United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

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| Secretary of Labor,<br><br>Complainant<br><br>v.<br><br>FabArc Steel Supply, Inc.,<br><br>Respondent. | OSHRC Docket No.: **18-1859** |

Appearances:

Christian P. Barber, Esq.
Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee
For Complainant

Charity Parris, Environmental Health & Safety Director
FabArc Steel Supply, Inc., Oxford, Alabama
For Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

## DECISION AND ORDER

FabArc Steel Supply, Inc. (FabArc) is engaged in the business of manufacturing fabricated steel products for steel erection. On October 11, 2018, Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) Lynne Bollinger conducted an inspection of FabArc's facility located at 111 Meadow Lane, Oxford, Alabama. As a result of OSHA's inspection, the Secretary issued a Citation and Notification of Penalty (Citation) to FabArc on November 5, 2018, alleging three serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act).

Item 1 alleges a serious violation of 29 C.F.R. § 1910.132(f)(1)(iv) for not training employees regarding fall protection personal protective equipment limitations. The Secretary proposes a penalty of $7,853 for this item.

Item 2 alleges a serious violation of 29 C.F.R. § 1910.147(c)(4)(i) for not utilizing lockout/tagout procedures to control potentially hazardous energy when removing the motor for the East Blastec. The Secretary proposes a penalty of $9,523 for this item.

Item 3 alleges a serious violation of 29 C.F.R. § 1910.178(p)(1) for not taking a forklift out of service until it repaired its malfunctioning horn and an oil leak. The Secretary proposes a penalty of $ 6,282 for this item.

## JURISDICTION AND COVERAGE

FabArc timely contested the Citation. Thereafter, this case was designated for Simplified Proceedings under Subpart M, § 2200.203(a), of the Commission Rules of Procedure.[1] The Court held a hearing in this matter on April 24, 2019, in Anniston, Alabama. Both parties filed post-hearing briefs on June 3, 2019. The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to §10(c) of the Act (Exh. J-1, ¶1). FabArc also admits that at all times relevant to this action it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 13-14; Exh. J-1, ¶2). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and FabArc is a covered employer under § 3(5) of the Act.

For the reasons that follow, the Court **VACATES** Item 1, and **AFFIRMS** Items 2 and 3 of the Citation and assesses penalties in the amount of $8,500 for Item 2 and $5,600 for Item 3.

## BACKGROUND

FabArc engages in the business of manufacturing fabricated steel products for steel erection (Tr. 58). It employs an average of 300 employees at its Oxford, Alabama, facility (Tr. 58; Exh. J-1 ¶4). OSHA initiated an inspection of the facility following FabArc's report to OSHA on October 4, 2018, of an accident at the facility resulting in an employee's finger being amputated. The employee was in the process of loading onto a golf cart the motor of the Blastec[2] machine at issue in this proceeding when the motor flipped while the employee's hands were inside of the strap holding the machine (Tr. 26, 58-59). CSHO Bollinger[3] initiated an

[1] During the pendency of this action, the revised Commission's Rules of Procedure became effective on June 10, 2019.

[2] During the hearing, the terms "baghouse" and "dust collector" were used interchangeably to refer to the Blastec machine.

[3] CSHO Bollinger graduated from Georgia Tech with a bachelor's degree in Industrial Engineering. She worked 2 ½ years with Union Carbide as an Associate Industrial Engineer, and for 17 years as an Associate Engineer, eventually becoming a Senior Engineer. After Union Carbide, CSHO Bollinger was employed as a Manufacturing Safety Engineer with Communications Technology Corporation for 1 ½ to 2 years when she left to work for OSHA. CSHO Bollinger will have been employed with OSHA as a Safety Engineer for 10 years at the end of 2019. She is

inspection of the facility on October 11, 2018, by meeting with a representative of the company to explain why she was there. She conducted an opening conference, inspected the location of the accident, interviewed employees, inspected the fall protection equipment, and reviewed the lockout/tagout procedures and the forklift inspection records (Tr. 45, 59-60, 75, 80, 85; Exh. J-1 ¶6). CSHO Bollinger found no violations relating to the accident. However, she found alleged violations of the fall protection, lockout/tagout, and powered industrial trucks standards.[4] Those alleged violations are at issue here.

The evidence regarding the violations found by CSHO Bollinger reveals that at 4 a.m. on the day of the accident, maintenance employee #1, who described himself as leadman, received a note left by the night shift that an electric motor in the baghouse[5] was no longer working (Tr. 26-27, 28). Because the motor was not working it caused problems with the shop blaster. The motor was removed on the day of the accident and was subsequently replaced with a new one (Tr. 59-61; Exhs. J-2 - J-6). The malfunctioning motor was located at the top of the Blastec machine, at a height of approximately 18 feet (Tr. 29, 62, 64; Exhs. J-2, J-4; J-6). In order to access the motor, employees used a manlift (Tr. 30, 31; Exhs. J-1 ¶15, J-7).

Removing the motor was maintenance employee #1's first assignment for the day. He did not communicate this assignment to his supervisor before starting it because his supervisor does not arrive until 7 a.m. (Tr. 28, 43). Maintenance employee #1 testified maintenance get to the facility early to get the shop ready for the day shift (Tr. 28, 48). Therefore, he and another employee (maintenance employee #2) initiated the assignment by putting on their harnesses and taking the manlift to the top of the Blastec machine. Both employees were tied off to the basket of the manlift as they rode up (Tr. 31, 35, 43; Exh. J-1 ¶12). Maintenance employee #2 remained tied off in the manlift and was there as a "buddy" to observe in case anything went wrong (Tr. 38, 44). Maintenance employee #1 testified the manlift was situated to the left of the baghouse, without a gap between it and the baghouse and was not moved until he came off the top of the

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responsible for inspecting worksites and preparing reports (Tr. 55-57).

[4] OSHA's Regional Emphasis Program requiring forklifts in the facility to be included in an inspection was the basis for expanding the inspection to include the forklift at issue (Tr. 74-75; Exh. J-18).

[5] Maintenance employee #1 described the baghouse as "a blaster, steel shop blaster. Steel runs through it and it gets all of the scale off of it, but the baghouse is a dust collector. It's got filters in it with a electric motor, fan on top, it pulls the dust out of the machine into the filters, substance caught in barrels." (Tr. 27) The baghouse is attached to the blaster by a big pipe, but stands 3 to 8 feet away from the blaster (Tr. 27).

baghouse[6] (Tr. 39, 40, 45).

Once on top of the baghouse, maintenance employee #1 detached his fall protection from the manlift, exited and connected his lanyard to an eyebolt located on the top of the baghouse at foot level (Tr. 33; Exhs. J-1 ¶13. J-12). His usual practice was to tie off to the eyebolt because there was no other place to tie off to (Tr. 35). Although maintenance employee #1 had been on top of other baghouses in the facility to work on motors, this was the first time he had been on top of the instant Blastec machine in the seven years since it had been installed[7] (Tr. 34, 51). Maintenance employee #1 testified he had received fall protection training and had previously seen FabArc's lockout/tagout procedures (Tr. 40, 49; Exh. J-16).

While on top of the baghouse, maintenance employee #1 determined the motor had power, so he turned off the power at the isolation switch he located to the left of the blaster, which he testified killed all the power to the motor (Tr. 28-29, 31, 41; Exh J-10). The circuit feeding the motor was rated at 480 volts (Tr. 36, 69). After disconnecting the power, he verified the circuit was no longer energized by using a voltmeter (Tr. 36, 47). According to maintenance employee #1 the circuit could not be re-energized because he was the only one who could get to the isolation switch (Tr. 36, 46). He could not lock out the machine at the main disconnect because its locking mechanism was broken (Tr. 29, 41). A replacement for the locking mechanism had been ordered but had not yet arrived (Tr. 42). Once the power was turned off at the isolation switch, unhooked the wires, put straps around the motor and pulled it out of the top with an overhead crane (Tr. 29, 37, 38-39). The crane took the motor to the center of the bay and then south to a golf cart where it was to be lowered (Tr. 39).

CSHO Bollinger recommended the issuance of a citation for a violation of 29 C.F.R. § 1910.132(f)(1)(iv) because maintenance employee #1 was exposed to a fall hazard greater than four foot and he and the safety director did not demonstrate an understanding of the fall protection limitations when they told her anchoring the lanyard at feet level was safe (Tr. 65, 83). FabArc provided no fall protection training records during the inspection (Tr. 65).

CSHO Bollinger recommended the issuance of a citation for a violation of 29 C.F.R. §

[6] Maintenance employee #1 testified he did not leave the top of the baghouse until after the employee whose finger was caught in the strap and amputated had left the facility (Tr. 45).
[7] This machine is one of two baghouses in the East Shop. The facility also has one baghouse inside the West Shop and three on the outside of the West Shop (Tr. 33, 34).

1910.147(c)(4)(i) because, although FabArc had lockout/tagout procedures, they were not followed on the day of the accident in that employees could not attach a lock to the disconnect which was broken (Tr. 68-69; Exhs. J-10, J-16). CSHO Bollinger further testified that no locks were on the isolation switch to ensure it was not reenergized. Since two employees were working on the assignment, two locks should have been placed on the isolation switch to prevent unexpected energization (Tr. 70-72; Exh. J-10).

CSHO Bollinger also recommended issuance of a citation for violation of 29 C.F.R. § 1910.178(p)(1) based on her review of the inspection records for the forklift which revealed it had been used since February without a working horn, and had been used at times when it was leaking or having problems with the brakes (Tr. 75-76). The forklift was equipped with a yellow strobe light which CSHO Bollinger testified was a warning device on forklifts equipped with them (Tr. 86-87; Exh. J-1 ¶7).

Based on CSHO Bollinger's inspection of the facility, OSHA issued the Citation at issue in this case to FabArc on November 5, 2018.

**STIPULATIONS**

The parties submitted the following stipulations as a joint exhibit:

1. Jurisdiction of this action is conferred upon the Commission pursuant to Section 10 (c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et. seq.*, hereinafter the Act, 19 U.S.C. § 659(c).

2. At all times relevant to this action, Respondent was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 651(5).

3. On the date of the alleged violations, Respondent had a place of employment at 111 Meadow Lane, Oxford, Alabama (the worksite), where it engaged in the business of manufacturing fabricated steel products.

4. Respondent employs an average of 300 employees at its Oxford, Alabama, facility.

5. On October 4, 2018, an accident occurred at the worksite. On that date, Charity Parris, Respondent's Enforcement, Health & Safety Director, reported the accident to the Occupational Safety and Health Administration (OSHA).

6. OSHA Compliance Safety and Health Officer Lynn Bollinger, an authorized representative of Complainant, conducted an opening conference on October 11, 2018, and conducted the inspection of the worksite, Inspection No. 1352763.

7. As a result of the inspection, Complainant issued to Respondent a Citation and Notification of Penalty pursuant to Section 9(a) of the Act, 29 U.S.C. § 658(a).

8. The Citation and Notification of Penalty identifies and describes the specific violations alleged, the corresponding abatement dates, and the penalties proposed.

9. On or about November 15, 2018, by a document of the same date, Complainant received notification, pursuant to Section 10(c) of the Act, 29 U.S.C. § 659(c), of Respondent's intention to contest the aforesaid Citation and Notification of Penalty.

10. On October 4, 2018, in the facility's East Shop Detail Bay, two maintenance employees, [maintenance employee #1] and [maintenance employee #2], were directed to troubleshoot the dust-collector vacuum system for a Blastec shot blasting machine.

11. The employees used a boom lift to reach the top of the dust collector, where the motor controlling the vacuum system was located.

12. Both employees used personal fall protection harnesses attached to the boom lift.

13. Once at the top of the dust collector, in order to remove the motor [maintenance employee #1] exited the boom lift and stood on top of the dust collector, unclipping his harness from the boom lift and clipping it to a lifting eye on the corner of the dust collector at foot level. There was no other location to which he could attach, other than lifting eyes at foot level.

14. At some point before October 4, 2018, the main disconnect handle for the Blastec machine broke and a lock could not be applied to it.

15. Before performing work to troubleshoot and remove the dust-collector vacuum system's motor on October 4, the employees turned off a power isolating "light switch" that was located at least 20 feet above the floor, several feet from the motor, and accessible only to persons on top of the dust collector near the motor. No lock was used, contrary to Respondent's machine-specific lockout procedures.

16. Inspection records for the forklift truck used in the area of the dust collector documented that the forklift had been operated without a working horn for at least four months, and had been leaking fluid for two weeks.

17. The forklift's backup alarm was operational, as was a strobe light that activated when the machine was put into gear.

(Exh. J-1.)

## THE CITATION

*The Secretary 's Burden of Proof*

To establish a violation, "the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharma. Prods*., No. 78-6247, 1981 WL 18810, at *4 (OSHRC July 30, 1981), *aff'd in relevant part*, 681 F.2d 169 (1st Cir. 1982).

### Item 1: Alleged Serious Violation of § 1910.132(f)(1)(iv)

*Alleged Violation Description*

Item 1 alleges:

> On or about October 11, 2018- East Shop Detail Bay, employees were exposed to fall hazards when not being aware that anchoring a harness/lanyard to an eyebolt located at foot level would permit a free fall greater than six feet.

*Section 1910.132(f)(1)(iv)*

Section 1910.132(f)(1)(iv) provides:

> *Training.* (1) The employer shall provide training to each employee who is required by this section to use PPE. Each such employee shall be trained to know at least the following:
> . . .
> (iv) The limitations of the PPE[.]

*(1) Applicability of the Cited Standard*

Subpart I of the Occupational Safety and Health Standards in Part 1910 addresses personal protective equipment. On January 17, 2017, a new standard for fall protection in general industry became effective. That standard, found at 29 C.F.R. § 1910.140 sets forth the requirements for fall protection and provides, regarding the scope and application of the standard, "This section establishes performance, care, and use criteria for all personal fall

protection systems. The employer must ensure that each personal fall protection system used to comply with this part must meet the requirements of this section." 29 C.F.R. § 1910.140(a). The standard at § 1910.140(d)(2)(ii) further sets forth requirements for rigging personal fall arrest systems as follows:

> Personal fall arrest systems are rigged in such a manner that the employee cannot free fall more than 6 feet (1.8m) or contact a lower level. A free fall may be more than 6 feet (1.8 m) provided the employer can demonstrate the manufacturer designed the system to allow a free fall of more than 6 feet and tested the system to ensure a maximum arresting force of 1,800 pounds (8kN) is not exceeded.

The Secretary did not cite the new fall protection standard for the alleged violations here where maintenance employee #1 secured his lanyard at foot level, exposing himself to a free fall of more than 6 feet. Instead, the Secretary alleges a violation of the standard found at §1910.132 (specifically §1910.132(f)(1)(iv)) which, prior to the effective date of the new standard had long been considered broad enough to apply to fall hazards. Fall protection such as a safety harness was considered a form of personal protective equipment. *Bethlehem Steel Corp*., 10 BNA OSHC 1470, 1472 (No. 79-310, 1982); *Hackney Inc.*, 16 BNA OSHC 1806, 1807-08 (No. 91-2409, 1994); *Cleveland Electric Illuminating Co.*, 16 BNA OSHC 2091, 2093 (No. 91-2198, 1994).

The necessity of fall protection pursuant to § 1910.132, however, is premised on a hazard assessment by the employer that fall protection is necessary, as set forth in §1910.132(d):

> *Hazard assessment and equipment selection.* (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:
> (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;
> (ii) Communicate selection decisions to each affected employee; and
> (iii) Select PPE that properly fits each affected employee
> . . .

For the alleged violative conditions at issue, the standard found at § 1910.140(d)(2)(ii) is the more specific standard. The Secretary did not move to amend the Citation to allege this new fall protection standard. As the cited standard is more general and is premised on completion of a hazard assessment, it is not applicable to the alleged violative conditions.

Item 1, alleging a violation of § 1910.132(f)(1)(iv) is vacated.

**Item 2: Alleged Serious Violation of § 1910.147(c)(4)(i)**

*Alleged Violation Description*

Item 2 alleges:

> On or about October 11, 2018- East Shop Detail Bay, the lockout/tagout procedure for the East Blastec was not used when removing the non-functioning motor from the top of the equipment.

*Section 1910.147(c)(4)(i)*

Section 1910.147(c)(4)(i) provides:

> *Energy control procedure.* (i) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.
> NOTE: Exception: The employer need not document the required procedure for a particular machine or equipment, when all of the following elements exists: (1) The machine or equipment has no potential for stored or residual energy or reaccumulation of stored energy after shut down which could endanger employees; (2) the machine or equipment has a single energy source which can be readily identified and isolated; (3) the isolation and locking out of that energy source will completely deenergize and deactivate the machine or equipment; (4) the machine or equipment is isolated from that energy source and locked out during servicing or maintenance; (5) a single lockout device will achieve a locked-out condition; (6) the lockout device is under the exclusive control of the authorized employee performing the servicing or maintenance; (7) the servicing or maintenance does not create hazards for other employees; and (8) the employer, in utilizing this exception, has had no accidents involving the unexpected activation or reenergization of the machine or equipment during servicing or maintenance.

*(1) Applicability of the Cited Standard*

Section 1910.147(a)(i) of the LOTO standard provides the "standard covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees."

The Blastec machine housing the motor was energized with 480 volts of electricity. Its energy source could be controlled at the main disconnect and at the isolation switch. On the day of the accident, the two maintenance employees were tasked with removing the motor which was not functioning. To do so they were required to de-energize the Blastec machine. To prevent the unexpected energization or start up of the Blastec, the employees were to tag out the machine consistent with FabArc's lockout/tagout procedures for the control of hazardous energy when employees serviced the Blastec (Exh. J-16). On the day of the accident the two maintenance employees were on the top of the Blastec, each had access to the isolation switch which was not locked and tagged out while maintenance employee #1 disconnected the wiring to the motor.

Although it did not happen, employee #2 could have turned on the isolation switch thereby re-energizing the Blastec. The main disconnect, which also was not locked and tagged out, but was placed in the off position, could have been turned to the on position. Unexpected energization or start up of the machine could have occurred with devasting consequences while maintenance employee #1 was in the process of removing the wiring connecting the motor to the Blastec because the energy source was not locked and tagged out as required by the standard.

FabArc asserts the procedures set forth in Exhibit J-16 are not for the Blastec machine at issue in this matter. The Court is not persuaded by and places no weight on this argument. No evidence or testimony at the hearing was elicited to support this claim. Likewise, despite FabArc's claim the Blastec had a single energy source, it did not establish any of the other requirements necessary to establish the exception to the standard.

Applicability of § 1910.147(c)(4)(i) is established.

*(2) Compliance with the Terms of the Cited Standard*

FabArc had in place lockout/tagout procedures for the control of hazardous energy for the Blastec, but it failed to utilize those procedures when the employees were engaged in the servicing and maintenance of the machine. The main disconnect was not locked and tagged out because the device for securing the locks was broken (Tr. 41). Instead, the employees placed the main disconnect in the off position and disconnected the power at the isolation switch, without attaching lock out devices to either (Tr. 46, 71-72; Exh. J-22). CSHO Bollinger testified that because two employees could access the isolation switch, two lockout devices should have placed on the isolation switch (Tr. 71-72). As the energy source to the Blastec machine was not locked and tagged out, violation of the terms of § 1910.147(c)(4)(i) is established.

*(3) Access to the Violative Condition*

Maintenance employees #1 and #2 worked at the top of the Blastec machine engaged in the process of the removing the motor from the machine. The two employees accessed the top of the machine by a manlift. Maintenance employee #1 exited the manlift, disconnected the power to the machine from the isolation switch before removing wiring connecting the motor to the machine, and placed straps on the motor so it could be removed from the machine with an overhead crane (Tr. 39). Employee #2 observed from the manlift. No lockout/tagout procedures were utilized. Both employees had access to unexpected energization of the machine. The

Secretary has established access to the violative conditions.

*(4) Knowledge of the Violative Conditions*

To prove knowledge, the Secretary can show that a supervisor had either actual or constructive knowledge of the violation and such knowledge is generally imputed to the employer. An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *American Engineering & Development Corp*., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc*., 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992). The employee's job function rather than title is determinative. Therefore, the Commission has imputed the knowledge of a "working leader," because although not a full-time supervisor he was a supervisor at the time of the alleged violation.

FabArc contends the Secretary cannot establish its management knew the maintenance employees were in the process of removing the malfunctioning motor from the Blastec since the maintenance supervisor was not onsite at the time of the alleged violation. The Court disagrees. Maintenance employee #1 testified he was the leadman when his supervisor was not present (Tr. 28). As such, he had authority over the employee in the manlift and therefor is a supervisor for purposes of imputing knowledge to FabArc.

Where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *ComTran Crp., Inc. v. U. S. Dep't of Labor*, 722 F.3d 1304, 1307-08 (11th Cir. 2013). A supervisor's knowledge of a subordinate employee's violative conduct may be imputed to the employer even when the supervisor himself is simultaneously involved in the same violative conduct. *Quinlan v. U. S. Dept. of Labor*, 812 F.3d 832 (11th Cir. 2016). Knowledge is imputed through leadman maintenance employee #1 who testified the place for securing locks on the main disconnect was broken. Although he disconnected the power at the isolation switch, he did not place a lock on the device. He also was aware employee #2 was in proximity of the isolation switch and also had not placed a lock on it.

The evidence also establishes knowledge through FabArc designated management. The Safety Director advised CSHO Bollinger that the maintenance office knew of the broken handle

on the main disconnect and had ordered a replacement part for it. Nonetheless, employees worked on equipment without applying locks (Exh. J-23).

Knowledge of the violative condition is established. The Secretary has proven all elements of his prima facie case.

**Item 3: Alleged Serious Violation of § 1910.178(p)(1)**

*Alleged Violation Description*

Item 3 alleges:

> On or about October 11, 2018- East Shop Detail Bay, the forklift had been operated since February without a working horn and had been operated for two weeks with a leak that had not been evaluated.

*Section 1910.178(p)(1)*

Section 1910.178(p)(1) provides:

> *Operation of the truck.* (1) If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

*(1) Applicability of the Cited Standard*

Section 1910.178(a)(1), addressing the applicability of powered industrial trucks, provides:

> This section contains safety requirements relating to fire protection, design, maintenance, and use of **fork trucks,** tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by internal combustion engines[.]

(emphasis added)

Forklifts were used in FabArc's facility. CSHO Bollinger, pursuant to the Reginal Emphasis Program for powered industrial trucks which included forklifts, expanded her inspection to include a forklift that operated in the vicinity of the accident (Tr. 74-75; Exh. J-18). The Secretary has established applicability of § 1910.178(p)(1).

*(2) Compliance with the Terms of the Cited Standard*

Inspection records of the forklift show that its horn was not operational and had not been functional since February 2018. The forklift also had leaks which were not repaired until August 2018. The forklift was operated during the time period it had these defects and was not taken out

of service (Tr. 75; Exhs. J-17, J-23). FabArc does not dispute these conditions of the forklift. Maintenance supervisor Saccal advised CSHO Bollinger sometimes the forklift leaked because it was overfilled. Communication from FabArc's safety director revealed the current leak was due to an issue with the side shifter, which though disabled, still caused problems (Exh. J-23). Parts for the horn had been ordered and the leak issues were resolved (Exh. J-23). Although FabArc argues a horn was not necessary because the forklift had a yellow strobe light for a warning device, the safety director had informed the automotive mechanic that a horn was critical (Tr. 106; Exh. J-23; FabArc brief, p. 10).

Violation of the terms of § 1910.178(p)(1) is established.

*(3) Access to the Violative Condition*

The evidence adduced at the hearing establishes the forklift had operated since February 2018 without a working horn and had operated with a leak until August 2018 in the vicinity where employees worked. OSHA's violation worksheet shows three maintenance employees were exposed (Exhs. J-17, J-23). The Secretary has established access to the violative conditions.

*(4) Knowledge of the Violative Conditions*

FabArc's maintenance supervisor Saccal completed the daily inspection reports for the forklift (Exhs. J-17; J-23). Knowledge of the violation is established. The Secretary has proven all elements of his prima facie case.

**Characterization of the Violations**

The Secretary characterized the violations of the standards found at §§ 1910.147(c)(4)(i) and 1910.178(p)(1) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

By not locking and tagging out the Blastec machine before working on it as required by § 1910.147(c)(4)(i), maintenance employee #1 was exposed to the unexpected energization of the machine which was powered by 480 volts of electricity and as a result could sustain an electric shock or be electrocuted.

Not taking out of service a forklift which was not in safe operating condition as required

by §1910.178(p)(1) can result in serious injury or death to employees. Here, the forklift without an operating horn could result in serious injuries or death to employees in the vicinity of the moving forklift. Leaks from the forklift also presented slip and fall hazards to employees, creating a substantial possibility of death or serious physical harm.

The Secretary properly characterized the cited violations as serious.

**PENALTY DETERMINATION**

"In assessing penalties, section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). 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*., No. 00-1052, 2005 WL 696568, at *3 (OSHRC February 25, 2005) (citation omitted). "Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors." *Natkin & Co. Mech. Contractors*, No. 401, 1973 WL 4007, at *9, n. 3 (OSHRC April 27, 1973).

FabArc employs approximately 300 employees at its Oxford, Alabama facility (Tr. 58; Exh. J-1 ¶4). It had been inspected three times by OSHA in the five years prior to the inspection (Tr. 78). OSHA did not apply any reductions for size or history. However, it applied a 15% good faith reduction to each gravity-based penalty. The Court credits FabArc with an additional good faith reduction based on its immediate correction of the violative conditions and its cooperation with OSHA during the inspection.

OSHA rated the gravity of the violations in Items 2 and 3 as moderate. CSHO Bollinger testified the gravity of the violation cited in Item 2 was rated moderate because employees could receive an electric shock if the 480 volt circuit was reenergized, and such an injury could result in death (Tr. 72-73).[8] She based the moderate gravity rating for Item 3 on concluding that a violation would be of medium severity since any injury could result in hospitalization, and by concluding the probability of an injury occurring was lesser because only a few employees were

[8] CSHO Bollinger testified that she had cut and pasted some information in the Violation Worksheet. The information for the probability justification should have reflected electrical hazard (Tr. 73).

present in the vicinity of the forklift when it was operated (Tr. 78; Exh. J-23).

Upon consideration of the gravity of the violations, FabArc's size, history and good faith, the Court assesses a penalty in the amount of $8,500 for ITEM 2; and $5,600 for ITEM 3.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

## ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of the Citation, alleging a serious violation of § 1910.132(f)(1)(iv), is **VACATED** and no penalty is assessed.
2. Item 2 of the Citation, alleging a serious violation of § 1910.147(c)(4)(i), is **AFFIRMED** and a penalty in the amount of $8,500 is assessed.
3. Item 3 of the Citation, alleging a serious violation of § 1910.178(p)(1), is **AFFIRMED** and a penalty in the amount of $5,600 is assessed.

**SO ORDERED.**

/s/ Sharon D. Calhoun

**Dated: August 20, 2019**

Administrative Law Judge
Atlanta, Georgia