985). *See also Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974) ("[A]n administrative agency is a creature of statute, having only those powers expressly granted to it by Congress or included by necessary implication from the Congressional grant.").

The Secretary, on the other hand, is vested with full policymaking authority under the Act, including the power to create and modify health and safety standards, 29 U.S.C. § 655, to render authoritative interpretations of those standards, *CF&I*, 499 U.S. at 152, and to exercise prosecutorial discretion in determining when it is appropriate to issue or withdraw a citation for violation of those standards. 29 U.S.C. § 658; *CF&I*, 499 U.S. at 152; *Cuyahoga*, 474 U.S. at 6-7. This is an important distinction; a unitary agency such as the NLRB would presumably have the power to create a duplicativeness doctrine to apply to its cases, and could do so either through rulemaking or adjudication. The Commission, on the other hand, because it is not a policymaking body, is limited to measuring claims of duplicativeness against the requirements of due process and associated notions of fundamental fairness. Given that the Commission may not "use its

adjudicatory powers to play a policymaking role," the Secretary's exercise of his explicit statutory mandate to enforce valid and proven citations pursuant to the Act and its standards cannot be disturbed unless it runs afoul of some higher authority. *See CF&I*, 499 U.S. at 154.

In the case of the duplicativeness doctrine, that higher authority is due process. *See Catapano*, 17 BNA OSHC at 1778-80 (holding multiple citations for violations of trenching standards at several different sites committed on different days not violation of due process). The doctrine ensures that in enforcing the Act, the Secretary does not violate substantive due process rights by citing an employer multiple times—i.e., by "piling on"—for what was essentially one violation.[21] Thus, the Commission can only vacate a proven violation on duplicativeness grounds when it would be fundamentally unfair to the employer, or otherwise violate due process to affirm it.[22]

The majority does not acknowledge this constraint on its power and instead arrogates to the Commission the authority to vacate one of the two proven citation items at issue here because, on the particular facts of this case, each violation could only have been abated by the same action—relocating the Fourth Street power line. The measures that might have been taken to abate each

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[21] The Commission's decision in *S.A. Healy*, 17 BNA OSHC 1145 (No. 89-1508, 1995), presents an example of this type of (probably inadvertent) "piling on." OSHA issued two items in a citation, both of which alleged a non-approved light fixture at "segment 479." Suspecting that there might not be two non-approved light fixtures at that location, the Commission ordered that, on remand, "the judge shall determine whether these two items are in fact duplicative as they appear to be and if so, he shall make an appropriate disposition to ensure that a double penalty is not assessed for a single instance of violation." Similarly, in *United States Steel Corp.*, 10 BNA OSHC 2123, 2133-34 (No. 77-3378, 1982), the Commission vacated an alleged overexposure violation as duplicative of specific engineering control and respirator violations. *See also Trinity*, 20 BNA OSHC at 1064 (vacating one of two citations for training violations because only deficiency established by both citations was with regard to failure to train on same substance's potential for eye and skin irritation).

[22] The Commission does possess discretion under section 17(j) to group penalties for related violations. 29 U.S.C. § 666(j); *H.H. Hall*, 10 BNA OSHC at 1046. Thus, to the extent there may be overlap between the two citation items at issue here, the violations could be grouped for penalty purposes. However, given the egregious behavior of the Respondent in this case, I would find no reason to do so. *See MJP*, 19 BNA OSHC at 1649 (affirming separate penalties for two related citations, given employer's "utterly cavalier and inexcusable disregard for the safety of its employees"); *Westar Mech.*, 19 BNA OSHC at 1583-84 (Commissioner Eisenbrey finding "no justification for Commission to exercise its discretionary authority to assess a single combined penalty" for two trench violations where respondent "has a history of exposing its employees to life-threatening hazards on what appears to have been a regular and recurring basis" and failed "to take even rudimentary precautions to protect workers").

violation could be a relevant consideration for the Commission in making its due process determination, and in some cases duplicative abatement alone might indeed establish the requisite unfairness. But the fact that Respondent could only have abated both violations by taking the same action does not necessarily establish that it is fundamentally unfair to affirm both violations. As the Commission stated in *H.H. Hall*, the "leading case" on the issue of duplicativeness (*see R&R Builders*, 15 BNA OSHC at 1383), "the Act requires an employer to comply with all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards *may* be satisfied by compliance with the more comprehensive standard." *H.H. Hall*, 10 BNA OSHC at 1046. In that case, the Commission noted that the conditions giving rise to the two violations were "separate and distinct" and found that "there is no unfair burden imposed on an employer when the same or closely related conditions are the subject of more than one citation item and a single action may bring an employer into compliance with the cited standards." This passage has been repeatedly quoted by the Commission in subsequent cases (*see R&R Builders*, 15 BNA OSHC at 1383; *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2081 (No. 88-523, 1993); *Burkes Mech.*, 21 BNA OSHC at 2142), and the case has been favorably cited in other decisions as well (*see A.L. Baumgartner Constr., Inc.,* 16 BNA OSHC 1995, 1998 (No. 89-1508, 1995); *J.A. Jones*, 15 BNA OSHC at 2207, *Wright & Lopez*, 10 BNA OSHC at 1112; *S.A. Healy*, 17 BNA OSHC at 1145; *Halmar*, 18 BNA OSHC at 1014).

As my discussion in Section I above highlights, there are numerous facts, in addition to the identity of abatement, that could in any given case be relevant to determining whether affirmance of two citations would violate due process notions of fundamental fairness. These include:

- whether the conditions giving rise to the violations are separate and distinct (*see H.H. Hall*, 10 BNA OSHC at 1046);

- whether the two standards violated are closely related, "sister standards" (as was the case in every previous Commission decision finding duplicativeness, *see* Appendix A);

- whether the two violations occurred on the same date and at the same location (*see J.A. Jones*, 15 BNA OSHC at 2207; *Catapano*, 17 BNA OSHC at 1778; *Westar Mechanical, Inc.*, 19 BNA OSHC at 1572);

- whether the same employees were exposed to the hazards involved in the two violations (*see, e.g., Koppers*, 2 BNA OSHC at 1354-55);

- whether the facts supporting both violations are the same, or are different (*see, e.g. Koppers*, 2 BNA OSHC at 1354-55 (allegation made "on a different basis"));

- whether the employer acted in good faith (*see Catapano*, 17 BNA OSHC at 1778-8); and

- whether compliance with one standard would ordinarily presuppose or substitute for compliance with the other (*see H.H. Hall*, 10 BNA OSHC at 1046).

My evaluation of the facts in this case in light of the full panoply of factors that are relevant to the issue of due process under Commission case law leads to the unmistakable conclusion that affirmance of both violations would result in no unfairness to Respondent. First, on December 1st, when OSHA initiated its inspection, Respondent had failed to comply with the crane standard for at least *five months*, in violation of two LIPA cease and desist orders, and continued doing so even after Respondent's managers assured OSHA that it would abate the hazard by keeping the crane at least 20 feet away from the Fourth Street power lines. On the other hand, the instances that comprise the proximity to energized powerlines violation occurred on December 3rd-5th, and had no connection with the crane standard's requirements or the facts surrounding the crane standard violation.[23] Indeed, photographic evidence shows that construction of the masonry wall on the third floor at the northeast corner of the building had not even begun when OSHA was on-site on December 1st. Thus, as noted above, these violative conditions occurred on different dates and existed independently of each other—the crane operated at the worksite without regard to the employees working on the wall near the northeast corner (and, in fact, operated for a long period of time before those employees could have ever begun work in close proximity to the Fourth Street power lines), and the employees near the northeast corner performed their work without regard to

[23] That citation item specifies that: (a) on December 3rd, employees who were installing a fall protection system along the north and east sides of the third floor worked directly under and three feet from the energized Fourth Street power line; (b) on or about December 4th, employees constructing the masonry block wall on the north and east sides of third floor came within approximately 12 inches of the energized line; (c) on or about December 5th, employees constructed the wall on the northeast corner of the third floor between the primary power lines and the secondary power lines, coming within four inches of the primary power lines and 14 inches from the secondary power lines; and (d) on or about December 5th, employees constructed the masonry block wall around an energized primary power line, coming within four inches of that line.

the operation of the crane. The only thing common to these two violations were the overhead powerlines, which did not by themselves constitute a violation. Moreover, as I have noted above, at n. 8, had Respondent taken action on December 1st to protect the employees exposed to electrocution as a result of the crane violation, the employees working near the northeast corner on December 3rd-5th would not have been exposed to the hazard. It is Respondent's *inaction* regarding the crane violation that led inextricably to the proximity to power circuit violation.

Second, as discussed above, the two cited standards here are not closely related and regulate entirely different workplace conditions. The crane standard concerns the safe operation of cranes and required Respondent to take a series of detailed steps *prior to as well as after beginning work with the crane* in order to protect employees from an electrocution hazard. The proximity standard, however, concerns only employee proximity to electricity and does not mandate any advance preparation. Under the proximity standard, Respondent's only obligation was to keep employees away from the energized powerlines unless they were otherwise protected.

Third, some of the employees who were exposed to an electrocution hazard as a result of the crane standard violation were not exposed to an electrocution hazard as a result of the proximity violation and vice versa. Thus, Respondent's failure to address the crane standard violation on December 1st meant that more employees were exposed to electrocution hazards over an additional six days.

In short, this is an employer with an extensive history of OSHA violations; that, over a period of months, repeatedly thumbed its nose at enforcement efforts designed to protect its employees from the dangers of electrocution; that assured OSHA it would comply with the crane standard but never did; and that knowingly exposed more employees to those electrocution dangers by permitting them to, among other things, build a wall around and within inches of a 7,620-volt primary power line.[24] Thus, Respondent has not been unfairly cited for what is essentially one bad act—the essence of duplicative citations—it has been cited for two willful violations of distinct standards that occurred independently of each other at the worksite. There is simply nothing unfair about that.

[24] The record establishes that from 2000 to 2012, at least 96 OSHA citations were affirmed against Respondent, including violations pertaining to electrical hazards.

Finally, the majority's decision to vacate the crane standard violation also serves to undercut a fundamental purpose of the Act, as evidenced by the penalty framework set out in section 17(a).[25] 29 U.S.C. § 666(a). This section authorizes the Secretary to characterize violations as "willful" or "repeated" and propose a penalty up to ten times greater than that of an ordinary violation. By vacating the crane citation item, the majority today has done more than simply relieve Respondent of liability in this case—it has immunized the company from being cited for a "repeat" violation of the crane standard—with an associated higher penalty—in the future. As the facts of this case bluntly demonstrate, some employers require the use of every possible enforcement tool to eliminate even the most obvious of workplace hazards.[26] By preventing OSHA from using this tool in a future enforcement action against this employer, the majority undermines the most fundamental purpose of the Act, which is to *prevent* employees from being exposed to unsafe working conditions in the first place.[27] In light of the outrageously dangerous behavior of this employer, the majority's decision to vacate the crane citation item is nothing short of egregious.

In sum, the Commission's authority to vacate a proven violation on duplicativeness grounds is limited by the bifurcated structure of the Act, which entrusts the Secretary, not the Commission, with the discretion to determine when to issue and prosecute a citation. Because

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[25] Section 17(a) states:

> Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

29 U.S.C. § 666(a).

[26] As the Fourth Circuit noted regarding repeat citations, "[i]ntrinsic within the statutory scheme of enforcement is the overall policy of providing employers with incentives to comply with the safety requirements of the Act." *George Hyman Constr. Co. v. Occupational Safety & Health Review Comm'n*, 582 F.2d 834, 841 (4th Cir. 1978).

[27] Citing *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979), the majority argues that vacating the crane standard citation will not prevent a future Commission from finding that a future crane standard violation should be characterized as repeat based on Respondent's violation of the proximity violation. I would only note that I have found no Commission decision finding repeat violations under such circumstances. As I have explained elsewhere in my dissent, the two standards are significantly different in focus and application.

affirmance of these two proven citation items would result in no unfairness to Respondent, and would not otherwise violate due process, I conclude the Commission is without the authority to vacate one of them.

For all these reasons, I dissent.

/s/
Cynthia L. Attwood
Commissioner

Dated: February 28, 2018

Appendix A

Case Name and Cite	Cited Standard(s)	Commission Holding
The nine cases in which the Commission found a citation item to be duplicative are highlighted in gray.		
Koppers Co., Inc., 2 BNA OSHC 1354 (No. 3449, 1974)	29 C.F.R. §§ 1910.93, 1910.134(a)(2)	The Commission held that two citations for violations of two different standards related to respiratory protection were not duplicative because each citation related to different employees and involved different facts.
Safeway Stores, Inc., 2 BNA OSHC 1439 (No. 454, 1974) (consolidated), *vacated on reconsideration on other grounds*, 3 BNA OSHC 1123 (1975)	29 C.F.R. §§ 1910.178(k)(1), 1910.178(m)(7)	The Commission considered whether violations of two separate standards, both requiring brakes to be set and wheel chocks to be placed on trucks, trailers or railroad cars during loading or unloading by powered industrial trucks, were duplicative. Commissioner Van Namee voted to vacate one of the citation items because both standards "require precisely the same conduct" and thus, in his view, the two citation items merge "to constitute a single violation . . . ." Chairman Moran agreed to vacate one of the citation items, but on other grounds. Commissioner Cleary dissented, explaining that the citations were not duplicative because one standard "controls the operation of the truck trailer, requiring that it be secured . . . to prevent its movement during" loading and unloading, while the other "controls the operation of the powered industrial truck, requiring that certain conditions exist before an employer permits its operator to drive onto a trailer . . . ."
Alpha Poster Serv., Inc., 4 BNA OSHC 1883 (No. 7869, 1976)	29 C.F.R. §§ 1910.106(e)(2)(iv)(a), 1910.106(e)(2)(iv)(d)	The Commission, without further elaboration, held that two citations, one for failure to transfer flammable liquids using safety cans and the other for failure to keep flammable liquids in covered containers, were duplicative because they "involve[d] substantially the same violative conduct."
Lee Way Motor Freight, Inc., 4 BNA OSHC 1968 (No. 10699, 1977)	29 C.F.R. §§ 1910.22(b)(1), 1910.30(a)(2)	The Commission held that two citation items relating to the condition of portable dock plates were "essentially duplicative," but did not provide any further analysis or explanation.

Case Name and Cite	Cited Standard(s)	Commission Holding
Granite-Groves, 5 BNA OSHC 1100 (No. 10677, 1977)	29 C.F.R. §§ 1926.651(w), 1926.700(b)(2)	The Commission held that two citations, one for failing to provide guardrails and the other for failing to cover or protect protruding rebars were not duplicative because "the conditions covered by the two citations, although related, [were] independent."
Stimson Contracting Co.,[45] 5 BNA OSHC 1176 (No. 13812, 1977)	29 C.F.R. §§ 1926.651(q), 1926.652(b)	The Commission held that the two citation items relating to cave-in protection were duplicative because compliance with § 1926.651(q), the more stringent standard, always "presupposes" compliance with § 1926.652(b), the less stringent standard.
Sletten Constr. Co., 6 BNA OSHC 1091 (No. 11028, 1977)	29 C.F.R. § 1926.500(b)(1)	The Commission held that two citation items for violation of the same provision of the fall protection standard were not duplicative because each cited violation "required a different means of abatement" under the standard.
Hoffman Constr. Co., 6 BNA OSHC 1274 (No. 4182, 1978)	29 C.F.R. § 1926.451(a)(4)	The Commission held that separate citations for violation of the same provision of the scaffold standard were not duplicative because the citations involved "different and separate scaffolds," and it was within the Secretary's "discretion as the prosecutor under the Act" to prosecute multiple violations of the same standard.
H.H. Hall Constr. Co., 10 BNA OSHC 1042 (No. 76-4765, 1981)	29 C.F.R. §§ 1926.651(q), 1926.652(a)	The Commission held that two citation items relating to cave-in protection were not duplicative even though abatement of the more stringent one would abate the other, explaining that "[a]lthough a worksite condition may violate more than one standard, section 5(a)(2) of the Act requires an employer to comply with all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards *may* be satisfied by compliance with the more comprehensive standard."

[45] Overruled by *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042 (No. 76-4765, 1981).

Case Name and Cite	Cited Standard(s)	Commission Holding
Wright & Lopez, Inc., 10 BNA OSHC 1108 (No. 76-256, 1981)	29 C.F.R. §§ 1926.652(c), 1926.652(e)	The Commission, citing to *H.H. Hall*, held that two citation items relating to the cave-in protection standard were not duplicative simply because abatement was the same. The Commission determined, however, that it was appropriate under the circumstances to "assess a single penalty for [the] overlapping violations."
United States Steel Corp., 10 BNA OSHC 2123 (No. 77-3378, 1982)	Multiple	Two Commissioners considered whether a multitude of different sets of citations and citation items were duplicative, finding some were duplicative, some were not, and disagreeing as to the disposition of others. Their analysis does not set out a test or rationale for determining whether a citation is duplicative.
Cleveland Consol., Inc., 13 BNA OSHC 1114 (No. 84-696, 1987)	29 C.F.R. §§ 1926.400(c)(1), 1926.400(c)(2)	The Commission held two citation items relating to employee proximity to electrical circuits were duplicative because they "involve[d] substantially the same violative conduct" and "as a practical matter" the way by which the employer would comply with one standard would bring it into compliance with the other.
Capform, Inc., 13 BNA OSHC 2219 (No. 84-0556, 1989)	29 C.F.R. §§ 1926.651(c), 1926.651(q)	The Commission held that two citation items relating to cave-in protection were duplicative because if the employer had complied with § 1926.651(q), the more stringent standard, it would necessarily have been in compliance with § 1926.651(c), the less stringent standard.
R&R Builders, Inc., 15 BNA OSHC 1383 (No. 88-0282, 1991)	29 C.F.R. §§ 1926.105(a), 1926.500(d)(1)	The Commission cited to *H.H. Hall* as the "leading case" on duplicativeness and held that two fall protection citation items were not duplicative and that it was not appropriate to assess a single penalty because "the cited standards require different forms of abatement and use of one form does not necessarily provide complete abatement in the circumstances."
Flint Eng'g & Constr. Co., 15 BNA OSHC 2052 (No. 90-2873, 1992)	29 C.F.R. §§ 1926.651(j)(2), 1926.652(a)(1)	The Commission held that two citation items relating to cave-in protection were not duplicative because the employer "could not meet [each] standard with one abatement effort" and "the hazards and their respective abatement methods are sufficiently distinct so as to constitute separate violations deserving of separate penalties."

Case Name and Cite	Cited Standard(s)	Commission Holding
Dec-Tam Corp., 15 BNA OSHC 2072 (No. 88-523, 1993)	29 C.F.R. §§ 1910.1001(d)(1)(ii), 1910.1001(d)(5) and 29 C.F.R. §§ 1910.1001(f)(1)(i), 1910.1001(k)(1)	The Commission examined two different sets of potentially duplicative citation items, one set involving the monitoring requirements of the asbestos standard and the other involving asbestos removal and housekeeping requirements. The Commission held that neither set was duplicative even though abatement was the same for the standards in each set. In its analysis, the Commission cited to *H.H. Hall* and explained that "it is clear that the Secretary is not barred from enforcing both standards" because "section 5(a)(2) of the Act requires an employer to comply with all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards may be satisfied by compliance with the more comprehensive standard."
J.A. Jones Constr. Co., 15 BNA OSHC 2201 (No. 87-2059, 1993)	29 C.F.R. §§ 1926.20, 1926.500	The Commission held that two citations, one for failing to institute a safety program and one for failing to install or provide fall protection, were not duplicative because they did not require the same abatement conduct, and thus were directed at fundamentally different conduct.
A.L. Baumgartner Constr., Inc., 16 BNA OSHC 1995 (No. 92-1022, 1994)	29 C.F.R. §§ 1926.403(i)(2)(i), 1926.416(e)(1)	The Commission cited to *H.H. Hall* and held that "because the Commission is not required to vacate duplicative items," there was no prejudice to the employer by the judge's sua sponte amendment of the Complaint to include an additional citation item for separate violation of the same standard.
S.A. Healy Co., 17 BNA OSHC 1145 (No. 89-1508, 1995)	Not provided	The Commission did not determine whether two citation items relating to a non-approved light fixture were duplicative, but cited to *H.H. Hall* and remanded the case to the judge to determine whether the citation items that "both allege a non-approved light fixture at segment 479" are "in fact duplicative as they appear to be and if so, [to] make an appropriate disposition to ensure that a double penalty is not assessed for a single instance of violation."

Case Name and Cite	Cited Standard(s)	Commission Holding
Andrew Catapano Enters., 17 BNA OSHC 1776 (No. 90-0050, 1996)	Multiple	The Commission held that the Secretary's issuance of citations for each instance of violations that occurred at different work sites and on different days did not violate due process. The Commission also declined to assess a single grouped penalty for each violation, citing the high gravity of the violations and the lack of good faith on the part of the employer who the Commission found had been "warned by OSHA's compliance officers at the first inspection that it was not complying with certain standards," but yet "violated the same standard over and over again."
The Halmar Corp., 18 BNA OSHC 1014 (No. 94-2043, 1997)	29 C.F.R. §§ 1926.550(15)(i), 1926.550(15)(iv)	The Commission held that two violations of separate provisions of the crane standard were not duplicative "[b]ecause the violations involve[d] different violative conduct with different means of abatement." The Commission assessed separate penalties for each violation, explaining that "there is no requirement to group penalties even when closely related conditions are subject of more than one citation item and a single action may bring an employer into compliance with the cited standards."
Kaspar Wire Works, Inc., 18 BNA OSHC 2178 (No. 90-2775, 2000)	29 C.F.R. §§ 1910.217(e)(1)(i), 1910.217(e)(1)(ii)	The Commission held that two citation items relating to the inspection of power presses were not duplicative because "the standards pertain to different power press components and provide for different inspection frequencies" such that "it would be possible for [the employer] to fully comply with either one of the cited standards and still fail to satisfy all of the requirements of the other."
MJP Constr. Co., Inc., 19 BNA OSHC 1638 (No. 98-0502, 2001)	29 C.F.R. §§ 1926.501(b)(2), 1926.501(b)(2)(ii), 1926.501(b)(3)	The Commission held that the Secretary may appropriately cite separate violations of the same standard where each individual instance occurred on separate dates, times, and locations.
Westar Mech., Inc., 19 BNA OSHC 1568 (No. 97-0226, 2001) (consolidated)	29 C.F.R. § 1926.652(a)(1)	The Commission held there were "sufficient distinctions between the two alleged violations" of the same cave-in protection standard to "warrant the conclusion that the Secretary acted within the scope of her discretion in treatment of them as separate violations of the standard and of the Act."

Case Name and Cite	Cited Standard(s)	Commission Holding
Trinity Indus., Inc., 20 BNA OSHC 1051 (No. 95-1597, 2003) *aff'd on other grounds*, 107 F. App'x 387 (5th Cir. 2004) (unpublished)	29 C.F.R. §§ 1915.12(d)(iii), 1915.12(d)(4)(ii)	The Commission concluded that two citation items relating to the training requirements of the confined spaces in shipyards standard were duplicative because "the only training deficiency established by the Secretary" was the same for each citation item.
Rawson Contractors, Inc., 20 BNA OSHC 1078 (No. 99-0018, 2003)	29 C.F.R. §§ 1926.652(a)(1), 1926.651(a)	The Commission declined to review whether two citation items relating to cave-in protection were duplicative because the issue was not argued before the judge, but noted that if it were to consider the issue, it would find the violations were not duplicative because abatement of one citation item would not necessarily abate the other citation item.
Major Constr. Corp., Inc., 20 BNA OSHC 2109 (No. 99-0943, 2005)	Not provided	The Commission held that the Secretary may cite "multiple instances of violation of the same standard based on different times or different places of occurrence."
Burkes Mech., Inc., 21 BNA OSHC 2136 (No. 04-475, 2007)	29 C.F.R. §§ 1910.147(c)(4)(i), 1910.261(b)(1)	The Commission held that two citation items, one for failure to comply with OSHA's lockout/tagout standard and the other for failure to comply with the lockout provision of the pulp, paper, and paperboard mills standard, were not duplicative even though abatement was the same. The Commission explained that violations are duplicative ' "where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in the abatement of the other item as well, " ' but nonetheless concluded that, because the lockout/tagout standard "primarily focuses on an employer's specific procedures for controlling hazardous energy, including verification" whereas the pulp, paper, and paperboard mills standard is "solely concerned with the act of locking out the machinery and equipment," the two citations items were not duplicative.
Manganas Painting Co. Inc., 21 BNA OSHC 1964	29 C.F.R. §§ 1926.62(c)(1), 1926.62(f)(1)	The Commission held that two separate citations of the lead standard regarding the same worker, one for overexposure to lead and the other for respirator non-

Case Name and Cite	Cited Standard(s)	Commission Holding
(No. 94-0588, 2007)		use, were duplicative because abatement of each citation (use of a respirator) was the same.
Gen. Motors Corp., 22 BNA OSHC 1019 (No. 91-2834E, 2007)	29 C.F.R. §§ 1910.147(c)(1), 1910.147(c)(4)(i), 1910.147(c)(4)(ii)	The Commission held that separate citation items relating to the lockout/tagout standard, one for failure to establish an energy control program and two others for failure to implement prescribed components of that program, were not duplicative because abatement was not the same. The Commission explained that "establishing a fully compliant energy control program would not abate a failure to implement the components of that program, nor would implementation of required energy control procedures abate a failure to establish a program."
E. Smalis Painting Co., 22 BNA OSHC 1553 (No. 94-1979, 2009)	29 C.F.R. §§ 1926.62(c)(1), 1926.62(e)(1)	The Commission held that separate citations of two closely-related provisions of the lead standard were duplicative because abatement of both required the implementation of adequate engineering, work practice and administrative controls for protection of the same individuals from overexposure to lead.
AKM LLC d/b/a Volks Constructors 23 BNA OSHC 1414 (No. 06-1990, 2011), *vacated on other grounds*, 675 F.3d 752 (D.C. Cir. 2012)	29 C.F.R. §§ 1904.29(b)(2), 1904.29(b)(3)	The Commission held that violations of two closely-related provisions of OSHA's record keeping standard were not duplicative because the provisions were aimed at collecting "fundamentally different" information and abatement of one would not necessarily abate the other.

Appendix B

29 C.F.R. § 1926.1408 Power line safety (up to 350 kV)—equipment operations.

(a) ***Hazard assessments and precautions inside the work zone.*** Before beginning equipment operations, the employer must:

(1) ***Identify the work zone by either:***

(i) Demarcating boundaries (such as with flags, or a device such as a range limit device or range control warning device) and prohibiting the operator from operating the equipment past those boundaries, or

(ii) Defining the work zone as the area 360 degrees around the equipment, up to the equipment's maximum working radius.

(2) Determine if any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone, could get closer than 20 feet to a power line. If so, the employer must meet the requirements in Option (1), Option (2), or Option (3) of this section, as follows:

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

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

(iii) Option (3) - Table A clearance.

(A) Determine the line's voltage and the minimum approach distance permitted under Table A (see § 1926.1408).

(B) Determine if any part of the equipment, load line or load (including rigging and lifting accessories), while operating up to the equipment's maximum working radius in the work zone, could get closer than the minimum approach distance of the power line permitted under Table A (see § 1926.1408). If so, then the employer must follow the requirements in paragraph (b) of this section to ensure that no part of the equipment, load line, or load (including rigging and lifting accessories), gets closer to the line than the minimum approach distance.

(b) Preventing encroachment/electrocution. Where encroachment precautions are required under Option (2) or Option (3) of this section, all of the following requirements must be met:

(1) Conduct a planning meeting with the operator and the other workers who will be in the area of the equipment or load to review the location of the power line(s), and the steps that will be implemented to prevent encroachment/electrocution.

(2) If tag lines are used, they must be non-conductive.

(3) Erect and maintain an elevated warning line, barricade, or line of signs, in view of the operator, equipped with flags or similar high-visibility markings, at 20 feet from the power line (if using Option (2) of this section) or at the minimum approach distance under Table A (see § 1926.1408) (if using Option (3) of this section). If the operator is unable to see the elevated warning line, a dedicated spotter must be used as described in § 1926.1408(b)(4)(ii) in addition to implementing one of the measures described in §§ 1926.1408(b)(4)(i), (iii), (iv) and (v).

(4) Implement at least one of the following measures:

(i) A proximity alarm set to give the operator sufficient warning to prevent encroachment.

(ii) A dedicated spotter who is in continuous contact with the operator. Where this measure is selected, the dedicated spotter must:

(A) Be equipped with a visual aid to assist in identifying the minimum clearance distance. Examples of a visual aid include, but are not limited to: A clearly visible line painted on the ground; a clearly visible line of stanchions; a set of clearly visible line-of-sight landmarks (such as a fence post behind the dedicated spotter and a building corner ahead of the dedicated spotter).

(B) Be positioned to effectively gauge the clearance distance.

(C) Where necessary, use equipment that enables the dedicated spotter to communicate directly with the operator.

(D) Give timely information to the operator so that the required clearance distance can be maintained.

(iii) A device that automatically warns the operator when to stop movement, such as a range control warning device. Such a device must be set to give the operator sufficient warning to prevent encroachment.

(iv) A device that automatically limits range of movement, set to prevent encroachment.

(v) An insulating link/device, as defined in § 1926.1401, installed at a point between the end of the load line (or below) and the load.

(5) The requirements of paragraph (b)(4) of this section do not apply to work covered by subpart V of this part.

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

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant, **v.** **NORTH EASTERN PRECAST LLC, Respondent.**	**OSHRC DOCKET NO. 13-1169**
THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor **Complainant,** **v.** **MASONRY SERVICES, INC. dba MSI** **Respondent.**	**OSHRC DOCKET NO. 13-1170**

Appearances:

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For the Secretary

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For the Respondent

Before: Keith E. Bell
Administrative Law Judge

DECISION AND ORDER

This proceeding 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. §§651-678 (OSH Act or the Act). Following an inspection of Respondents' worksite in Valley Stream, New York, the Secretary of Labor (Secretary), through the Occupational Safety and Health Administration (OSHA), issued three citations to North Eastern Precast LLC (NEP), alleging various willful, serious and other-than-serious violations of the Act. OSHA also issued four citations to Masonry Services, Inc. (MSI), alleging various willful, repeat, serious and other-than-serious violations. Both employers filed a timely notice of contest, bringing this matter before the Commission.

Before the hearing, all parties stipulated that, because both MSI and NEP have overlapping ownerships and were working at the same site, they should be treated as a single employer, subject to a single set of citations[1]. According to the stipulation, each citation item issued to NEP is consolidated with the analogous item issued to MSI and the penalties originally issued to MSI will be considered the proposed penalties for the consolidated items. (Ex. J-1, ¶ 4). The numbering system for the citations issued to MSI will be preserved for the consolidated citations. Hereafter, MSI and NEP will be collectively referenced as Respondent, except where circumstances require reference to either of the employers alone. Also, employees allegedly exposed to the violations will be considered to be employees of Respondent. *Id.*

A hearing was held in New York City on October 21-22, 2014. The parties filed post-hearing briefs. For the reasons set forth below, all citations and proposed penalties are affirmed.

[1] The general contractor, Vordonia Contracting & Supplies Corp,/Alma Realty Corp., was also issued citations that were timely contested. (Docket No. 13-1167). That case was originally consolidated with these two cases. Before the hearing, however, Vordonia settled the matter with the Secretary and that case is no longer before the Commission. (Tr. 6).

Jurisdiction

Based upon the record, I find that, at all relevant times, MSI and NEP were engaged in a business affecting commerce and were employers within the meaning of sections 3(3) and 3(5) of the Act. (NEP Answer ¶¶ I, III; MSI Answer ¶¶ I, III, Ex. J-1, ¶ 5). I also find that the Commission has jurisdiction over the parties and subject matter in this case. (Ex. J-1, ¶1)

Background

In the summer of 2012, Respondent contracted with Vordonia Contracting & Supplies Corp,/Alma Realty Corp. (Vordonia) to provide the masonry work at a mixed retail/residential construction project in Valley Stream, a town on Long Island, New York. (Tr. 253, Ex. J-1, ¶ 9).

The site was located between Brooklyn Avenue and Fourth Street. Power lines ran along both streets and shared a common pole (pole #3)[2] at the corner of Fourth and Brooklyn. (Ex. C-26A). Both lines carried 13.2 kV. (Tr. 64). That pole was approximately 10 degrees out of plumb and encroached over the footprint of the building. (Tr. 357, 797, Ex. C-67). The Fourth Street line fed electricity from the poles at the site to several downstream customers. Because it was a dead end line, the power could not be rerouted. (Tr. 68, 168, 206). Therefore, rather than de-energizing the line, it had to be moved further from the worksite. (Tr. 69, 206, 286, 318, 320, 329). However, the power from the Brooklyn Avenue line, between poles 2 and 3, could be rerouted and the line de-energized. (Tr. 68, 206)

At a pre-job meeting that summer, James Sal Herrera, one of Respondents' owners, met with Patricio Solar, Vordonia's in-house architect, and designated representative at the jobsite.

[2] At the hearing, the Secretary's numbering system for the poles differed from the system used by Long Island Power Authority (LIPA). All references to pole numbers will be to the official numbering system used by LIPA. Exhibit C-26 is a diagram of the site using the Secretary's numbering method. Exhibit C-26A is the same diagram, but reflects the official LIPA pole numbering system.

(Tr. 442-444, 800-801, Ex. J-1, ¶ 11). Herrera testified that, at first, he thought the wires were phone lines, but that Solar informed him that they were power lines. (Tr. 718, 801-802). Herrera noticed that the power lines on both Fourth Street and Brooklyn Avenue appeared to be less than ten feet from the jobsite and might pose a problem as the building went up. Herrera told Solar that Vordonia had to move or insulate the power lines to enable Respondent to perform the necessary crane work while remaining in compliance with OSHA requirements. (Tr. 442-444, 699, 801). Solar told him that he would handle the matter because he already had to talk with the LIPA to have power brought into the building. (Tr. 699-700).

In July 2012, Jermaine Clarke, a design engineer supervisor connected with LIPA, visited the site. He noted that a crane was located on Brooklyn Avenue close to the Fourth Street side. None of the lines along the site were de-energized and he was concerned because the crane was operating within 10 feet of the power line on Brooklyn Avenue. (Tr. 91-92). As a result, he issued a Cease and Desist Order requiring that the work be stopped until the lines were de-energized. (Tr. 92). Although other unnamed persons were present, Clarke remembered giving the Order only to Solar. (Tr. 109). Clarke also posted stickers and tossed flyers on the site warning of the dangers of working near high voltage lines. (Tr. 93, Ex. C-24). Shortly after the Cease and Desist Order was issued, the Brooklyn Avenue line was de-energized and grounding devices were placed on it. (Tr. 68). The Fourth Street line could not be de-energized because there was no feed coming from the other side to pick up downstream customers. (Tr. 68). Although not explicitly stated in the record, the evidence, as discussed *infra*, leads to the inference that the crane was soon moved from Brooklyn Avenue to Fourth Street. *See generally, Manganas Painting Co.,* 21 BNA OSHC 1964, 1981 (No. 94-0588, 2007)(citations omitted)(noting "reasonable inferences can be drawn from circumstantial evidence"). However,

it is unclear whether the crane was moved prior or subsequent to the lifting of the Cease and Desist Order.

In August 2012, LIPA representative, Guerson Carelus visited the site. He noticed that the crane, now on Fourth Street, was lifting loads over the Fourth Street power line onto the construction site. (Tr. 172). He was concerned that workers' lives were in jeopardy because of the proximity of the load to the line. (Tr. 172, 176-177). Carelus requested that the work stop. (Tr. 173-174). He gave warning pamphlets in English and Spanish to as many employees as possible. (Tr. 178-180). He spoke with someone identified as a supervisor of the crane company and told him that they had to take down the crane. (Tr. 174). The next day, August 23, 2012, he issued the second Cease and Desist Order. (Tr. 173, Ex. R-2). Carelus delivered the Order to Solar and left the site without talking to anybody else. (Tr. 177-178). According to crane operator, Anthony Ferrara, both he and Superintendent, Manuel Herrera were informed by LIPA that the Fourth Street line was energized and that they had to maintain a safe distance from the line. They were also informed that the Fourth Street line could not be de-energized. (Tr. 445-449). As a result, the crane was moved back to Brooklyn Avenue, where the line was now de-energized. (Tr. 174, 176-177, 194, 319-320).

Later that day, after the crane was moved to Brooklyn Avenue, the Cease and Desist Order was lifted. (Tr. 320, Ex. R-3). The letter removing the Order emphasized that the line between poles #2 and #3 on Brooklyn Avenue had already been de-energized and constituted a safe work zone. (Ex. R-3).

Around this time, Solar had conversations with LIPA involving the Fourth Street line where they discussed the cost of relocation, which was estimated at $70,000. (Tr. 285-288). Solar talked to Respondent about halting construction until the relocation issue was resolved and

suggested that they work on the opposite side of the building. (Tr. 290-291). However, he did not explicitly tell them that they couldn't do any work on the Fourth Street side until the issue with LIPA was resolved. (Tr. 295). Although both the Cease and Desist Order and the Notice to Proceed specifically stated that the lines carried 13 kV, (Exs. R-2, R-3), Solar testified that he didn't think that anybody understood the danger because they did not know how much current was going through the lines or how close they could get without someone getting hurt. (Tr. 295). However, he knew from common sense not to get too close to the lines. (Tr. 296).

On December 1, 2012, Compliance Safety and Health Officer (CSHO), Brian Calliari and Senior Compliance Officer, Anthony Campose, began the OSHA inspection. (Tr. 343). At that time, Respondent had done some foundation work and steel erection. They were performing masonry block and precast concrete plank installation on the third floor. (Tr. 337, 365, Ex. C-25). The crane on Brooklyn Avenue was lifting the planks over the Brooklyn Avenue line and bringing them within eight feet of the energized Fourth Avenue line before setting them down in the worksite. (Tr. 373-374, Ex. C-26A)

Before conducting the opening conference, CSHO Calliari informed Superintendent/Foreman, Manuel Herrera that the overhead line on Fourth Street constituted an imminent danger to the crane operations and requested that Herrera remove the employees from the hazard. (Tr. 348). After the employees were removed, an opening conference was held. (Tr. 349). Another opening conference was held with Respondent's owner, James Sal Herrera, and a phone conference was held with Solar. (Tr. 349-350). The CSHO told the Herreras that the planks should not be installed, but staged outside the worksite or installed at another part of the building where they could maintain a safe distance from the line. (Tr. 419-420). James Sal Herrera told the CSHO that he would have to eat the cost of returning the trucks with the planks

to the NEP plant and that they could not stage the planks outside of the work area. (T. 420). James Sal Herrrea told him that they would continue to set the planks in other areas of the structure and would not encroach on the energized line. (Tr. 421). The full inspection ensued, which resulted in several of the instant citations. (Tr. 351).

After the OSHA inspectors left the site, and contrary to Herrera's promise to the CSHO, Respondent continued to install planks along Fourth Street, up to and past the northeast corner where the power line now hung directly over the building. (Tr. 421-423). James Sal Herrera testified that Respondent used a center pick method of lifting the planks, meaning that the rigging came down from the crane boom above the center of the load and secured at both ends of the load. (Tr. 734, Ex. C-25). As the plank installation progressed toward the northeast corner, the crane got progressively closer to the Fourth Street power line. (Tr. 408-410, Ex. C-69). They also continued to build the masonry wall at the northeast corner. (Tr. 422-426, Ex. C-14).

As the masonry wall was erected vertically, it too got closer to the Fourth Street power line. (Tr. 409). At some point after the December 1 inspection, the masonry wall exceeded the height of the Fourth Street line. Because the common pole[3] shared by the two lines was out of plumb, the line crossed the plane of the wall. Therefore, to continue to build the wall, Respondent created a 5 X 5 inch hole in the wall for the line to pass through. (Tr. 85-86, 95, 222-223, 226, 463-464, Exs. C-14, C-15, C-47). As the line entered the wall, it was covered by an insulation type of material. (Tr. 147, 234-235, 305, Exs. C-15, C-84).

When LIPA design engineer Clarke arrived at the site on December 5, he observed that Respondent built the wall around the primary wire. He was shocked. Clarke testified that he never saw anything like it before and was surprised that nobody was killed. (Tr. 85). Believing that his earlier warnings were ignored, and concerned that, after he left the site, work would

[3] This is designated as "Brooklyn pole #3 (common)" on Exhibit C-26A.

resume, Clarke called the police to shut down the site. (Tr. 156, 299). That day, Clarke also issued a third Cease and Desist Order to Solar, requiring that all work activity be stopped "immediately." (Tr.88-89, Ex. C-13).

LIPA referred the matter to OSHA. (Tr. 156). CSHO Calliari returned to the site on December 6, 2012. (Tr. 422). The CSHO observed that Respondent continued working after his inspection and that the Fourth Street power line passed through the masonry wall. He also observed that Respondent erected an engineered fall protection system along the north and east sides of the third floor. (Tr. 425, 477) He continued his inspection which resulted in the Secretary alleging additional violations.

After December 6, Vordonia paid the $70,000 fee to LIPA and the Fourth Street line was relocated. (Tr. 69, 90, 328)

Stipulations

Before the hearing, the parties agreed to the following "Admitted Stipulated Facts and Issues of Law":

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act (the Act).

2. Respondent Masonry Services Inc. dba MSI (MSI), is a corporation organized under the laws of the State of New York and doing business in the State of New York, maintaining a principal office and place of business at 201 Snediker Ave., Brooklyn, NY 11207, is and at all times hereinafter mentioned was engaged in construction.

3. Respondent North Eastern Precast LLC (NEP), a limited liability company organized under the laws of the State of New York and doing business in the State of New York, maintaining a principal office and place of business at 3963 State Highway 5S, Fultonville, NY 12072, is and at all times hereinafter mentioned was engaged in precast concrete manufacturing and installation.

4. Respondents MSI and NEP did and do act as a single employer for purposes of the OSH Act, and are deemed a single employer in this matter, subject to a single set of citations and proposed penalties, such that each citation item that was issued to NEP in this matter is consolidated with the analogous citation item that was issued to MSI in this matter,

with the resulting consolidated items being against Masonry Services Inc. dba MSI/North Eastern Precast LLC, a single employer (MSI/NEP), and with the resulting proposed penalty for each consolidated citation item consisting of the penalty originally proposed against MSI. Respondent was the employer of the employees who were allegedly exposed to the hazards alleged in the citations issued to MSI and NEP.

5. Many of the materials and supplies used and/or manufactured by MSI/NEP originated and/or were shipped from outside the State of New York and MSI/NEP was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and is an employer within the meaning of section 3(5) of the Act.

6. James Sal Herrera is owner of NEP and is co-owner of MSI.

7. Jaime T. Herrera is the brother of James Sal Herrera and is co-owner of MSI.

8. Manuel Jesus Herrera is the brother of James Sal Herrera.

9. MSI executed a contract in 2012 with Vordonia Contracting & Supplies Corp. (Vordonia) for work to be performed by Respondent at a worksite located at 14 Brooklyn Avenue in Valley Stream, NY (the Worksite).

10. Vordonia was the general contractor for the work performed at the Worksite.

11. Patricio Solar was Vodonia's primary representative at the Worksite with whom MSI/NEP communicated regularly about the Worksite.

12. Prior to commencing work, James Sal Herrera asked Patricio Solar about the status of the power lines on the worksite.

13. MSI/NEP coordinated with Patricio Solar regarding work performed at the Worksite. MSI/NEP advised Mr. Solar about the schedule of work, including the delivery of concrete floor planks.

14. Individuals who supervised employees of MSI/NEP at the Worksite in 2012 included James Sal Herrera and Manuel Jesus Herrera.

15. Individuals who provided personal protective equipment to employees of MSI/NEP at the Worksite in 2012 included James Sal Herrera and Manuel Jesus Herrera.

16. In or around September 2012, the power line located on the Brooklyn Avenue side of the worksite was de-energized.

17. Respondent performed work at the Worksite on, among other dates, December 1 and 5, 2012.

18. Respondent used a Liebherr LTM 1220-5.2 mobile crane at the Worksite in 2012.

19. Respondent possessed a copy of the operating manual/instructions for the Liebherr LTM 1220-5.2 mobile crane.

20. On Saturday, December 1, 2012, Respondent used a Liebherr LTM 1220-5.2 mobile crane to hoist and set precast concrete floor planks on the Worksite.

21. On Saturday, December 1, 2012, Respondent had employees engaged in precast concrete erection at the Worksite.

22. Respondent operated a JLG Lull Model 1044C-54 powered industrial truck at the Worksite in 2012.

23. Respondent possessed a copy of the operator manual for the JLG Lull Model 1044C-54 powered industrial truck.

24. On April 23, 2010, MSI executed an Informal Settlement Agreement with OSHA to resolve an OSHA citation that had been issued to MSI as a result of OSHA inspection number 314087883.

25. Citation 1, Item 4 of the OSHA citation that was issued to MSI as a result of OSHA inspection number 314087883 alleged a violation of 29 CFR 1926.701(b).

(Ex. J-1)

Applicable Law

To demonstrate a *prima facie* violation of an OSHA standard, the Secretary must prove that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *D.A. Collins Const. Co., Inc. v. Secretary of Labor*, 117 F.3d 691, 694 (2d Cir. 1997); *Atl. Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent. *N.Y. State Elec. & Gas Corp v. Secretary of Labor,* 88 F.3d 98,105 (2d Cir. 1996).

The Citations

Although the citations issued separately to MSI and NEP essentially allege violations of the same standards, there are a few differences. Besides some minor numbering differences, the

repeat violation issued to MSI is cited as other-than-serious to NEP. As agreed to by the parties, the repeated charge will be retained as the allegation against the combined entity. For convenience, the following chart summarizes the items issued against each party, and the resultant merged consolidated citations that are addressed in this decision:

Standard	**MSI Citation**	**NEP Citation**	**Consolidated**
29 CFR 100(a)	Citation 1, item 1	Citation 1, item 1 items a and b	Citation1, items 1
1926.251(a)(2)(iii)	Citation 1, item 2	Citation 1, item 2	Citation 1, item 2
1926.251(c)(9)	Citation 1, item 3	Citation 1, item 3	Citation 1, item 3
1926.416(a)(3)	Citation 1, item 4	Citation 1, item 4	Citation 1, item 4
1926.602(c)(1)(vi)	Citation 1, item 5	Citation 1, item 5	Citation 1, item 5
1926.602(d)	Citation 1, item 6	Not issued	Citation 1, item 6
1926.1408(e)	Citation 1, item 7	Citation 1, item 7	Citation 1, item 7
1926.1408(g)(1)	Citation 1, item 8	Citation 1, item 8	Citation 1, item 8
1926.1412(c)(1)	Citation 1, item 9	Citation 1, item 9	Citation 1, item 9
1926.1424(a)(2)(ii)	Citation 1, item 10	Citation 1, item 10	Citation 1, item 10
1926.416(a)(1)	Citation 2, item 1	Citation 2, items 1 instances a-d	Citation 2, item 1 instances a-d
1926.1408(a)(2)	Citation 2, item 2	Citation 2, item 2	Citation 2, item 2
1926.701(b)	Citation 3, item 1 (repeat)	Citation 1, item 6	Citation 3, item 1 (repeat)
1926.502(k)(3)	Citation 4, item 1	Citation 3, item 1	Citation 4, item 1

Discussion

At the hearing and in their briefs, the parties primarily focused on the willful allegations in Citation 2. Because that citation constitutes the heart of this case, and the allegations therein are relevant to several other lesser charges, it is discussed first.

Citation 2, item 1 (29 C.F.R. § 1926.416(a)(1))

Allegations

The citation alleges that, from December 3 to December 5, 2012, at various locations around the worksite, employees of Respondent were working as close as four inches to the energized power line that ran along Fourth Street, carrying 13 kV of electricity, phase to phase.

The cited standard provides:

> (a) *Protection of* employees. (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 de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means.

Merits

There is no dispute that Respondent was engaged in construction work. (Ex. J-1, ¶ 2). The evidence also establishes that the Fourth Street power line running along the construction site was energized. Accordingly, the standard applies.

Regarding instance (a), the CSHO testified that employees, who installed the engineered fall protection system on the third floor, came within three feet of the line. (Tr. 477). That distance assumed that the height of an average employee was only five feet. Manuel Herrera told the CSHO that the height of the third floor was eight feet. Therefore, the CSHO estimated that, a five foot tall employee would be approximately three feet below the power line when

installing the engineered fall protection system. (Tr. 477-478). According to the CSHO, an employee more than five feet tall would have been even closer to the line. (Tr. 478).

In instances (b) and (c), based on descriptions given to him by Manuel Herrera, the CSHO estimated that employees constructing the masonry block wall on the north and east side of the building on December 4, worked approximately 12 inches below the inner-most power line on the Fourth Street Circuit. (Tr. 478-479, Ex. C-14). When work continued on December 5, at the northeast corner of the third floor, employees constructing the masonry block wall worked between the inner-most and the middle overhead power line on the Fourth Street circuit. (Tr. 479). Based on information provided by Manuel Herrera, the physical dimensions of the concrete masonry units, and physical measurements obtained from LIPA, the CSHO estimated that employees worked approximately four inches from the primary power line and 14 inches from the secondary power line. (Tr. 480).

In instance (d), the evidence demonstrates that, when the CSHO returned to the worksite on Dec. 5, at the north side of the third floor, the wall was actually built around the Fourth Street power line and that a sleeve had been placed over that portion of the line entering the wall. (Exs. C-15, C-84). The CSHO testified that, when building the wall, employees had a phase to phase exposure because they were working between the inner-most and the middle overhead power lines on the Fourth Street circuit. (Tr. 479). Based on information provided by Respondent and line measurements by LIPA, the CSHO estimated that to, to have built the wall in this fashion, employees came within four inches of the primary line and approximately 14 inches from the secondary power line. (Tr. 479-480). The CSHO also estimated that, to actually capture the line in the wall on December 5, employees had to come within four inches of the lines. (Tr. 480-481).

James Sal Herrera admitted that it was likely that the masonry wall was built by his employees. (Tr. 784). Also, whoever installed the sleeve on the line had to do so with their hands. (Tr. 305).

The evidence establishes that Respondent violated the standard as alleged and that its employees were exposed to the hazard posed by the energized Fourth Street power line.

Characterization

The Secretary alleges and the evidence demonstrates that Respondent knew of the violation and that the violation was willful.

1. Legal Standard

A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *A. Schonbek & Co., v. Donovan,* 646, F.2d 799, 800 (2d Cir. 1981); *Valdak Corp.,* 17 BNA OSHC 1135, 1136 (No. 93-239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1996) *Williams Enterp. Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987); *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). 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 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 Enterp, Inc.,* 13 BNA OSHC at 1257.

Willfulness is negated by evidence that the employer had a good faith opinion that the conditions in its workplace conformed to OSHA requirements. *E.g., Calang Corp*., 14 BNA OSHC 1789, 1791 (No. 85-319, 1990). The test of good faith is an objective one, i.e., whether the employer's belief concerning the factual matters in question was reasonable under all of the

circumstances. In other words, the employer's belief must have been "non-frivolous." *Morrison-Knudson*, 16 BNA OSHC , 1105, 1127 (No. 88-572, 1993); *See Secretary v. Union Oil*, 869 F.2d 1039, 1047 (7th Cir. 1989).

2. Analysis

After the December 1 inspection, Respondent had notice that the Fourth Avenue line was energized. The CSHO told James Sal Herrera that the line posed a hazard and elicited a promise from Herrera that Respondent would avoid the line. (Tr. 419-421). Given the clear warnings given to him by the CSHO, I find James Sal Herrera's assertion that, before December 5, he did not know that the Fourth Street line was not de-energized to be self-serving and not credible. (Tr. 780). James Sal Herrera asserted that he did not know that the wall was built and that, had he known what his employees were doing, he would have stopped it. (Tr. 785). However, Respondent's superintendent and supervisor, Manuel Herrera was on the site and had authority to stop the work. (Tr. 786). Additionally, there were several foremen at the site. (Tr. 786).

During the December 1 OSHA inspection, Manuel Herrera was clearly informed by the CSHO that the Fourth Street line was energized. He knew from his OSHA course work that no work should be performed within ten feet of energized power line. (Tr. 433). After asserting that he did not know whether the line was energized, he stated that "[t]here was no sign there, so I can work there" in a signed statement given to the CSHO. He noted that LIPA drove by, but did not stop to tell them that the line was energized. He then stated that "[i]f nobody tells me it's energized, I will go there to work." (Tr. 433). He continued: "[I]f I look at wires and I don't know what is, I don't care. If I know it is live, I stay ten feet away. If I don't know if it is live or not, I can go near it." (Tr. 433-444).

The CSHOs presented multiple options to the Herreras that would have enabled Respondent to continue its work until the problems with the Fourth Street line were resolved. (Tr. 419). They were told by the CSHOs that they could stage the planks at another area of the building, or continue setting planks in other areas of the building where they would not get closer than 20 feet from the line. (Tr. 419). James Sal Herrera told the CSHOs that he could not return the trucks with the planks back to the upstate NEP plant because there was no money and he would have to eat the cost. (Tr. 420). He further indicated that they couldn't stage the precast planks outside of the designated work area. *Id*. However, Herrera assured the CSHOs that they would set planks in safe areas without encroaching within 20 feet of the energized line. (Tr. 421). Despite these warnings, and contrary to James Sal Herrera's assurances, Respondent continued work in areas where employees were required to come literally within inches of the energized line. Indeed, both Manuel Herrera and crane operator Anthony Ferrara, Jr., told the CSHO that Respondent resumed its work immediately after the CSHOs left the site. (Tr. 422, 649-651).

As the work continued, the crew came progressively closer to the line. (Tr. 409). Yet, James Sal Herrera testified that he never discussed with his foreman that the work was progressing to a point where they would have interference from the Fourth Street power line. (Tr. 790). When asked why he did not have such conversations, Herrera explained that "I could give you a litany of excuses, just poor planning on our part." (Tr. 791). When considered with the other evidence, what Herrera deemed "poor planning" looks more like a genuine lack of care.

Particularly reckless was Respondent's building of the masonry wall enclosing the power line. When Clarke saw the power line passing through the hole in the wall he was shocked. Further, he stated that he had never seen anything like it before and wondered how it was possible to do something like that without anyone getting hurt or killed. (Tr. 85). LIPA

representative Robert Braccia, who visited the worksite several times, stated that he had "never seen anything so horrendous in my [sic] life." (Tr. 222)

Because Respondent continued to defy the warnings about the danger of the power line, as manifested by two earlier Cease and Desist Notices, Clarke found it necessary to not only issue a third Cease and Desist Notice for the jobsite, but to also contact the local police and the township to ensure that Respondent ceased its hazardous activities.(Tr. 156). As previously noted, where the employer claims it did not know of the standard, its reckless disregard for employee safety can establish that even if actually informed of the hazardous condition, it would not care. *Williams Enterp. Inc.,* 13 BNA OSHC at 1257. Here, Respondent not only knew of the standard, it was also unambiguously informed that it was in violation and that its employees were exposed to a potentially fatal hazard. However, the evidence reveals that it did not care.

Respondent asserts that the violation was not willful because, rather than setting forth specific minimum distances that must be maintained from a power line, the standard requires only that employees not be allowed to work "in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit." This failure of the standard to delineate "close proximity" required it to exercise judgment. Respondent also asserts that, although the Secretary claimed that the insulation material around the power line was not sufficient to insulate it, the material was never tested. Moreover, the voltage of the line was not established. (Resp'ts Post Hr'g Br. at 8).

These arguments are without merit. The evidence establishes that employees worked literally inches from the Fourth Street power line. While there may be legitimate judgmental differences regarding what constitutes an impermissible "proximity" to a power line, allowing employees to come within inches of the line clearly does not constitute a reasonable exercise of

that judgment. *Morrison-Knudson*, 16 BNA OSHC at 1127. In any event, Respondent was warned by the CSHO about the proximity of the crane to the lines and, after assuring him that they would maintain an adequate clearance, resumed the hazardous activity as soon as the CSHO left the site. Similarly, while the insulation material around the wire was never tested, the testimony of both the CSHO and LIPA representative Robert Braccia established that it was not a material that was capable of providing any effective insulation of the line. (Tr. 234-235, 454). Moreover, regardless of the insulation qualities of the wire cover, employees still had to virtually touch the wire to install it. Finally, Respondent's assertion that the voltage of the line was not tested is frivolous. Representatives from LIPA, which owns the lines, testified that the wires were energized and carried 7,620 volts in each line or a combined 13.2 kV. (Tr. 79).

Accordingly, I find that the evidence establishes that Respondent willfully violated the cited standard as alleged.

Penalty

1 Legal Standard

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the S., Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Id* at 2214.

The maximum statutory penalty for a willful violation is $70,000. Section 17(a) of the Act; 29 U.S.C. §666(a). Based on the factors set forth in Section 17(j) of the Act, the Secretary proposed a penalty of $61,600[4].

2. Analysis

The CSHO testified that gravity is composed of two parameters: severity and probability. (Tr. 481). Here, the severity was rated as high because, with voltages of 7,620 volts per line or 13.2 kV phase to phase, death or serious physical injury was likely to result in the event of an accident. (Tr. 481-482). Taking into account the number of employees exposed, and the frequency of exposure, the probability of an incident was rated as "greater." (Tr. 482). The CSHO testified that the resulting gravity was high, resulting in a gravity-based penalty of $70,000. (Tr. 482).

With 51 employees for MSI was a small employer and Respondent was given a 20% reduction for size. (Tr. 483-484). However, the penalty was increased 10% because it had a substantial prior history of OSHA violations. (Tr. 483). Since 2000, Respondent has been inspected 28 times and issued 96 citations, including multiple serious and repeat violations that were either affirmed through settlements or informal settlement conferences. (Tr. 486-487). Finally, no credit was given for good faith because the inspection resulted in citations for willful, serious and repeat violations. (Tr. 485).

[4] Originally, the Secretary assessed a separate penalty of $49,000 for this item against NEP. However, when the parties stipulated that the cases be joined, they also agreed that the penalties to be considered would be those proposed against MSI. (Joint Pre-Hr'g Statement, p. 12, ¶ 4)

Respondent argues that the proposed penalties are excessive and would cripple it. It also contends that other willful cases involving similar hazards resulted in lesser penalties. I am not persuaded. Respondent has introduced no financial statements to support its contention that the proposed penalties would result in financial distress. In any event, financial hardship imposed upon Respondent is not a statutory criterion for determining the appropriateness of a penalty. Finally, each case stands on its own and involves its own unique facts and circumstances. Other cases that resulted in lower penalties are not before this Court. I find that the facts and circumstances before this Court justify the penalty proposed by the Secretary.

Citation 2, item 2 (29 C.F.R. § 1926.1408(a)((2))

The Allegation

The citation alleges that on or about December 1, 2012, employees hoisted and set precast concrete floor planks with a mobile crane. The rigging came within 8 feet of the overhead primary and secondary power lines which carried 13 kV phase to phase.

The cited standard provides:

(a) *Hazard assessments and precautions inside the work zone.*

* * *

(2) Determine if any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone, could get closer than 20 feet to a power line. If so, the employer must meet the requirements in Option (1), Option (2), or Option (3) of this section as follows:

(i) *Option (1)-De-energize and ground.* Confirm from the utility owner/operator that the power line has been de-energized and visibly grounded at the worksite.

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

(iii) *Option (3) –Table A* clearance.

(Note: Under table A the clearance for lines up to 50 kV is 10 feet. The CSHO explained that Option (2) would apply where the employer does not know the voltage of the power line. (Tr. 490)).

Merits

The evidence establishes that Respondent, who was engaged in construction work, operated a crane in proximity to the energized overhead power line on Fourth Street. The standard applies.

As previously noted, when the CSHO went to the worksite on December 1, he found that the overhead line on Fourth Street constituted an imminent danger and requested that Manuel Herrera remove the employees from the hazard. (Tr. 348). Employees were actively engaged in setting precast concrete planks. The planks were rigged to a large hydraulic mobile truck crane with a 240 foot boom, hoisted over the Brooklyn Avenue circuit, near the Fourth Street power line, and placed along the east side of the structure along Fourth Street. (Tr. 365, 370). The Fourth Street line could not be de-energized because LIPA was unable to reroute service to its downstream customers. (Tr. 206). Therefore, at a minimum, Respondent was obligated to adhere to option (3) and maintain a minimum ten foot distance between the crane and the power line.

Clarke explained that, because the Fourth Street line came so close to the building, it was not possible to maintain a ten foot clearance. (Tr. 67). Where the planks were being installed near Fourth Street Pole #1, the CSHO observed crane equipment operating less than ten feet from the power line. (Tr. 370-371, Exs. C-25, C-46). At that location, the horizontal distance from the innermost power line to the face of the building was approximately 4 feet 9 inches. (Tr. 464, Exs. C-46, C-47 at 3). Where the planks were being installed near the middle of Brooklyn

Pole #3[5] the pole was hanging over the building because it was out of plumb and leaning toward the building. (Tr. 364-365, 408-410, Exs. C-26A, C-46 at 2, C-47 at 1, C-69). Therefore, employees could not work on the Fourth Street side of the building without creating a proximity hazard. (Tr. 70). He testified that the power line posed a proximity hazard to the individual wire rope slings supporting the plank, the wire rope spreader assembly, and the planks themselves. (Tr. 373-374, 379-380, 386, Exs. C-25, C-61, C-66). The CSHO estimated that the planks and rigging came within eight feet of the load. (Tr. 374, 492-494, Ex. C-61). In some instances the rigging came even closer. (Tr. 492-494, Exs. C-21, C-60).

The planks themselves were conductive because they contained metal reinforcing material and could retain moisture. (Tr. 374, 381). Respondent asserts that the planks did not present a hazard because they were cast using a "zero slump mix"[6] which minimizes the moisture in the planks. (Tr. 707). However, the CSHO testified that, in his experience, concrete created by a zero slump mix still has moisture. (Tr. 617-618). I find that the evidence establishes that the planks contained moisture. Even accepting Respondent's assertion, "minimizing" moisture is not the same as "eliminating" moisture.

Employees who were guiding and setting the planks were touching the load and could have been electrocuted if any part of the crane made contact with the power line. (Tr. 379-382, 385, Ex. C-38). The CSHO further explained that the proximity of the rigging and the planks to the power line risked the entire crane superstructure becoming energized. This could have electrocuted employees located in or around the base of the crane at street level. (Tr. 373-374, 380-381). Even without actual contact, the proximity of the crane and its components could have

[5] As previously noted, Brooklyn Pole #3 was the common pole that carried lines from both the Brooklyn Avenue and Fourth Street lines.

[6] A "zero slump mix" refers to the amount of slump cast concrete undergoes during testing. A "zero slump mix" generally sets faster and harder than other mixes. (Tr. 617-618, 706-707).

allowed it to enter the electric field created by the line, causing an arc flash which could have resulted in electrocution. (Tr. 53-54, 225). The record establishes the violation.

Characterization

The Secretary asserts, and the evidence establishes that the violation was willful.

The evidence demonstrates that, from the beginning of the project, Respondent was fully aware that the Fourth Street line posed a proximity hazard. Similarly, Respondent superintendent Manuel Herrera told OSHA that he learned in OSHA classes that a crane must maintain a ten foot distance from energized power lines. (Tr. 433). The crane's operating manual, which warned about the hazard of operating cranes near power lines and the minimum distance requirements, was used by Respondent at the worksite. (Tr. 454-457, Ex. J-1 at ¶¶ 18-20, Ex. C-40 at pp. 13-14).

James Sal Herrera and MSI Vice President, Jaime T. Herrera, were aware of the OSHA rule that crane equipment cannot come near a power line. (Tr. 799-800, Ex. J-2 at 6-7, 11-13). At the pre-job meeting, James Sal Herrera told Solar that both the Fourth Street and Brooklyn Avenue power lines would pose a problem as the building went vertical because they were less than ten feet from the worksite, and that they had to be moved or insulated to perform the crane work. (Tr. 699, 801). In a statement given to the CSHO, James Sal Herrera stated that "I knew power lines on Fourth Street and Brooklyn Avenue were less than ten feet and told Patricio [Solar] in late summer 2012 meeting." (Tr. 444) He further stated that he told Solar that Vordonia "would have to relocate/insulate the power lines." (Tr. 442-443, 801). However, LIPA's July Cease and Desist Order[7] gave Respondent unambiguous notice that none of the lines

[7] Even though the Cease and Desist Order was handed to Solar, Respondent had notice of its existence and scope. The site was shut down thereby suspending all work including the prime target of the Order --- the RESPONDENT employees working on the Fourth Street side of the project. Moreover, Clarke posted and handed out to employees

had been de-energized. Respondent asserts that it assumed that Solar would take care of the problem. Any assumption that the Fourth Street line was de-energized was fully dispelled in August when the second cease and desist notice was issued.

The August Cease and Desist Order not only provided notice to Respondent that the Fourth Street line remained energized, it also put it on notice that it was encroaching into the safety zone of the lines. Furthermore, Guerson Carelus testified that on August 23rd, he talked with the employees and a supervisor and told them that they were working too close to the wires. (Tr. 174-177, 446-447). When the supervisor insisted that he was told by Solar that it was okay to work where they were, Carelus told them that the situation was dangerous and people could die. (Tr. 177). Carelus informed him that they could work on Brooklyn Avenue, because it was de-energized. (Tr. 177).

According to Solar, between August and December, Respondent made repeated inquiries about LIPA moving the Fourth Street line. (Tr. 320-321). On several occasions, as construction neared the Fourth Street power line, Respondent told him that if the line was not moved, they would have to pack up and leave until it was time to come back. (Tr. 294-295). Solar suggested to them that they work on the side of the building away from Fourth Street. (Tr. 290-291). Yet, despite the Cease and Desist Orders and its own concerns, and despite its expressed awareness that they were operating in violation of the ten foot clearance rule, MEP/NEP continued to work on the Fourth Street side of the site in plain indifference to employee safety.

Respondent makes several arguments that the violation was not willful. First, it claims that James Sal Herrera thought that the overhead wires were phone lines, not power lines. It

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handbills warning about the hazards of working around power lines. It seems implausible that Respondent did not at least inquire as to why its work was shut down.

asserts that 90% of its work was in New York City where the power lines are buried underground and, therefore, he was not familiar with overhead power lines. This excuse challenges credulity. As noted, it was James Sal Herrera who brought the hazard of the power lines to the attention of Patricio Solar at the pre-job meeting. He told Solar that the lines had to be either moved or insulated, which clearly establishes that he knew that they were power lines. This evidence clearly demonstrates that if Herrera had any misunderstanding about the nature of the lines encroaching on the worksite, they were dispelled during this pre-job meeting. Herrera was further warned by the August Cease and Desist Order that the Fourth Street power line was energized.

Respondent next asserts that it relied on Solar's assurance that he would resolve the problem of the lines with LIPA. However, the August Cease and Desist Order from LIPA unmistakably informed Respondent that, while the Brooklyn Avenue line was de-energized, the Fourth Street line remained a problem. James Sal Herrera claimed that he saw the red jumpers on the common pole and assumed it meant that the Fourth Street line was de-energized. (Tr. 716, 807). However, those jumpers were on the pole shortly after the July Cease and Desist Order was issued. The August Cease and Desist Order was issued because the Fourth Street line remained energized. Respondent offers no explanation why the August Cease and Desist Order did not put them on notice that the Fourth Street line remained energized. Rather, Respondent asserts that it just assumed, but never specifically inquired whether the Fourth Street line was de-energized. Indeed, Herrera's claim that he was so lacking experience with overhead lines that he could not tell the difference between phone lines and power lines must be weighed against his decision to assume, but not confirm, that the Fourth Avenue line was de-energized. If Herrera could not tell the difference between power lines and phone lines, he would not have been able to

tell which circuit the red jumpers indicated was de-energized. His failure to ascertain the status of the lines while continuing to expose his employees to the hazard of electrocution constituted nothing less than a plain indifference to employee safety.

Respondent asserts that when hurricane Sandy struck in late October 2012, the power was knocked out of the area. (Tr. 229-230, 242). It suggests that it did not know that power had been restored and believed that the power remained out on the Fourth Street line. This argument is without merit. Power was restored to all of Long Island by the end of November. (Tr. 243). There is nothing in the record to suggest that Respondent ever inquired whether the power remained out. Yet, knowing that if power was restored, it was exposing its employees to the hazard of electrocution, it continued working. Again, this demonstrates plain indifference to employee safety.

Respondent's lack of regard for employee safety was further underscored by its conduct after the inspection. During the inspection, the CSHO unambiguously warned Respondent of the hazard posed by the Fourth Street line. The CSHO deemed the situation an imminent hazard and had Respondent remove its employees from the zone of danger. Respondent promised him that work on the Fourth Street side of the site would not continue until the hazard was abated. Yet, once the CSHO left the site, Respondent proceeded to completely ignore the warning and its own promise and, with reckless disregard to the safety of its employees, resumed work on the Fourth Street side. One of the tests for willfulness is whether the employer was actually aware that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care. *Propellex Corp.*, 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999). Here, Respondent was informed of the standard and the hazard to which it was exposing its employees, however, its actions demonstrated that it simply did not care.

The evidence leads to only one conclusion, that Respondent was plainly indifferent to employee safety and that the violation was willful.

Penalty

As with Citation 2, item 1, the Secretary proposed a penalty of $61,600 for Citation 2, item 2. The CSHO testified that the severity of the violation was high because death or serious injury could occur as a result of the hazard. The probability was deemed to be greater because of the number of employees exposed and the repetitive nature in which exposure occurred. (Tr. 495-496). As a result, the gravity-based penalty was $70,000. (Tr. 496). The CSHO further testified that, as with Citation 2, item 1, a 20% adjustment was made for Respondent's size, a 10% increase was made for Respondent's substantial OSHA history, and no deduction was given for good faith. (Tr. 496-497).

I find that the Secretary properly considered the gravity of the violation to be high, and that he properly considered the statutory factors when arriving at his proposed penalty. Accordingly, a $61,600 penalty is assessed.

Citation 1, item 1

Allegation

Citation 1, item 1 alleges that Respondent committed a serious violation of 29 CFR §1926.100(a) on the grounds that at the east side of the building, on the third floor:

> Employees setting precast concrete planks were working near and directly below the suspended load without helmets, on or about December 1, 2012.

The cited standard provides:

> (a)Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

Merits

Respondent was engaged in the construction of a multi-level building using, among other things, a crane to hoist materials. Therefore, the standard applies.

The CSHO testified that, on December 1, 2012, employees engaged in precast concrete construction, were hoisting precast concrete planks with a crane and working near and directly below the suspended load, without protective helmets. (Tr. 380, 500, Exs. C-38, C-64). The condition was visible from street level and Respondent's supervisor, Manuel Herrera was present at the site. (Tr. 501).

Also, on December 6, the CSHO witnessed and photographed an employee on a truck, working below the booms during a tandem powered electrical truck lift where employees were loading counterweights onto a flatbed truck. (Tr. 501-503, 506, Exs. C-85, C-86). This condition occurred in front of the worksite, close to the Brooklyn Avenue/Rockaway intersection, along Brooklyn Avenue. (Tr. 502). As with the previous instance, Supervisor, Michael Herrera was present when the CSHO observed the violations. (Tr. 508). The conditions exposed the employees to being struck in the head by the planks. (Tr. 380). I find that the preponderance of the evidence establishes that the standard was violated as alleged.

That the violation was committed in full view of Supervisor, Manuel Herrera, establishes that, with reasonable diligence, Respondent knew or could have known of the violative conditions.

Affirmative Misconduct Defense

Respondent asserts that the violation was the result of employee misconduct. It points out that James Sal Herrera testified that all employees are provided with and required to wear protective head gear. (Tr. 747). In most cases, to establish the affirmative defense of

"unpreventable employee misconduct," the employer must rebut the Secretary's showing of knowledge by proving that: (1) it has established work rules designed to prevent the violation, (2) it has adequately communicated these rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations are discovered. *E.g., D.A. Collins Const. Co., v. Secretary of Labor,* 117 F.3d at 695; *Rawson Contractors, Inc.,* 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003); *Precast Servs., Inc.*, 17 BNA OSHC 1454, 1455, (No. 93-2971, 1995), *aff'd without published opinion*, *sub nom Precast Servs. v. Reich*, 106 F.3d 401 (6th Cir. 1997). However, this case arose in and is appealable to the Second Circuit. In *N.Y. State Elec. & Gas Corp. v. Secretary of Labor,* 88 F.3d at 108, the Second Circuit held that, where the sufficiency of an employer's safety program is at issue, the burden is on the Secretary to establish that the program was not adequate. I find that the Secretary met that burden.

The evidence establishes that protective hard hats were provided to employees and that Respondent had a rule requiring them to be worn. (Tr. 451, 613). Respondent asserts that employees gave statements to the CSHO that they are required to wear hard hats. Although employee statements were marked for identification, they were not admitted into evidence. Rather, portions of their statements were read into the record[8]. (Tr. 585-586). None of those portions related to protective headgear. Although the Secretary did not introduce these statements into evidence, nothing prevented Respondent from doing so, if it believed that it contained exculpatory information. Moreover, in its brief, Respondent does not cite to any part of the statements, either read into the record or not, that would support its assertion. A review of the record does reveal that, during cross-examination of the CSHO, a portion of the statement of Quacy Jones was read into the record, where the employee stated that "Sal Herrera would make

[8] The employees were crane operator, Anthony Ferrara, (Tr. 445-446); rigger, Quacy Jones, (Tr. 450); and production manager, Paul Hartman. (Tr. 451). The exhibits marked, but not admitted were C-43 (Ferrara); C-43 (Jones); and C-33 (Hartman).

sure everyone had their hard hats." (Tr. 451, 613). However, mere words does not a safety program make.

The evidence establishes that James Sal Herrera was not always on the site. (Tr. 783-786). In his absence, his brother Manuel Herrera had supervisory authority. (Tr. 786). The violative conditions occurred in full view of Manuel Herrera. That employees felt free to violate the rule in front of their supervisor demonstrate that the rules were not actively enforced. *See Falcon Steel Co.,* 16 BNA OSHC 1179, 1194 (No. 89-2883, 1993)(consolidated). There is no evidence to suggest that Respondent was enforcing its work rule. I find that the evidence adduced by the Secretary, and Respondent's failure to rebut that evidence by demonstrating that it took measures to enforce the work rule, establishes the inadequacy of its safety program. *See D.A. Collins Constr. Co.,* 117 F.3d at 695-696.

Characterization and Penalty

The CSHO testified that death or serious physical harm would have likely occurred had an employee been struck in the head by a plank. (Tr. 509). The violation was properly characterized as serious.

The Secretary proposed a penalty of $6,160. The CSHO testified that both the severity of the violation and the probability of an accident were high. According to the CSHO the probability of an accident was "greater" because there were multiple employees repetitively and repeatedly exposed to the hazard. (Tr. 509). The Secretary arrived at an unadjusted gravity-based penalty of $7,000. (Tr. 509). The same penalty adjustments considered for the willful violations were considered here. (Tr. 510). I find that the proposed penalty properly considers the statutory factors and that the $6,160 proposed penalty is appropriate.

Citation 1, item 2

Allegation

Citation 1, item 2 alleges that Respondent committed a serious violation of 29 CFR §1926.251(a)(2)(iii) on the grounds that the loads did not have permanently affixed markings indicating the safe working loads at the following locations:

a) on or about December 1, 2012, on Brooklyn Avenue and the east side of the third floor-the wire rope slings used to hoist precast concrete floor planks;

(b) on or about December 1, 2012, on Brooklyn Avenue and the east side of the third floor, the two legged wire rope spreader assembly used between the crane hook and the wire rope slings on the load being hoisted; and

(c) on or about December 6, 2012, by Brooklyn Avenue, the endless wire rope sling used to load the crane counterweights, which weighed 10 tons (20,000 pounds).

The cited standard provides:

> (a) *General*
>
> * * *
>
> (2) Employers must ensure that rigging equipment:
>
> * * *
>
> (iii) Not be used without affixed, legible identification markings, required by paragraph (a)(2)(i) of this section[9].

Merits

Respondent is a construction contractor and was using rigging equipment for material handling. Therefore, the standard applies.

According to the CSHO, it is important for the identification tags to be affixed to the equipment because they indicate the types and manner of hitches that could be used. They also

[9] The referenced section requires that rigging equipment has "permanently affixed and legible identification markings as prescribed by the manufacturer that indicate the recommended safe working load." 29 C.F.R. § 1926(a)(2)(i).

indicate the angles and safe working loads that are permitted for that particular piece of equipment. (Tr. 513).

The CSHO testified that, in instance (a) and (b), employees were actively engaged in hoisting precast planks with a crane. Instance (a) refers to the individual wire rope slings located at each end of the precast planks, used to hoist the planks. Some of the slings were missing tags. (Exs. C-65, C-89). One tag was illegible and the CSHO was unable to read the diameter or safe working loads. (Tr. 514-516). The evidence also establishes that there was no tag on the wire rope spread assembly as alleged in instance (b). (Tr. 515, Ex. C-65).

Regarding instance (c), Ex. 90 shows an endless wire rope sling that was one of the two slings used to hoist the crane counterweight onto the back of a flatbed truck along the front of Brooklyn Avenue. (Tr. 517-518). The sling did not have a tag affixed to it to indicate the safe working load or diameters. (Tr. 518). Respondent does not specifically address this item in its post-hearing brief. However, at the hearing, James Sal Herrera testified that all the rigging it purchased had two tags affixed one on each end of the cable. He speculated that the tags might have fallen off. (Tr. 771). Respondent adduced no evidence to indicate that it had a program requiring that the tags be regularly checked for the presence and legibility. To the contrary, the number of tags missing, together with the lack of legibility of another tag demonstrates that Respondent had no program for regularly checking the tags. Therefore, the record establishes that Respondent knew, or with the exercise of reasonable diligence could have known of the violative condition.

The failure to comply with the standard was established.

The CSHO testified that the failure to have legible tags affixed to the gear exposed riggers, signalmen, and laborers engaged in setting the precast planks to a hazard. (Tr. 518). As

to items (a) and (b), he explained that riggers would rig the planks singly or sometimes double on the backs of the trucks. Once the slings were placed underneath each end of the plank, it was connected to the wire rope spread assembly that was attached to the main load line of the crane. Employees would stand, holding the wire rope sling in position until the crane could obtain sufficient tension to enable them to let go without the sling moving to the center or coming off the end. Once the wire sling attained proper retention, the crane operator would begin to hoist it. The riggers would climb down off the trucks while the load was simultaneously hoisted to an elevation sufficient to clear the primary circuit on the Brooklyn Avenue side of the site. This exposed them to the hazard of being struck in the event that the chocker they used failed because they were unknowledgeable about the safe working load. (Tr. 517-520). Laborers and signalmen were exposed to the same hazard as the load was being lowered. (Tr. 520).

In instance (c), the employee on the back of the flatbed truck was exposed because he was positioning the counterweight. (Tr. 520). Without the tags, none of the employees at the work site knew the safe working load or the manner in which the sling could be used to properly rig those counterweights during the lift operation. (Tr. 521).

Characterization and Penalty

The evidence establishes that a sling failure could have resulted in an employee being crushed to death. (Tr. 521). Therefore, the violation was properly characterized as serious.

The Secretary proposed a penalty of $6,160 for this violation. The CSHO testified that the probability of an accident was "greater" because of the number of employees exposed. Employees were exposed throughout the course of their work and the repetitive nature of the activity. (Tr. 521-522). As a result, the Secretary arrived at a gravity based penalty of $7,000. According to the CSHO, the Secretary applied the same adjustments for history, good faith and

size made in the previous items in arriving at an adjusted proposed penalty of $6160. I find that the Secretary properly applied the statutory factors when arriving at the proposed penalty. Therefore, the proposed penalty of $6,160 is assessed.

Citation 1, item 3

Allegation

Citation 1, item 3 alleges a serious violation of 29 CFR §1926.251(c)(9) on the grounds that, on or about December 1, 2012, by Brooklyn Avenue, on the east side of the third floor, the "wire rope slings used to hoist the precast concrete planks, weighing up to approximately 11,000 pounds, were not protected from the sharp edges of the precast concrete floor planks".

The cited standard provides that:

(c) *Wire Rope*
(9)Slings shall be padded or protected from the sharp edges of their loads.

Merits

The evidence establishes that Respondent is engaged in construction work and was using slings to lift loads. The standard applies.

The padding prevents the rigging from being damaged. Nylon slings can fray or tear; the outer jackets of component slings can tear and expose the internal core. Individual strands or entire cores from wire rope slings can suffer abrasion. (Tr. 523).

The CSHO testified that on December 1, 2012, Respondent used wire rope slings to hoist precast planks. The evidence establishes that the planks had sharp edges, but were not padded or protected. (Tr. 523, Ex. C-36). As in Citation 1, item 2, employees exposed included riggers, laborers and signalmen engaged in hoisting the planks. (Tr. 524-525). Respondent's supervisor, Manuel Herrera, was present during the crane work. (Tr. 525). Therefore, Respondent knew, or with the exercise of reasonable diligence could have known of the violative condition.

Respondent does not address the merits of this item in its brief. I find that the preponderance of the evidence establishes that Respondent violated the standard as alleged.

Characterization and Penalty

The Secretary proposed a penalty of $4,400. The CSHO testified that the severity of the violation was high because a sling failure could result in death or serious injury. (Tr. 525). Therefore, the violation was properly characterized as serious. The probability of an accident was rated as lesser, resulting in a gravity-based penalty of $5,000. (Tr. 526). To that penalty, the Secretary made the same percentage adjustments as in the earlier discussed violations. I find that the Secretary properly considered the statutory factors when proposing the penalty. The proposed penalty of $4,400 is assessed.

Citation 1, item 4

Allegation

Citation 1, item 4 alleges that Respondent seriously violated 29 CFR §1926.416(a)(3) on the grounds that at times prior to and including December 21, 2012, on the north and east sides of the building on the second and third floors:

> Signs were not posted identifying the locations of the overhead primary and secondary power lines that were in close proximity to the building. In addition, the employer did not warn employees about the hazards or the proper protective measures to be taken when they worked in close proximity to the overhead primary and secondary power lines.

The cited standard provides:

> (a) *Protection of employees*
> (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. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the

location of such lines, the hazards involved, and the protective measures to be taken.

Merits

The evidence demonstrates that Respondent is a construction contractor. The evidence also demonstrates that its employees were working in proximity to the energized line on Fourth Street. The standard applies.

The CSHO testified that there were no signs posted with respect to either the energized primary or secondary overhead lines on the Fourth Street side of the work site. (Tr. 527-528). Moreover, James Sal Herrera testified that employees were not advised about the energized line, the hazards involved or the protective measures to be taken. (Tr. 720-722). In his statement given to the CSHO, Manuel Herrera stated that when some of the masons and laborers asked him about the Fourth Street line, he told them only "not to damage it." (Tr. 433). Respondent failed to comply with the standard.

As previously discussed, the evidence also demonstrates that Respondent knew, or with the exercise of reasonable diligence could have known that the Fourth Street power line was energized. Both James Sal Herrera and Manuel Herrera knew that they did not provide the requisite information to its employees.

Characterization and Penalty

All the employees at the worksite were exposed to the hazard of electrocution because they were not informed of the hazard involved in working near energized power lines. (Tr. 528). Had the lack of information resulted in an employee getting too close to the energized power line, he/she likely would have been electrocuted thereby resulting in death or serious harm. (Tr. 522). The violation was properly characterized as serious.

The Secretary proposed a penalty of $6,160 for this serious violation. (Tr. 528). The CSHO testified that, because the violation exposed employees to the hazard of death or serious injury by electrocution, the severity of the violation was considered to be high. (Tr. 528). Due to the number of employees exposed to the hazard, the frequency of the exposure, and the repetitive nature of the exposure, the probability of an accident was considered to be greater. (Tr. 528). This resulted in a gravity-based penalty of $7,000. After adjusting for Respondent's size, history, and good faith, as discussed earlier, the Secretary proposed a penalty of $6,160. I find that the Secretary properly considered the statutory factors and the proposed penalty is appropriate.

Respondent asserts that this item, along with Citation 1, items 7 and 8 are duplicative of the violations set forth in Willful Citation 1, items 1 and 2. The merits of these assertions will be discussed, *infra.*

Citation 1, item 5

Allegation

Citation 1, item 5 alleges that on or about December 6, 2012, Respondent committed a serious violation of 29 CFR §1926.602(c)(1)(vi) on the grounds that

> The JLG Lull Telehandler forklifts, Serial #s 0160029366 and 0160013049, used to load the crane counterweights onto a flatbed truck were operated beyond the rated load capacity.

The cited standard provides:

> (c) *Lifting and hauling equipment(other than equipment covered under subsection N of this part).*
> (1) Industrial trucks shall meet the requirements of § 1926.600 and the following:
> (vi) All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation as defined in American National Standards Institute B56.1-1969, Safety Standards for Powered Industrial Trucks.

Merits

The evidence establishes that Respondent is a construction contractor and was using powered industrial trucks. The standard applies.

On December 6, 2012, the CSHO observed Respondent using two forklifts to simultaneously load two counterweights onto the back of a flatbed truck. (Tr. 533, Ex. C-86). One of the counterweights weighed 10 tons or 20,000 pounds. (Tr. 534, Ex. C-95). The forklifts in use were model 1044C-54 Series II. (Tr. 534-535, Ex. C-87). The outriggers were not deployed which could have increased the stability of the lift. (Tr. 548). The CSHO testified that, based on the extension of the booms and the angle of operations, the load charts for that forklifts indicated that the maximum allowable load capacity for the procedure was 11,000 pounds. (Tr. 540-544, Ex. C-5). The lift exceeded the combined capacity of the forklifts by 9,000 pounds. (Tr. 544). Therefore, Respondent violated the applicable American National Standard Institute (ANSI) standard which requires that forklift operators "[h]andle only loads within the rated capacity of the truck." ANSI B56.1-1969 §605(b) (Ex. C-42 at p 7, ¶ 605B).

The CSHO further testified that he observed a hydraulic hose failure on one of the two forklifts used during the hoisting operations. (Tr. 544-545). He asserted that the hose ruptured immediately after the second counterweight was loaded. There was foaming liquid where the internal hydraulic fluid penetrated through the outer jacket of the hose. The foam had emulsified from the pressure of the release. (Tr. 546). He explained that all forklifts, boom and fork operations and the outrigger operations are dependent upon a single hydraulic system. (Tr. 545).

Respondent asserts that it operated according to an engineer's drawing which called for two forklifts. Therefore, it operated in good faith in compliance with those drawing. Respondent's argument is without merit.

The CSHO testified that the plan relied on by Respondent was not followed and that it was not representative of the manner in which the forklifts were configured. Specifically, the drawing reflects the crane as originally manufactured. However, the forklift used had been modified with an eight-foot vertical adjusting mass at the connection to the forklift. (Tr. 536-537, Ex. C-4). Most importantly, the plan signed off on by the engineer was for an eight ton lift, not a ten ton lift. (Tr. 536-537). Therefore, the lift exceeded the engineered plan used by Respondent by two tons. Respondent did not rebut the CSHO's testimony. Respondent's assertion of good faith is without merit and I find that the evidence establishes that Respondent violated the standard as alleged[10].

The CSHO testified that exposed employees included laborers, the truck operators, and Manuel Herrera himself, who admitted to operating one of the powered industrial trucks. (Tr. 546-547). Manuel Herrera was present during the lift operations. (Tr. 546). I find that he knew, or with the exercise of reasonable diligence could have known of the violative condition.

Characterization and Penalty

The Secretary proposed a penalty of $6,160 penalty for this item. The CSHO testified that the results of a lift failure would likely be death or serious injury. The violation was properly characterized as serious. Also, the severity of the violation was high. (Tr. 547). The probability of an accident was considered to be "greater" because of the amount of weight exceeding the limits. On this basis, the Secretary arrived at an unadjusted gravity-based penalty of $7,000. After applying the statutory adjustments, the Secretary arrived at a proposed penalty of $6,160. I

[10] In any event, good faith is a statutory criterion used when determining a penalty and generally is not a defense to a violation. Good faith is a defense against a charge of willfulness. *Williams Enterp., Inc.,* 13 BNA OSHC at 1256-57. However, this item was not alleged to be willful.

find that the Secretary properly considered the statutory factors in arriving at the proposed penalty, and it is assessed.

Citation 1, item 6

The Allegations

Citation 1, item 6 alleges that Respondent seriously violated 29 CFR § 1926.602(d) on the ground that, on or about December 6, 2012[11],

> The employee operating the JLG Lull Telehandler Rough Terrain Fork Lift #10, Model # 1044C-54 Series II, Serial # 0160029366, to load crane counterweights was not a qualified fork lift operator.

The cited standard requires that powered industrial truck drivers be trained in accord with the standard for powered industrial trucks at 29 CFR §1910.178(l) which provides:

> (l) Operator training. (1) *Safe operation.* (i) The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).

(ii) Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (l), except as permitted by paragraph (l)(5).*Merits*

The evidence establishes that Respondent is a construction contractor and was operating powered industrial trucks. Therefore, Respondent was required to ensure that its truck operators were properly trained. The cited standard applies.

During the inspection, the CSHO interviewed employee Louis Lara and observed him in one of the forklifts during the tandem lift operation. (Tr. 550-551). After being asked several

[11] The citation originally alleged that the violation occurred on December 1. At the hearing, the CSHO explained that the date was entered by mistake and that the alleged violation took place on December 6. (Tr. 552-553). The citation was amended without objection to reflect the correct date. (Tr. 553).

general questions about safety, the CSHO directly asked Lara if he had any powered industrial truck or forklift training. Lara replied that he had no such training. (Tr. 551). Manuel Herrera, who was present during the interview, told the CSHO that Lara was not operating the forklift. Rather, Herrera asserted that he was operating it and that Lara was only sitting in the machine. However, the CSHO testified that Lara operated one of the two forklifts involved in the tandem lift. (Tr. 588).

James Sal Herrera testified that Lara had been trained to operate the forklift. Herrera asserted that Lara had operated forklifts before coming to work for Respondent. (Tr. 749). He further testified that when Lara came to work for Respondent, he had to be trained on their machines, which were different than the type Lara was used to driving. (Tr.749). According to Herrera, Lara was trained by one of his brothers and received a yearly refresher course along with all the other forklift operators. (Tr. 749).

Respondent also asserts that Lara, whose native language is Spanish, speaks only broken English. (Tr. 748). As a result, it contends that the CSHO was not able to effectively communicate with him. The CSHO testified that, while Lara might have been a Spanish speaker, when interviewed, he spoke English. (Tr. 588).

I find that the preponderance of the evidence establishes that that Lara operated the forklift without the proper training. The CSHO testified that Lara was operating the forklift. (Tr. 588). Had Lara been merely sitting in it, he could have communicated that to the CSHO during the interview. Similarly, Lara could have told the CSHO that he received training from one of the Herrera brothers. Indeed, Manuel Herrera was present during the interview of Lara. If Lara had been trained by him or one of his other brothers, nothing prevented him from correcting Lara. This is especially so if there had been a language problem that prevented Lara from fully

understanding the question or providing a coherent answer. Finally, when the CSHO inquired about Lara's training, Herrera's response was only that it was like "driving a truck." (Tr. 552).

Respondent could have rebutted the Secretary's *prima facie* showing of a violation by introducing documentary evidence to demonstrate that Lara had been trained; or it could have called Lara to testify and explain his training. Respondent did neither. Moreover, James Sal Herrera's assertion that Lara was trained by his brothers fails to establish the nature or sufficiency of the training.

Supervisor, Manuel Herrera was present at the time Lara was operating the forklift. As the supervisor and superintendent, he knew or with the exercise of reasonable diligence could have known that Lara was not properly trained. Therefore, Respondent had knowledge of the violation. At a minimum, Lara and Manuel Herrera were exposed to the hazard posed by an untrained operator operating the forklift.

Characterization and Penalty

The Secretary proposed a penalty of $4,400 for this violation. The evidence establishes that the violation was serious. The CSHO testified that the severity of the violation was high because death or serious harm could result from an accident that occurred because the forklift was operated by an untrained operator. (Tr. 559). The CSHO also testified that the probability of an accident was "lesser," resulting in a gravity-based penalty of $5,000. After applying the aforementioned statutory factors, the Secretary proposed a penalty of $4,400. I find that the Secretary properly considered the statutory factors, and that the proposed penalty is appropriate.

Citation 1, item 7

Allegation

Citation 1, item 7 alleges a serious violation of 29 CFR §1926.1408(e) on the grounds that on or about December 1, 2012:

(a) On the east side of the building, the employer assumed that the overhead primary and secondary lines located on Fourth Street overhead primary and secondary power lines located on Fourth Street were de-energized where a crane was operating;

(b) On the east side of the building, the employer did not confirm with the utility owner/operator that the overhead power lines located on Brooklyn Avenue continued to be de-energized where the crane was operating.

The cited standard provides:

> (e)*Power lines presumed energized.* The employer must assume that all power lines are energized unless the utility owner/operator confirms that the power line has been and continues to be de-energized and visibly grounded at the worksite.

Merits

The evidence establishes that Respondent is a construction contractor and that, at all relevant times, it was working near and around overhead power lines. The standard applies.

As discussed in Citation 2, item 2, the evidence demonstrates that Respondent's crane was operating in proximity to both the Fourth Street and Brooklyn Avenue power lines. The evidence also establishes that Respondent failed to confirm that the overhead power lines were de-energized. To the contrary, when he saw that jumpers were placed on the lines, James Sal Herrera "assumed" that they were de-energized. (Tr. 716, 730-731, 807). Indeed, Herrera admitted that he never specifically asked if the lines were energized and was never told by Solar

which lines were de-energized. (Tr. 728). Moreover, when told by Solar that he would take care of the matter, Herrera simply concluded that they were no longer an issue. (Tr. 781).

That the Brooklyn Avenue lines were de-energized reduces the gravity of the violation of instance (b), but does not exculpate Respondent. The standard requires the employer to "confirm" that the lines are de-energized and presupposes that, without such confirmation, the lines may be energized. The purpose of the standard is to eliminate the margin of error.

After Hurricane Sandy struck the area, there were widespread power outages. (Tr. 242). The power was restored on Long Island by the end of November. (Tr. 243). Despite the widespread damage that could have affected the grounds, and repairs which could have inadvertently re-energized the Brooklyn Avenue lines, Respondent assumed, but never confirmed, that the Brooklyn Avenue lines remained de-energized, (Tr. 624). Rather, the evidence is that Respondent fully relied on Solar to take care of the matter and never contacted LIPA to confirm that the power remained out on Brooklyn Avenue. (Tr. 702). Finally, Manuel Herrera told the CSHO that, in clear violation of the standard, he believed it was all right to work around power lines unless specifically told that the lines were energized. (Tr. 433). The evidence establishes that Respondent failed to comply with the cited standard.

The CSHO testified that Respondent's failure to confirm that the lines were de-energized exposed all the employers on the site to the hazard of posed by energized power lines. (Tr. 555-557)

James Sal Herrera claimed that he was not aware that he was required to confirm that the lines were de-energized (Tr. 729, 731). Whether or not employers are aware of a reasonable interpretation of an OSHA regulation and fully understand it, they are charged with knowledge and are responsible for compliance. *Ed Taylor Constr. Co. v. OSHRC,* 938 F.2d 1265, 1272 (11th

Cir. 1991). Accordingly, the evidence establishes that Respondent knew or with the exercise of reasonable diligence could have known of the violative condition.

Characterization and Penalty

The Secretary proposed a penalty of $6,160 for the violation. The CSHO testified that the severity of the violation was high because of the likelihood could have resulted in death or serious and permanent injury. (Tr. 555). Therefore, the violation was properly characterized as serious.

According to the CSHO, the probability of an accident was greater because of the proximity of the cranes to both the Fourth Street and Brooklyn Avenue power lines, and because the Fourth Street power line was energized. (Tr. 555-556). This resulted in a gravity based penalty of $7,000. (Tr. 558). The CSHO also testified that the statutory factors of size, history and good faith were applied as discussed *supra*, resulting in a proposed penalty of $6,160. (Tr. 558-559).

Respondent asserts that this violation, along with Citation 1, items 4 and 8 are duplicative of the violations contained in Citation 2. This issue will be discussed, *infra.*

Citation 1, item 8

Allegation

Citation 1, item 8 alleges that, on or about December 1, 2012, Respondent violated 29 CFR §1926.1408(g)(1) on the grounds that employees were not trained to recognize the hazards; the method to prevent contact; or the procedures to follow in the event that contact was made with the power lines. On the east side of the third floor of the worksite, employees were setting precast concrete floor planks with the crane, within 8 feet of overhead primary and secondary

power lines. The primary power lines were energized with 13,200 volts phase to phase and the secondary power lines were energized within 120-240 volts phase to ground.

The cited standard provides:

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

Merits

The evidence establishes that Respondent is a construction contractor and that it was performing work in the proximity of an energized power line. The standard applies.

During the inspection, the CSHO learned from interviews with Superintendent, Manuel Herrera and other employees that employees who worked with crane equipment at the site had not received training on such topics as hazard recognition, preventive measures to take in case of contact with an energized line, personal protective equipment, how to respond in the event of

contact, and other topics set forth in the cited standard. (Tr. 561-562). Similarly, James Sal Herrera testified that he did not tell his nephew and crane operator, Chris Herrera, that he would be working around power lines. (Tr. 719-721). When asked if he thought it important that the crane operator be informed that he would be working around power lines, James Sal Herrera replied that "hindsight is always 20/20." (Tr. 721). Moreover, Manuel Herrera told the CSHO that he received some prior OSHA training and was aware of the training requirements. However, he did not provide any training to the employees with respect to crane operations in proximity to power lines. (Tr. 561-562). The evidence establishes that Respondent failed to comply with the standard.

All employees who worked around the crane were exposed to the hazard of electrocution. (Tr. 561). The violation was properly characterized as serious. Also, Respondent knew, or with the exercise of reasonable diligence could have known that it failed to provide its employees with the requisite training.

Characterization and Penalty

The evidence establishes that the violation exposed employees to the hazard of electrocution. The violation was serious. The Secretary proposed a penalty of $4,400 for the violation. The CSHO testified that, because employees were exposed to the hazard of electrocution, the severity of the violation was high. (Tr. 563). However, the probability of an accident caused by the violation was rated as "lesser," resulting in a gravity-based penalty of $5,000. After considering the statutory factors, the Secretary proposed a penalty of $4,400. I find that the proposed penalty is appropriate, and it is assessed.

Citation 1, item 9

Allegation

Citation 1, item 9 alleges that Respondent committed a serious violation of 29 CFR §1926.1412(c)(1) on the grounds that, on December 1, 2012, Respondent's Liebherr Mobile Crane, Model #LTM 1200-5.2 268 Ton, Serial # 070 495, was not inspected by a qualified person after it was assembled.

The cited standard states:

> (c) *Post-assembly*
> (1)Upon completion of assembly, the equipment must be inspected by a qualified person to assure that it is configured in accordance with manufacturer equipment criteria.

Merits

The evidence establishes that Respondent is a construction contractor and that crane operator Anthony Ferrara assembled the crane on December 1, 2012. The standard applies.

The CSHO testified that, on December 1, 2012, Anthony Ferrara, told him that he forgot to inspect the crane after assembling it that day. (Tr. 564-566). Ferrara told the CSHO that the crane was last inspected several days earlier on a separate job. (Tr. 564-566). When the CSHO asked him for documentation for the most recent crane inspection, Ferrara produced from the crane a "Crane Operator Daily Inspection Checklist" dated November 29, 2012, which was from a different worksite. (Tr. 565-566, Ex. C-70). In a subsequent interview, several months later, Ferrara recanted his earlier statement and asserted that the crane was inspected on December 1, 2012. (Tr. 606-607). Superintendent, Manuel Herrera, told the CSHO that he had not spoken to the crane operator to ensure that the crane was inspected as required. (Tr. 566-567).

The Secretary established a *prima facie* violation and Respondent failed to rebut the Secretary's evidence. Respondent refers to the testimony of an NEP crane operator Saul

Herrera[12] that he inspect[s] the crane each day and completes a daily inspection log. I find that Saul Herrera's testimony had no probative value. First, Saul Herrera did not operate the crane at issue. (Tr. 672). Second, his testimony was inconsistent and contradictory. According to Herrera, when he first started working at the site, the Fourth Street line was already moved. (Tr. 677). However, the evidence establishes that the line was not moved until after the December 6 visit of the CSHO. Indeed, in his deposition, Herrera stated that he was not at work when OSHA showed up. (Tr. 681). Yet, in his deposition, he also stated that he first learned from that they were power lines when OSHA showed up. (Tr. 681). He did not explain how he could have learned anything during the OSHA inspection when he did not show up until after the inspection.

He then testified that, when he first got to the site, he did not notice the overhead power lines. (Tr. 679). Yet, he explained that when he got to the site, he too thought the power lines were telephone lines because in New York City, where he usually works, power lines are buried underground and phone lines are above ground[13]. (Tr. 680). Moreover, while Saul Herrera testified that it was Respondent's regular practice to conduct a daily inspection, he could not testify from his own knowledge whether Ferrara conducted that inspection on December 1, especially since he asserted that he did begin work at the site until after that date.

James Sal Herrera testified that Respondent's normal operating procedure after assembling a crane is to conduct a walk around inspection, check everything, and make sure that it's working before starting operations. (Tr. 685). However, Ferrara was not called to testify and Respondent did not produce the relevant log book to the CSHO.

The evidence indicates that these log books are normally kept in the crane and are readily accessible to the driver. (Tr. 675). If Ferrara had filled out the log books for December 1, he

[12] Saul Herrera is the nephew of the principals of Respondent.

[13] Saul Herrera's assertion that he believed that the power lines were telephone lines mirrors the excuse made by owner James Sal Herrera. (Tr. 718, 801-802).

failed to explain why he failed to produce them when asked by the CSHO. Further, if there was a language issue that kept Ferrara from understanding the request, Manuel Herrera was present during the interview and could have produced the logs.

Manuel Herrera was the supervisor on the site. He told the CSHO that he had not spoken with Ferrara to ensure that the crane was properly inspected. (Tr. 566-567). Manuel Herrera also told the CSHO that he doesn't talk to the crane operator. Rather, the operator shows up and sets up the crane. Herrera also told the CSHO that, when the crane is ready, the operator informs him that he is ready to work. Aside from that, there is no other interaction between himself and the crane operator. (Tr. 566-567). This failure to perform his supervisor functions constitutes a lack of reasonable diligence and demonstrates that, with the exercise of such diligence, Respondent could have known that Ferrara failed to conduct the requisite inspection.

The CSHO also testified that the failure to conduct the post assembly inspection exposed all the employees in and around the crane to the possibility of a catastrophic failure of the jib or a displacement of a counterweight. (Tr. 567).

The violation was established.

Excluded Logs

At the hearing, Respondent attempted to introduce what it claimed were log sheets for the crane. Although Respondent refers to them in its brief, at the hearing the Secretary objected to its use because they were not produced during discovery. (Tr. 686-692). When asked to explain its failure to produce the sheets during discovery, Respondent refused to do so in open court, and insisted that he provide an explanation off the record. (Tr. 687-688). Reminding Respondent that this was a public hearing, this Court refused to allow it. (Tr. 687-688).

Under the Federal Rules of Evidence (FRE) 403:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

These inspection records were made by Respondent. It knew the records existed and who had custody of them. Therefore, it cannot claim that the evidence was newly discovered. Yet, during discovery, Respondent failed to indicate to the Secretary that these documents existed and that it was making a good faith effort to obtain them or an acceptable copy for use at the hearing. This constituted a lack of diligence which warranted exclusion. *Cf. U.S. v. Schwartzbaum,* 527 F.2d 249, 254 (2d Cir. 1975)(finding burden on party seeking new trial that it could not, with due diligence, have discovered the evidence before, or at the latest, at trial); *U.S. v. Costello*, 255 F.2d 876, 879 (2d Cir. 1958)(opining it fundamental that defendant seeking a new trial under any theory must satisfy the district court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, at the trial).

Moreover, to preserve a claim of error on an evidentiary ruling, the party claiming the error must inform the court of its substance by an offer of proof, unless the substance was apparent from the context. Fed. R. Evid. 103(a)(2). This is especially true when evidence is excluded under FRE 403. In the absence of any proffer that would connect the inspection sheets with the day in question, the evidence has no probative value. *U.S. v. Al Jaber,* 436 F. App'x. 9, 11 (2d Cir. 2011). Here, Respondent made no such proffer. Therefore, it cannot be determined whether the evidence had any probative value to establish that Respondent actually conducted the required inspections. Indeed, when James Sal Herrera was asked by Respondent's counsel whether any of the inspection sheets at issue pertained directly to December 1, he either could not or would not answer in the affirmative. (Tr. 612). He testified only that, the night before, he

looked through the inspection reports "*hoping* to find some pertinent information." (Tr. 692)(emphasis added).

The decision to admit exhibits not revealed during the prehearing stage is a matter left to the discretion of the judge. *See Consol. Rail Corp.*, No. 81-1025, 1982 WL 139716 (O.S.H.R.C.A.L.J. March 11, 1982). Here, Respondent failed to satisfy its burden of establishing either that the evidence had substantial probative value, or that it exercised due diligence in revealing, discovering or obtaining the evidence. Accordingly, it was properly excluded.

Characterization and Penalty

The severity of the violation was considered to be high because of the likelihood of death or serious injury in the event of a catastrophic crane failure due to an inadequate inspection. (Tr. 568). The violation was properly characterized as serious. The probability of an accident was considered to be "lesser," resulting in a gravity based penalty of $5,000. (Tr. 568). After adjusting for the statutory factors set forth *supra*, the Secretary arrived at a proposed penalty of $4,400. I find that the Secretary properly considered all relevant factors and that the proposed penalty is appropriate.

Citation 1, item 10

Allegation

Citation 1, item 10 alleges a serious violation of 29 CFR §1926.1424(a)(2)(ii) on the grounds that, on or about December 1, 2012, the swing radius of the Liebherr Mobile Crane was not marked to prevent employees from entering the hazardous area.

The cited standard provides:

> (a) *Swing radius hazards*
> (1) The requirements of paragraph (a)(2) of this section apply where there are accessible areas I which the equipment's rotating superstructure (whether permanently or temporarily mounted) poses a reasonably foreseeable risk of:

(ii) Pinching/crushing an employee against another part of the equipment or another object.

Merits

Respondent is a construction contractor and was using a crane in the proximity of employees. The standard applies.

During the inspection, the CSHO photographed Respondent's crane set up, with both its forward and rear outriggers deployed. (Tr. 569, Ex. C-57). The CSHO testified that, the riggers would rig each plank and approach the crane. As the superstructure would rotate from west to east, the employees were exposed to being crushed between the counterweight and the outrigger. Also, the riggers would occasionally walk up and approach the superstructure of the crane and communicate with the operator, which placed them between the outriggers. (Tr. 570). According to the CSHO, there were no barriers or warning lines around that area. (Tr. 570). The evidence establishes the violation.

The CSHO testified that Supervisor, Manuel Herrera was present at the site when this was occurring. (Tr. 570-571). Respondent knew, or with the exercise of reasonable diligence could have known of the violative condition.

Characterization and Penalty

The Secretary proposed a penalty of $4,400 for the violation. The severity of the violation was considered high because of the likelihood of death or serious injury in the event that an employee got crushed or pinned between the counterweight and the outrigger. (Tr. 571). The violation was properly characterized as serious.

Despite the potential severity of an injury, the probability was rated as "lesser," resulting in a gravity based penalty of $5,000 for the violation. (Tr. 571). After applying the statutory

factors, discussed *supra*, the Secretary proposed a penalty of $4,400. I find that the proposed penalty properly reflects the statutory considerations and is appropriate.

Duplicative Defense

In its brief, Respondent asserts that the Citation 2, items 1 and 2 and Citation 1, items 4, 7 and 8 are duplicative and that, at a minimum, the penalties for the duplicative violations should be vacated. (Resp'ts Br. at pp. 6-7, 12).

Under Commission precedent, violations are considered duplicative only where they require the same abatement conduct or where abatement of one citation *will necessarily* result in abatement of the other item as well. *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1024 (No. 91-2834E, 2007) (consolidated); *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2207; *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2056-57 (No. 90-2873, 1992*); R & R Builders*, 15 BNA OSHC 1383, 1391-92 (No. 88-252, 1991).

Although a worksite condition may violate more than one standard, section 5(a)(2) of the Act requires an employer to comply with all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards *may* be satisfied by compliance with the more comprehensive standard. Thus, there is no unfair burden imposed on an employer when the same or closely related conditions are the subject of more than one citation item and a single action may bring an employer into compliance with the cited standards. *See, H.H. Hall Constr. Co.,* 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981).

I find that the violations were not duplicative.

Respondent asserts that the four violations could have been abated by relocating the Fourth Street line. However, Respondent did not have the authority or ability to relocate the lines. That was a matter that was between LIPA and Vordonia, the general contractor. Where, on

a multi-employer construction worksite, an employer lacks the authority or ability to properly abate a violative condition, that employer must still use alternative measures to protect its employees. *Electric Smith, Inc. v. Secretary of Labor,* 666 F.2d 1297, 1298 (9th Cir. 1982); *Capform, Inc.,* 16 BNA OSHC 2040, 2041-42 (No. 91-1613, 1994). Therefore, Respondent was obligated to take feasible alternative measures to protect its employees from the energized line. The evidence demonstrates that, short of removing its employees from the site, Respondent could have protected its employees from each of the cited hazards only by separate and unrelated feasible alternative measures. However, the evidence reveals that Respondent not only failed to take alternative measures, it took no measures at all.

Citation 2, item 2 alleged that Respondent's crane and its rigging was operating within 10 feet of the energized lines. Among the abatement method for that violation was to have the crane stage the planks along another section of the worksite or otherwise keep the crane and rigging a safe distance from the lines.

Citation 2, item 1 did not involve the crane. Rather it involved the proximity of the lines to employees working on the building. That violation was totally independent of Citation 2, item 2. Even had the crane been removed, which it was not, that violation would have occurred because employees were working inches from the energized lines. As with Citation 2, item 1, part of the hazard could have been eliminated by staging the prefabricated planks at another part of the worksite. However, after the initial inspection, and warnings from the CSHO that the energized lines exposed employees to the hazard of electrocution, Respondent had its employees build a wall literally inches from the energized lines and actually built part of the wall around the lines. This could not be abated by simply changing the staging of the planks. James Sal Herrera testified that he did not discuss the hazard with his foreman and attributed that failure to "poor

planning." (Tr. 791). "Poor planning" does not constitute effective alternative abatement. Respondent should not have proceeded building the wall until it either found a way to do so without exposing its employees to the hazard of electrocution, or halted work until it prevailed upon the Vordonia to have the lines moved.

In Citation 1, item 4, Respondent failed to post signs or otherwise warn employees about the hazards of working near energized lines and failed to identify those lines. Even if Respondent ensured that employees were working a safe distance from the Fourth Street line, it had the obligation to identify and warn employees about those lines, since they remained energized and were in close proximity to the building. Therefore, the violation was not duplicative of the hazards identified in Citation 2.

Citation 1, item 7 prohibits Respondent from assuming that the lines were de-energized. As long as employees or equipment were working near lines, the employer has the duty to specifically confirm that the lines were de-energized. It does not matter if the lines were de-energized, as long as employees were working around power lines. Indeed, even after the Brooklyn Avenue power lines were de-energized, Respondent was required to confirm that fact. Abatement had nothing to do with keeping cranes or employees a safe distance from energized lines.

Finally, Citation 1, item 8 requires that employees working with or around cranes be properly trained about power lines. This obligation does not depend on whether the lines are energized. It is a precautionary standard, to ensure that employees know how to avoid getting too close to a power line and what to do in the event that they make contact with a power line. Also, this item was not duplicative of Citation 1, item 4, which applies to all employees, not those only working around cranes. Item 8 requires special training for employees working around cranes

and, therefore, has more specific requirements than item 4 which merely requires that all employees be warned of the hazards posed by the lines.

Despite the fact that the violations alleged in this case, performing work in proximity to an energized power line, result in the same general hazard—electrocution—the conditions giving rise to the violations are separate and distinct. Accordingly, I conclude that Respondent's non-compliance with the standards is not duplicative. *H.H. Hall,* 10 BNA OSHC 1042, 1046.

The Commission has wide discretion in the assessment of penalties for distinct but potentially overlapping violations. *Id.* Here, however, I find that the violations were sufficiently independent to justify separate penalties. Based on the evidence, I find that Respondent's argument concerning the duplicative nature of certain violations is flawed --- especially as it relates to the two willful items. After the December 1 inspection, Respondent was warned that the crane could not place the planks along Fourth Street and that it should stage the planks elsewhere. Despite assurances that it would heed the CSHO's warnings, Respondent resumed its hazardous activities as soon as the CSHO left the site without implementing any of the CSHO's reasonable abatement measures. Moreover, the evidence establishes that it engaged in even more dangerous behavior by having employees erect the masonry wall mere inches from the energized lines. Under these circumstances, to accept Respondent's assertion that these items are duplicative would ignore the separate, distinct, and potentially fatal hazards to which its employees were exposed.

Citation 3, item 1

Allegation

Citation 3, item 1 alleges a repeat[14] violation of 29 CFR §1926.701(b) on the grounds that, on or about December 1, 2012, on the east side of the third floor of the site, the rebar extending from the masonry block wall along the edge of the building was not guarded where precast concrete floor planks were being set.

The cited standard provides:

> (b) *Reinforcing steel* All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

Merits

The evidence establishes that Respondent is a construction contractor and that its employees were working near vertical rebar (Tr. 573, Ex. C-39). The standard applies.

On December 1, 2012, the CSHO observed and photographed employees working near vertically protruding, but unguarded rebar. (Tr. 572-576, Ex. C-39, C-63). Exhibit C-39 shows a laborer engaged in setting a precast plank while in actual physical contact with vertical rebar. (Tr. 573). The rebar was vertical at various heights. (Tr. 573). The CSHO explained that the vertical rebar extended upward out of the masonry block wall from the lower level. These blocks were approximately seven inches wide and the rebar was placed at the center. The edge of the precast plank, when set into its final position, rested on that remaining 3.5 inches. While placing the planks, the employees had to be cognizant of where they landed so that they were placed on the masonry block. This required the employee to get close to the end of a plank to

[14] This citation is identical to serious Citation 1, item 6 issued to NEP, except that the citation issued to NEP was not classified as a "repeat". However, based on the parties' stipulation that the citations issued to MSI control for the purposes of this case, it is the repeat citation issued to MSI that is before this Court.

confirm its location before setting it down. The employee could have inadvertently set the plank down, gone past the wall and fallen onto the rebar. (Tr. 575-576).

At the hearing, James Sal Herrera testified that the rebar does not come with caps. Rather, they place plastic rebar caps on the rebar to protect employees from impalement. (Tr. 750, Ex. C-14). He explained that one of the problems is that employees working in the area accidentally knock off the caps. (Tr. 750). When this happens, the employee is supposed to pick up the cap and replace it, but not all employees do so. (Tr. 751).

The photographic evidence supports Herrera's assertion that protective caps were placed on the rebar. (Exs. C-14, R-4). As noted, *supra*, in the Second Circuit, when the sufficiency of an employer's safety program is at issue, the burden is on the Secretary to establish that the program was inadequate. The Secretary met that burden.

Even assuming Herrera's testimony was sufficient to establish that Respondent had a work rule requiring employees to replace dislodged rebar caps, there is no evidence that the rule was effectively communicated, or that Respondent took steps to either discover violations or effectively enforce those rules when violations were discovered. To the contrary, the evidence demonstrates that only a small percentage of the rebar was capped. Therefore, any rule requiring employees to replaced dislodged caps was honored more in the breach. (See e.g. Exs. C-37, C-39, C-57, C-59, C-63, C-69). The Secretary established that Respondent failed to have an effective work rule.

The uncapped rebar was in plain view. Respondent knew or with the exercise of reasonable diligence could have known that many of the rebar near employees were uncapped and that employees were ignoring any rule to replace the caps.

The evidence establishes that employees were exposed to the hazard of exposure from the uncapped rebar. (Tr. 575, Exs. C-39, C-63, C-64).

Characterization

The Secretary alleged that the violation was repeated.

1. Legal Standard

A violation is repeated if the employer was previously cited for a substantially similar violation and the citation became a final order before the occurrence of the alleged repeated violation. *Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2105 (No. 09-0240, 2012); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979).

> Where the citations involve the same standard, the Secretary makes a *prima facie* showing of "substantial similarity" by showing that the prior and present violations are for failure to comply with the same standard. The burden then shifts to the employer to rebut that showing.

Gem Indus. Inc., 17 BNA OSHC 1861, 1866 (No. 93-1122, 1996), *aff'd* 149 F.3d 1183 (6th Cir. 1998) (not selected for publication).

2. Analysis

The Secretary established that, on March 31, 2010, MSI was issued a citation for a serious violation of 29 CFR §1926.701(b) for not guarding protruding reinforcing steel. (Tr. 578, Exs. C-53, C-54). Both the standard and the hazard were the same as in the instant case. (Tr. 580). On April 23, 2010, MSI and OSHA executed an informal settlement agreement in which MSI withdrew its Notice of Contest. (Tr. 579, Ex. C-55, Ex. J-1, para. 24). This settlement rendered the citation a final order of the Commission. Accordingly, I find that the Secretary properly cited the violation as repeated.

Penalty

The Secretary proposed a penalty of $5,280. The CSHO testified that the severity of the violation was low. He noted that this was not a situation where employees might fall from an elevated height and be impaled on the rebar. Rather, the hazard was that if an employee contacted a rebar he could suffer a laceration that would require stitches. Therefore, the severity was considered to be low. (Tr. 580). The probability of the violation was considered to be "lesser", resulting in a gravity-based penalty of $3,000. This penalty was doubled to $6,000 because the violation was repeated. From that gravity-based penalty, the Secretary considered the statutory factors, reducing the proposed penalty to $5280. (Tr. 581). I find that the proposed penalty is consistent with the factors set forth in the Act and is assessed.

Citation 4, item 1

Allegation

Citation 4, item 1 alleges that Respondent committed an other-than-serious violation of 29 CFR §1926.502(k)(3) on the grounds that on or about December 1, 2012, employees were engaged in precast erection operations utilizing a controlled access zone, but Respondent did not maintain a copy of the fall protection plan as required by the standard.

The cited standard states in relevant part:

> (k) *Fall protection plan.* This option is available only to employees engaged in leading edge work, precast concrete erection work, or residential construction work (See § 1926.501(b)(2), (b)(12), and (b)(13)) who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment. The fall protection plan must conform to the following provisions.
>
> * * *
>
> (3) A copy of the fall protection plan with all approved changes shall be maintained at the job site.

Merits

The evidence establishes that Respondent was engaged in precast concrete erection work and that it chose to protect its employees with a fall protection plan rather than conventional fall protection. (Tr. 582-583, 758-760, Ex. J-1, para. 21). Therefore, it was required to maintain a copy of its fall protection plan at the worksite. The standard applies.

During the inspection, the CSHO asked James Sal Herrera to see a copy of the plan. No copy of the plan was provided. (Tr. 583). The Secretary made a *prima facie* showing of a violation of the standard. Respondent offered nothing in rebuttal to explain its failure to produce a written plan. Its failure to either produce the plan or explain its failure to do so leads to the logical inference that no written plan existed. *Manganas Painting Co.,* 21 BNA OSHC at 1981. Therefore, the preponderance of the evidence establishes that Respondent failed to comply with the requirements of the standard.

The CSHO testified that the laborers and signalman were actually working in the fall protection zone and exposed to fall hazards. The crane operator went up to the work area prior to starting hoisting operations and was walking around the immediate area, exposing him to fall hazards. Also, Manuel Herrera admitted to being in the work area earlier in the day and, therefore, was exposed to fall hazards. (Tr. 584-585).

Respondent knew it was using an engineered fall protection plan. Therefore, it knew or, with the exercise of reasonable diligence could have known that it did not maintain a copy of that plan at the worksite. The violation was established.

No penalty was proposed for the violation and none will be assessed.

Findings of Fact and Conclusions of Law

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

Conclusion and Order

Based upon the foregoing decision, it is ORDERED that:

1) Citation 1, item 1, alleging a serious violation of 29 CFR §1926.100(a), is AFFIRMED and a penalty of $6,160 is ASSESSED;

2) Citation 1, item 2, alleging a serious violation of 29 CFR §1926.251(a)(2)(iii), is AFFRIMED and a penalty of $6,160 is ASSESSED;

3) Citation 1, item 3, alleging a serious violation of 29 CFR §1926.251(c)(9), is AFFIRMED and a penalty of $4,400 is ASSESSED;

4) Citation 1, item 4, alleging a serious violation of 29 CFR §1926.416(a)(3), is AFFIRMED and a penalty of $6,160 is ASSESSED;

5) Citation 1, item 5, alleging a serious violation of 29 CFR §1926.602(c)(1)(vi), is AFFIRMED and a penalty of $6,160 is ASSESSED;

6) Citation 1, item 6, alleging a serious violation of 29 CFR §1926.602(d), is AFFIRMED and a penalty of $4,400 is ASSESSED;

7) Citation 1, item 7, alleging a serious violation of 29 CFR §1926.1408(e), is AFFIRMED and a penalty of $6,160 is ASSESSED;

8) Citation 1, item 8, alleging a serious violation of 29 CFR §1926.1408(g)(1), is AFFIRMED and a penalty of $4,400 is ASSESSED;

9) Citation 1, item 9, alleging a serious violation of 29 CFR §1926.1412(c)(1), is AFFIRMED and a penalty of $4,400 is ASSESSED;

10) Citation 1, item 10, alleging a serious violation of 29 CFR §1926.1424(a)(2)(ii), is AFFIRMED and a penalty of $4,400 is ASSESSED;

11) Citation 2, item 1, alleging a willful violation of 29 C.F.R. §1926.416(a)(1), is AFFIRMED and a penalty of $61,600 is ASSESSED;

12) Citation 2, item 1, alleging a willful violation of 29 C.F.R. §1926.1408(a)(2), is AFFIRMED and a penalty of $61,600 is ASSESSED;

13) Citation 3, item 1, alleging a repeat violation of 29 CFR §1926.701(b), is AFFIRMED and a penalty of $5,280 is ASSESSED;

14) Citation 4, item 1 alleging an other-than-serious violation of 29 CFR §1926.502(k)(3) is AFFIRMED and $0 penalty is ASSESSED.

SO ORDERED.

/s/

Keith E. Bell
Judge, OSHRC

Dated: September 28, 2015
Washington, D.C.