UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BRIGADE ENERGY SERVICES LLC, Respondent.	OSHRC DOCKET NO.: 22-0548

Appearances:

Gregory W. Tronson, Esq. & Jeffrey M. Leake, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado

For Complainant

Emily R. Linn, Esq. & Steven R. McCown, Esq., Littler Mendelson, P.C., Austin, Texas

For Respondent

Before: Judge Christopher D. Helms – U.S. Administrative Law Judge

DECISION AND ORDER

I. PROCEDURAL HISTORY

On November 3, 2021, a surface explosion occurred on an oil well worksite in Grassy Butte, North Dakota, injuring three workers. Brigade Energy Services LLC ("Respondent") was the general contractor on the worksite, and two of its workers were injured. After being notified about the workplace fatality, the U.S. Occupational Safety and Health Administration ("OSHA") opened an inspection of the Grassy Butte worksite. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging a violation of the

Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et. seq.* ("OSH Act") and proposing a total penalty of $14,502. The Citation was issued on April 29, 2022, and alleged a serious violation of one of OSHA's Explosives and Blasting Agents standards found at 29 C.F.R. § 1910.109(b)(1) or, in the alternative, a violation of section 5(a)(1) ("the general duty clause") of the OSH Act.

Respondent timely contested the Citation, bringing this matter before the U.S. Occupational Safety and Health Review Commission ("Commission"). A hearing was held in Denver, Colorado on August 26-27, 2024, and also remotely on September 24, 2024. The following witnesses testified: (1) [Redacted], Derrick Hand for Respondent; (2) [Redacted], Senior Wireline Operator for KLX; (3) OSHA Compliance Safety and Health Officer (CSHO) Brian Trondson; (4) Brandon Sletten, Rig Supervisor/Crew Chief for Respondent; (5) Earl Raynor, Wireline Supervisor for Respondent; (6) Nick Lantz, Rig Supervisor for Respondent; and (7) Richard Plageman, Vice President of Quality, Health, Safety and Environment for Respondent.

Both parties filed post-hearing briefs and post-hearing reply briefs. Upon careful consideration, the Court VACATES the Citation.

II. STIPULATIONS

The parties filed a Joint Stipulation Statement ("JSS") prior to the hearing. *See* JSS (Aug. 16, 2024). These stipulations will be addressed herein as appropriate.

III. JURISDICTION

The record establishes that Respondent is an employer within the meaning of the OSH Act, is engaged in a business affecting interstate commerce, and filed a timely notice of contest to the subject Citation. (Complaint ¶¶ II, V; Answer ¶¶ II, V; JSS ¶¶ A2, A4). Accordingly, as the parties stipulated, the Court has jurisdiction over this proceeding pursuant to section 10(c) of the

OSH Act. 29 U.S.C. § 659(c); JSS ¶ A1; *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 995 (5th Cir. 1975), *aff'd sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977) (describing "Enforcement Structure of OSHA").

IV. FACTUAL BACKGROUND

A. The Grassy Butte Project

In the oil and gas industry, Respondent is a company[1] that performs maintenance and repair services on existing oil wells, including "plug and abandonment" ("P&A") jobs. (Ex. C-5 at 1.) A P&A is a type of service performed on a no longer functioning oil well to safely cut, cap and seal it. (Tr. 91-92.) Essentially, it concerns the closing and the sealing of a well so that the land can be reclaimed. (Tr. 197). As relevant to the matter here, a P&A requires a workover crew to prepare the well and to provide derrick hauling support, a wireline crew to perforate the well using explosives, and a cement crew to seal the destroyed well. (Tr. 197-201.)

At the Grassy Butte worksite, the leaseholder of the well, Citation Oil & Gas, hired Respondent to perform the P&A. (Ex. C-3 at 3.) Respondent performed the workover function and hired KLX to perform the wireline function of the P&A.[2] (Ex. C-3 at 3.) As the workover crew, Respondent focused its work on and around the "workover rig" (also referred to as the "derrick" in this matter). (*See*, e.g., Tr. 215, 223 referring to Ex. C-3 at 16 (Fig. 16) and 18 (Fig. 21)). As gleaned from this record, the workover rig is a piece of wheeled machinery with a rig floor/platform/deck located at its rear. (Tr. 215-216; Exs. C-3 at 18 (Fig. 21), C-35 (annotated version of Ex. C-3 (Fig. 21)).) The workover rig stands over the "well head" and operates like a

[1] Respondent is known within the industry as a "workover" company. (Resp't Br. at 3.)

[2] The facts of this case revolve around the interaction between Respondent (the workover crew) and KLX (the wireline crew). The evidence regarding the cement crew was not developed with respect to the facts of this matter and so this decision addresses mainly the workover and wireline portions of this P&A job.

crane that raises and lowers items into and out of the "wellbore."[3] (Tr. 99, 468, 478, 621; Ex. C-3 at 15 (Fig. 15).)

The wireline crew, on the other hand, is responsible for connecting the wireline (a "large cable about the diameter of your pinkie finger") to a "perforation gun." (Tr. 94-95, 512-513.) The wireline crew lowers the connected perforation gun inside the well to a predetermined depth and then perforates the well. (Tr. 92, 98, 198-199.)

The workover crew and the wireline crew must coordinate because both crews depend on each other for their respective tasks. For example, the workover crew must first prepare the well before the wireline crew can deploy the perforation gun. (Tr. 468.) To prepare the well, the workover crew removes residual casing or piping from the existing well. (Tr. 468, 506-07.) When the workover crew determines that the well is sufficiently prepared, the workover crew signals to the wireline crew that the well is ready for the perforation gun. (Tr. 94.) Notably, the workover crew assists the wireline crew in "rigging up"[4] by "tying off" the wireline sheaves to the top of the rig as part of their job duties. (Tr. 94-95.) In short, the workover crew and the wireline crew rely on one another, and the crews are described as working "hand-in-glove." (Tr. 108.)

B. The Perforation Gun

The perforation gun is used to perforate the walls within the well. (Tr. 116.) After the perforation gun is lowered into the well to a predetermined depth, the wireline crew detonates the perforation gun, which then shoots "firing arrows" such that the surrounding portion of the well

[3] The "wellhead" is the structural assembly located directly above the well hole. The well hole itself is also termed the "wellbore." Ex. C-3 at 7 ("Tubulers below the cut are left in the wellbore"), 15 (Fig. 15) (noting "well head" in "typical wireline conveyed perforating hookup" diagram).

[4] "Rigging up" and "rigging down" are terms used to describe the set up and take down procedures for the wireline on the wellhead and workover rig. (Tr. 93-98, 533.)

wall perforates. (Tr. 92, 112, 116-17, 478-479, 593-594.) The *mechanism* of the perforation gun used at the Grassy Butte worksite is critical to the analysis of this case.

The perforation gun has been described as a "pipe bomb," in that the shape of it is "a steel tube with directional charges inside of it." (Tr. 97, 122; *see*, e.g., Ex. C-3 at 8 (Fig. 4) (generic illustration of steel tube containing explosives), 14 (Fig. 14) (picture of steel tube in this case).) The steel tube has also been referred to as "the carrier." *See, e.g.*, Tr. 142, 171, 511-512 (referring to Ex. C-3 at 11 (Fig. 10).) KLX, the wireline company in this case, loaded the steel tube, or carrier, with explosives in its shop the day before transporting it to the oil well worksite. (Tr. 104.)

This steel tube must be connected to an electrical power source to detonate the charges inside the steel tube to perforate the well. (Tr. 107-109.) This power source is "the wireline." (Tr. 107); *see also*, e.g., Sec'y Br. at 6 ("Once the perforation gun is loaded with explosives, it is then connected *to a wireline* which provides an electrical current to the gun for detonation") (emphasis added). The wireline power source is also termed a "wireline tool string," due to the many components of it such as the "rope socket," the "collar locater (or CCL)", the "quick change," and a "seal block." (Exs. C-3 at 21 (Fig. 25), R-24 at 1 (Fig. 25) (annotated Ex. C-3 (Fig. 25))); *see also* Resp't Br. at 5-6 ("several mechanical tools are used to connect the perforation gun with the wireline, to form a wireline tool string.") CSHO Trondson referred to the wireline tool string as the "firing head." (Tr. 270, 292-293, 370.)

The Court notes that it is <u>undisputed</u> that – in contrast to the steel tube – none of the components of the wireline (i.e., the wireline tool string, or the firing head) are independently explosive or contain explosives or blasting agents like the steel tube does. (Tr. 379, 401, 405; Resp't Br. at 6 ("Notably, none of these component parts *of the wireline tool string* are a perforation gun, or contain explosives or blasting agents") (emphasis added); Sec'y Br. at 13

(claiming that worker "handled explosives when he helped complete the connection of the loaded perforation gun *to the CCL wireline connection*, making it a singular explosive device")(emphasis added); Sec'y Reply Br. at 6 ("Brigade's employees "handled" explosives because the quick change/CCL *connects* to the perforation gun") (emphasis added).)

These two components – the steel tube and the wireline tool string – must be connected for the perforation gun to operate as it is designed to do. (Tr. 107, 386-87, 537-38.) When the steel tube is connected to the wireline tool string, a "button/pin" mechanism inside that connection allows the electricity from the wireline tool string to flow to the steel tube, which then detonates the charges within it. (Tr. 516-17 (discussing Ex. C-3 at 12, 21 (Figs. 11, 25)).)

The wireline truck is the source of electricity for the perforation gun. (Tr. 117-20.) The KLX wireline crew was composed of two workers – a wireline operator and a wireline engineer. The wireline operator connects the steel tube to the wireline tool string, and the wireline engineer monitors the electrical signal from the wireline truck. (Tr. 118-19.) At a certain point in the process, the wireline crew performs a "check fire" to ensure that "the truck is sending an electrical signal." [5] (Tr. 94-95, 118-20.)

Once the "check fire" step is complete[6] and the steel tube is connected to the wireline tool string, the perforation gun is ready to be lowered into the well. (Tr. 112.) When connected, the perforation gun weighs about 40 pounds. (Tr. 536-38 (discussing Ex. C-3 at 11, 12, 21 (Figs. 9, 10, 11, 25)).) The wireline crew "starts to tighten the wireline" using aluminum sheaves that have

[5] The wireline crew members worked together via "signals" to know when to connect the steel tube to the wireline tool string. (Tr. 118.)

[6] The record suggests that the "check fire" step is performed before the steel tube is connected to the wireline tool string, and can be performed even before the steel tube is brought from the truck onto the worksite. (Tr. 523-24.) However, the record also suggests that the "check fire" step in this case resulted in unexpected energy within the wireline during the connection process and was the reason behind the surface explosion in this matter. (Tr. 120, 523-29.) For the purposes of this case, it is unnecessary to determine the reason behind the incident and so the Court makes no finding as to the cause of the explosion.

been rigged into place on the derrick by the workover crew for this purpose, raises the perforation gun from the ground up over the well, and then lowers the perforation gun down into the well to a predetermined depth for detonation. (Tr. 95, 112, 621; Ex. C-3 at 15 (Fig. 15).)

C. The Surface Explosion

Respondent's workover crew consisted of Rig Supervisor Nick Lantz, Crew Chief Brandon Sletten, and three crew members. (Tr. 261, 467.) The morning of the incident, Lantz met with his crew and Pat Ruslek, the "company man for Citation Oil," to discuss any job hazards that day and fill out a corresponding job safety analysis. (Tr. 467, 471, 611-612; Ex. C-11.) The KLX wireline crew was not present on the jobsite during this discussion. (Tr. 612.) [Redacted], a derrick hand for Respondent, testified that he was advised that morning that a "live gun" would be on site that day and that a "no cell phones" policy was in place because "[the wireless phone] will trigger the gun." (Tr. 46-47; Ex. C-11.) [Redacted] was warned to "stay away" from the wireline operation because "we were still in the firing line," and was told he was not to assist the wireline operation unless asked, but if he was asked to assist, he was to notify his supervisor who would give further direction. (Tr. 47-48, 53, 83-84.)

The KLX wireline crew arrived at the worksite around 10:30 a.m. (Tr. 97.) KLX Senior Wireline Operator [Redacted] was tasked with the perforation gun, and KLX Wireline Engineer Howard McMahan was tasked with the electrical signal originating from the KLX truck. (Tr. 90, 106-07.) Two detonations (referred to as "runs") were scheduled for the day: one at 1,000 feet deep in the well, and the second at 60-90 feet deep. (Tr. 99.) According to [Redacted], the "runs go quickly." (Tr. 97.) Around 11:00 or 11:30 a.m., the workers successfully detonated the perforation gun 1,000 feet deep in the well. (Tr. 97.) There is little evidence in this record regarding who stood where and did what during this first run. (Tr. 386.) The second run was

scheduled around 6:00 p.m., once Respondent's workover crew had prepared the well after the first run. (Tr. 103-04.)

[Redacted] testified that, around the time of the incident, Respondent's crew and the KLX crew were both at the "same wellhead" area. (Tr. 50; *see also* Tr. 215 (referring to Ex. C-3 at 18 (Fig. 21) (overview picture of area and equipment)).) [Redacted] stood about 4 to 5 feet from one of Respondent's workers (referred to as "Worker A") and KLX operator [Redacted]. [Redacted] watched Worker A and [Redacted] work together at the rear of the workover rig, while the rest of the Brigade crew was located at the wellhead about 30 to 40 feet away, performing other tasks. (Tr. 51, 485, 613-14.) [Redacted] watched Worker A pick up the wireline tool string by the CCL/cable head section in an effort to assist [Redacted] during the task of connecting the steel tube to the wireline tool string. (Tr. 50-52, 62, 121, 151.) During this time, KLX engineer McMahan was in the cab of the KLX truck. (Tr. 52, 106.)

[Redacted] held the steel tube, which had been loaded with explosives the day before the incident in the KLX shop. (Tr. 104.) Worker A held the wireline tool string; specifically, the CCL/cable head part of the wireline tool string. (Tr. 149, 151 (referring to Ex. C-3 at 21 (Fig. 25) (identifying part of the wireline tool string as the CCL/cable head)).) [Redacted] connected the loaded steel tube *he was holding* to the end of the wireline tool string – the CCL/cable head part of which *Worker A was holding* – and an unexpected explosion occurred, injuring all three workers. (Tr. 54, 62, 70, 72-73, 80-81, 121-122.)

Lantz, Sletten, and a third crew member, who were all located near the rig platform of the workover rig 30 to 40 feet away, were not injured. (Tr. 485, 594, 613, 623.) Lantz and Sletten testified that they did not see [Redacted] or Worker A near [Redacted], nor did they see Worker A assist [Redacted] in connecting the steel tube to the wireline tool string. (Tr. 486, 594-95.)

D. The OSHA Inspection

Shortly after the incident, the McKenzie County Sheriff's Department reported the explosion at the Grassy Butte worksite to the Bismark OSHA Area Office. (Tr. 175, 181-182.) The OSHA Assistant Area Director contacted CSHO Trondson that evening and directed him to investigate the worksite the following day.[7] (Tr. 181, 190-191.) On his way to the worksite, CSHO Trondson obtained documentation from the McKenzie County Sheriff's Department, including photographs and typed-up interview statements that it had collected during its investigation. (Tr. 182.)

Based on the information he received from the McKenzie County Sheriff's Department (which did not include contact information for Respondent), CSHO Trondson contacted a representative of KLX to meet him at the worksite. (Tr. 191-92, 347.) CSHO Trondson arranged to meet with the KLX representative, as well as "the company man" with Citation Oil and Gas. (Tr. 195, 372-373; Ex. C-3 at 2.) The KLX representative attempted to reach Respondent but was unsuccessful. (Tr. 347-348.) CSHO Trondson conducted an opening conference and a walk-around of the worksite with representatives of KLX and Citation Oil and Gas. (Tr. 193-195.)

Two months later, after having used an incorrect email address for Respondent, CSHO Trondson was contacted by Dustin Nygard, Respondent's legal counsel, on January 6, 2022. (Tr. 349-50; Ex. C-5.) CSHO Trondson requested and received documents from Respondent, and then subsequently conducted interviews with Respondent's workers. (Tr. 249-50, 259-60, 265, 268;

[7] Brian Trondson is an OSHA CSHO working out of the Bismarck Area Office. (Tr. 175, 328.) CSHO Trondson has been an OSHA CSHO since August 2019, and previously served in the United States Coast Guard performing search and rescue investigations and, also, high-risk operations involving explosives. (Tr. 176, 178-80, 686.) CSHO Trondson has an associate's degree in process plant technology. (Tr. 328.) Since becoming an OSHA CSHO, he has participated in 120 investigations, 3 of which involved the oil and gas industry, and one of which–the current matter–involved explosives. (Tr. 329-30.) CSHO Trondson consulted "API R67 and API 19, some ATF documents, Federal Motor Carrier documents, DOT documents, EPA documents," among others, in his research leading up to his recommendation to issue a citation in this matter. (Tr 334.)

Exs. C-6, C-7, C-8, C-9, C-10, C-11.) CSHO Trondson did not hold an opening conference or conduct a walk-around inspection of the worksite with any representative of Respondent. (Tr. 350-51, 354, 687, 703, 725.) CSHO Trondson also did not hold a closing conference with Respondent. (Tr. 702-03, 725-26.)

As a result of his inspection, CSHO Trondson recommended that OSHA issue a citation to Respondent. (Tr. 184; Ex. C-1.) OSHA issued Respondent a citation alleging either a serious violation of 29 C.F.R. § 1910.109(b)(1)[8] or, in the alternative, a serious violation of section 5(a)(1) ("the general duty clause") of the OSH Act.[9] OSHA alleged Respondent violated the OSH Act because Respondent's "employees who were not essential to the operation handled explosives by assisting in the assembly of a perforation gun, and were not cleared from the hazard area." (Ex. C-1 at 8.)

E. Respondent's Safety Policies Regarding Explosives

Respondent has 600 employees and operates in several states including North Dakota and Texas. (Tr. 305; Ex. C-5 at 1.) Respondent generally only performs workover work, except in Andrews, Texas, where Respondent performs wireline work in addition to workover work. (Tr. 500-01.) Respondent's workers in Texas who perform wireline work are specifically trained in explosives and explosive safety.[10] (Tr. 503-06 (referring to Exs. C-14 (Brigade Explosives

[8] Section 1910.109(b)(1) provides: "*General hazard.* No person shall store, handle, or transport explosives or blasting agents when such storage, handling, and transportation of explosives or blasting agents constitutes an undue hazard to life." 29 C.F.R. § 1910.109(b)(1) (emphasis in original).

[9] The general duty clause provides: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

[10] Respondent Wireline Supervisor Earl Raynor–in response to the Secretary's case-in-chief–testified to Respondent's procedures in Andrews, Texas, where he supervises these workers. (Tr. 497.) Raynor, however, had no experience with the worksite in Grassy Butte, and could not speak to what happened in Grassy Butte with respect to the interaction between Respondent's workover crew and the KLX wireline crew on the day of the incident. (Tr. 567.)

Security Plan), C-15 (Oilfield Explosives Program), C-16 (Brigades Wireline Operations policy in the Brigade HSE Handbook)).)

However, the workover workers, such as those in Grassy Butte, are not trained in any of these explosive programs because, according to Respondent, that training would be unnecessary as Respondent does not perform the wireline function anywhere except in Texas. (Resp't Reply Br. 6-7.) Therefore, notably, none of Respondent's workers interviewed by CSHO Trondson knew anything about the technical aspects of the perforation gun used on the day of the incident. There was a "verbal policy" for Respondent's workers to "go along side of the rig" prior to the perforation gun being lowered into an oil well (i.e., while the perforation gun was being assembled). (Tr. 297.)

Respondent's Health, Safety, Environment (HSE) Handbook, Section VII, "Plugging and Abandonment," provides: "General Plugging Requirements: Only [Brigade] certified personnel are approved to order or handle explosive materials." (Ex. C-16 at 35-36) (emphasis added). In addition, the HSE Handbook states: "Wireline Operations: Electric Wireline Safety … Only authorized wireline personnel shall handle wireline, wireline down hole tools, and associated components. All other personnel shall stand clear of the wireline operations." (Ex. C-16 at 36) (emphasis added).

Lantz testified that his crew members were "absolutely not" permitted to help by "putting hands on the perforation gun" because "they are explosives, you should never handle those explosives because we were not trained in that." (Tr. 603-04.) However, Lantz also testified that his crew members were allowed to assist the wireline crew in ways that did not involve handling explosives such as when asked for a wrench, "opening the well up" or "opening up the blind ramps." (Tr. 602.) He agreed that his crew was free to move about the worksite as the work progressed, and that his crew also assisted the wireline as needed, as long as it did not involve

assembly of the perforation gun or handling explosives or blasting agents. (Tr. 618, 630.) Lantz testified that Respondent's employees are instructed to "clear away from the wellsite" with respect to explosives. (Tr. 630.) Notably, however, Lantz and his crew did assist other wireline crews at other times, prior to the incident, in lowering perforation guns down into wells when it is already in the "tube," and thus, according to Lantz, employees were not handling the perforation guns at that time. (Tr. 622.)

Lantz testified that he had never received wireline or explosive related training, and he was not familiar with Respondent's "Explosives Safety and Security Plan" or "Well Services Explosives Training Program." (Tr. 588-589; Exs. C-14, C-15.) He stated, however, that section VIII of Respondent's HSE Handbook entitled "Plugging and Abandonment" as noted above does apply to him and his crew. (Tr. 589-591; Ex. C-16 at 35.)

Sletten confirmed that he had never received training on the hazards associated with explosives from Respondent. (Tr. 468.) He was not familiar with Respondent's "Brigade Wireline Explosive Security Plan" or "Well Servicing Explosives Training Program" documents, and he had never been trained on the "Explosives and General Explosive Safety" portion of the HSE Handbook. (Tr. 468-70; Exs. C-14, C-15, C-16.) Like Lantz, Sletten explained that since Respondent does not perform wireline functions in North Dakota, those documents do not apply to him or his crew. (Tr. 480-481.)

Sletten recalled that Lantz had directed the workover crew to stay away from wireline operations on days prior to the explosion. (Tr. 494.) According to Sletten, this was a general instruction because it was "common sense...Just that it's not our area to be working in, so stay away from it." (Tr. 493-494.) However, Sletten did not remember Lantz specifically ordering the workover crew to move to a safe distance on the jobsite while the wireline operation was taking

place in Grassy Butte on the day of the explosion. (Tr. 493.) He testified that during his time with Respondent–including on the day of the explosion–there was never any discussion, or at least he does not recall a discussion, about hazards associated with the perforation gun when it was on the surface of the well. (Tr. 470, 484.)

Similarly, [Redacted] testified that he received "basic" safety training from Respondent, but no training on explosives – although he was trained to stay away from a "red tape" area. (Tr. 38, 60, 74.) He explained that "red is danger, watch out. Things can happen, get hurt, killed, whatever." (Tr. 60.) [Redacted] explained that companies use red tape or flags around a wireline operation because "there are cables in motion." (Tr. 60.) He testified that he did not see red tape on the worksite on the day of the incident.[11] (Tr. 59.)

According to [Redacted], the wireline crew performed the tasks associated with "the gun" at the project. (Tr. 47.) He understood that he was not a member of the wireline crew, and while he had seen wireline crews work before, the date of the incident was the first time he worked with KLX on a project. (Tr. 47, 52, 55-56.) [Redacted] was not aware of a "doghouse," which is a term for a safe location far away from a well that could be used while a wireline crew was working with a perforation gun. (Tr. 57-58, 86-87.)

V. DISCUSSION

A. Fair Notice

As a threshold matter, the Court finds that Respondent did not have fair notice of the alleged violative condition in this case. "It is patently unfair for an agency to decide a case on a

[11] Lantz and Raynor testified that it was the wireline contractor's responsibility to place red flags or other safety signals surrounding any wireline operations. (Tr. 569, 629.) [Redacted] testified that KLX did not place safety tape around the wireline operations because "the company man" (i.e., Citation Oil and Gas) did not require it on its worksite. (Tr. 108.) [Redacted] also testified that there were no KLX procedures that accounted for untrained or unauthorized individuals being near explosives, although he testified that the proximity between Respondent workover crew and KLX wireline crew was not unusual. (Tr. 124, 140-41.) He further testified that his only concern regarding a workover crew inadvertently causing a surface detonation would be an "incoming cellphone call." (Tr. 141.)

legal theory or set of facts which was not presented at the hearing." *National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257, 1267 n. 40 (D.C Cir. 1973) (*National Realty*).

> [A] court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue.

McWilliams Forge Co., Inc., No. 80-5868, 1984 WL 908440, at *3 (OSHRC, Jul. 20, 1984) (citations omitted). "Also, evidence introduced at a hearing that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case." *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992) ("*Yellow Freight*").

The perforation gun at this worksite is the center of the alleged OSH Act violation and involves specialty terminology, some of which are common terms with multiple meanings (i.e., charge, explosive). The terminology that was used in this record is important, as the terminology in the cited standard, and *related standard definitions*, and in the alleged violation description of the Citation is what accounts for Respondent's duty of safety in this case. The Court is concerned that due to the specialty terminology, technical aspects of this perforation gun and unsophisticated witnesses, the alleged violative condition was never fully litigated because neither party understood what the alleged violative condition was and when it occurred at the same time throughout these proceedings.

Respondent is entitled to know the condition that constitutes the alleged OSHA violation. While Respondent was put on notice of the standard alleged to have been violated, the Citation did not firmly specify what the violative condition was and when it existed. *KS Energy Servs., Inc.*, No. 06-1416, 2008 WL 2846151, at *2 (OSHRC, Jul. 14, 2008) ("With respect to the sufficiency of pleadings, due process requires that a cited employer "be given notice and an opportunity to

respond."). Instead, the what and when aspects of the alleged violative condition evolved over the course of the proceedings.

In the alleged violation description ("AVD") of the Citation – the first pleading in this matter – OSHA stated that the violative condition was, "employees who were not essential to the operation handled explosives by assisting in the assembly of a perforation gun, and were not cleared from the hazard area." (Ex. C-1 at 8.) The relevant terms in the AVD were "explosives," "assembly" and "perforation gun." The record suggests that CSHO Trondson, [Redacted], Lantz and Worker A himself used such terms inaccurately when describing what they believed occurred on the worksite.

For example, CSHO Trondson relied on witness statements, which witnesses it is undisputed did not know how explosives work. Consequently, it is not surprising that CSHO Trondson misunderstood the conditions on the worksite. As early as his investigation, CSHO Trondson believed – based on witness interviews – that Worker A held "the carrier" component of the perforation gun. (Ex. C-3 at 7 ("[[Redacted]] held the perforation gun while [Worker A[12]] slid the carrier into the gun.").) However, as noted above, [Redacted] testified that Worker A held the CCL/cable head portion of the wireline tool string, which contained no explosives or blasting agents, whereas [Redacted] handled "the carrier," which was the steel tube that did contain explosives. (Tr. 121-122, 149, 151.) Just a few days before the first day of the trial on August 24, 2024, during an interview with Nick Lantz, CSHO Trondson conveyed his yet still misunderstanding to Respondent that the component of the perforation gun that Worker A held contained "blasting caps." (Ex. R-21 at 9, 15-16.) CSHO Trondson later testified on the second

[12] CSHO Trondson mistakenly identified [Redacted] in his investigation narrative as having handled the wireline tool string instead of Worker A. (Tr. 380, 696.)

day of the trial (August 27, 2024) that Worker A held the firing head, which did not contain explosives. (Tr. 379.)

At trial, [Redacted] testified that he believed he saw Worker A hold "the explosive part" of the perforation gun. (Tr. 51.) [Redacted] later clarified that he could be incorrect because he had no training in explosives. (Tr. 69-70.) Finally, even Counsel for the Secretary seemed to convey a misunderstanding of the alleged violative condition at the trial. In response to Respondent's motion to dismiss at the hearing, Counsel for the Secretary relied on Worker A's misstatement that he held "the charge" in the CSHO's investigation report as that which allegedly was sufficient for Respondent to form a defense in this matter.[13] (Tr. 320-323, 455-456); *see also* Secretary's Opposition to Brigade's Renewed Motion to Dismiss at Ex. 2 (Worker A stating "He picked up the gun and put and *I pick up the charge*…") (emphasis added) (Sept. 12, 2024).

As discussed in the applicability section below, the term "explosive" in the cited standard has been defined by OSHA, to include a "device" that has the purpose of explosion. 29 C.F.R. § 1910.109(a)(3).[14] Although his testimony implies that he considered the completed perforation gun a "device," CSHO Trondson at the trial did not refer to this OSHA definition. (Tr. 362-365, 405-406.) In fact, CSHO Trondson was not aware of either of these OSHA definitions at the time of the trial. (Tr. 362-65.) Now, post-hearing, the Secretary claims for the first time that the violative condition was the "handling" of the CCL/cable head but only *as it was being connected*

[13] Worker A did not testify at the hearing. The formal record contains his signed statements to Respondent during its internal investigation of the incident in the days afterward. However, those statements were not included in the evidentiary record. See Secretary's Opposition to Respondent's Renewed Motion to Dismiss at Exhibits 2, 3 (Sept. 12, 2024). These documents therefore cannot be used by the Secretary to prove her underlying case. This Court, however, uses these documents to illustrate how this case developed over the course of these proceedings. The evidentiary record does include Worker A's documentation that he received the same HSE Handbook as Lantz and [Redacted]. (Tr. 640-41; Ex. R-12.)

[14] Section 1910.109(a)(3) provides in pertinent part: "Explosive - any chemical compound, mixture, or *device*, the primary or common purpose of which is to function by explosion[.]" 29 C.F.R. § 1910.109(a)(3) (emphasis added).

to the rest of the perforation gun. (Sec'y Sur-Reply at 10 ("common sense supports a finding that two people working together to connect a perforation gun loaded with explosives *to a component that makes the gun operable*, are 'handling explosives'.") (emphasis added). This connection theory of the CCL/cable head to the rest of the perforation gun changes the alleged violation's nature – it is not simply handling agents/devices that were never properly identified and defined by the government, and it is not the assembly of the steel tube component of the perforation gun as arguably alleged by the AVD in the Citation.

The Court questioned CSHO Trondson regarding the hazardous condition in order to clarify the nature of the case. (Tr. 404-406); Commission Rule 67(j)[15] ("Duties and powers of judges"), 29 C.F.R. § 2200.67(j). The fact that the Court had to ask questions to decipher and to nail down what the hazardous condition was and when it would have been created signals that Respondent might not have had sufficient notice of the exact nature of the violative condition at the time the Citation was issued. Respondent has been clear that it relied on CSHO Trondson's investigative report to develop its defense in these proceedings. (Tr. 311-327); Resp't's Response to Order Requiring Filing of Notice of Intent to Seek Deposition and Renewed Motion to Dismiss (Sept. 5, 2024); Resp't Post-Hearing Br. at 14-16, Ex. A. If CSHO Trondson and Counsel for the Secretary were confused before and during the hearing, and the Court was puzzled over what precisely was being alleged as the hazardous condition during the hearing, it is reasonable to find that Respondent was unfairly led astray and was prevented from developing a proper defense in this matter.

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[15] It shall be the duty of the Judge to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues and avoid delay. The Judge shall have authority with respect to cases assigned to the Judge, between the time the Judge is designated and the time the Judge issues a decision, subject to the rules and regulations of the Commission, to: … j) Call and examine witnesses and to introduce into the record documentary or other evidence[.]

29 C.F.R. § 2200.67(j).

It is also telling that the Secretary heavily relies on Respondent's witness Wireline Supervisor Earl Raynor in her post-hearing briefing to establish the now alleged violative condition. (Sec'y Br. at 13-14; Sec'y Sur-Reply at 6-10.) Raynor's testimony entered into the record only after the Secretary presented her *prima facie* case.

> The Commission may look to the issues as they are litigated and in particular the manner in which the employer presents its case to help determine whether the employer has had fair notice of the recognized hazard from which it has a duty to protect its employees.

Beverly Enters., Inc., No. 91-3344, 2000 WL 34012177, * 9 (OSHRC, Oct. 27, 2000). This evidence cannot serve as showing that Respondent had fair notice of the alleged violative condition. *Yellow Freight*, 954 F.2d at 358. That Respondent does not object to the Secretary's use of Raynor's testimony does not suggest or imply consent to try the issue of the now alleged violative condition. *McWilliams Forge Co., Inc.*, 1984 WL 908440, at *3.

The formal record establishes that not all aspects of this perforation gun were squarely recognized by all interested persons in this case at the same time. Indeed, these instances in the record reveal that the parties spoke to each other pre-trial and during trial without fully recognizing what the other was intending to communicate. At this point in the proceeding, the Citation does not allege what the Secretary is now alleging in her post-hearing brief as to what exactly the violative condition was and when it occurred. This Court declines to *sua sponte* amend the Citation to conform the pleadings to the evidence because the unpleaded issue of the alleged violative condition was not "squarely recognized" by both parties. *Id.*

For these reasons alone, due to lack of fair notice of the alleged violative condition, the Citation is vacated.

B. Applicable Law on the Merits

Even if Respondent had fair notice of the violative condition, the Court finds that the Secretary failed to establish a violation of the cited standard or of the general duty clause as alleged in the Citation. To establish a *prima facie* violation of an OSHA regulation, the Secretary has the burden to prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at *6 (OSHRC, Dec. 5, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *Hartford Roofing Co*., No. 92-3855, 1995 WL 555498, at *5 (OSHRC, Sept. 15, 1995). Preponderance of the evidence has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the Evidence, Black's Law Dictionary (10th ed. 2014).

C. Analysis of the Merits

The Secretary alleges a serious violation of 29 C.F.R. § 1910.109(b)(1), which provides:

> ***General hazard.*** No person shall store, handle, or transport explosives or blasting agents when such storage, handling, and transportation of explosives or blasting agents constitutes an undue hazard to life.

29 C.F.R. § 1910.109(b)(1). The Secretary alternatively alleges a violation of section 5(a)(1) of the OSH Act. The Secretary sets forth the violation as follows:

a) On or about November 03, 2021, at or near 13456 Seventh Street NW in Grassy Butte, North Dakota where employees who were not essential to the operation handled explosives by assisting in the assembly of a perforation gun, and were not cleared from the hazard area.

(Complaint; Ex. C-1 at 8.)

Respondent argues that the Secretary violated its right to due process through various investigative and litigation failures. (Resp't Br. at 1-2.) Respondent also argues that the Secretary failed to establish a violation of both the cited standard and the general duty clause. (Resp't Br. at 1-2.) The Court finds that the Secretary failed to establish both alleged violations.

1. The Cited Standard Applies

The Secretary claims that 29 C.F.R. § 1910.109(b)(1) applies because Worker A "handled explosives when he helped complete the connection of the loaded perforation gun to the CCL wireline connection, making it a singular explosive device."[16] (Sec'y Br. 13). Respondent seems to concede that the cited standard applies and instead focuses its arguments on "non-compliance." (Resp't Br. 18-19.) The applicability analysis is not so simple. The cited standard applies only to explosives or blasting agents – and Respondent argues forcefully that Worker A did not handle "an explosive" when he handled the CCL/cable head. (Resp't Br. 19-21.) Thus, to first establish whether the cited standard applies in this case, it is necessary to determine whether Worker A handled explosives or blasting agents – as defined by OSHA – when he held the CCL/cable head.

This crucial issue was not explored throughout these proceedings, yet the Secretary's entire case depends on it. As noted above, the Court finds that while the record establishes that the cited standard applies in this matter, the issue that serves as the basis for the standard's applicability was unpleaded and not "squarely recognized" by either party during these proceedings. *McWilliams*

[16] The Secretary–relying on [Redacted]'s testimony–also claims that the standard applies because "[a]fter the perforation gun is loaded and attached to the wireline, the wireline operator often hands the perforation gun *up to a Brigade Rig Crew Hand* on the well floor/platform to lower the gun into the well hole." (Sec'y Br. at 14 citing Tr. 111-112) (emphasis added). However, the Secretary's reliance on [Redacted]'s testimony is misplaced because he later testified that he does not know whether this type of conduct had ever occurred on this specific worksite. (Tr. 113-114.)

Forge Co., Inc., 1984 WL 908440, at *3 citing *Standard Title Ins. Co. v. Roberts*, 349 F.2d 613, 620-22 (8th Cir. 1965).

a. OSHA Definitions

The cited standard provides that "No person shall store, handle, or transport *explosives or blasting* agents when such storage, handling, and transportation of *explosives or blasting agents* constitutes an undue hazard to life." 29 C.F.R. § 1910.109(b)(1) (emphasis added). Section 1910.109 contains the definitions of "explosives" and "blasting agents." 29 C.F.R. 1910.109(a) ("Definitions applicable to this section). To determine the meaning of "explosives" or "blasting agent" within the cited standard, the Court looks first to the standard's text and structure. *Superior Masonry Builders, Inc.*, No. 96-1043, 2003 WL 21525277, at *2 (OSHRC, Jul. 2003); *Unarco Com. Prods.*, No. 89-1555, 1993 WL 522454, at *5 (OSHRC, Dec. 6, 1993).

OSHA defines an "explosive" in pertinent part as "any chemical compound, mixture, or *device*, the primary or common purpose of which is to function by explosion[.]" 29 C.F.R. § 1910.109(a)(3) (emphasis added). A "blasting agent" is defined, in pertinent part, as "any material or mixture, consisting of a fuel and oxidizer, intended for blasting, not otherwise classified as an explosive and in which none of the ingredients are classified as an explosive[.]" 29 C.F.R. § 1910.109(a)(1).[17]

[17] Another definition in this part is notable:

> ***Explosive-actuated power devices.*** Explosive-actuated power device—*any tool or special mechanized device* which is actuated by explosives, but not including propellant-actuated power devices. Examples of explosive-actuated power devices are jet tappers and *jet perforators*.

29 C.F.R. § 1910.109(a)(2) (emphasis added). Unlike the words "explosive" and "blasting agents," the term "explosive-actuated power device" was not mentioned at all during the proceedings even though it appears relevant. The Court declines to jump so far as to analyze the facts of this matter under this definition when neither party explicitly mentioned this definition during or after the hearing, and because it is unnecessary to dispose of this case.

b. Worker A Handled an Explosive at the Moment of Connection

The Secretary–for the first time–cites to the definition of "explosive" in 29 C.F.R. 1910.109(a)(3), which contains the term "device" in support of her argument that the standard applies. The Secretary argues that once the loaded steel tube is connected to the CCL/cable head wireline it became a "singular explosive device," and was therefore an explosive as considered by OSHA. (Sec'y Br. at 13.) Respondent does not address this argument, instead arguing that the Court should not have drawn out confirming testimony from Respondent Wireline Supervisor Raynor.[18] (Resp't Reply Br. at 5-6 (citing Tr. 531).)

Based on OSHA's definition of "explosive," the Court finds that the standard applies to the facts of this matter. Because the steel tube component contains explosives, the Court finds that the steel tube itself is considered an explosive. Because the CCL/cable head portion of the wireline tool string that Worker A handled does not contain explosives or blasting caps, the Court finds that the CCL/cable head portion and the wireline tool string itself is not designed to function by explosion. Instead, it is designed to provide an electrical source of energy and–undisputedly–would not explode on its own if not connected to the steel tube. However, once connected, the CCL/cable head portion (and the wireline tool string itself) becomes one with the steel tube, and the purpose of this connected device is "to function by explosion." 29 C.F.R. § 1910.109(a)(3). Therefore, the Court finds that the CCL/cable head portion of the wireline tool string that Worker A handled on the day of the incident was an explosive–as defined by OSHA–*at the moment* it was connected to the steel tube.

The cited standard applies.

[18] As noted above, the Court posed questions to certain witnesses to clarify factual uncertainties and to revolve ambiguities in this case. Commission Rule 67 directs this Court to "assure the facts are fully elicited" in a Commission hearing. 29 C.F.R. § 2200.67 ("Duties and powers of Judges").

2. The Secretary Failed to Establish Non-Compliance with the Cited Standard

The Court, however, sees a deficiency with Complainant's evidence on the non-compliance prong of this alleged violation. *Jake's Fireworks Inc. v. Acosta*, 893 F.3d 1248, 1259 (10th Cir. 2018) (*Jake's Fireworks*). Based on the plain wording of the cited standard, only "undue" hazards are noncompliant, not "due" hazards. 29 C.F.R. § 1910.109(b)(1). The cited standard does not prohibit handling explosives all the time, it does not prohibit being near a wireline operation, and the standard also does not require an adequate safety program. The Secretary had the opportunity to cite Respondent for a training violation or a safety program violation but did not do so.

To establish non-compliance with the cited standard, the Secretary must prove how Worker A's handling constituted an "undue hazard" in this case. 29 C.F.R. 1910.109(b)(1). The Secretary claims that Respondent violated the cited standard by creating/allowing "an undue hazard to life" by (1) Lantz not knowing where [Redacted] and Worker A were at the time, (2) Respondent not providing its Grassy Butte workers its Andrews, Texas wireline explosive training, and (3) Respondent not following its own safety plan and clearing the area. (Sec'y Br. 14-16). The Secretary is essentially trying to prove non-compliance with an OSHA standard by establishing a violation of Respondent's own safety program. But Respondent's safety program is not an OSHA standard. For this cited standard, a violation of Respondent's own safety program can only serve as evidence toward constructive knowledge (as discussed below), not toward noncompliance.

The Secretary has not explained how Worker A's *handling* of the CCL/cable head the moment the wireline tool string connected to the steel tube "constituted an undue hazard." In *Jake's Fireworks*, 893 F.3d at 1258, the employer was cited under this standard for the manner in which it stored fireworks. The Circuit Court looked to the conduct of the Respondent to determine whether it constituted an "undue hazard." The Circuit Court found:

> A reasonable person responsible for employee safety would have understood the storage and handling of explosives in the Old Facility created an undue hazard. The danger of ignition from the black gunpowder and broken fireworks that littered the Old Facility constituted a hazard for employees.

Jake's Fireworks, 893 F.3d at 1258 (emphasis added).

On this record, we do not know how Worker A's handling of the CCL/cable head once it was connected to the steel tube contributed to the explosion, if at all; no evidence in the record establishes that Worker A's actions contributed to the explosion. (Tr. 529-531) (Raynor testifying that holding the components of the wireline tool string would not cause the surface detonation). [Redacted] (who was trained in explosives) still does not know why the perforation gun exploded and did not say that Worker A contributed to the misfire at all. (Tr. 117.) The Secretary has therefore not established how Worker A's handling of the CCL/cable head "created" an "undue hazard" to Respondent's workers on the Grassy Butte worksite. *Jake's Fireworks*, 893 F.3d at 1258.

3. The Secretary Failed to Establish that Respondent had Knowledge of the Violative Condition

"When elimination of a particular hazard requires employees to follow certain procedures, the employer must take the steps necessary to assure that employees follow those procedures." *Danco Constr. Co.*, No. 12847, 1977 WL 7785 (OSHRC, Oct. 25, 1977)), *aff'd*, 586 F.2d 1243 (8th Cir. 1978).

> Knowledge of the violative condition, either actual or constructive, is an element of the Secretary's burden of proving a violation: the Secretary must prove either that the employer knew of the violative condition or that it could have known with the exercise of reasonable diligence.

Walmart, Inc., No. 17-0949, 2023 WL 1990803, at *6 (OSHRC, Feb. 8, 2023) (citation omitted). "In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately

supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *S.J. Louis Constr. of Tex.*, 2016 WL 561092, at *2. "[K]nowledge can be imputed to the cited employer through its supervisory employee." *Walmart, Inc.*, 2023 WL 1990803, at *6 (citation omitted).

The alleged violative condition occurred when the steel tube connected to the wireline tool string to complete the perforation gun. This moment is too fleeting to determine whether Respondent knew or should have known about it. *Thomas Indus. Coatings, Inc.*, 2012 WL 1777086, at *4 (No. 06-1542, 2012) (unable to evaluate reasonably diligent inspection by supervisor absent evidence showing how long violative condition existed). It is undisputed that no one saw [Redacted] or Worker A with [Redacted] – both Lantz and Sletten testified that they could not see them from their vantage point. (Tr. 486, 594.) Additionally, [Redacted] testified that "these runs go quickly," and it is unknown how long [Redacted] and Worker A were standing around [Redacted] so as to alert Lantz to look for them. (Tr. 97.) Even CSHO Trondson could not determine and did not know how long Worker A was exposed to the alleged hazardous condition. He testified:

> Q. How long do you think, you know, the employees were exposed to a specific hazard that you cited in your citation, which is the contact with explosives or blasting agents?
>
> A. I do not know the specific time.
>
> Q. Did you ask that question of any witnesses?
>
> A. It was trying to be determined through questioning. If there was no specific question asked as what the exact time was, no.

(Tr. 449.) Furthermore, while the Secretary claims that [Redacted] and Worker A were "non-essential personnel," it is undisputed that Respondent's workers were expected to assist KLX operations at certain times with certain tasks. (Tr. 94-95, 602.) It is unclear on this record at what

point during the wireline operations that [Redacted] and Worker A became "non-essential personnel" such that Lantz or Sletten should have known to locate them at the time of the incident.

The Court notes, however, Respondent's own safety rules regarding explosives were not followed at the Grassy Butte worksite. A violation of an employer's own safety program can serve as evidence toward constructive knowledge. *Little Beaver Creek Ranches, Inc.*, No. 77-2096, 1982 WL 22633, at *5-6 and n.6 (OSHRC, Jun. 30, 1982) (*citing Danco Constr. Co.*, No. 12847, 1977 WL 7785 (OSHRC, Oct. 25, 1977)), *aff'd*, 586 F.2d 1243 (8th Cir. 1978).)

Respondent had rules on its Grassy Butte worksite that no worker was to handle explosives. (Tr. 603-604.) It concerns the Court that Respondent's workover crew members have assisted wireline crews to lift a fully connected perforation gun up over the well to lower it into the well hole. Alarmingly, Lantz testified that he did not consider this activity as handling an explosive because the explosives were encased in the steel tube and thus "we're not handling the perforation gun itself." (Tr. 622.) The Court finds that this activity violates Respondent's own safety program in Grassy Butte and that Respondent's supervisor actually knew about it.[19] *Little Beaver Creek*, 1982 WL 22633, at *5-6 n.6; *Walmart, Inc.*, 2023 WL 1990803, at *6.

Nevertheless, the act of lifting a perforation gun up and over the well was not the subject of the Citation. Since it is the Secretary's burden to establish the violation in this matter, the Court looks at the evidence through the narrowed lens of the actual alleged violative condition. The Secretary has not explained how prior instances of assisting in the lifting and lowering of a fully

[19] The HSE Handbook also contains the following prohibition: "Wireline Operations: Electric Wireline Safety … Rig crew members shall never handle perforating guns and other detonable devices entering or removed from the wellbore." (Ex. C-16 at 36.) This prohibition was not raised at the hearing, although the record suggests that Lantz and his crew did assist other wireline crews at other times in lowering perforation guns down into wells. (Tr. 622.) However, OSHA cited Respondent for its assistance with the assembly of the perforation gun, not assistance in lowering the perforation gun into the well. (Ex. C-1 at 8; Tr. 621-622 (Counsel for Secretary stating that testimony regarding lowering the perforation gun into wells was relevant only to the knowledge component–rather than the compliance component–of the alleged violation).)

connected perforation gun into the wellhole relates to the alleged violative condition of Worker A holding the CCL/cable head of the wireline tool string while [Redacted] connected the steel tube to it. It is possible that Respondent did not clearly communicate or enforce its rule that prohibits its workover crew from touching explosives. It is also possible that Respondent's work rules were clearly communicated and enforced. However, this evidence was not introduced into the record possibly because of the evolving nature of the alleged violative condition over the course of the proceeding.[20] Therefore, as it is the Secretary's burden to establish a violation by the preponderance of the evidence, the Court finds that the Secretary has not met her burden with respect to knowledge. *S.J. Louis Constr. of Tex.*, 2016 WL 561092, at *2.

4. The General Duty Clause Allegation Is Rejected

The Court finally turns to the general duty clause violation alleged in the alternative of the Citation. It is proper for the Secretary to plead, at times, a specific violation and, in the alternative, a general duty clause violation for the same alleged set of facts. *See, e.g.*, *Henkels & McCoy, Inc.*, No 8842, 1976 WL 6159, at *3 (OSHRC, Aug. 3, 1976) (there is "nothing objectionable about pleading or citing violations of subsections (1) and (2) of section 5(a) in the alternative"). However, "[t]he Commission has held that an applicable standard preempts application of the general duty clause." *Armstrong Cork Co.*, No. 76-2777, 1980 WL 10754, *4 (Feb. 29, 1980)

[20] The Court notes that Respondent did not discipline Worker A for a violation of its own work rule not to "touch anything that [KLX was] dealing with," when he picked up and stabilized the CCL/cable head part of the wireline tool string. (Tr. 593, 600.) Such post-incident evidence can help the Secretary establish constructive knowledge, but only in conjunction with other pre-incident disciplinary evidence. *Precast Servs., Inc.*, No. 93-2971, 1995 WL 693954, at * 2-3 (OSHRC, Nov. 14, 1995) (when considering either constructive knowledge or the affirmative defense of unpreventable employee misconduct, "Commission precedent does not rule out consideration of post-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline."). However, the Secretary had the burden to establish constructive knowledge with such evidence and failed to introduce it.

(citations omitted), *aff'd*, 636 F.2d 1207 (3d Cir. 1980).

Here, as noted above, the Secretary has established that the standard cited in the first instance applies to the alleged violative condition but has failed to establish a violation of the standard. Therefore, the Court finds that the general duty clause is preempted by the cited standard as it applies to the condition of Worker A handling the CCL/cable head at the moment it was connected to the steel tube. *Armstrong Cork Co.*, 1980 WL 10754, *4.

Furthermore, the Court finds that the Secretary has not established a feasible means of abatement for an alleged violation of the general duty clause.

> To prove a general duty clause violation, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. [She] must also prove that the employer had knowledge of the hazardous condition.

S. J. Louis Constr. of Tex., No. 12-1045, 2016 WL 561092, at *2 (OSHRC, Feb. 5, 2016) (citations omitted).

The Secretary claims that the Citation itself suggests that Respondent could have "cleared the hazard area" to feasibly abate the hazard.[21] (Sec'y Reply Br. at 12-13.) However, the Secretary relies entirely on Raynor's testimony regarding how he performs work in Andrews, Texas to prove this proposed feasible means of abatement. (Sec'y Post-Hr'g Br. at 25-26.) The Secretary argues that, as Respondent does in Texas, Respondent could also "relocate non-essential personnel to a safe distance," suggesting 200 feet (in other words, a "doghouse"), during wireline operations. (*Id*;

[21] The Court disagrees that the Citation itself provided sufficient notice to Respondent of the particular steps Respondent should have taken to have avoided a general duty clause citation. *National Realty*, 489 F.2d at 1268 (for a general duty clause citation, "the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation."). While the Secretary could have cured this deficiency of the Citation by the time of the hearing, she did not do so here, as discussed above, especially regarding the 200-foot "doghouse" proposed abatement. *Baroid Div. of NL Indus., Inc*., 660 F.2d 439, 450 (10th Cir. 1981) ("While an inadequate citation may be cured through actual notice at the hearing, the employer must at least at the hearing stage receive adequate notice of what particular steps it should have taken to avoid citation.")

Sec'y Sur-Reply at 11.) Raynor, however, had no experience with the Grassy Butte, North Dakota worksite. (Tr. 567.) Thus, the Court finds his testimony regarding feasibility of abatement for an alleged general duty clause violation insufficient under these circumstances. Moreover, Raynor's testimony was brought in after the Secretary rested her case and based on a misunderstanding of the alleged violative condition. The Court declines to use Raynor's testimony to satisfy the Secretary's burden of proof.

Finally, the Secretary did not pose such feasibility questions to Lantz or Sletten, the two supervisors who were on the Grassy Butte worksite. In fact, the Secretary confirmed with Lantz that a distance such as that of a "doghouse" was only used when the perforation gun was "down in the well and perforating" and not "prior to that." (Tr. 615-616.) The Secretary did not inquire any further. The Secretary points to no other evidence that would support her claim that a 200-foot safe distance was feasible.

Accordingly, the Secretary has not established a feasible means of abatement for the alleged violation of the general duty clause.

Citation 1, Item 1 is VACATED.

ORDER

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

Citation 1, Item 1, alleging in the first instance a serious violation of 29 C.F.R. § 1910.109(b)(1), or in the alternative of section 5(a)(1) of the OSH Act, is VACATED.

SO ORDERED.

/s/ Christopher D. Helms

Christopher D. Helms
Judge, OSHRC

Date: December 19, 2025
Denver, Colorado