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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Durco Contractors, Inc., *formally* J. R. Durham d/b/a Durco Contractors, Inc., Respondent.	OSHRC Docket No. **15-0693**

Appearances:

Yasmin K. Yanthis-Bailey, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

No representative appeared for the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Durco Contractors, Inc., (Durco)[1] contests a six-item Citation and Notification of Penalty issued to it by the Occupational Safety and Health Administration (OSHA) on March 17, 2015. The Citation resulted from an inspection conducted by compliance safety and health officer (CSHO) James Oglesby in Jackson, Mississippi, in response to a formal complaint (Tr. 19). The worksite was a historic hotel, the Edison Walthall, which was being renovated and converted into

[1] OSHA originally issued the Citation and Notification of Penalty to "J.R. Durham, dba Durco Contractors, Inc.," on March 17, 2015. Durco's articles of incorporation list James Randall Durham Senior as its registered agent and incorporator (Exh. C-12). In the notice of contest letter received by the Commission on April 17, 2015, Mr. Durham stated, "James R. Durham is not doing business as Durco Contractors, Inc. The Job located at the Edison Walthall was a job that was ran [sic] by Durco, Inc." In response to this information, the Secretary issued an Amended Citation and Notification of Penalty on April 22, 2015, citing the business name set forth in the Articles of Incorporation. The Amended Citation states:

> The following item(s), as classified in the attached citation, is (are) amended as follows: (Establishment name corrected to: Durco Contractors, Inc.).

(Exh. C-1) On April 28, 2015, the Commission docketed the case under respondent's name as originally cited by OSHA. The Secretary and the Commission continued to caption some case documents with "J.R. Durham, dba Durco Contractors, Inc." The Court now amends the record to reflect the correct name of respondent is "Durco Contractors, Inc." *See John Hill,* 7 BNA 1485, 1486 (No. 78-0047, 1979) ("We find that the Secretary's attempt to more accurately identify the employer in the complaint was a mere technical misnomer which did not affect the nature of the proceedings or the allegations against the employer.").

an apartment building. Durco was hired to perform the renovation (Tr. 20).

The Citation alleges Durco committed violations of six Construction Standards of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act). Item 1 of the Citation alleges a serious violation of 29 C.F.R. § 1926.25(a) for failure to keep debris clear from stairs. The Secretary proposes a penalty of $2,040.00 for Item 1. Item 2 alleges a serious violation of 29 C.F.R. § 1926.1926.56(a) for failure to provide adequate lighting for an interior stairway. The Secretary proposes a penalty of $2,400.00 for Item 2. Item 3 alleges a serious violation of 29 C.F.R. § 1926.403(i)(2) for failure to guard against accidental contact with energized electrical wires. The Secretary proposes a penalty of $1,700.00 for Item 3. Item 4 alleges a serious violation of 29 C.F.R. § 1926.405(g)(1)(iii) for using an extension cord as a substitute for the fixed wiring of a structure. The Secretary proposes a penalty of $2,000.00 for Item 4. Item 5 alleges a serious violation of 29 C.F.R. § 1926.602(c)(1)(vii) for permitting an unauthorized person to ride on a powered industrial truck. The Secretary proposes a penalty of $1,700.00 for Item 5. Item 6 alleges a serious violation of 29 C.F.R. § 1926.602(d) for failure to certify each operator of a forklift had been adequately trained and evaluated. The Secretary proposes a penalty of $2,800.00 for Item 6.

Durco timely contested the Citation (Tr. 12). The Chief Judge of the Commission designated this case for Simplified Proceedings and assigned the case to the undersigned on May 21, 2015. The parties entered into preliminary settlement negotiations, with Mr. Durham representing Durco *pro se.* Mr. Durham provided a post office box address, an email address, and a telephone number where he could be contacted. At some point midsummer of 2015, Mr. Durham broke off all contact with the Secretary's counsel and failed to return her email messages and telephone calls. Mr. Durham failed to appear for the scheduled March 28, 2016, prehearing telephone conference and failed to file a prehearing statement as ordered by the Court (Tr. 9-10). Commission Rule 6 provides:

> Every pleading or document filed by any party or intervenor shall contain the name, current address and telephone number of his representative or, if he has no representative, his own name, current address and telephone number. Any change in such information shall be communicated promptly in writing to the Judge, or the Executive Secretary if no Judge has been assigned, and to all other parties and intervenors. A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.

Mr. Durham never provided updated information indicating he had changed his telephone number, his email, or his post office box address. Mr. Durham had responded previously to

communications transmitted via all three of these channels.[2] Despite repeated attempts by telephone, regular mail, and email, neither the Court nor counsel for the Secretary has been able to get a response from Durco since June 30, 2015.[3] The Court and the Secretary provided Durco with adequate notice at each step of this proceeding.

The Court scheduled a hearing in this matter for April 1, 2016. Because it seemed likely, based on his past conduct, Mr. Durham would not appear, the Court held the hearing telephonically. The Secretary's counsel and the Court were located in our respective offices in Atlanta, Georgia, and the court reporter and CSHO Oglesby were located in the Hinds County Courthouse in Jackson, Mississippi. Mr. Durham did not, in fact, appear and the hearing proceeded without representation for Durco (Tr. 9-10). CSHO Oglesby was the only witness who testified at the hearing.

For the reasons that follow, Item 1 of the Citation is VACATED, and Items 2 through 6 of the Citation are AFFIRMED as serious and a total penalty of $10,600.00 is assessed.

Background

In response to a formal complaint, CSHO Oglesby conducted an inspection of the hotel worksite in Jackson, Mississippi.[4] Durco had begun working on the site in early October of 2014 (Tr. 21). Durco "was conducting demolition work, meaning they were gutting the hotel. The hotel was going to be converted into apartments, so they [were] taking out the walls, the furniture, the wiring, just basic demolition type work." (Tr. 20-21)

CSHO Oglesby first arrived at the worksite on November 24, 2014. He held an opening conference with Mr. Durham, who identified himself as "the superintendent and also the owner of the company." (Tr. 21) CSHO Oglesby provided Mr. Durham with a copy of the formal complaint. Mr. Durham disputed the allegations in the complaint. CSHO Oglesby conducted a

[2] Counsel for the Secretary forwarded a copy of an email thread between her and Mr. Durham to the Court's Legal Assistant. Mr. Durham's last email communication is dated June 30, 2015.

[3] In his Post-Hearing Submission, the Secretary states, "It is apparent from its actions that the company has abandoned its case. Respondent is in clear defiance of the requirements to follow Commission rules and therefore, a full judgment by default or otherwise is appropriate in this case." (p. 5) Although the Court agrees Durco has abandoned its case, the Court declines to enter a default judgment against Durco. There is no pending motion for default judgment from the Secretary and the Court has not entered an order to show cause why Durco should not be held in default for failure to comply with the Court's orders. *See* Commission Rule 101(a).

[4] CSHO Oglesby has been with OSHA almost eight years. He is a retired Air Force Master Sergeant. While with the Air Force, CSHO Oglesby was a safety specialist for thirteen years (Tr. 15). He has conducted approximately 450 inspections for OSHA's Jackson, Mississippi, area office. He estimated approximately 80% of his inspections were on construction sites (Tr. 18-19). CSHO Oglesby's testimony was straightforward and responsive to the questions. He exhibited a quick recall of details. I find CSHO Oglesby's testimony to be credible.

walkaround inspection accompanied by Mr. Durham. After the walkaround inspection, CSHO Oglesby began interviewing workers at the site. CSHO Oglesby estimated there were fifteen workers on the site and he interviewed four of them (Tr. 54). While interviewing Employee #2, CSHO Oglesby repeated to him Mr. Durham's denial of the complaint's allegation. CSHO Oglesby testified, "[Employee #2] said, well, Mr. Durham didn't tell me the truth. So he showed me around the building, showed me where each one of the complaint items were located." (Tr. 22) CSHO Oglesby visited the worksite on two other occasions after the November 29, 2014, visit. He took written, signed interview statements from the employees (Exh. C-8 through C-11). He also took photographs of the conditions (Exhs. C-3 through C-7). Based on the CSHO's inspection, OSHA issued the Citation in this case to Durco on March 17, 2015.

Jurisdiction

Under § 10(c) of the Act, the Commission has jurisdiction when an employer files a timely notice of contest. *P & Z Co., Inc.,* 7 BNA OSHC 1589, n. 4 (No. 14822, 1979) ("If a notice of contest is filed, then pursuant to Section 10(c) the Secretary must notify the Commission and the Commission acquires jurisdiction over the contest."). Here, the Secretary stipulated Durco filed a timely notice of contest (Tr. 12). The Court determines the Commission has jurisdiction in this case.

Coverage

The Secretary has the burden of proving the company was an employer within the meaning of the Act. *See All Star Realty Co., Inc.*, 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014) ('"[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site.'" (citing *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated)). The Act defines *employer* as "a person engaged in a business affecting commerce who has employees[.]" 29 U.S.C. § 652(5). *Employee* is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(6).

In Durco's notice of contest, Mr. Durham wrote, "[E]ach and every citation that you have issued would be the responsibility of the temporary agencies that supplied the employees." First, there is no evidence in the record the workers at the site were supplied by a temporary staffing agency. In their written statements, the workers identified Durco as their employer (Exhs. C-8 through C-11). Second, it is undisputed Mr. Durham was the sole supervisor on the worksite. In their written statements, the workers on the site stated Mr. Durham directed their work (Exhs. C-

8 through C-11). The Commission has held where an employer is in control of the workplace, it is responsible for complying with OSHA standards with regard to temporary workers. *See The Barbosa Grp., Inc.,* 21 BNA OSHC 1865, 1867 (No. 02-0865, 2007) ("[In *Froedtert Mem. Lutheran Hosp., Inc.,* 20 BNA OSHC 1500 (No. 97-1839, 2004)], OSHA cited a hospital for violations of the [bloodborne pathogens] standard based on the exposure to workplace hazards of housekeepers supplied to the hospital by two temporary help agencies. Applying *Darden*, the Commission concluded that the hospital was properly cited under the OSH Act as an employer of the housekeepers because the hospital directed and controlled the means, methods, location, and timing of their work, and also provided sole on-site supervision and on-the-job instruction. [*Id.*] at 1505-07[.]"); *Southern Scrap Materials Co., Inc.,* 23 BNA OSHC 1596, 1612 (No. 94-33-93, 2011) ("Although Temp Staffers, a temporary work agency, supplied W.H. to work as a burner in the non-ferrous area of Southern's Thomas Yard, W.H.'s relationship with Temp Staffers is not determinative of whether he had an employment relationship with Southern at the time of the alleged violations.").

The record, although slight, establishes Durco, through Mr. Durham, directed the methods and location of the work and provided sole onsite supervision.

> While the Secretary had the burden of proving its case by substantial evidence, what constitutes substantial evidence varies with the circumstances. The "evidence a reasonable mind might accept as adequate to support a conclusion" is surely less in a case like this where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight. *See, e.g., Noranda Aluminum, Inc. v. OSHRC,* 593 F.2d 811, 814 & n.5 (8th Cir. 1979) (decision to leave Secretary's case unrebutted "a legitimate but always dangerous defense tactic in litigation"); *Stephenson Enterprises, Inc. v. Marshall*, 578 F.2d 1021, 1026 (5th Cir. 1978). Thus, thin as the underlying evidence was, we find it sufficient in these circumstances.

Astra Pharm. Products, Inc. v. Occupational Safety & Health Review Comm'n, 681 F.2d 69, 74 (1st Cir. 1982). The Court determines Durco was the employer of the affected workers on the site.

The Secretary must establish Durco engaged in a business affecting commerce. Here, Durco was under contract to demolish and renovate a hotel, which are construction activities related to alteration of the structure. Section 1926.12(b) provides, "For purposes of this section, 'Construction work' means work for construction, alteration, and/or repair, including painting and decorating." Commission precedent has long held that construction work necessarily is

covered by the Act. *Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983) (construction work affects interstate commerce because there is an interstate market in construction materials and services). The Court determines Durco's construction activities affect interstate commerce, within the meaning of § 3(5) of the Act. The Secretary has established Durco is a covered employer under the Act.

The Citation

The Secretary's Burden of Proof

To establish a violation of a specific OSHA standard, the Secretary must prove (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

Applicability of the Construction Standards

The Secretary alleges Durco violated six standards found in the Part 1926 Construction Standards. Durco was engaged in demolition work on the interior of the building, for the purpose of renovating the interior and converting the structure from a hotel to an apartment building. The Commission has held the demolition and removal activities attendant to the conversion of a structure constitute an alteration within the meaning of § 12(b*). Ryder Transp. Servs.,* 24 BNA OSHC 2061, 2062 (No. 10-0551, 2014) ("*See Active Oil Serv., Inc*., 21 BNA OSHC 1184, 1186, 2004-09 CCH OSHD ¶ 32,803, p. 52,497 (No. 00-0553, 2005) (concluding that building's 'conversion from oil to gas heat constituted an alteration of [it] and its surrounding property,' and that cited employer's removal of 'oil tanks and oil-burning equipment was an integral part of this alteration' and, therefore, was construction work))." Specific standards regulating demolition are found in Subpart T of the Part 1926 Construction Standards.

The Court concludes Durco was engaged in construction and OSHA properly cited the employer under the Construction Standards.

Item 1: Alleged Serious Violation of § 1926.25(a)

Item 1 alleges: "3rd and 5th floor stairs – On or about November 25, 2014, carpet padding was placed on the stairs. The padding was not secured and it created a tripping hazard."

Section 1926.25(a) provides: "During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures."

CSHO Oglesby testified that Item 1 "involved carpet padding . . . placed on the stairway and it wasn't secured, and it presented a tripping hazard." (Tr. 25) Exhibit C-3 comprises two photographs showing a flight of stairs covered with unsecured carpet padding. Mr. Durham told CSHO Oglesby he had placed the carpet padding "on the stairs so he could slide the furniture from the upper floors down to the bottom floor." (Tr. 31)

Applicability of the Cited Standard

The American Heritage Dictionary Second College Edition (1982) defines *debris* as "1. The scattered remains of something broken or destroyed ruins. 2. *Geol.* An accumulation of relatively large rock fragments." The Commission was not guided by the dictionary definition of *debris* in the two leading cases on the issue.[5] In *Gallo Mech. Contractors, Inc.,* 9 BNA OSHC 1178, 1180 (No. 76-4371, 1980), the Commission held *debris* does not encompass equipment but does include material which may or may not be used in the future.

> "[D]ebris" within the meaning of section 1926.25(a) includes material that is scattered about working or walking areas. Whether the material has been used in the past or can or will be used in the future is irrelevant. We conclude, however, that equipment cannot be considered "debris" within section 1926.25(a). The linkage of "all other debris" with "form and scrap lumber with protruding nails" suggests that only material is covered by the standard. Moreover, the nature of construction work would generally preclude keeping work areas and passageways entirely clear of equipment. Accordingly, although the materials consisting of wood, steel pieces, pipes, and other objects on the first elevation constitute debris within section 1926.25(a), the equipment to be installed or removed on both elevations involved in this case is not debris.

In *Capform, Inc.,* 16 BNA OSHC 2040, 2044 (No. 91-1613, 1994), the Commission declined to accede to the employer's argument that "without clear indication from the drafter of the standard, the Commission should apply the usual and ordinary meaning of the terms." The Commission stated,

> [Capform] notes that "debris" is defined in Webster's Ninth New Collegiate Dictionary (1991) as "the remains of something broken down or destroyed; ruins," which is not what the materials at issue here were. We find no basis for disturbing our decision in *Gallo.* There we considered the meaning of "debris" in light of the purpose of the standard (to prevent tripping accidents) and in relation to the only items specifically listed in the standard (form and scrap lumber with protruding nails). Capform's proposed meaning does not take into account this purpose, and Capform does not cite any precedent in support of its view. As for Capform's argument that to apply *Gallo's* definition of "debris" would cripple

[5] Commissioner MacDougall discusses the Commission's expansive interpretation of *debris* in her dissent in *Brand Energy Solutions, LLC,* 25 BNA OSHC 1386 (No. 09-1048, 2015).

> construction contractors, the definition has been Commission precedent since 1980, and Capform presents no evidence that it has had that effect.

Id.

In this case, the Court determines the carpet padding placed by Durco to cover the stairs is not debris, even under the Commission's broad interpretation of that term. The carpet padding was not material Durco had used in the past that now was cluttering up the stairs and it was not material it stored on the stairs because it planned to use in the future. Durco was using the carpet padding at the time of the inspection in order to facilitate sliding furniture down the stairs. Durco had purposefully placed the carpet padding on the stairs with the intention of expediting the removal of furniture. Neither *Gallo* nor *Capform* indicates material in current use, placed for the specified purpose of aiding employees with their work progress, is debris.

The Court finds the carpet padding was not debris at the time of the inspection and, accordingly, § 1926.25(a) does not apply to the cited conditions. Item 1 is vacated.

Item 2: Alleged Serious Violation of § 1926.56(a)

Item 2 alleges: "3rd thru 7th floor internal stairs - On or about November 25, 2014, employees were using stairs that had inadequate lighting."

Section 1926.56(a) provides: "Construction areas, ramps, runways, corridors, offices, shops, and storage areas shall be lighted to not less than the minimum illumination intensities listed in Table D-3 while any work is in progress[.]" Table D-3 requires a minimum of 5 foot-candles for "General construction area lighting" as well as for "Indoors: warehouses, corridors, hallways, and exitways."

Applicability of the Cited Standard

The cited stairs were in a construction area and constituted an exitway. Section 1926.56(a) applies to the cited conditions.

Terms of the Standard Were Not Met

CSHO Oglesby testified, "The employees were using a set of stairs that did not have lighting; it was dark." (Tr. 27) He measured the illumination in the stairwell using a calibrated light meter. The meter reading "was something like .01, which means almost completely dark." (Tr. 28) CSHO Oglesby stated he attempted to take photographs of the dark stairwell, "but it was just a black sheet of paper, because it was . . . completely dark." (Tr. 28-29) The Secretary has established Durco failed to comply with the requirements of § 1926.56(a).

Employee Exposure

Employees used the cited stairs to access the other floors and to move furniture to the bottom level (Tr. 27-28). One employee sustained an injury falling down the darkened stairs (Tr. 28). Employee exposure to the tripping or falling hazard due to inadequate illumination is established.

Employer Knowledge

Mr. Durham was the onsite supervisor of the employees. He initially told CSHO Oglesby that Durco's employees did not use the stairs. The employees the CSHO interviewed, however, informed him they did use the stairs "and Mr. Durham had told them they could use the stairs, to use those stairs." (Tr. 32) CSHO Oglesby's testimony establishes Mr. Durham had actual knowledge of the violative condition.

As supervisor, Mr. Durham's knowledge of the inadequate lighting for the stairway is imputed to Durco. This case arises in the Fifth Circuit, where the Court of Appeals has held:

> [A] supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable.

W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety & Health Review Comm'n, 459 F.3d 604, 608-09 (5th Cir. 2006). This is not a situation for which the Secretary is required to establish the supervisor's conduct was foreseeable by the employer. It was Mr. Durham's responsibility, as supervisor, to ensure there was adequate lighting in the stairwell. However, unlike *Yates,* Mr. Durham was not the sole employee exposed to the hazard created by Durco's failure to adequately illuminate the stairway. His subordinate employees were also exposed to the cited hazard. *See Quinlan v. Sec'y, U.S. Dep't of Labor,* 812 F.3d 832, 841 (11th Cir. 2016).

Furthermore, Mr. Durham identified himself to CSHO Oglesby as the owner of Durco. Durco's articles of incorporation list Mr. Durham as Durco's registered agent and incorporator.

> "Knowledge" by a corporate entity is necessarily a fiction; the corporation can only be said to 'know' information by imputing to it the knowledge of natural persons who serve as its agents." *Central Soya de Puerto Rico, Inc. v. Secretary,* 653 F.2d 38, 39 (1st Cir.1981*). See also Acme Precision Products, Inc. v. American Alloys Corp.,* 422 F.2d 1395, 1398 (8th Cir.1970) ("knowledge of officers and key employees of a corporation, obtained while acting in the course of their employment and within the scope of their authority, is imputed to the corporation itself").

Caterpillar, Inc., 17 BNA OSHC 1731, 1732 (No. 93-373, 1996), *aff'd* 122 F.3d 437 (7th Cir.

1997). As owner of the company, Mr. Durham knew of the violative conditions he failed to correct as the onsite supervisor on the project.

The Secretary has established Durco had actual knowledge of the violation of § 1926.25(a).

Classification of the Violation

The Secretary classified the violation of § 1926.25(a) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result 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). The Court finds that serious physical harm is the likely result if an employee tripped and fell down the stairs due to inadequate illumination. The violation is serious.

Item 3: Alleged Serious Violation of § 1926.403(i)(2)

Item 3 alleges: "1st Floor Ballroom – On or about November 25, 2014, employees were exposed to energize[d] electrical wiring that protruded from the wall and floor while removing carpet from the ballroom floor."

Section 1926.403(i)(2) provides:

> Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by cabinets or other forms of enclosures, or by any of the following means:
>
> (A) By location in a room, vault, or similar enclosure that is accessible only to qualified persons.
>
> (B) By partitions or screens so arranged that only qualified persons will have access to the space within reach of the live parts. Any openings in such partitions or screens shall be so sized and located that persons are not likely to come into accidental contact with the live parts or to bring conducting objects into contact with them.
>
> (C) By location on a balcony, gallery, or platform so elevated and arranged as to exclude unqualified persons.
>
> (D) By elevation of 8 feet (2.44 m) or more above the floor or other working surface and so installed as to exclude unqualified persons.

CSHO Oglesby testified unguarded energized electrical wires were protruding from the floor and walls of the ballroom (Tr. 29).

Applicability of the Cited Standard

Section 1926.403(i)(2) addresses "guarding of live parts." CSHO Oglesby took two

photographs of the wires at issue, one of which shows a voltage tester lit up as it touches a wire (Exh. C-4). The cited standard applies to the cited conditions.

Terms of the Standard Were Not Met

As is clear from a review of Exhibit C-4, the energized wires photographed by CSHO Oglesby are protruding from the floor and the wall of the ballroom and are not guarded. The first photograph, which shows the lit up voltage tester touching the wire, is of "a wall where a light fixture was at one time, but had been removed and the bare wires just hanging out of the wall." (Tr. 33) The second photograph shows an energized wire lying on the floor.

The Secretary has established the terms of § 1926.403(i)(2) were not met by Durco.

Employee Exposure

CSHO Oglesby testified the employees working in the ballroom were exposed to the hazard of electrocution or electrical shock (Tr. 29-30). Through employee interviews, CSHO Oglesby learned employees had worked in the ballroom to remove the carpet off the floor (Tr. 30). Employee exposure to the energized wires is established.

Employer Knowledge

Initially, Mr. Durham denied Durco's employees were required to enter the ballroom (Tr. 30). After CSHO Oglesby learned through employee interviews that they were instructed to remove the carpet in the ballroom, Mr. Durham conceded, "[O]kay, yeah, they did move some of the carpet out of the room." (Tr. 31) The Secretary has established Mr. Durham had actual knowledge of the violative condition.

The violation of § 1926.403(i)(2) is established.

Classification of the Violation

The Secretary classified the violation of § 1926.403(i)(2) as serious. The Court finds that death or serious physical harm is the likely result if an employee made contact with one of the unguarded energized wires. The violation is serious.

Item 4: Alleged Serious Violation of 1926.405(g)(1)(iii)

Item 4 alleges: "4th floor hallway – On or about November 25, 2014, an extension cord was hard wired into the building electrical system. The extension cord grounding wire was not connected to the building electrical system."

Section 1926.405(g)(1) provides in pertinent part: "[F]lexible cords and cables should not be used . . . [a]s a substitute for the fixed wiring of a structure."

CSHO Oglesby testified he observed an extension cord "hardwired into the building

electrical system." (Tr. 33)

Applicability of the Cited Standard

Section 1926.405(g) addresses "Flexible cords and cables." The extension cord at issue is a flexible cord. The cited standard is applicable.

Terms of the Standard Were Not Met

CSHO Oglesby testified Durco had removed the cover of the junction box in the ceiling and "cut the plug off the extension cord and connected the extension cord to the wiring that was inside the junction box. And what it shows [in Exhibit C-5] is the extension cord running from the junction box down to the floor. . . . And then on the floor, there were other extension cords plugged into the cord that was running from the ceiling." (Tr. 35)

The Secretary has established Durco violated the terms of § 1926.405(g)(1)(iii) by using an extension cord as a substitute for the fixed wiring of the building.

Employee Exposure

CSHO Oglesby testified the hardwiring of the extension cord was in place for at least a week and Durco's employees were working in the area. The employees were exposed to "electrical shock, possible electrocution from using ungrounded equipment. . . . [T]he extension cord is not grounded, so anything that's plugged into this cord here would be the same thing, it won't be grounded." (Tr. 36)

Employee exposure to the hazard of electrical shock or electrocution is established.

Employer Knowledge

The extension cord at issue was located on the fourth floor for at least one week. The extension cord was connected to other extension cords in use. Mr. Durham walked through the building on a regular basis (Tr. 37-38). The Secretary has established Durco, through Mr. Durham, had at least constructive knowledge of the hazardous condition.

Classification of the Violation

The Secretary classified the violation of § 1926.405(g)(1)(iii) as serious. The Court finds that death or serious physical harm is the likely result if an employee received a shock from use of the ungrounded extension cord. The violation is serious.

Item 5: Alleged Serious Violation of § 1926.602(c)(1)(vii)

Item 5 alleges: "Jobsite – On or about November 25, 2014, an employee was riding on a pallet that was being carried by a forklift. The employee was supporting a desk that was on the pallet and being moved by the forklift operator."

Section 1926.602(c)(1)(vii) provides: "Unauthorized personnel shall not be permitted to ride on powered industrial trucks. A safe place to ride shall be provided where riding of trucks is authorized."

CSHO Oglesby testified he observed an operator driving a forklift down a ramp. The forklift was carrying a pallet on which a dresser was placed. A Durco employee was standing on the pallet, holding the dresser to keep it from falling off the pallet (Tr. 38).

Applicability of the Cited Standard

Section 1926.602(c) applies to "lifting and hauling equipment," including industrial trucks, of which forklifts are a type. The cited standard applies.

Terms of the Standard Were Not Met

CSHO Oglesby observed the Durco employee riding on the pallet being carried by the forklift as soon as he arrived at the worksite the first day of his inspection (Tr. 38). The CSHO did not take a photograph of the incident as it was happening because he was unable to get his camera out in time (Tr. 39). Instead, CSHO Oglesby took a posed photograph showing the employee standing next to the dresser on the pallet (Exh. C-6; Tr. 39). The employee admitted to the CSHO he was standing on the pallet as it was carried by the forklift "to keep the dresser from sliding off the pallet." (Tr. 40)

The Secretary has established a violation of § 1926.602(c)(1).

Employee Exposure

CSHO Oglesby testified the hazard created by the employee riding on the pallet as it was carried by the forklift was the employee "could have fallen off the forklift and been run over by the forklift." (Tr. 39) Employee exposure is established.

Employer Knowledge

CSHO Oglesby was speaking with Mr. Durham when the operator started coming down the ramp with the pallet, dresser, and employee riding on the forklift. Both men observed the violative condition together. CSHO Oglesby testified Mr. Durham "really didn't say anything to them until I pointed it out to—until I brought it to his attention." (Tr. 40) "[B]y the time I mentioned that to Mr. Durham, he told them to stop." (Tr. 39)

CSHO Oglesby did not testify regarding the length of time he and Mr. Durham observed the violative conduct before the CSHO pointed out the hazardous nature of the conduct. It is plausible Mr. Durham may have testified he had insufficient time to process his observation of the violative conduct and instruct the operator to stop or that he was distracted by the presence of

the CSHO. Mr. Durham, however, failed to appear at the scheduled hearing. He did not make this argument or provide any other rationale for his failure to immediately correct his subordinate employees.

> It is well established that when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party. *Graves v. United States*, 150 U.S. 118, 121 (1893). The Commission has also noted that when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case. *CCI, Inc.*, 9 BNA 1169, 1174, 1981 CCH OSHD ¶ 25,091, pp. 30,994-95 (No. 76-1228, 1980), *aff'd*, 688 F.2d 88 (10th Cir. 1982); *see also Woolston Constr. Co.*, 15 BNA OSHC 1114, 1122 n.9, 1991-93 CCH OSHD ¶ 29,394, p. 39,573 n.9 (No. 88-1877, 1991) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976)), *aff'd without published opinion*, No. 91-1413 (D.C. Cir. May 22, 1992).

Capeway Roofing Sys., Inc., 20 BNA OSHC 1331, 1342-1343 (No. 00-1968, 2003).

As the record stands, the Secretary has presented unrebutted testimony establishing Mr. Durham had actual knowledge of the violation of the cited standard. Mr. Durham witnessed the violative conduct and did not instruct the operator to stop the forklift or the employee to get off the pallet until prompted by CSHO Oglesby. Mr. Durham's actual knowledge of the violation is established and is imputed to Durco.

The Secretary has established Durco violated § 1926.602(c)(1)(vii).

Classification of the Violation

The Secretary classified the violation of § 1926.602(c)(1)(vii) as serious. The Court finds that death or serious physical harm is the likely result if the employee riding the pallet carried by the forklift had fallen from the pallet. The violation is serious.

Item 6: Alleged Serious Violation of § 1926.602(d)

Item 6 alleges: "Jobsite – On or about November 25, 2014, the employer did not ensure that each forklift operator [was] trained and certified to operate forklifts."

Section 1926.602(d) provides: "NOTE**:** The requirements applicable to construction work under this paragraph are identical to those set forth at §1910.178(l) of this chapter." Section 1926.602(d) makes the training requirements set forth in § 1910.178(l) applicable to operators of powered industrial trucks in construction.

Section 1910.178(l) requires that employers "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)." This required training must "consist of a combination of formal instruction ..., practical training ..., and evaluation of the operator's performance in the workplace." § 1910.178(l)(2)(ii). The content of the required training is prescribed by § 1910.178(l)(3). Section 1910.178(l)(6) provides: "The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation."

CSHO Oglesby testified the forklift operators "were not certified to operate the forklift." (Tr. 41)

Applicability of the Cited Standard

Section 1926.602(d) addresses "Powered industrial truck operator training." Section 1910.178(l), incorporated by reference in the cited standard, lists the requirements for the operator training. At least two of Durco's employees operated the forklifts at the worksite. The cited standard applies.

Terms of the Standard Were Not Met

CSHO interviewed the forklift operators, who told him they were not certified to operate a forklift (Tr. 41). In a written statement, Employee #1 stated, "I'm not certified to operate a forklift. J. R. Durham ask[ed] me could I drive a forklift and I said yes. Forklift certification was not checked on. . . . I drove the forklift this morning." (Exh. C-8). Employee #1 signed this statement. Employee #2 stated, "I'm not certified to operate the forklift. I operate the forklift daily from 7 AM to 5 PM." (Exh. C-9). Employee #2 signed his written statement.

The Secretary has established Durco failed to ensure each forklift operator was trained and certified to operate the forklifts.

Employee Exposure

Employee #2 stated he drove the forklift daily for the entire shift. Both the operators and other employees are exposed to potential broken bones or other injuries or death when untrained operators can strike employees with the forklift or cause material to fall on the operator or others. The incident witnessed by CSHO Oglesby where the forklift operator drove the forklift as it carried another employee standing on a pallet holding onto a dresser is an example of the hazardous behavior in which an untrained operator may engage.

Employee exposure is established.

Employer Knowledge

It is the employer's obligation to ensure its forklift operators are trained and certified. Employee #1 stated, "Forklift certification was not checked on." (Exh. C-8) Employee #2 stated, "I'm not certified to operate the forklift." (Exh. C-9) As supervisor, it was incumbent upon Mr. Durham to verify the operators were certified to operate forklifts before he instructed them to do so. Mr. Durham was aware he did not verify the certification of the employees. He had actual knowledge the forklift operators were not certified. His knowledge is imputed to Durco.

The Secretary has established Durco violated § 1926.602(d).

Classification of the Violation

The Secretary classified the violation of § 1926.602(d) as serious. The Court finds that death or serious physical harm is the likely result of untrained employees operating forklifts in the presence of other employees. The violation is serious.

Penalty Determination

Under § 17(j) of the Act, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Durco employed approximately fifteen employees (Tr. 54). There is no evidence in the record showing OSHA had previously inspected a Durco worksite. The Court gives Durco no credit for good faith based on the awareness of the supervisor that the employees were routinely working under hazardous conditions. *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048 (No. 91-2834E & 91-2950, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices).

The record established approximately fifteen employees worked on the jobsite for approximately one month. No precautions against injury were taken by Durco. The likelihood of injuries to the employees was high, given the pervasiveness of the violations. Upon due consideration of these factors, the Court determines the violations were of high gravity and assesses the penalties as proposed by the Secretary for Items 2 through 6 of the Citation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of the Citation, alleging a serious violation of § 1926.25(a), is VACATED and no penalty is assessed;
2. Item 2 of the Citation, alleging a serious violation of § 1926.56(a), is AFFIRMED and a penalty of $2,400.00 is assessed;
3. Item 3 of the Citation, alleging a serious violation of § 1926.403(i)(2), is AFFIRMED and a penalty of $1,700.00 is assessed;
4. Item 4 of the Citation, alleging a serious violation of § 1926.405(g)(1)(iii), is AFFIRMED and a penalty of $2,000.00 is assessed;
5. Item 5 of the Citation, alleging a serious violation of § 1926.602(c)(1), is AFFIRMED and a penalty of $1,700.00 is assessed; and
6. Item 6 of the Citation, alleging a serious violation of § 1926.602(d), is AFFIRMED and a penalty of $2,800.00 is assessed.

SO ORDERED.

/s/
SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia

Date: May 18, 2016