UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ACTING SECRETARY OF LABOR,[1] Complainant, v. JLJ IV ENTERPRISES, INC., Respondent.	OSHRC Docket No. **22-0970**

DECISION AND ORDER

Attorneys and Law Firms

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JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Respondent JLJ IV Enterprises, Inc. ("JLJ"), a construction company that contracts with the City of New York ("NYC") to upgrade infrastructures, was installing rebar on a Consolidated Edison, Inc. ("Con Ed") manhole in Manhattan when an employee working inside the manhole suffered burns to his face from an arc flash that occurred from a Con Ed feeder cable. The United States Department of Labor, through the Occupational Safety and Health Administration ("OSHA"), investigated the accident and subsequently issued[2] a three-item citation to JLJ for

[1] Section 12(g) of the Act mandates that "[u]nless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure." 29 U.S.C. § 661(g). Since the Commission does not have a rule regarding substitution of parties, Rule 25(d) of the Federal Rules of Civil Procedure applies. On March 11, 2023, Julie A. Su became the Acting Secretary of Labor and was automatically substituted as a party pursuant to Rule 25(d). For ease of reference, the Acting Secretary will be referred to as the "Secretary" herein.

[2] The Secretary has assigned responsibility for enforcement of the Act to OSHA and has delegated her authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA

alleged serious violations of the of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651–678, with proposed penalties of $13,052.00 respectively for each item. In the citation, the Secretary alleges JLJ violated 29 C.F.R. § 1926.102(a)(1), related to the construction industry standards for eye and face protection equipment, and 29 C.F.R. §§ 1926.416(a)(1) and (a)(3)), related to electrical safety-related work practices.[3] After JLJ timely filed a notice of contest, the Secretary filed a complaint[4] with the Commission ("Court"), and JLJ filed an answer raising three affirmative defenses. For the reasons indicated *infra*, the Court concludes only JLJ's third affirmative defense has been properly raised and preserved.

JLJ's first affirmative defense asserts the complaint was "barred, in whole or in part, for failure to state a claim against Respondent." (Am. Answer p. 3, ¶1.) Under Federal Rule of Civil Procedure 12(b),[5] a motion asserting any Rule 12(b) defenses "must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). The failure to state a claim upon which relief can be granted is one of those defenses that must be made before pleading. *See* Fed. R. Civ. P. 12(b)(6). JLJ waived this defense when it failed to raise it in a Rule 12(b)(6) motion. *See, e.g., Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106 (9th Cir. 2000), *as amended on denial of reh'g* (Nov. 1, 2000), *cert. denied*, 121 S. Ct. 1735 (2001) ("[a] fundamental tenet of

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and promulgated the Occupational Safety and Health Standards at issue. *See* Order No. 8-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020), *superseding* Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has authorized OSHA's Area Directors to issue the citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

[3] While there is a more specific standard, §1926.960(g), that applies to hazards related to flames and electric arcs, it only "covers the *construction* of electric power transmission and distribution lines and equipment." 29 C.F.R. §1926.960(a)(1)(i) (emphasis added). The Secretary does not assert, and the evidence does not show, that JLJ was involved in the *construction* of electric power transmission and distribution lines and equipment.

[4] The Secretary's motion to amend the complaint was granted prior to assignment of the case for trial. Attached to the original and amended complaints and adopted by reference therein is the original citation at issue. (Compl., Ex. A; Am. Compl., Ex. A.) Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R. § 2200.30(d).

[5] Since the Commission does not have a rule establishing the types of defenses that may be asserted by motion, Federal Rule of Civil Procedure 12(b) applies.

the Federal Rules of Civil Procedure is that certain defenses under Fed.R.Civ.P. 12 must be raised at the first available opportunity or, if they are not, they are forever waived.").

JLJ's second affirmative defense asserts it "has a complete defense to the violations cited in the Citation based upon documentary records and testimony of witnesses." (Am. Answer p. 4, ¶2.) To the extent this is an affirmative rather than a general defense, since JLJ did not expressly address it at trial or in its brief, it has been abandoned. *See Marmon Grp., Inc.*, 11 BNA OSHC 2090, 2090 n. 1 (No. 79–5363, 1984) (Commission declines to reach issues on which the aggrieved party indicates no interest); *Ga.-Pac. Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

JLJ also attempted to assert two more affirmative defenses at trial and in its post-trial brief. JLJ asserted that Con Ed owned the cables in the manhole and was the "host employer solely responsible for inspecting, maintaining and moving the electrical cables inside the manhole," and that JLJ relied on Con Ed to ensure the cables were safe to work around. (*See, e.g.*, Tr. 442:13-443:22, 469:25-470:17, 483:22-484:17; see also Resp't's Br. at 1, 5, 8.) JLJ also asserted in its post-trial brief that the accident "was not foreseeable." (Resp't's Br. at 24.)[6]

Commission Rules 34(b)(3) and 34(b)(4) mandate that "[t]he answer shall include all affirmative defenses being asserted" and "[t]he failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable." 29 C.F.R. §§ 2200.34(b)(3), (4). JLJ has offered no explanation for its failure to raise these two affirmative defenses in its answer. Therefore, JLJ is prohibited from raising them since it failed to raise them as soon as practicable.

Based upon the record, the Court concludes it has jurisdiction over the parties and subject matter in this case. (*See* Jt. Stip. Facts ¶¶ 1-3, 7.) Pursuant to section 12(j) of the Act and Commission Rule 90(a)(1), after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings.[7] *See* 29 U.S.C. § 661(j); see also 29 C.F.R. § 2200.90(a)(1). For

[6] The Court notes the Secretary does not have the burden of presenting evidence that the accident was foreseeable. Rather, JLJ had the burden of timely raising that affirmative defense and proving that it was not.

[7] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

the reasons indicated *infra*, the Court **AFFIRMS** Citation 1, Items 1, 2, and 3, and **ASSESSES** a penalty in the amount of $13,052.00 respectively for each item.

II. BACKGROUND

JLJ is a construction company that contracts with NYC to upgrade NYC's infrastructures, e.g., replacement of water mains, sidewalks, curbs, catch basins, etc., for pedestrian safety improvements. (*See* Jt. Stip. Facts ¶4; Tr. 370:24-371:2.) Relevant here, JLJ contracted with NYC to address a realignment of a sidewalk and curb to bring the curb out, also known as a "bump out," on the northwest corner of West 34th Street and 8th Avenue in Manhattan. (*Id.* at ¶5; Tr. 371:25-372:4.) During this work, JLJ was responsible for rebuilding the walls and roof of a Con Ed manhole located at 33rd Street and 8th Avenue (the "worksite") pursuant to a separate agreement between JLJ and Con Ed. (*Id.* at ¶5; Tr. 372:5-8.)

JLJ had been working on the manhole at the worksite for over two years. (Tr. 374:13-16.) The manhole at the worksite was approximately 11-12 feet deep and the work there involved demolition where JLJ built a false roof or deck under the roof, removed the roof, and then broke down the walls. (Tr. 237:5-6; 372:12-25; 562:6-8; 632:15-18.) To accomplish this, JLJ built decks to stand on top of while breaking the walls and used a chipping gun to break the walls and remove the rebar. (Tr. 373:2-9.) After the demolition was completed, JLJ began rebuilding the manhole by building the floor and walls, and then the roof, using concrete and rebar, which required JLJ to build wooden forms for the concrete to go inside. (Tr. 373:10-24.)

JLJ's Foreman/Crew Leader, Manuel Ferreira, oversaw the work of JLJ's employees at the worksite. (Tr. 370:13-21.) Ferreira supervised the crew at the worksite, prepared the crew for the job and conducted a briefing with the crew at the job each day, and was responsible for ensuring that everything was safe and that everyone had the proper personal protective equipment ("PPE"), and, with JLJ's Superintendent, Peter Marino, planned the work to be performed each day. (Tr. 369:19-370:21.) Although Marino also supervised the work at the worksite, he was not always present because he also visited and oversaw other JLJ worksites. (Tr. 406:23-408: 10.) Rather, Marino directed the work to be performed at the worksite, visited the worksite, went over the work to be performed, and coordinated with various entities to complete projects at the worksite. (Tr. 406:23-408:7, 432:18-433:12.)

On February 11, 2022, JLJ was installing rebar on the south wall of the manhole with

employees outside of the manhole cutting and bending rebar and one employees inside and one outside the manhole working to place the rebar. (Jt. Stip. Facts ¶6; Tr. 375:4-13.) The two employees inside the manhole measured the size of the rebar needed and then placed the rebar and tied it with tie wire. (Tr. 375:14-19.) One of those employees, [Redacted], was inside the manhole tying the bottom portion of the rebar, and the other employee, Adriano Mota, was tying rebar at the top. (Tr. 375:20-376:4, 563:14-15.)

The manhole was filled with electrical cables, including at least one protruding through wood sheeting on the south side of the manhole (the south side of the manhole is marked with an X on Ex. C-5), at least six protruding through wood sheeting on the north side of the manhole, and a large number throughout the central part of the manhole. (Jt. Stip. Facts ¶11; Tr. 381:1-5, 382:14-16, 384:20-25; Ex. C-5; Ex. C-6, at 4:15-18.) The cable protruding through the wood sheeting on the south side of the manhole was energized to 13,000 volts, or 13 kV. (Tr. 145:12-14.) While the employees were installing rebar in the manhole, the rebar passed within six inches of energized power lines. (Tr. 393:2-7.) The rebar had to pass between six inches and a foot of the energized power line protruding from the wood sheeting on the south side of the manhole. (Tr. 394:10-395:16.) [Redacted]'s face was within a foot of the cable on the south side of the manhole while placing and tying the rebar. (Tr. 638:4-10.)

Prior to climbing down into the manhole, [Redacted] was wearing "goggles and the face shield." (Tr. 631:8-20, 632:10-14.) At approximately 11:55 pm, [Redacted] was working inside the manhole when an arc fault, in the form of an arc flash, occurred from a Con Ed feeder cable, causing burns to his face. (Jt. Stip. Facts ¶¶ 7, 8; Tr. 173:25-174:3, 390:16-25, 400:17-20.) The arc flash, which took the form of a big explosion, occurred from the cable that protruded from the wood sheeting on the south side of the manhole, at or near the point where it protruded from the wood sheeting. (Tr. 390:16-25, 174:9-17, 400:23-401:11; Ex. C-5; Ex. C-6, at 18:25-19:10.) At the time of the explosion, [Redacted] was not wearing the face shield. (Tr. 637:7-10.) He admitted that he had taken it off and placed it up top, outside the manhole. (Tr. 638:12-15.) At the time of the accident, Mota was on top of the manhole but outside. (Tr. 563:19-21.) Con Ed did not post any warning signs at the worksite concerning energized electrical lines on or before February 11, 2022. (Jt. Stip. Facts at ¶10.)

Mahendra Taramal, OSHA's Compliance Safety and Health Officer at the Manhattan area office for approximately five years, was assigned to investigate the accident. (Tr. 22:7-17, 29:1-

6.) As part of his investigation, Taramal interviewed JLJ safety manager Ana Guzman, as well as nonmanagerial JLJ employees. (Tr. 30:21 – 31:5.) Taramal also reviewed JLJ's incident report and took pictures of the worksite. (Tr. 31:10-15, 40:12-13.) After concluding his investigation, Taramal proposed the original citation at issue in this case. (Tr. 41:24-42:6.)

A few days after the accident, on February 16, 2022, Con Ed investigator Charlie Wissert interviewed [Redacted], Mota, and Ferreira, and when he asked what PPE were JLJ's employees wearing, they told him helmets, safety glasses and work boots. (Tr. 219:1-4; 217:24-218:3, 224:3-19.) Marino also admitted to Wissert that it "wasn't the company policy to use" PPE and stated, "if you're so worried about it, why don't you . . . supply us with . . . PPE?" (Tr. 220:17-25.)

JLJ had an inspection in the preceding five years which resulted in violations. (Tr. 55:13-56:3.) At the time of the OSHA inspection JLJ had 219 employees. (Tr. 55:3-12.) OSAH subsequently issued the original citation, which proposed an adjusted penalty of $13,052 for each citation item. (Tr. 57:6-7, 75:10-12, 77:23-25.)

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety & Health Rev. Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)). The Act was a "revolutionary piece of labor legislation," *REA Express, Inc. v. Brennan*, 495 F.2d 822, 825 (2d Cir.1974),[8] both remedial and preventative, the broad purpose of which was to assure safe and

[8] Under the Act, the employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, both the worksite and JLJ's principal office are in New York, which is in the Second Circuit. (*See* Am. Compl. ¶ II; Am. Answer ¶ II; Am. Compl., Ex. A; see also Jt. Stip. Facts ¶ 2). Therefore, in deciding this case the Court applies Second Circuit precedent, where it is highly probable this case would be appealed, and in addition, Commission precedent, when necessary. *See Burlington Capital*, No. 20-0528, at 3 n.3 (OSHRC 2020) (applying Commission precedent where one relevant circuit affirmed Commission's authority to grant Rule 60(b) relief but two other relevant circuits had not specifically ruled on the issue); *Sci. Applications Int'l Corp.*, *d/b/a/ SAIC*, 2020 WL 1941193, at *10 (No. 14-1668, 2020) (applying Commission precedent where one relevant circuit conflicts with Commission

healthful working conditions for workers. *See* Act § 2(b), 29 U.S.C. § 651(b); *Brennan v. OSHRC (Underhill Const. Corp.)*, 513 F.2d 1032, 1038 (2d Cir.1975).

"Congress provided for the promulgation and enforcement of workplace standards through a comprehensive regulatory scheme. Regulatory responsibilities under the Act are divided between two administrative entities." *New York State Elec. & Gas Corp. v. Sec'y of Lab.*, 88 F.3d 98, 103 (2d Cir. 1996). "The Secretary of Labor exercises rulemaking and enforcement powers, establishing the standards, investigating employers to discover non-complying conduct, issuing citations, and assessing monetary penalties." *Ibid.* (citing 29 U.S.C. §§ 655, 657–59). "The Commission exercises adjudicative powers and serves as the 'neutral arbiter' between the government regulatory body and an employer." *Ibid.* (quoting *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (*per curiam*)). Therefore, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I*, 499 U.S. at 151.

"To implement the Act's legislative scheme, Congress imposed two duties on employers." *Id.*, 88 F.3d at 104. "First, an employer has a general duty to 'furnish ... 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 [its] employees.'" *Ibid.* (quoting 29 U.S.C. § 654(a)(1)). "Second, an employer has a duty to comply with the more specific safety and health standards promulgated under the Act." *Ibid.* (citing 29 U.S.C. § 654(a)(2)).

In the Second Circuit, "[t]o establish a violation of an OSHA standard, the Secretary must demonstrate by a preponderance of the evidence that: '(1) the cited standard applies; (2) the terms of the standard were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited condition.'" *Walsh v. Walmart, Inc.*, 49 F.4th 821, 827, 2022 WL 4842041 (2d Cir. 2022)) (quoting *Triumph Constr. Corp. v. Sec'y of Labor*, 885 F.3d 95, 98 n.3 (2d Cir. 2018).

A. LAY OPINION TESTIMONY

Three of the Secretary's lay witnesses, Taramal, Marino, and Con Ed Engineer Thomas Campbell, were permitted, over JLJ's objections, to give lay opinion testimony pursuant to Rule

precedent and the other has not directly addressed the issue); *Bethlehem Steel Corp.*, 9 BNA OSHC 1346, 1349 n.12 (No. 76-3444, 1981) (consolidated) (applying Commission precedent where relevant circuits were in direct conflict and explaining that "the Commission, as an agency with national jurisdiction, may find it difficult to apply the law of a single circuit where venue for an appeal would lie in several circuits").

701 of the Federal Rules of Evidence.[9] However, the Court informed the parties that they could raise the propriety of permitting this lay opinion testimony again in their post-trial briefs. The Secertary did so. The Court concludes that to the extent these lay witnesses were providing opinion testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702, that testimony was required to be scrutinized under the rules regulating expert opinion. Therefore, in deciding this case, the Court declines to rely on the specific impermissible opinion testimony described *infra*.

Rule 701 deals with the opinion testimony of lay witnesses and permits it only if it is "(a) rationally based on the witness's perception; (b) helpful to clearly understand the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.[10] Opinion testimony of lay witnesses is "based on their own rational perceptions" if it is "based upon their 'first-hand knowledge or observation.'" *United States v. Esposito*, No. 20-2143-CR, 2021 WL 5492935, at *3 (2d Cir. Nov. 23, 2021) (citations omitted).

Thus, "opinion testimony of lay witnesses must be predicated upon concrete facts within their own observation and recollection—that is facts perceived from their own senses, as distinguished from their opinions or conclusions drawn from such facts[.]" *United States v. Kaplan*, 490 F.3d 110, 119 (2d Cir. 2007) (citation omitted). "This requirement works in tandem with the helpfulness requirement, which 'is designed to provide assurance against the admission of opinions which would merely tell the jury what result to reach.'" *United States v. Jenkins*, No. 19-2778-CR, 2022 WL 3138879, at *4 (2d Cir. Aug. 5, 2022), *cert. denied*, 143 S. Ct. 533 (2022). "In short, Rule 701 represents no departure from [Rule] 602: 'A witness may not testify to a matter until evidence is introduced sufficient to support a finding that the witness had personal knowledge of the matter.'" *United States v. Garcia*, 413 F.3d 201, 211 (2d Cir. 2005). "Rule 701 simply recognizes lay opinion as an acceptable 'shorthand' for the 'rendition of facts that the witness personally perceived.'" (*Ibid*) (citations omitted).

[9] Commission Rule 71 mandates that "[t]he Federal Rules of Evidence are applicable" in Commission proceedings. 29 C.F.R. § 2200.71.

[10] "The burden is on the party wishing to introduce lay opinion testimony" to satisfy these three foundation requirements. *United States v. Grinage,* 390 F.3d 746, 749 (2d Cir.2004).

Rule 701 was amended in 2000 to add subsection (c), "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 Notes of Advisory Committee on 2000 amendments.[11] "[T]he distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,'" while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" *Ibid.* (citation omitted).

At trial, when JLJ objected to Campbell's testimony, the Secretary asserted that "Campbell is going to be testifying about his personal observations of an analysis that he conducted. Testimony may not be excluded as improper lay opinion, even if special knowledge is required, if it's based on firsthand observations in a specific investigation, which is the case here." (Tr. 131:10-16.) In support of this position, the Secretary relied on this Court's opinion in *Cooper Tire & Rubber Co.*, No. 11-1588, 2015 WL 9854708, at *9 (OSHRC Mar. 17, 2015) (ALJ) and the Second Circuit's opinion in *Bank of China, New York Branch v. NBM LLC*, 359 F.3d 171 (2d Cir. 2004).

In *Cooper Tire*, this Court held that "testimony need not be excluded as improper lay opinion, even if some specialized knowledge was required, 'if it was based on first-hand observations in a specific investigation,'" *Cooper Tire*, 2015 WL 9854708, at *10 (quoting *United States v. Akins*, 746 F.3d 590, 599 (5th Cir. 2014)). However, as the Court reminded the Secretary at trial, the Court was applying Fifth Circuit precedent in deciding that case, which is not controlling in the present case. *See* 29 U.S.C. §§ 660(a) and (b).

The Secretary also asserts the Second Circuit's opinion in *Bank of China* "held that to the extent witness testimony is grounded in investigations undertaken based on their perceptions, even

[11] Although the Advisory Committee's notes are not binding, the United States Supreme Court has frequently relied on them in deciding the appropriate construction of rules of evidence or procedure. *See, e.g., United States v. Young*, 470 U.S. 1, 15n.12. (1985); *United States v. Abel*, 469 U.S. 45, 51 (1984); *Barefoot v. Estelle*, 463 U.S. 880, 905 n.9 (1983); *United States v. Frady*, 456 U.S. 152, 163n.13 (1982); *Delta Air Lines v. August*, 450 U.S. 346, 352 n.8, 356-360 (1981). Thus, the Court also relies on them in deciding the appropriate construction of the rules of evidence, particularly since, as the Reporter for the Advisory Committee has stressed, the notes "were carefully scrutinized by the involved congressional committees and subcommittees, and, except in those instances where superseding changes were made in the Rules by the Congress, must be taken to represent the thinking of that body as the equivalent of a committee report effectively serving as the basis of legislation." Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L. Rev. 908, 913 (1978).

if it calls for some specialized knowledge, it is admissible and is not expert testimony." (Tr. 160:6-12.) The Court does not agree with Secretary's interpretation of *Bank of China*, which held the admission of the bank employee's testimony under Rule 701 "was error because it was not based *entirely* on [his] perceptions." *Bank of China*, 359 F.3d at 181 (emphasis added).

Thus, in *United States v. Cuti*, 720 F.3d 453 (2d Cir. 2013), the Second Circuit reiterated that "if the testimony was 'not a product of his investigation, but rather reflected [his] specialized knowledge," then it was impermissible expert testimony. *Id.*, 720 F.3d at 460 (quoting *Bank of China*, 359 F.3d at 182).[12] Likewise, in *United States v. Cabrera*, 13 F.4th 140 (2d Cir. 2021), the Second Circuit admonished again that a lay witness's opinion is inadmissible if the "'reasoning process was not that of an average person in everyday life,'" but rather, was reached "through an opaque, intuitive process grounded in some kind of specialized knowledge[.]" *Id.*, 13 F.4th at 150 (quoting *Garcia*, 413 F.3d at 216–17). To illustrate when testimony crosses the line from lay to expert opinion, the Second Circuit noted "that jurors were not 'helped' within the meaning of Rule 701 by opinion testimony that, in addition to telling them 'what was in the evidence,' also told them 'what inferences to draw from it.'" *Ibid*.

i. Campbell Inadmissible Testimony

Campbell has worked for Con Ed for 18 years as a Senior Engineer and Distribution Engineer. (Tr. 128:15-20.) As a Senior Engineer, Campbell is the "subject matter expert for all cables rated 33 KV—33,000 volts and below in the Con Ed system" and is "responsible for the purchase specifications, the maintenance, the maintenance and operation specifications, monitoring the system for the health of the cables, diagnosing cable and joint failures on the system that we have from time to time." (Tr. 128:25-129:6.)

Campbell conducts cable failure analyses "about 12 to 20 times a year." (Tr. 129:20-23.) A cable fails "when a cable, through—for some reason, a dielectric failure when the cable is no longer able to hold the voltage, you know, we will have a failure from a high-voltage portion of the cable to the ground and that will—in our system will trigger the relays to shut down that feeder

[12] In *Cuti*, the Second Circuit held the challenged testimony was properly admitted as factual testimony since "the witnesses were not testifying to the existence of facts, but simply acknowledging that knowledge of such facts, already admitted into evidence, would have caused them to alter their accounting treatment." *Id.*, 720 F.3d at 459. "These limitations left little room for the witnesses to engage in speculation and ensured that their testimony fell near the fact end of the fact-opinion spectrum." *Id.*, 720 F.3d at 458.

or that cable, stop energizing it." (Tr. 129:24-130:6.) A cable failure typically includes an arc flash. (Tr. 130:7-9.) When conducting a cable failure analysis Campbell testified:

> [W]e look for environmental issues with the cable. We'll look at the outside, look at the condition of the jacket, the outside of the cable, look for any signs of mechanical damage, chemical damage, water damage. Then we will look at the cable itself, look at the components of the cable, make sure that the conductor—the carbon black-filled rubber portions, the rubber portion, the metallic outer layer all appear that—you know, we check it to make sure it meets the design standards that we use to purchase cables.

(Tr. 130:12-22.) Regarding the polypropylene jacket, Campbell testified it was on the exterior of the cable and that:

> It's a protective layer. So when we pull the cable through conduits, there's a lot of friction. You don't want to be damaging the flat strap neutrals or the insulation, so the jacket will be—will take most of the abuse. It's a very tough outer jacket so it will typically handle it. You might see, you know, scrapes on it on occasion. And then it also—so it will protect from mechanical damage, it will protect from chemical moisture damage, that sort of thing.

(Tr.145:15-146:3.)

The cable that failed in this case was part of Con Eds feeder 16M71. (Tr. 132:7.) As part of Campbell's cable failure analysis of the cable in this case, he was provided photos of the insulation of the damage site, met with Gene Littanzi, JLJ's underground section manager in Manhattan, along with other Con Ed employees to examine a sample of cable, which was "probably about 14 or 18 inches of cable." (Tr. 131:25-132:14.) According to Campbell, "the cable comes in . . . three insulated conductors, so we had all three of the phases to look at. So we had the cable . . . with the hole in it . . . as well as the other two phases to get a feel for what the cables were like without having been damaged by the failure." (Tr. 132:15-21.) Based upon his examination of the failed cable Campbell opined:

> The failed specimen had a burn through it going down—from the conductor to the outside of the cable. You know, the cable consists of an inside copper conductor, which is high voltage, and an outside conductor, the flat straps we call them, which is flat tape wrapped around the—outside the insulation. So the—the conductors expose the insulation. The flat straps and the jacket over that were burned and literally vaporized, no longer part of the cable. So we definitely saw that that was the place where the cable—where the feeder had failed. We looked at the other two samples, and there were burn marks on the outside of those two samples but no indications of any dielectric insulation failure on those two. We also looked at the ends of the cable to determine whether the cable was made properly, that the

> conductor—which is, you know, about nine-tenths of an inch diameter, stranded copper, you know, with a carbon black-filled rubber over that, a rubber insulation—carbon black-filled rubber over that, and the flat straps and jacket all appeared concentric, they appeared to be of the proper dimensions, there were no gross defects in the—in the design—in the actual physical aspects of the cable outside of the failured one. One other thing. There was a—the cable was—had a more-than-usual bend in it around the point of the—of the—of the failure.

(Tr. 135:10-136:14) (emphasis added).

Regarding the cause of the failure, Campbell opined that "we have specifications and industry standards that require that a cable cannot be bent more than a—ten times the diameter[.]" (Tr. 137:16-18.) "[I]n this case it was about an inch and a half diameter piece of cable, so you can't bend it with a radius less than what would be a 31-inch circle." (Tr. 137:18-21.) "When we looked at the cable, the bent portion appeared to be—have a radius of about four to six inches right around the area of the failure." (Tr. 137:21-24.) Campbell opined that the cable appeared to be "overly bent, possibly due to being bent around an object." (Tr. 138:2-4.) More specifically, that "the failure occurred at a point where a window was—was taken out of the wood sheeting that the cable was leaning on the—on the edge of the window in that—in that sheeting." (Tr. 141:14-17.) "So, again, no, there's some concerns that through cable motion that this could have damaged the cable at that point. (Tr. 141:17-20.)

Regarding "cable motion," Campbell opined that "[t]here's normal vibration . . . [and] as the cable heats up and cools down … when the load changes as customers use or stop using their equipment, the cable will expand and contract, so you get some movement, and that could lead to abrasion where we don't have any protection from . . . something it's leaning on." (Tr. 141:22-142:4.) "[I]t appears the cable is leaning on the side of the window cut into the—into the wood sheeting." (Tr. 142: 17-19.) Campbell opined that:

> That the cable was impinged, was – was bent around a sharp object beyond its – its designed cable bend radius, and through cable motion from vibration and cable contraction and expansion, led to damaging the outside of the cable, which can push on those flat straps which are about .02 inches. So, you know, if they're pushed in, they can have a sharp edge which can dig into the outside of the insulation, making the insulation not able to handle the electrical stresses inside the cable, leading to the failure of the cable.

Tr. 142:22-143:7.) Campell opined that "[d]ue to the possibility of cable damage from abrasion at the severe edges of cable conduit, Con Edison uses protective material, such as fare leaders, for medium-voltage cable coming out of conduits." (Tr. 155:6-11; see also Ex. C-2 at 3.)

In his report, Campbell also opined that "[t]his reduces the risk of abrasion damage caused by cable movement, either mechanical movement, cable vibration, or contraction/expansion of the cable during normal operation." (Ex. C-2 at 3.) "As noted above, no such protection was found on the cable either as it exited the conduit or where it bent going into the window in the wood sheeting." (*Ibid.*) "Since the cable fault location occurred where it bent into the sheeting window, the most likely cause of failure was the flat strap neutrals damaging the underlying insulation and shielding (the dielectric portion of the cable) caused by abrasion of the cable at the window entrance." (*Ibid.*) "So when—when—our specifications require that when we're pulling out of the conduit, at the end of the conduit we actually put a thin split tube of plastic between the cable and the edge of the conduit to prevent abrasion failures such as might be found looking like the failure sample that we have." (Tr. 155:13-19.)

To clarify the composition of the cable, the Secretary asked Campbell the following series of questions:

> Q. So if we could look at starting from the inside of the cable, it appears that there are a number of small strands.
> A. Right.
> Q. What are those?
> A. Those are copper strands.
> Q. Okay. And there's a black material around them?
> A. Yes.
> Q. Okay. And what is that black material?
> A. It's a carbon-filled rubber.
> Q. Okay. Is that the EPR?
> A. It's a different material than EPR. The EPR is the non-black tape portion.
> Q. Got it. So the EPR is around that black?
> A. Yes.
> Q. Okay. And then you testified there are also flat straps?
> A. Where the carbon black rubber on the outside of the (inaudible).
> THE REPORTER: "on the outside"?
> A. Yeah, the—the outside—it's the next layer in in the circumference. It's over—over the—the black—the black carbon-filled material.
> Q. Okay. Understood. Okay. So there's this—this strand—strand of copper in the middle?

A. Right.
Q. Followed by the rubber, black rubber?
A. Right, which is partially conductive.
Q. Okay. And then the EPR?
A. That's the insulation.
Q. And then on the outside of the EPR?
A. It's another layer of carbon-filled rubber, which is also partially conductive.
Q. And those are the flat straps?
A. The flat straps is the copper—copper strips that are wrapped around the outside black layer.
Q. So there's copper on the outside?
A. It's—well, there's copper between the—between the carbon rubber that's over the insulation and the polypropylene jacket that's on the outside of the cable.
Q. Okay. Understood. So outside of the EPR, the next layer is the black—
A. Right.
Q. —rubber, carbon—
A. Carbon-filled rubber.
Q. Carbon-filled rubber, okay. And then the copper flat straps?
A. Are over that.
Q. And then the polypropylene jacket is over that?
A. Correct.

(Tr. 190:14-192:20.)

Assuming Campbell's testimony was based on his perceptions resulting from his investigation and reflected his investigatory findings and conclusions, the Second Circuit has admonished that it is still not admissible if it "reflect[s] 'specialized knowledge [resulting from] extensive experience[.]'" *United States v. Afriyie*, 929 F.3d 63, 69 (2d Cir. 2019) (quoting *Bank of China*, 359 F.3d at 181-82) (alteration in original). "[T]he foundation requirements of Rule 701 do not permit a [witness] to testify to an opinion so based and formed if the [witness's] reasoning process *depended, in whole or in part*, on his specialized training and experience." *Garcia*, 413 F.3d at 216 (emphasis added).

The Court concludes Campbell's testimony did not result from a process of reasoning familiar in everyday life, but rather, *depended, in whole or in part*, on his specialized knowledge resulting from extensive experience as a "subject matter expert for all cables rated 33 KV—33,000 volts and below in the Con Ed system." It resulted from a process of reasoning that "was not that of an average person in everyday life,'" but rather, was reached "through an opaque, intuitive process grounded in some kind of specialized knowledge[.]" *Cabrera*, 13 F.4th at 150 (quoting *Garcia*, 413 F.3d at 216–17). To the extent Campbell's testimony rested "in any way" upon

scientific, technical, or other specialized knowledge, its admissibility was required to be determined by reference to Rule 702, not Rule 701. *Garcia*, 413 F.3d at 215. The Court also is "not helped" within the meaning of Rule 701 by his testimony that, in addition to telling the Court "what was in the evidence," also tells the Court "what inferences to draw from it." *Cabrera*, 13 F.4th at 150.

ii. Taramal's Inadmissible Testimony

In *Kaspar Electroplating Corp.*, 16 BNA 1517, 1519 (No. 90-2866, 1993), the Commission held that opinion testimony by an OSHA compliance officer may be admissible as non-expert testimony if it is "helpful in the resolution of a material issue and is based on his personal knowledge." In coming to that conclusion, the Commission relied on *Harrington Construction Corp.*, 4 BNA OSHC 1471, 1472 (No. 9809, 1976), which referenced the language of Rule 701 *as it existed in 1975*, which at that time provided that "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701 (1975). Thus, it did *not* include the 2000 amendment adding subsection (c), *i.e.*, a lay witness opinion is limited to one that is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Therefore, *Kaspar* and *Harrington* must be read *in pari materia* with the 2000 amendment adding subsection (c).

Even in *Kaspar*, the Commission acknowledge that "Commission judges should not admit opinion testimony by a compliance officer on a subject about which only an expert may testify, unless the compliance officer has been shown qualified as an expert in that area." *Kaspar*, 16 BNA at 1519. This comports with the Second Circuit, which has admonished that the purpose of Rule 701 "is to prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702[.]" *Garcia*, 413 F.3d at 215.

When the Secretary asked Taramal what an "arc flash" was, Taramal opined that it "is when you have an electrical circuit and the conductor that energizes a portion, like the feeder cable in this case, is exposed, and you also have another conductor that may come close to it, the current will arc, and that is the current looking for a path to ground." (Tr. 37:7-15.) "And it is—it does occur in a fraction of a second, and it contains high heat, which does injure anyone that's close

by." (Tr. 37:15-17.) "And an arc flash does have the ability to injure an employee, burn their skin, even cause death in some cases." (Tr. 37:17-19.) "In the case of an arc flash, the conductor or metals might melt. That's due to the high heat that occurs. And that molten metal can also fly. How does that happen? Because sometimes an arc blast does occur, and this will cause the molten metal to act like a flying particle and move towards the employee's face, which is why they recommend a face shield to cover the entire circumference of the face." (Tr. 45:0-17.)

> After reviewing Exhibit J-2, a photo of the electrical feeder cable, Taramal opined:
>
> So what I'm seeing here is the electrical feeder cable going through the box that's being constructed by JLJ employees. And there is a cut-out in that box to feed the cable through. And I can also see a rebar, green rebars, that they're also tying together to construct that box.
>
> So the electrical feeder cable in this picture, I can see that. This is after the arc flash because you see the charring around the cable that goes through the hole that's created. I noticed that the cable has a thin plastic coating. And this is mentioned in the—Con Edison's report as well. But I also noticed that the hole cut-out for the—the construction box, it's not—it's not laced with any type of protection, abrasion protection, so the cable is just being fed through and those jagged edges are more likely to cut this plastic. The plastic on these cables are thin. There's not insulation to protect employees.

(Tr. 60:3-61:13.) "Also with the—with the plastic, it's—it's there for environmental factors for these cables. So the plastic is to protect, for instance, something in excavation to protect it from dirt or water that might come in contact with it, but it is not insulation to protect employees from the electrical hazards." (Tr. 61:20-62:1.) "I'm talking about the thin plastic coating on the feeder cable. So it is the black-colored coating around the cable that we're seeing predominantly on the cable." (Tr. 62:4-7.)

After reviewing Campbell's report (Exhibit C-2), Taramal testified "the portion I'm reading is the description of the coating material, the plastic coating, and it's listed as polypropylene jacket. And that will be a thin plastic material that is not insulation to protect employees from electrical hazards." (Tr. 67:24-68:3.) When asked if he knew what the purpose of that coating was, Taramal testified "[i]t is an environmental protection for these types of cables, and it will protect for like dirt, debris, rain. If you see it on the—like above the sidewalks, you see overhead power lines, these may be used to protect from things like snow and rain as well. It's for the environment protection for cables." (Tr. 68:8-15.) When asked why he opined that it was not insulation to protect employees, Taramal testified:

> Because it's—that thin plastic can be damaged easily. But insulation to protect employees would be a type of rated installation. For instance, like in the National Electrical Safety Code, Section 443 describes that employers have to not rely on nonrated insulation, and this would be—well, this is not insulation, but there are cases when you have nonrated insulation, meaning it's not tested or verified to be insulation to protect employees.

(Tr. 68:16-69:2.)

The Court concludes Taramal's testimony "was 'not a product of his investigation, but rather reflected [his] specialized knowledge," and therefore, was impermissible expert testimony. *Id.*, 720 F.3d at 460 (quoting *Bank of China*, 359 F.3d at 182). And it "was not based *entirely* on [his] perceptions." *Bank of China*, 359 F.3d at 181 (emphasis added). It was not the result of a process of reasoning familiar in everyday life, but rather, was the result of a process of reasoning which can be mastered only by specialists in the field. It was not based upon the reasoning process of an average person in everyday life—but rather—was based on his specialized experience. *Cuti*, 720 F.3d at 460. Therefore, to the extent these opinions rested "in any way" upon scientific, technical, or other specialized knowledge, its admissibility was required to be determined by reference to Rule 702, not Rule 701. *Garcia*, 413 F.3d at 215.

iii. Marino's Inadmissible Testimony

JLJ argues Marino "testified that the electrical cables were properly insulated. (Resp't's Br. at 27.) According to JLJ, Marino "confirmed that Con Ed only purchases insulated cables and that the rebar that Mr. [Redacted] was working with at the time had a rubberized coating to protect against electrocution." (*Ibid.*) When Marino was asked, "[a]re all of the wires, to your observation, insulated," Marion said, "yes." (Tr. 468:1-2.) When asked, "who does that," Marino stated:

> The manufacturer. The wires come out insulated. Con Edison uses two types of wires. When the cable is overhead on a pole, it's a naked cable. There's no insulation on it. When the wires are in the ground, all the cables come out with insulation on them. Con Ed uses steel conduits to run their cables through. So the wires themselves are protected because they're insulated; otherwise, they couldn't use a steel conduit. So they use steel conduits, except for the last ten feet going into a manhole is concrete; otherwise, Con Ed installs their cables in steel conduits. So all the cables come from whichever manufacturer Con Ed buys them from insulated for the rating of that cable. If it's a 9kV, a 13kV, a 15kV. They buy it insulated. Then the only time the insulation is taken off is when Con Ed does a splice. What a splice is, we call them crabs. They put a positive leg, a negative leg, a neutral leg, and they sit them in—in a—a box, like a plastic box, that has copper in the middle of it to conduct it. So the one leg hits the copper, this leg hits the copper, copper, copper. Then they put a cover on it. Then they close—they bolt that close. Then

> they wrap that in arc-proof tape to ensure—so there's never a bare cable that we are working around. If we ever come across a bare cable, it's typically in the street in a trench where the conduit has been broken due to other people working at the time or, you know, ten, 15 years ago a water main being put in or whatever. And when we come across that, we stop, we call Con Ed, they come out and they check the coating on the cable for us, they will wrap it, or they'll cut that section of the cable out. And then we proceed after that. We never worked around bare cables.

(Tr. 468:4-469:15.) Thus, JLJ argues "[t]he evidence proffered showed Con Ed purchased triple insulated cables from the manufacturer, which cables were then arc-proofed as required by Con Ed." (*Id.* at 26.)

When asked where the arc-proof (fireproof) blankets were used, Marino testified, "we'll place that over the cables that are insulated, arc-proof taped." (Tr. 456:7-12.) He went on to explain:

> Arc-proof tape is a tape that is—that is put on—on cables to stop the cable from arcing. What arcing is, if there's a cable here and a cable here, the electricity wants to go between the two cables, even if they're insulated. And when you work in like a manhole around those cables, the cables are insulated, but if you don't put the arc-proofing on, as we say, you feel the hair on your legs stand up when you walk past them, because you're getting a little bit of a—the—that arc without electricity that just wants—that's electricity wants to go to itself. So what the arc-proofing does is they—Con Edison wraps it in a manhole, they wrap it around the cables, and that'll stop any of that—that stray electricity from going from one cable to another.

(Tr. 455:16-456:6.) "[W]e'll place that over the cables that are insulated, arc-proof taped; however . . . we usually place that blanket in the area that we're working. Because in case something happens to those cables, you know, beyond our control, there's something that will stop the flash from getting to one of our employees." (Tr. 456:11-17.) "We put them over the cables themselves. Typically we'll make like—like either a wooden bench or something like that that we'll drape it on." (Tr. 456:20-22.) "Just where you're working. There are too many cables in a manhole." (Tr. 456:25-457:1.)

After reviewing a photograph Marino took on the day of the accident at the beginning of the shift (Ex. R-5) he opined, the "cable had its manufacturer's insulation on, that I can verify by looking at it and saying that it's not a bare cable, that it is insulated the way the manufacturer sent it out." (Tr. 500:1-6.) "There's [also] arc-proof wrapping around where it's bent. Do you see that? The white is arc-proof tape that Con Edison applies." (Tr. 500:11-13.) When asked if by looking at this photograph he could tell whether all the wires were insulated, Marino opined, "[y]es, they're

all black. If they weren't insulated, they would be bare copper, and it would be either copper or green." (Tr. 501:16-20.)

The Court concludes Marino's opinions were "not based *entirely* on [his] perceptions." *Bank of China*, 359 F.3d at 181 (emphasis added). It resulted from a process of reasoning that "was not that of an average person in everyday life,'" but rather, was reached "through an opaque, intuitive process grounded in some kind of specialized knowledge[.]" *Cabrera*, 13 F.4th at 150 (quoting *Garcia*, 413 F.3d at 216–17). Therefore, to the extent these opinions rested "in any way" upon scientific, technical, or other specialized knowledge, its admissibility was required to be determined by reference to Rule 702, not Rule 701. *Garcia*, 413 F.3d at 215.

B. ALLEGED VIOLATIONS

i. Amended Citation 1, Item 1

In Amended Citation 1, Item 1, the Secretary alleges JLJ violated 29 C.F.R. § 1926.102(a)(1), which mandates in relevant part that JLJ must "ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation." 29 C.F.R. § 1926.102(a)(1). The Secretary alleges JLJ violated that standard when its "employees worked in proximity to energized electrical feeder cables without the use of face shields or other appropriate face protection." (Am. Compl. ¶V.)

a. Applicability

"Unlike most of the Secretary's safety and health standards," section 1926.102(a)(1) "does not presume the existence of a safety hazard." *Pratt & Whitney Aircraft, Div. of United Techs. Corp. v. Donovan*, 715 F.2d 57, 63 (2d Cir. 1983). "Whether there exists a significant risk depends on the seriousness of the potential harm and the likelihood of that harm being realized." *Id.* at 64. "To establish the applicability of a PPE standard that, by its terms, applies only where a hazard is present," the Secretary must demonstrate that "there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE." *Wal-Mart Distrib. Ctr. # 6016*, 25 BNA OSHC 1396, 1400-01 (No. 08-1292, 2015), *aff'd in part and vacated in part on other grounds*, 819 F.3d 200 (5th Cir. 2016). Here, there was a significant risk of harm because employees were working near energized electrical lines for long periods of time when an arc flash

or arc blast could occur. (Tr. Tr. 46:9-15, 372:9-374:16, 375:4-24, 400:17-20, 449:22-450:10, 517:19-24; Ex. C-6, at 17:5-25.)

It is also clear that JLJ had actual knowledge of a need for protective equipment. Both JLJ supervisor Ferreira, and JLJ superintendent Marino admitted at trial that there were hazards associated with working around electrical cables, including that the cables could explode and that employees always need to be aware of those hazards while working around electrical cables. (Tr. 387:3-6, 410:14-19, 449:22-450:10; C-6, at 17:5-25.) Marino also admitted JLJ had actual knowledge of a need for face protection while working near energized electrical cables in manholes because of the risk of an explosion or arc flash like the one that occurred that burned [Redacted]'s face. (Tr. 446:14-447:5, 449:22-450:10.) The Court concludes there was a significant risk of harm and that JLJ had actual knowledge of a need for protective equipment. Therefore, the Court concludes the Secretary has established the cited standard applies.

b. Noncompliance

JLJ argues it ensured "its employees used appropriate eye and face protection by providing safety glasses/goggles and face shields to its employees[.]" (Resp't's Br. at 7.) However, [Redacted] testified at trial that he took off his face shield before the accident and placed it up top, "outside the manhole," and was not wearing it at the time of the explosion. (Tr. 636:12-22; 637:7-10, 638:12-17.) Therefore, the Court concludes the Secretary has established JLJ failed to comply with the cited standard when it failed to ensure [Redacted] used appropriate eye or face protection while being exposed to eye or face hazards.

c. Access

[Redacted] was not wearing appropriate eye or face protection when he was exposed to the hazard of an arc flash or arc blast from an electrical cable. [Redacted]'s injuries establish actual exposure. *See S & G Packaging*, 19 BNA OSHC 1503, at *3 (employee's "injuries establish actual exposure to the unguarded drive rollers."); see also *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) (employee's fall through a skylight established actual exposure to a fall hazard), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). Therefore, the Court concludes the Secretary has established a JLJ employee was exposed to the violative condition.

d. Knowledge

"The fourth element, the knowledge requirement, may be satisfied by proof either that the employer actually knew, or 'with the exercise of reasonable diligence, could have known of the

presence of the violative condition.'" *N.Y. State Elec.*, 88 F.3d at 105 (citation omitted). "Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent." *Ibid. See also, United States v. Mazza*, 594 F. App'x 705, 709, 2014 WL 6805433 (2d Cir. 2014) (the actions, omissions, and knowledge of a corporate entity's agents may be imputed to it). "Further, constructive knowledge may be predicated on an employer's failure to establish an adequate program to promote compliance with safety standards." *Id.* at 105-106.

The Secertary argues the "weight of the credible evidence shows that JLJ did not have a work rule requiring the use of face shields while working in the Manhole." (Sec'y's Br. 13.) JLJ's Site Specific Health and Safety Plan includes a section titled, Personal Protective Equipment, which indicates "[t]he field supervisor is responsible for assessing the workplace to determine if hazards are present, or likely to be present, which necessitate the use of personal protective equipment (PPE)." (Ex. R-28, § 15 at 87.) "If such hazards are present, or likely to be present, JLJ Enterprises shall select, and have each affected employee use, the type of PPE that will protect against the identified hazards." (*Ibid.*) Under a subsection titled, Eye and Face Protection, JLJ mandates in relevant part "[e]mployees must use appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation." (Ex. R-28, § 15 at 87.) Therefore, the Court finds no merit in this argument.

As to actual knowledge, when Wissert interviewed Ferreira and Marino and asked what specific PPE was worn, they admitted they only used helmets, safety glasses and work boots. Marino also admitted to Wissert that it "wasn't the company policy to use" PPE and "if you're so worried about it, why don't you . . . supply us with . . . PPE?" JLJ also admits Ferreira "was present at the manhole supervising the employee's as they descended into the Manhole." (Resp't's Br. at 28.) The Court concludes the knowledge of Ferreira and Marino that JLJ employees were not using face shields or other appropriate face protection is imputed to JLJ.

Even assuming Ferreira did not have actual knowledge that employees were not wearing face shields, knowledge of a violation may be established where the hazardous condition and the presence of employees are in a conspicuous location or are otherwise readily observable. *Kokosing Constr. Co.*, No. 92-2596, 1996 WL 749961, at *2 (OSHRC Dec. 20, 1996); accord *Hamilton Fixture*, No. 88-1720, 1993 WL 127949, at *16, *18 (OSHRC Apr. 20, 1993). Here, [Redacted] testified he took off his face shield before the accident and placed it up top, outside the manhole.

And JLJ admits Ferreira "was present at the manhole supervising the employee's as they descended into the Manhole" and that he "stood watch over the employees at the top of the manhole." (Resp't's Br. at 25, 28; see also Ferreira Dep. at 18:25-19:10; Tr. 633:4-10, 638:4-10; Ex. C-5).

Thus, [Redacted] was in plain view of Ferreira without a face shield while [Redacted]'s face was only one foot away from the cable that exploded. *See Am. Airlines, Inc.*, Nos. 93-1817 & 93-1965, 1996 WL 88760, at *2 (OSHRC Feb. 23, 1996) (finding employer knowledge where violative conditions were in plain view and supervisory personnel were present throughout work operations). Ferreira knew or with the exercise of reasonable diligence, could have known that while [Redacted] was in the manhole he was not wearing a face shield, and his constructive knowledge is imputed to JLJ. Therefore, the Court concludes JLJ either knew, or with the exercise of reasonable diligence, could have known of the presence of the violative condition. Therefore, the Court concludes the Secretary has established JLJ had knowledge of the condition.

ii. Citation 1, Item 2

In Citation 1, Item 2, the Secretary alleges JLJ violated section 1926.416(a)(1) when "employees entered the manhole and worked in proximity to an exposed energized electrical feeder cable which was not de-energized or guarded by insulation and/or other means." (Compl. Ex. A.) The cited standard mandates that "[n]o employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means." 29 C.F.R. § 1926.416(a)(1).

a. Applicability

The safety-related work practices requirements contained in section 1926.416 apply to "hazards arising from the accidental contact, direct or indirect, by employees with all energized lines, above or below ground, passing through or near the jobsite." 29 C.F.R. § 1926.400(b). Here, there is no dispute that a hazard existed due to the possibility of employees accidentally contacting an energized line passing through the manhole. Therefore, the Court concludes the Secretary has established the cited standard applies.

b. Noncompliance

JLJ argues it "treated the Con Ed cables as being energized and provided its employees

with the appropriate PPE to guard against any injuries resulting from the presence of the electrical cables." (Resp't's Br. at 26.) However, the cited standard does not require "appropriate PPE." It requires JLJ ensure its employees are protected against electric shock "by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means." 29 C.F.R. § 1926.416(a)(1). Even if JLJ provided appropriate PPE to guard against any injuries resulting from the presence of the electrical cables, it failed to ensure [Redacted] wore the PPE.

As to "proximity," the Commission has held "that an employee shall not work so close to an energized power circuit that he may inadvertently contact it in the course of his work." *Cleveland Consolidated Inc.*, No. 84-696, 1987 WL 89048 at *3 (OSHRC Feb. 13, 1987). Here, at the time of the arc flash, [Redacted]'s face was approximately one foot from the energized cable that exploded. To place the rebar in the manhole, employees also needed to pass the rebar within six inches of energized power lines in the manhole. Applying the *Cleveland* proximity standard, the Court concludes employees worked in proximity to an electric power circuit such that they could contact the electric power circuit in the course of work.

There is no dispute that the cables in the manhole were not deenergized. Therefore, to comply with the standard, JLJ was required to ensure that the cables were guarded effectively by insulation or other means. The question then is whether the circuit was guarded effectively by insulation or other means. Relying on Campbell's lay opinions, the Secretary argues JLJ failed to comply with this requirement "with respect to the cable involved in the arc flash incident or most of the other cables in the Manhole." (Sec'y's Br. at 20) (citing Tr. 132:13-21, 135:9-16, 171:22-172:3, 190:12-24, 191:16-25, 192:1-20; see also Ex. C-2 at 1-2). The Secretary's reliance on Campbell's testimony (Tr. 132:13-21; 171:22-172:3) is not supportive of her assertion since it makes no reference to insulation or other means of guarding. As to the Secretary's reliance on the other cited portions of Campbell's testimony, as the Court indicated *supra*, it declines to rely on these impermissible expert opinions.

The Secretary also asserts that "[w]hile the cable involved in the arc flash had an interior layer of insulation, that insulation was surrounded by both a partially-conductive layer of rubber and a layer of conductive copper, the latter of which was covered by only the thin polypropylene jacket." (Sec'y's Br. at 21) (citing Tr. 191:19-192:20). "Both JLJ's supervisor and foreman acknowledged at hearing that if a cable had copper showing through its outer layer, it would not be considered insulated." (*Ibid.*) (citing Tr. 501:16-20; 561:22-562:5). "The only material

surrounding the outermost layer of copper in the cable involved in the arc flash was the thin polypropylene jacket intended to protect the cable from damage, which is not insulation." (*Ibid.*) (citing Tr. 192:15-19, 60:3-61:13, 68:5-15, 145:18-146:3). "The cable was thus uninsulated." (*Ibid.*) "It is apparent from photographs of the Manhole that like the cable involved in the arc flash, other cables in the Manhole had only thin plastic coatings, and not insulation, covering them." (*Ibid.*) (citing C-5; J-2; R-5; R- 21).

The Secretary's reliance on Ferreira's testimony (Tr. 561:22-562:5) is not supportive of her assertion since it makes no reference to an acknowledgment "that if a cable had copper showing through its outer layer, it would not be considered insulated." As to the Secretary's reliance on the other cited portions of the testimony of Campbell and Taramal, as the Court indicated *supra*, it declines to rely on these impermissible expert opinions. And without this testimony, the Court disagrees with the Secretary that "[i]t is apparent from photographs of the Manhole that like the cable involved in the arc flash, other cables in the Manhole had only thin plastic coatings, and not insulation, covering them."

JLJ argues "Mr. Campbell, Mr. Marino and Mr. Ferreira all testified that the electrical cables were properly insulated. (Resp't's Br. at 27.) As indicated *supra*, the Court declines to rely on their impermissible opinion testimony. Relying on Campbell's opinion, JLJ also argues the "subject electrical cable that 'popped' had arc proof tape applied, which is intended to protect the underlying cable from an arc flash of an adjacent cable." (Resp't's Proposed Fact ¶11) (citing Tr. 187:10-14). Again, the Court declines to rely on this impermissible expert opinion. However, the Secretary has the burden to establish the violation, and the Court concludes she has failed to establish the cable was not insulated.

Nonetheless, the Secretary also asserts that "even if the polypropylene jacket on the cable constituted effective guarding, where insulation may be damaged in the course of employees' work processes, it is not sufficient to guard electric cables." (Sec'y's Br. at 21) (citing *Hirsch Elec. Co.*, No. 94-0161, 1994 WL 728106, at *4 (OSHRC Dec. 19, 1994) (ALJ) (affirming violation of 29 C.F.R. § 1926.416(a)(1) where materials with sharp edges were being installed near electric wires and the insulation covering wires could have been "pinched"). The Secretary argues that "JLJ built wood walls, or wood sheeting, around the cable in such a way that the cable was pressed up against the side of the sheeting." (*Ibid.*) (citing Ex. C-5; Tr. 391:1-5, 392:10-19; Ex. C-6, at 8:18-9:5). The Court finds *Hirsch* persuasive.

The Secretary also argues that "industry standards make clear that even where a cable has insulation on it, it is not considered guarded to protect employees absent some additional protection." (Sec'y's Br. at 21.) "For example, the definition of 'guarded' in the National Electrical Safety Code (NESC) includes a note that states, '[w]ires that are insulated but not otherwise protected are not normally considered to be guarded.'" (*Ibid.*) (citing Ex. C-1, at 35. "The NESC also states that '[e]mployees shall not place dependence for their safety on the covering (nonrated insulation) of wires.'" (*Ibid.*) (citing *id.*, at 59; Tr. 68:16-69:2).

The term "guarded" is defined under OSHA's standards as "[c]overed, shielded, fenced, enclosed, or otherwise protected by means of suitable covers, casings, barriers, rails, screens, mats, or platforms to remove the likelihood of approach to a point of danger or contact by persons or objects." 29 C.F.R. 1926.449. Here, although Marino testified that arc-proof (fireproof) blankets were placed "over the cables that are insulated, arc-proof taped," he then qualified that statement, "however, they are—we *usually* place that blanket in the area that we're working." (Tr. 456:11-14.) While arc-proof blankets would meet the definition of "guarded," there is no evidence that an arc-proof blanket was used on the cable that failed. Thus, the Court concludes the circuit was not guarded effectively. The Secretary has established non-compliance.[13]

c. Access

As indicated *supra*, at the time of the arc flash, [Redacted]'s face was approximately one foot from the energized cable that exploded. And to place the rebar in the manhole on February 11, 2022, the employees needed to pass the rebar within six inches of energized power lines in the manhole. The Secretary has established employees were exposed to the violative conditions.

d. Knowledge

Ferreira had actual knowledge of the condition of the cables without any insulation on them in the manhole on February 11, 2022, as he testified that he did a visual inspection of the manhole at the beginning of the night. (Tr. 561:7-562:12.) The condition of the cables without any insulation on them was also in plain view, giving both Ferreira and Marino constructive knowledge of that

[13] JLJ also argues it did not violate the standard because "it does not: (a) own the electrical cables; (b) did not control the worksite; (c) had no duty to insulate, move or maintain the electrical cables, and (d) did not work on electrical cables." (Resp't's Br. at 27.) JLJ also asserts "as set forth in Mr. Marino's testimony, de-energization of the electrical cables was not technologically feasible" and that "JLJ undertook alterative protective measures." (*Ibid.*) However, as indicated *supra*, JLJ is prohibited from raising additional affirmative defenses post-trial.

condition. Ferreira also knew that prior to the accident, the cable involved in the accident was pressed up against the side of the wood sheeting that JLJ had built, because he observed that condition during his inspection at the beginning of the night. (Ferreira Dep. 8:18-9:5; see also Tr. 396:23-25.) Ferreira and Marino also had actual knowledge that employees were working in proximity to the electrical lines in the manhole, which they treated as live. (Tr. 381:15-21, 384:20-25, 393:2-7, 394:10-14, 410:11-13, 505:14-19; see also Ferreira Dep. 17:5-25.) The knowledge of Ferreira and Marino is imputed to JLJ. Therefore, the Secretary has established JLJ had knowledge of the lack of effective guarding of the cables.

iii. Amended Citation 1, Item 3

In Amended Citation 1, Item 3, the Secretary alleges that JLJ violated section 1926.416(a)(3) when "employees worked in a manhole that was not inspected for electrical hazards" and JLJ "did not post and maintain warning signs where electrical circuits existed and did not advise employees of the location and hazards of electrical circuits/lines, or protective measures to be taken," where "[t]ools/equipment were in close proximity to the electrical feeder cables." (Am. Compl. Ex. A.) The cited standard mandates:

> Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

29 C.F.R. § 1926.416(a)(3).

a. Applicability

JLJ is a construction contractor with employees working in proximity to the energized lines at the worksite. There is no dispute that JLJ's employees worked within six inches to one foot of energized power lines at the worksite. Therefore, the Court concludes the Secretary has established the cited standard applies.

b. Noncompliance

JLJ argues that it treats all cables as if they are energized. (Tr. 384:20-25, 410:11-13.) Assuming that is true, neither Con Ed nor JLJ posted any warning signs at the worksite concerning energized electrical lines on or before February 11, 2022. Therefore, the Court concludes the Secretary has established the cite standard was violated.

c. Access

As indicated *supra*, employees worked in proximity to the energized electrical lines when they and the rebar they were placing passed within six inches to one foot of the energized lines. Therefore, the Court concludes the Secretary has established employees were exposed to the violative conditions.

d. Knowledge

Both Ferreira and Marino admitted that JLJ did not post any warning signs related to energized cables at the worksite. (Tr. 404:12-15; 412:12-15; 546:2-4.) Marino testified no warning signs were posted, because, according to him, "there were no bare electric cables where we're working." (Tr. 546:6-8.) The knowledge of Ferreira and Marino is imputed to JLJ. Therefore, JLJ was aware that it did not post the required warning signs. Thus, the Court concludes the Secretary has established knowledge.

C. SERIOUS CHARACTERIZATION OF VIOLATIONS

A violation is properly characterized as "serious" if there is a "substantial probability that death or serious physical harm could result" from the cited conditions. 29 U.S.C. § 666(k). The Secretary "need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result." *Huen Elec., Inc.*, No. 20-0134, 2022 WL 7035656, at *11 (OSHRC Oct. 3, 2022). Here, all three violations were properly characterized as serious since there was a substantial probability that death or serious physical harm could result from an arc flash or arc blast if an employee is not wearing face protection, including burns from explosions and from molten metal flung at an employee's face. (Tr. 44:12-45:17.)

D. INFEASIBILITY DEFENSE

"When a standard states a specific method of complying, an employer seeking to be excused from liability for its failure to comply with the standard has the burden of demonstrating that the action required by the standard is infeasible under the circumstances cited." *State Sheet Metal Co.*, Nos. 90–1620 and 90–2894, 1993 WL 132972, at *7 (OSHRC Apr. 27, 1993) (consolidated) (citation omitted). "To establish infeasibility as an affirmative defense, an employer must show that: '(1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of

protection.'" *Altor, Inc.*, No. 99-0958, 2011 WL 1682629, at *13 (OSHRC Apr. 26, 2011) (citation omitted), *aff'd on other grounds*, 498 F. App'x 145 (3d Cir. 2012) (unpublished).

JLJ argues that "Marino testified it was infeasible for JLJ to implement any further safety precautions." (Resp't's Br. at 8.) Thus, JLJ argues "as set forth in Mr. Marino's testimony, de-energization of the electrical cables was not technologically feasible." (*Id.* at 27.) The Court finds no merit in this argument. JLJ admits it undertook alterative protective measures[14] (Resp't's Br. at 27-28) and Marino admitted JLJ could "place the insulated fireproof blanket over the cables that are insulated, arc-proof taped . . . that will stop the flash from getting to one of our employees." (Tr. 456:11-17.) With these admissions, the Court concludes JLJ has failed to prove the second prong of the infeasibility defense.

IV. PENALTY DETERMINATION

Under the Act, the Secretary has the authority to propose a penalty. *See* 29 U.S.C. §§ 659(a). In the citation, the Secretary proposed a penalty of $13,052 for each of the three serious violations.[15] However, Congress vested the Commission with the final "authority to assess all civil penalties provided in [the Act]," which it determines *de novo*. 29 U.S.C. § 666(j); see also *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Section 17(j) requires that when assessing penalties, "due consideration" must be given "to the

[14] According to JLJ, Marino "contacted Con Ed to request a daily inspection each time JLJ was scheduled to perform work in the Manhole," "performed his own inspection and conducted a safety meeting to highlight the dangers of the energized Con Ed cables and the need to take precautions when working around them in the Manhole," and "ensured the employees had their PPE, which included a face shield." (Resp't's Br. at 27-28.) According to JLJ, Ferreira also "performed his own 'hand's on' inspection from inside the Manhole before continuing the safety meeting wherein he reminded the employees to take precautions around the hazardous Con Ed energized cables and to wear their PPE" and "was present at the manhole supervising the employee's as they descended into the Manhole." (*Id.* at 28.)

[15] Section 17(b) of the Act mandates that any employer who has received a citation for a serious violation "shall be assessed a civil penalty of up to $7,000 for each such violation." 29 U.S.C. § 666(b). However, in 2015 Congress passed the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act), which requires federal agencies to adjust civil penalties for inflation each year. *See* Bipartisan Budget Act of 2015, Pub. L. 114-74, § 701, 129 Stat. 584, 599 (2015) (codified at 28 U.S.C. § 2461 note). The Inflation Adjustment Act provides that the increased penalty levels apply only to civil monetary penalties "which are assessed after the date the increase takes effect." *See* Section 6 of the Inflation Adjustment Act, 28 U.S.C. 2461 note (Nov. 2, 2015). At the time of the citation, the maximum penalty for a serious violation was $14,502.00. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments for 2022, 87 FR 2328, 2336 (Jan. 14, 2022); see also 29 C.F.R. § 1903.15(d)(3) (2022).

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." 29 U.S.C. § 666(j).

These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (citation omitted). "Gravity is typically the most important factor in determining an appropriate penalty and depends upon the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Capform, Inc.*, No. 99-0322, 2001 WL 300582, at *4 (OSHRC Mar. 26, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). For the reasons indicated *infra*, considering JLJ's size, the gravity of the violations, the lack of good faith, and its history, the Court concludes the appropriate penalty for each item is $13,052.00.

JLJ had 219 employees at the time of OSHA's inspection. The Secretary proposed a 10% size reduction. The Court agrees with the Secretary's proposed size reduction. With respect to the gravity of the violation, the Secretary determined, and the Court agrees, the gravity of the violation was "high." In making this assessment, the Secretary concluded, and the Court agrees, the severity was "high," based on the harm that would result from the hazard—death or serious injury from electrocution or exposure to an arc blast or arc flash. The Secretary also determined, and the Court agrees, the probability of injury from each violation was "greater," due to the employees' scope of work in breaking down and rebuilding the manhole, which required the employees to be inside the manhole and in proximity to the energized cables, for hours a day for many months.

The Secretary did not propose a reduction for good faith. "With regard to good faith, the Commission has given consideration to various factors including the employer's safety and health program and its commitment to assuring safe and healthful working conditions." *Capform, Inc.*, No. 99-0322, 2001 WL 300582, at *5 (citation omitted). Here, JLJ knew that it had not posted any warning signs at the worksite concerning energized electrical lines. JLJ also knew [Redacted] did not keep his face shield on. The Court concludes JLJ is not entitled to a good faith reduction. The Secretary also did not propose any adjustments for history since JLJ had an inspection in the preceding five years which resulted in violations. The Court agrees with that determination.

Therefore, giving due consideration to the appropriateness of the penalty with respect to the size of JLJ's business, the gravity of the violations, the good faith of JLJ, and the history of

previous violations, the Court concludes a penalty in the amount of $13,052.00 respectively for each violation is appropriate. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Items 1, 2, and 3 are **AFFIRMED**, and each item is **ASSESSED** a penalty in the amount of $13,052.00 respectively, for a total penalty of $39,156.00.

SO ORDERED.

/s/
JOHN B. GATTO, Judge

Dated: May 10, 2024
Atlanta, GA