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.

DELTA ELEVATOR SERVICE CORP.,
DBA DELTA BECKWITH
ELEVATOR CO.,

Respondent

OSHRC DOCKET NO. 12-1446

Appearances: Nathaniel C. Henderson, Esquire
U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts
For the Secretary.

Paul J. Waters, Esquire
Waters Law Group, Clearwater, Florida
For the Respondent.

Before: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (Act). On December 14, 2011, the Occupational Safety and Health Administration (OSHA) inspected a worksite in Boston, Massachusetts, where the Respondent, Delta Elevator Service Corp. (Respondent or Delta), was performing work relating to an elevator in the building at the site. As a result of the inspection, on June 8, 2012, Delta was issued a Citation and Notification of Penalty (Citation) alleging three serious violations of OSHA's general industry standards. Delta timely filed a notice of contest, bringing this matter before the Commission. In his complaint, the Secretary withdrew two of the Citation items, leaving

only Item 3 for resolution, that is, an alleged violation of 29 C.F.R. § 1910.335(a)(1)(i). (Tr. 7-10). The hearing in this case took place on February 26 and 27, 2013, in Boston, Massachusetts. Both parties have filed post-hearing briefs and reply briefs. The Secretary also filed, on the same date as his reply brief, a motion to amend the Citation to allege in the alternative two violations of OSHA's construction industry standards. Delta filed a response opposing the Secretary's motion.

The broad issues for determination are as follows:

1. Did the parties expressly or impliedly consent to try whether Delta violated certain unpleaded construction industry standards, and were those unpleaded issues actually tried?
2. Does the general industry standard cited in Item 3 of the Citation apply?
3. Is the evidence presented in support of the Secretary's request for enterprise wide abatement sufficient to support a determination that Delta violated the cited general industry standard at times and places that were not specified in the underlying Citation?

As described below, the Secretary's motion to amend the Citation to allege in the alternative certain construction industry standards is denied. Item 3 of the Citation is vacated because (1) the cited general industry standard does not apply, and (2) the evidence in support of the request for enterprise wide abatement does not support a determination that Delta violated the cited general industry standard at other worksites.

Background

Delta is a Massachusetts corporation and is wholly-owned by Otis Elevator Company. Delta is in the business of servicing elevators, escalators, and lifts pursuant to service contracts. Delta currently services about 2200 units under service contracts. On December 14, 2011, OSHA began an inspection of a construction site located at 131 Clarendon Street, in Boston, Massachusetts, after an accident occurred at the site that day. The accident involved an employee of Absolute Environmental, Inc. (AEI), the asbestos abatement subcontractor. The accident took place when the AEI employee fell into the elevator shaft in the building at the site and was injured. (Tr. 8, 20-21, 69-77, 393, 398).

The building at the worksite, which had previously been used as an office building, was undergoing demolition prior to and at the time of the OSHA inspection.[1] The building had two elevators, but only one was in service during the demolition. Both elevators were decommissioned in January 2012. In the 20 years preceding the demolition project (Project), Delta had had a service contract covering the building's elevators. This service contract was canceled in November 2011 due to the upcoming Project. After the Project had gotten underway, the State of Massachusetts had shut down the elevator due to its life safety system having been removed. State regulators required that a special permit be issued for elevator operation during the Project, and required further that a qualified elevator mechanic operate the elevator. The Massachusetts Department of Public Safety Elevator Division issued a permit styled "New Construction/Modernization/Repair/Decommission Permit" for this purpose. The general contractor of the Project, John Moriarty Association (JMA), hired Delta in November 2011 to operate the elevator in conformance with this permit, so that JMA could move workers and materials up and down throughout the building during the Project. (Tr. 69, 72-73, 76-77, 85-86, 347-51, 381-86, 394-95; RX-F).

In early December 2011, AEI was performing asbestos abatement in the building. AEI was using the elevator to move its employees and materials, to include removing bagged asbestos materials from the building. On December 12, 2011, the elevator was not working, and the AEI employees had to use the stairs to remove the bagged asbestos materials. Joe Corsini, the Delta mechanic who was on site to operate the elevator that day, tried to diagnose the problem but was unsuccessful. Corsini contacted Russell Peal, Delta's service adjustor, so that Peal could troubleshoot the problem and return the elevator to service. Peal and Corsini discovered the elevator pit had flooded, which resulted in the bottom floor and pit wiring being under water. Peal determined which elevator switch had been affected by the flooding by testing a circuit on the elevator control panel, which was located in the elevator machine room. Thereafter, Corsini pumped the water out of the flooded area and attempted to get the elevator running again that afternoon. After he was unable to do so, he secured the elevator on the

[1] The record is insufficiently developed to permit a finding as to whether the building was being completely demolished, or only partially demolished and then renovated. The weight of the evidence establishes that it was one or the other. (Tr. 69, 73, 348-50, 385-86).

eighth floor and left the building at the end of the day. On December 13, 2011, AEI continued to use the stairs for its work. On the morning of December 14, 2011, Corsini returned to the site to operate the elevator. He went to the machine room, removed his lock and tag and re-energized the elevator, and pressed a relay to open the elevator doors on the eighth floor so that he could put the elevator in service. He then went down the stairs to the eighth floor, and when he got there he saw the elevator doors open and the floor of the car about 8 inches below floor level. Corsini entered the elevator, at which time he noticed light and movement below; he called down to ask what was going on, and when he received no answer he ran up to the machine room and de-energized and locked out the elevator. He then ran down the stairs to find out what had happened, and learned someone had fallen into the pit and had been injured. He ran back up the stairs to retrieve tools to assist in the person's rescue, but by the time he reached the basement the person was being attended by EMS personnel. (Tr. 28, 36-37, 68, 74-78, 90-91, 349-57, 364, 389; RX-C, p. 3; RX-G, pp. 8-9).

After the OSHA inspection, citations were issued to AEI, JMA and Delta. The citations issued to AEI and JMA alleged that both had violated 29 C.F.R. § 1926.20(b)(2), which is an OSHA construction industry standard. The citation issued to AEI alleged it had not ensured that the elevator had been inspected prior to attempting to use it; the citation issued to JMA alleged it had not ensured that the elevator had been determined to be operational before allowing the asbestos abatement contractor to use it. (RX-C, p. 1; RX-D, p. 1). The Citation issued to Delta, however, alleged violations of OSHA's general industry standards, and, as amended by the complaint, alleged a single violation of the standard relating to personal protective equipment (PPE) for employees working in areas where there are potential electrical hazards, 29 C.F.R. § 1910.335(a)(1)(i). Specifically, Item 3 alleges that employees "did not wear appropriate personal protective equipment to protect themselves from electric shock and arc blast hazards when working near energized electrical parts on the elevator control board" and "were exposed to voltages of up to approximately 208 volts." The Secretary asserts that Delta violated the standard because the employees were not wearing voltage-rated gloves (for protection from electric shock) or arc-rated clothing (for protection from arc flash).

Jurisdiction

Delta is a Massachusetts corporation in the business of servicing elevators, escalators, and lifts. Its office is at 115 Shawmut Road, in Canton, Massachusetts. All of the elevator mechanics Delta employs work out of that location. Delta's mechanics use equipment and tools for their work, and it is reasonable to conclude that some of these items have moved in interstate commerce. (Tr. 8, 28-31, 36-44, 344-45, 357-58, 367, 375, 379, 393, 405-07). Further, Delta admits the Commission has jurisdiction in this case. *See* Answer, ¶ I. The evidence supports the admission and establishes that Respondent is an employer with employees that is engaged in a business affecting commerce. *See* §§ 3(3), 3(5) of the Act, 29 U.S.C. §§ 652(3), 652(5). The Commission has jurisdiction over the parties and the subject matter in this case.

Positions of the Parties

The Secretary contends the Delta employees at the site were not engaged in construction work. He notes they were there to operate and maintain the same elevator that Delta had been servicing for over 20 years, not to perform either building demolition or asbestos abatement. According to the Secretary, the fact that these construction activities were occurring at the site did not transform the work the Delta employees were performing to construction work. S. Brief, pp. 38-40. The Secretary disputes Delta's assertion that the elevator at the site was integral to the construction work, pointing out that when the elevator was out of service the AEI employees simply used the stairs to remove the bagged asbestos materials. The Secretary urges that equipment that is indeed integral to construction (e.g., scaffolding and cranes) should not be equated with the elevator in this case. The Secretary likens the elevator to a pre-existing toilet or water fountain in a building undergoing renovation that might be used by the employees who are performing the renovation work. S. Reply Brief, pp. 16-17.

As indicated above, on the same date the Secretary submitted his reply brief, he filed a motion to allege in the alternative violations of two construction industry standards (although maintaining his principal position that those standards do not apply). He asserts that the evidence presented at the hearing with respect to the general industry standard also supports a finding that the construction industry standards were violated. He also asserts that Delta would not be prejudiced by the granting of the amendment. S. Motion, pp. 1-5.

Delta contends it was engaged in construction work at the subject site. It first notes the meaning of "construction work" set out at 29 C.F.R. § 1910.12(b), and the Sixth Circuit's decisions in *Brock v. Cardinal Indus.*, 828 F.2d 373 (6th Cir. 1987) (*Cardinal*), *abrogated on other grounds, Martin v. OSHRC*, 499 U.S. 144 (1991), and *Nat'l Eng'g & Contracting Co. v. OSHRC*, 838 F.2d 815 (6th Cir. 1987) (*NEC*). Delta also notes the meaning of "subcontractor" as set out at 29 C.F.R. § 1926.13(c), and cites to various Commission decisions holding that work by a subcontractor that is an integral or necessary part of the construction project is "construction work" for purposes of applying Part 1926. Delta states that its work at the site was integral to the Project because it was hired directly by the general contractor to operate the elevator so that workers, tools and materials could move from floor to floor in the building. Delta notes further that in the days prior to the inspection, it had been operating the elevator for AEI so its workers could remove bagged asbestos materials from the building, and that when the elevator was out of service on December 12, 2011, the workers had to carry the bagged asbestos materials down the stairs. Delta points out that the service contract it previously had at the site had been cancelled and that a state-issued permit for "New Construction/ Modernization/ Repair/ Decommission" had to be obtained before Delta could lawfully operate the elevator for the general contractor during the Project. According to Delta, it defies logic that OSHA would cite it under the general industry standards and cite JMA and AEI under the construction industry standards, particularly when the alleged violations all involved the same elevator. R. Brief, pp. 12-15.

Delta asserts that further proof that its work at the site was covered by the construction industry standards is shown by 29 C.F.R. § 1926.552, which sets out specifications for different types of elevators used in construction. That standard, entitled "Material hoists, personnel hoists, and elevators," states at § 1926.552(d) that "[p]ermanent elevators under the care and custody of the employer and used by employees for work covered by this Act shall comply with the requirements of [the] American National Standards Institute…." (cited ANSI standards omitted). Delta notes the elevator at the site was a permanent elevator that was previously used by the building's occupants, but that during the Project it was "used by employees for work covered by this Act" – specifically, employees of JMA and AEI. R. Reply Brief, pp. 4-5.

Delta opposes the motion to plead in the alternative, noting that from the outset of this matter it has repeatedly asserted that its work at the site was covered by the construction industry standards and that the Secretary had "consistently and deliberately" disagreed with its position; only now, at the end of the briefing period, has the Secretary moved to allege in the alternative violations of construction industry standards. Delta states that the motion does not meet the legal requirements for a post-hearing amendment, and that it would be prejudiced if the amendment were allowed. R. Response, pp. 1-2, 4-8.

The Secretary's Motion to Amend

In proceedings before the Commission, Rule 15(b)(2) of the Federal Rules of Civil Procedure governs post-hearing amendments of the Secretary's citation and complaint. That rule provides:

> (2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Applying Rule 15(b) in *Armstrong Steel Erectors*, 17 BNA OSHC 1385 (No. 92-262, 1995), the Commission stated as follows:

> [C]onsent to try an unpleaded issue may be express or implied, but it occurs only when the parties squarely recognized that they were trying an issue not raised in the pleadings. Failure to object to evidence relevant to the unpleaded issue may indicate consent, but not if the evidence is also relevant to a pleaded issue.

Id. at 1387-88 (citations omitted).

A significant case originating from the Commission involving the post-hearing amendment of a citation is *McLean-Behm Steel Erectors, Inc.*, 608 F.2d 580 (5th Cir. 1979). In that case, the employer moved to dismiss the citation at the close of the hearing on the ground that a more specific standard applied rather than the general standard that was cited. During the hearing, the Secretary had expressly declined to request that the citation be amended. The judge deferred ruling on the employer's motion, but after post-hearing briefing was complete, the judge amended the citation *sua sponte* to allege a violation of the more specific standard that the

employer had previously argued was applicable. The Commission affirmed the judge's decision, but the Fifth Circuit reversed, holding as follows:

> [T]he unchallenged admission of evidence relevant to both pleaded and unpleaded issues does not imply consent to trial of the unpleaded issues, absent some obvious attempt to raise a new issue…. Because all the proof adduced at the hearing was relevant to the violation originally charged, petitioner's failure to object to its admission cannot be construed as implied consent to trial of the unpleaded regulation.

Id. at 582 (citation and footnotes omitted). In *McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128 (No. 80-5868, 1984), the Commission cited the Fifth Circuit's opinion in *McLean-Behm* and stated that amendment under Rule 15(b) "is proper only if two findings can be made – that the parties *tried* an unpleaded issue and that they *consented* to do so." *Id*. at 2129 (emphasis in original).

Delta contends that neither of the above findings exists in this case. First, the unpleaded issue of whether Delta violated the two unpleaded construction industry standards was not tried. Delta notes that the transcript contains no mention of either standard by any party or witness, that no exhibit refers to either standard, and that the first time the standards are discussed are in its own brief, but only in the context of showing that two similarly-situated employers could be held to different standards of conduct depending on the OSHA standard cited. R. Brief, p. 17.

The cited general industry standard, 29 C.F.R. § 1910.335(a)(1)(i), provides that:

> *Personal protective equipment*. Employees working in areas where there are potential electrical hazards shall be provided with, and shall use, electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed.
>
> Note: Personal protective equipment requirements are contained in subpart I of this part.

The unpleaded construction industry standards that are the subject of the Secretary's motion, 29 C.F.R. §§ 1926.95(a) and 1926.416(a)(1), provide respectively as follows:

> *Application*. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical

> irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.
>
> * * * *
>
> *Protection of employees*. 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 of other means.

Delta notes that the Secretary has proposed *two* construction industry standards as alternatives to the single general industry standard that was cited, and argues that there are numerous and significant differences between the terms of the alternative standards and the cited standard. R. Response, pp. 6-7. The Secretary, on the other hand, asserts that the construction industry standards proposed in his motion are the equivalent of the cited general industry standard. He also asserts that there is no tangible difference between the language employed in § 1910.335(a)(1)(i) (e.g., requiring use of "electrical protective equipment that is appropriate") and the language employed in § 1926.95(a) (e.g., requiring use of "personal protective equipment … wherever it is necessary"). S. Motion, p. 3.

The Secretary's argument is rejected. There are patent differences in the language employed in the standards at issue. In particular, the words "appropriate" and "necessary" do not have the same meaning. "Appropriate" means "suitable or fitting for a particular purpose, person, occasion, etc.," while "necessary" means "being essential, indispensable, or requisite." *Random House Unabridged Dictionary* 103, 1283-84 (2d ed. 1993). The alleged violations of the construction industry standards the Secretary has proposed were not actually tried at the hearing.

Secondly, the parties did not consent to try whether Delta violated the unpleaded construction industry standards. The standards were never mentioned at the hearing. All of the evidence that was admitted at the hearing was relevant to the alleged violation of the general industry standard, and, as neither party made any allusion to the construction industry standards, there was no "obvious attempt to raise a new issue." *McLean-Behm*, 608 F.2d at 582. Thus, none of the evidence that was presented to prove a violation of the cited standard can be used to find implied consent to try the unpleaded issues. Stated another way, there is nothing in the

record to support a finding that Delta and the Secretary "squarely recognized" that violations of the construction industry standards were being tried. *See McLean-Behm*, 608 F.2d at 582; *Armstrong Steel*, 17 BNA OSHC at 1387-88. R. Response, pp. 8-10.

Finally, Delta would be prejudiced if the requested amendment were allowed. The Fifth Circuit's statement in *McLean-Behm* is instructive on the matter of prejudice:

> Elemental fairness proscribes depriving petitioner of its right to present defenses to the charge against it. [Rule] 15(b) certainly would have permitted the [judge] to add an alternative charge under [the proposed standard] before the evidentiary hearing closed, but the Secretary forewent that timely opportunity to afford the petitioner adequate notice. Because the record in this case does not reveal uncontrovertably that petitioner could not have prevailed in any defense to [the proposed charge], we find prejudice requiring reversal.

McLean-Behm, 608 F.2d at 582.

For the foregoing reasons, the Secretary's motion to amend the Citation is denied.

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must prove by a preponderance of the evidence that the cited standard applies, that its terms were not met, that employees had access to the violative condition, and that the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharm. Prod*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

The Applicability of the Cited Standard

The starting point for whether an employer is performing construction work is 29 C.F.R. § 1910.12(b), which states: "For purposes of this section, *Construction work* means work for construction, alteration, and/or repair, including painting and decorating. See discussion of these terms in § 1926.13 of this title." The Sixth Circuit held in 1987 that "the explicit reference to section 1926.13 in 1910.12(b) mandates that the interpretation of the terms 'construction, alteration, and repair' in the Construction Safety Act, Davis-Bacon Act, and Miller Act should 'have considerable precedential value' in defining the term 'construction work' in section 1910.12." *Cardinal*, 828 F.2d at 377; *NEC* 838 F.2d 817. R. Brief, p. 12.

The Secretary's regulations implementing the Davis-Bacon Act state:

> The terms "construction" … or "repair" mean all types of work done on a particular building or work at the site thereof …, all work done in the construction or development of the project, including without limitation, altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, … or work … by persons employed by the contractor or subcontractor.

29 C.F.R. § 5.2(j). Further, § 1926.13(c) defines the term "subcontractor" to mean "a person who agrees to perform any part of the labor or material requirements of a contract for construction, alteration or repair." 29 C.F.R. § 1926.13(c). Thus, the Commission has long held that "Part 1926 applies … to employers who are actually engaged in construction work or who are engaged in operations that are an integral and necessary part of construction work." *Snyder Well Serv., Inc.*, 10 BNA OSHC 1371, 1373 (No. 77-1334, 1982). *See also, e.g., Sw. Bell Tele. Co.*, 7 BNA OSHC 1058, 1059 (No. 15841, 1979); *A.A. Will Sand & Gravel Corp.*, 4 BNA OSHC 1442, 1443 (No. 5139, 1976).

In *Cardinal*, the Sixth Circuit agreed with the Secretary that an employer that made modular housing units that were later taken to and installed at their destinations (but not by the employer) was not engaged in construction work. The court thus reversed the Commission's decision, which had held that it was the nature of the work rather than its location that controlled. The court ruled that to be considered construction, there must be a nexus between the work and the construction site. 828 F.2d at 378-80.

In *NEC*, the Secretary argued that the employer's work at the site, which was upgrading and expanding a waste treatment plant, was construction. The employer argued that the valve replacement work it was performing at the pump house at the site at the time of the inspection was maintenance, not construction. The court agreed with the Secretary that it was the totality of the employer's work at the site that governed the work's classification, and that the valve replacement work the employer was doing at the time of the inspection was an integral and necessary part of the overall construction project. 838 F.2d at 818-19.

The facts recited in the Background section of this decision establish that the work on the Project was construction, in that the building at the site was being either demolished or

partially demolished and then renovated. JMA, the general contractor of the Project, had hired Delta to operate the building's elevator so that workers and materials could be moved throughout the building. While Delta had previously had a service contract with the building's last overseer, that contract was cancelled in November 2011 due to the upcoming Project. Delta's agreement with JMA was not simply another "service contract," but rather was a standing work order for Delta to operate the elevator as needed when the construction work at the site required using the elevator.[2] The State of Massachusetts had shut down the elevator and permitted it to be used only if a qualified elevator mechanic operated it. JMA engaged Delta to fill that role. (Tr. 69, 76-77, 85-86, 90, 347-51, 381-86, 394-95; RX-F, RX-I).

The Background section also establishes that in the days before the OSHA inspection, Delta had been running the elevator so that AEI, the asbestos abatement subcontractor, could move workers and materials to the floors where it was working. AEI was also using the elevator to remove bagged asbestos materials from the building. On December 12, 2011, the elevator was not working, and the AEI employees had to use the stairs to remove the bagged asbestos materials. When Corsini, the Delta mechanic who had been working at the site, could not get the elevator to operate, Peal, Delta's service adjustor, went to the site to diagnose the problem so the elevator could be put back in service. Corsini and Peal discovered that the cause of the problem was that the elevator pit had flooded. Peal also determined which elevator switch had been affected. Corsini pumped the water out of the elevator pit, but when he attempted to run the elevator later that day it still would not operate. On December 13, 2011, the AEI employees once again had to use the stairs to removed bagged asbestos materials. On the morning of December 14, 2011, Corsini returned to the site and prepared to put the elevator in operation. Before he had finished doing so, an AEI employee attempted to use elevator and fell down the elevator shaft and was injured. (Tr. 28, 36-37, 68, 74-78, 90-91, 349-52, 364, 389; RX-C, p. 3; RX-G, pp. 8-9).

The Secretary's position, as set out above, is that Delta's work at the subject site was "identical" to the work it had performed previously under the service contract. S. Brief, p. 40.

[2] Attached to RX-I, the work order, are service tickets showing Delta provided a mechanic at the site on several days in November and December 2011. Most of the service tickets indicate the mechanic was there to operate the elevator.

The facts do not support this assertion. Delta was hired to operate the elevator in the building to facilitate the work of the general contractor and other contractors, such as AEI, at the site. Delta was not hired to service and maintain the elevator, as it would have under a service contract. Delta did perform *some* service-related work on the elevator, such as the diagnostic activities on December 12, 2011, so that the elevator could be returned to service. This work, however, was in furtherance of the overall purpose of Delta being at the site, which was to run the elevator so that other workers at the site could efficiently perform their job duties. Delta's work at the site was not, therefore, "identical" to the work that Delta had performed under its previous service contract.

Even if Delta's activities at the site had some similarities to the work it had done under its previous service contracts for the building's elevators, the Secretary's focus on the nature of the work misses the point. As set out in the discussion above relating to *Cardinal* and *NEC*, the determinative issue is not the nature of the work but rather its location and whether the work is an integral and necessary part of the overall construction project. There is no question that Delta was working on a construction site and that its work was being done in furtherance of the Project. The Secretary contends that Delta's work at the site was not integral or necessary to the Project, but rather that the elevator was a mere convenience for the AEI workers to use for removing the bagged asbestos materials from the building. S. Reply Brief, p. 16.

The Secretary's suggestion that it was a mere inconvenience for workers to traverse up to eight flights of stairs while carrying bags of asbestos material is untenable. The general contractor hired Delta for the purpose of moving workers and materials up and down throughout the building in the elevator. To assert that this could be done effectively, if at all, by climbing up and down flights of stairs during the course of a workday is to ignore the realities of construction work in general and the demolition work here in particular.

The evidence establishes that Delta's work was an integral and necessary part of the demolition Project. Delta was consequently performing construction work, and the general industry standard cited by the Secretary does not apply in the circumstances of this case.

Because the Secretary has not established an essential element of his burden of proof, and in light of the discussion below relating to the request for enterprise-wide abatement, Item 3 of the Citation must be vacated.

The Secretary's Request for Enterprise-Wide Abatement

On January 14, 2013, the Secretary filed a motion to amend the complaint to allege that Delta's employees performed work like that at the subject site at other worksites without using appropriate personal protective equipment. The motion sought to amend the complaint to request "an order of enterprise-wide abatement against Respondent compelling its compliance with 29 C.F.R. § 1910.335(a)(1)(i) at all of Respondent's workplaces." The motion was granted, over Delta's objections, on January 28, 2013. On February 11, 2013, Delta filed an answer to the amended complaint. The answer denied the new allegation in the amended complaint and set out various affirmative defenses in regard to the request for enterprise-wide abatement.

In view of the above finding that the cited standard does not apply to Delta's work at the subject site, the merits of the violation alleged in Item 3 have not been adjudicated. The Secretary appears to contend that a violation of the cited standard can nonetheless be found based on the evidence (presented in support of his request for enterprise-wide abatement) that Delta performs work pursuant to service contracts at over 2000 jobsites that is like the work that Peal and Corsini performed at the subject site. S. Brief, p. 46; S. Reply Brief, pp. 2, 13-14.

The record shows that Delta has service contracts for about 2200 units, including elevators, escalators, and lifts. Its service contract work involves maintaining and repairing the units as well as responding to service calls. (Tr. 381, 393). The record also shows that a regular part of the service work involves activities like those of Peal and Corsini at the subject site and that the equipment at service sites can have from 208 to 480 volts. Further, for such work, Delta generally does not require its elevator mechanics to wear voltage-rated gloves to protect against electric shock or to wear arc-rated clothing to protect against arc flash.[3] (Tr. 41-44, 47, 252, 324-25, 328-29, 358-62, 366-67, 372-77, 438-41, 444-45, 449-51, 456-57; SX-1, pp-5-8). The Secretary contends that this evidence, together with the evidence that he asserts proves a violation of the cited standard at the subject site, also establishes violations of that

[3] At the subject site, neither Peal nor Corsini wore voltage rated gloves. Peal used an insulated multi-meter to test the elevator's control panel circuitry, and Corsini used an insulated "stick" to push the non-conductive relays on the elevator control panel. Each wore a long sleeved shirt or sweatshirt that was neither arc-rated nor flame resistant. (Tr. 28-32, 35-39 36-37, 205-06, 277-79, 349-52, 364, 459-60; SX-4).

standard at all of Delta's sites where it performs service contract work. This argument is rejected.

First, while enterprise-wide abatement has occurred in Commission cases where the parties have agreed to such abatement in a voluntary settlement agreement, (*see, e.g., Phillips 66 Co.*, 16 BNA OSHC 1332, 1334-35 (No. 90-1549, 1993)), there is no Commission or other precedent holding that such abatement may be directed pursuant to the "other appropriate relief" clause in section 10(c) of the Act. Second, as Delta notes, the requested relief in this case would require an order that (1) is not based on any work performed at a worksite where an inspection took place, and (2) is not the subject of any allegation contained in the citation underlying the contest. In other words, the Secretary would have the Commission judge grant relief based solely upon claimed violations for which the Secretary presented no evidence as to the time, location, or place of the claimed violations, and only the most general evidence respecting the circumstances of those claimed violations. *Cf.* Commission Rule 34(a)(2), 29 C.F.R. § 2200.34(a)(2) (specifying that Secretary's complaint must include allegations of the "time, location, place and circumstances of each … alleged violation"). Third, as Delta points out, even if a violation of the standard at the subject site had been found, Delta would necessarily have to adopt protective equipment policies that encompass all of its elevator mechanics because it has only one location out of which all of those employees work, and thus the requested enterprise-wide abatement is a redundancy. R. Brief, p. 33.

For the foregoing reasons, the evidence is insufficient to support a determination that Delta violated the cited standard at sites other than the subject worksite. The Secretary's request for enterprise-wide abatement is denied, and the vacating of Item 3 of the Citation is confirmed.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered that Item 3 of Citation 1 is VACATED.

/s/

William S. Coleman
Judge, OSHRC

Date: September 30, 2013
Washington, D.C.