UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

DOCKET NO. 18-0149

v.

PACIFIC TECH CONSTRUCTION, INC.,

Respondent.

Appearances:

Norman E. Garcia, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California
For Complainant

Aaron K. Owada, Esq., AMS Law, PC, Lacey, Washington
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On September 15, 2017, OSHA Compliance Safety and Health Officer Michael Potter inspected Respondent's worksite at the Portland Air National Guard Base located in Portland, Oregon. During the course of his inspection, CSHO Potter observed Respondent's employees using an unguarded table saw outside a building being renovated, as well as multiple uncovered, live, electrical outlets and switches within the same building. (Stip. Nos. 2A, 2B; Tr. 69, 107; Ex. C-9, C-10). Based on these observations and subsequent interviews, CSHO Potter determined Respondent committed two violations of the Occupational Safety and Health Act and recommended the issuance of a *Citation and Notification of Penalty*.

Based on CSHO Potter's recommendations, Complainant issued a *Citation and Notification of Penalty*, alleging Respondent committed a serious violation of 29 C.F.R. § 1926.304(i)(1), and a repeat violation of 29 C.F.R. § 1926.416(a)(1) [or alternatively, 1926.405(j)(1)(i)], with total proposed penalties of $27,705. Respondent timely contested the *Citation*, which brought the matter before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act.

A trial was conducted on November 6–7, 2018, in Portland, Oregon. Five witnesses testified at trial: (1) CSHO Michael Potter; (2) Area Director Cecil Tipton; (3) Lee Sykes, senior project manager/corporate safety manager for Respondent; (4) Jason Reetz, project manager for Respondent; and (5) Bruce Brock, superintendent for Respondent. Both parties timely submitted post-trial briefs for the Court's consideration.

Jurisdiction & Stipulations

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Stip. Nos. 1A–1B). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties also stipulated to other factual matters, which were submitted to the Court on the record at the beginning of the trial. (Tr. 40; Ex. C-1).

Factual Background

Respondent, a general contractor, was hired by the Portland Air National Guard to remodel its Medical Clinic, located at 6801 NE Cornfoot Road in Portland, Oregon.[1] (Stip. No. 1F). The remodel required Respondent to remove and replace all the exterior walls of the Medical Clinic,

1. Respondent was also hired to perform renovations on two other buildings on the Air National Guard's campus; however, none of the citation items at issue involves activity in those buildings.

including the siding, roofing, and windows, which Jason Reetz referred to as the "envelope" of the building. (Stip. No. 1G; Tr. 334). Respondent also remodeled some of the offices affected by the exterior renovations; specifically, those that had at least one wall along the building's perimeter. (Tr. 433). The interior portion of the remodel included mold remediation, replacement of sheetrock, repainting, and floor replacement. (Tr. 334). CSHO Potter conducted his inspection while these activities were occurring. (Stip. No. 1H).

CSHO Potter arrived at the worksite on September 15, 2017 at approximately 8:30 a.m.[2] (Tr. 67). According to security protocol, CSHO Potter met with the base safety and health officer, Master Sergeant Peterson, who escorted him to the Medical Clinic. (Tr. 67). Upon arriving at the entrance to the Clinic, CSHO Potter observed three workers using a table saw to cut pieces of plywood. (Tr. 69, 80). Closer inspection revealed that the saw blade did not have a guard. (Stip. No. 2B; Tr. 69; Ex. C-9). According to CSHO Potter, he went inside the clinic to find a representative for Respondent. (Tr. 68–69). Once inside, he found Bruce Brock, who identified himself as the superintendent for the project. (Tr. 69). Before starting the opening conference, CSHO Potter asked Brock to walk back outside where the employees were using the unguarded table saw. (Tr. 69). Three of Respondent's employees—Rodney Swenson, Steve Taylor, and Mark Rubon—were still cutting 8-foot strips of plywood with the saw. (Stip. No. 2D, 70). CSHO Potter took photographs of the scene, after which Brock directed the employees to immediately stop using the saw. (Tr. 70). The employees then packed up the saw and moved on to other duties. (Tr. 105–106). Afterwards, CSHO Potter conducted an opening conference with Brock and other subcontractor representatives working on the project. (Tr. 106).

2. CSHO Potter was later joined by CSHO Brian Peters, an industrial hygienist, who came to observe the mold remediation efforts. (Tr. 67). CSHO Peters did not testify at trial.

After the opening conference, CSHO Potter continued with the inspection. (Tr. 106). As he traveled through the rooms impacted by the exterior renovations, CSHO Potter noticed multiple uncovered electrical outlets and switches in at least four different rooms. (Tr. 107, 110–111; Ex. C-6). Using a GFCI circuit tester, CSHO Potter tested the wiring in each of the uncovered outlets and switches. (Tr. 108; Ex. C-10). Every one of the uncovered outlets and switches he tested was live energized at 110 volts.[3] (Tr. 107–110). According to Brock, the outlets needed to remain energized during Respondent's work because the breaker panels had improper labeling, and because the medical clinic employees needed power to continue working in other areas of the building. (Tr. 127). This was confirmed by Pavel Zabarenko, who was the electrician for the project. (Tr. 127; Ex. C-32 at 8).

Two of the light switches had been pulled out of the wall and had exposed wires hanging out with energized components; one of the outlets had an extension cord plugged into it; and the remaining outlets had painters tape placed over the face of the receptacle. In some instances, Respondent's employees wrapped the tape around the side of the outlets, very close to where the uninsulated wires attached to the terminal screws of the outlet. (Tr. 109, 116–117; Ex. C-10). As illustrated by the photographs submitted into evidence, the gaps between the drywall and the energized, unprotected elements of the outlets varied in size, but none of those elements was very far from the surface. (Ex. C-10 at 5). CSHO Potter learned Respondent's employees removed the outlet covers and switches and covered them with tape so that they would not be ruined while they painted the room. (Tr. 118–119; Ex. C-10). In addition to observing Respondent's employees and subcontractor employees working in some of the rooms identified in Exhibit C-6—as well as the

3. CSHO Potter found a data port that did not register as energized because it carries low voltage; the GFCI reader only recognizes "live" wires when they are over 50 volts. (Tr. 124).

fact that tape was placed over the top of the outlets—CSHO Potter also saw fresh paint splatter on some of the tape.

Discussion

To establish a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.304(i)(1): Each circular hand-fed rip saw was not guarded by a hood that completely enclosed that portion of the saw above the table and that portion of the saw above the material being cut:
>
> (a) Portland Air National Guard Base – Medical Clinic building 135 – On or about September 15th, 2017 and at times prior thereto employees were ripping lumber on the BOSCH 4100 table saw without an adequate guard or hood.

Citation and Notification of Penalty at 6.

The cited standard provides, in relevant part:

> Each circular hand-fed ripsaw shall be guarded by a hood which shall completely enclose that portion of the saw above the table and that portion of the saw above the material being cut.

29 C.F.R. § 1926.304(i)(1).

The Standard Applies and Was Violated

The parties stipulated that, on the date of the inspection, Respondent's employees were using a Bosch 4100 table saw that did not have a guard for its blade. (Stip. Nos. 2A, 2B). Respondent's employees were using the circular table saw to rip pieces of plywood into furring

strips, which were used as shims for the fascia of the Medical Clinic renovations. (Tr. 452–53). The blade was not guarded at any point above the table or above the material that was being cut. (Tr. 69; Ex. C-9). Based on these stipulations and facts, the Court finds the standard applies and was violated.

Respondent's Employees Were Exposed to a Hazard

To establish access under Commission precedent, the Secretary must show Respondent's employees were exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

Respondent's employees using the table saw to cut eight-foot-long furring strips. (Tr. 69). Due to the length of the boards being cut, one employee was required to feed the wood into the saw blade, while another was positioned on the opposite side of the saw to receive the cut pieces. (Tr. 73–75). The individual feeding the wood was using both hands: one hand to hold the weight of the wood and the other hand to maintain pressure against the saw's fence (also known as a guide) to ensure a straight cut through the wood. (Tr. 73–74; Ex. C-9 at 1). CSHO Potter testified he observed the employee feeding the wood into the saw blade come within one foot of the blade as he pushed it through. (Tr. 74). Similarly, the employee receiving the cut wood on the other side of the saw came within a few feet of the blade as he grabbed the cut pieces. (Tr. 75). Given their proximity to the blade, CSHO Potter concluded that both the feeding and receiving employees were exposed to the hazard imposed by the blade because either employee could slip, trip, or otherwise contact the spinning blade with their hands. (Tr. 75). This was particularly acute in the

case of the feeding employee, because he had to maintain pressure on the piece of wood as he pushed it towards the saw blade. (Tr. 75).

Respondent makes three arguments to suggest its employees were not in, nor were unlikely to enter, the zone of danger. None of the arguments are persuasive. First, Respondent argues the photographic evidence illustrates the employees were several feet from the saw and that it was not in operation at the time the photograph was taken. Simply because CSHO Potter did not capture the exact moment in time that would illustrate the process described above does not mean his description of their work was inaccurate. CSHO Potter saw the employees cutting the lumber in plain sight at the Medical Clinic entrance when he began the inspection, as well as a few minutes late when he brought Brock back outside to observe what was going on. (Tr. 69–70). Respondent has not given the Court any reason to doubt CSHO Potter's description of how close the employees got to the unguarded blade while cutting the furring strips.

Second, Respondent argues there was "no evidence as to whether it was reasonably predictable that the wood or employee would slip, let alone contact the saw blade." *Resp't Br.* at 9. Respondent also argues that the individuals identified in the photograph were experienced and qualified employees, whom Brock expected would have the know-how to use common tools associated with carpentry work. *Id.* Regardless of the employees' respective levels of experience, the standard for exposure asks whether employees have been, will be, or are in the zone of danger which may result from any slip, trip, or other unintentional movement. *See Southern Hens v. OSHRC*, 930 F.2d 667 (5th Cir. 2019)("OSHA standards serve to protect workers from 'common human errors such as neglect, distraction, inattention, or inadvertence.'"), *quoting Matsu Ala., Inc*., 25 BNA OSHC 1952 (No. 13-1713, 2015) (ALJ), 2015 WL 6941348, at *21 (internal quotation omitted). In this case, Respondent's employees were working within a foot or two of a spinning

saw blade that was completely unguarded. One of those employees was walking directly towards the blade while pushing a piece of lumber through it, while the other had to approach the saw in order to grab the split piece of lumber and pull it through the same blade. The potential for an accident under such a scenario is apparent, and the Court concludes that Respondent's employees were within the zone of danger.

Third, Respondent argues that the nature of the cuts being made—rough cuts of plywood—did not require precision, and, therefore, it was unnecessary for employees to get very close to the moving blade. Like the previous argument, this disregards the actual proximity to the blade observed by the CSHO, as well as the potential for mistakes or inadvertent contact. *See, e.g., Bredshall Plastering, Inc.*, 19 BNA OSHC 1449 (No. 00-1590, 2001) (ALJ) (finding an employee's hands 11 inches away from blade within zone of danger because it is "reasonably predictable than an employee's hands could come in contact with the blade as a result of operational necessity, accident, or inadvertence"). Accordingly, the Court finds Respondent's employees were exposed to the hazard.

Respondent Had Knowledge of the Violation

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of the noncomplying conduct of a subordinate, it is reasonable

to find the employer had knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980).

In this case, the question of knowledge is largely contingent upon the Court's assessment of CSHO Potter's and Bruce Brock's credibility. There is no doubt the terms of the standard were violated; however, the key issue is whether Respondent had reason to know about it. There were no supervisory employees operating the saw at the time of CSHO Potter's observations, nor is there direct evidence of Brock specifically observing the operation of the saw until after it was brought to his attention. According to Brock, he had never seen the table saw in operation until the morning of September 15, 2017. (Tr. 444–45). Thus, according to Respondent, it had no reason to know the saw was being operated at all, let alone that it was being operated without a guard.

Conversely, Complainant presented evidence Brock should have been aware the saw was being used without a guard. CSHO Potter testified he was told by two of the employees operating the saw, one of which was Mark Rubon, that they had used the table saw every day for the last thirty days. (Tr. 89–91). Although no one specifically told him the saw was unguarded during that entire period of time, CSHO Potter concluded the guard must have been missing the whole time, because Respondent was never able to locate a guard for the saw after CSHO Potter pointed out the safety hazard. (Tr. 399–400, 439). Brock's office trailer was located approximately 100 yards away from where CSHO Potter found the saw, with an unobstructed view of the saw location. (Tr. 95–96; Ex. C-9 at 1[red circled trailer]). Additionally, the was right outside the main entrance to the Medical Clinic which Brock commonly used to enter and exit the building. (Tr. 95; Ex. C-9 at 1). In fact, on the day of the inspection, Brock testified he entered the clinic through the main entrance, which meant he would have walked past the saw; though he claims it was not set up when he entered the clinic that morning and that he never heard the saw operating. (Tr. 417).

Brock's testimony contained inconsistencies. In discussing the unguarded saw blade, he was unclear about when he first met with CSHO Potter or when he first saw the unguarded saw. (Tr. 365, 398). At one point he testified they first met around noon, and then later agreed with Complainant's counsel that they actually met in the morning around 9:00 a.m. (Tr. 366–67). When confronted with a photograph of the table saw, he testified he never observed CSHO Potter taking the photograph only to later contradict himself by saying he had. (Tr. 368, 398-399). He then tried to downplay the significance of what he observed by attempting to suggest he did not see his employees "using" or "operating" the saw, even though he admitted he saw them working in and around the saw with cut lumber. (Tr. 399). The fact that one of the photographs, taken in Brock's presence, show one of Respondent's employees pulling a piece of lumber away from the saw makes this claim particularly dubious. (Ex. C-9). In addition, although Brock testified, consistent with CSHO Potter's testimony, that the opening conference was held outside of the building in the courtyard near where the saw was located, his deposition testimony indicated the opening conference occurred inside the building. (Tr. 415). In contrast to Brock, CSHO Potter consistently and credibly testified about the events of September 15th, from the time he arrived on site to when he encountered Brock, their subsequent observation of the unguarded saw being used, and the progression of the OSHA inspection.

The Court finds the foregoing facts are sufficient to establish Brock was aware of the condition of the saw, or with the exercise of reasonable diligence, should have been aware of it. *See N & N Contractors, Inc. v. OSHRC,* 255 F.3d 122, 127 (4th Cir. 2001) (employer has constructive knowledge of a violation if employer fails to use reasonable diligence to discern the presence of a violative condition). Accordingly, the Court finds Respondent, through Brock, had constructive knowledge of the violation.

Based on the foregoing, the Court finds Complainant established a *prima facie* violation of the standard.

The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the likely injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

The parties stipulated "that if an employee were injured by a table saw that it is reasonably likely that hospitalization would occur . . . ." (Stip. No. 2O). On cross-examination, Brock admitted an employee could lose fingers or a hand if exposed to an unguarded saw blade. (Tr. 393). Accordingly, the Court finds the violation was properly characterized as serious.

Respondent Failed to Prove the Affirmative Defense of Unpreventable Employee Misconduct

In order to prevail on a claim of unpreventable employee misconduct, Respondent must show: (1) it had established work rules designed to prevent the violation; (2) it adequately communicated those rules to its employees; (3) it had taken steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096–97 (No. 10-0359, 2012). In other words, it is incumbent upon Respondent to "demonstrate that the actions of the employee were a departure from a uniformly and effectively communicated and enforced workrule [sic]." *Archer-Western Contractors Ltd.*, 15

BNA OSHC 1013 (No. 87-1067, 1991). Although Respondent had a work rule requiring its "circular saw shall be equipped with guards that automatically and completely enclose the cutting edges", the Court finds it failed to adequately communicate that rule, failed to take steps to discover violations of that rule, and failed to effectively enforce the rule (or any other) when violations were detected. (Stip. 2M).

As to communication of the rule, Jason Reetz testified each new employee was required to read the safety policy and sign an acknowledgment that they read and understood the policy; however, neither Reetz nor Brock could credibly testify whether Rubon, Swenson, Taylor, or any of the other employees at the Medical Clinic worksite had been trained on that policy. (Tr. 303, 396). Instead, Reetz testified, "It's an assumption we made that if they're there, they'd been trained." (Tr. 303). Respondent did not introduce any independent evidence of such training. Similarly, Brock testified that when employees came to his worksite, he expected them to know how to use a table saw because they had prior experience and it was a common tool used in his trade. (Tr. 450). The Court finds this the foregoing is insufficient to establish adequate communication of a work rule.

Brock testified he conducted daily, albeit undocumented, inspections of the worksite and equipment, insofar as it was going to be used. (Tr. 503). Given the Court's finding that the unguarded saw had been in operation for a month, however, the Court questions whether such inspections occurred, or, at the very least, whether they were effective.

Finally, the Court finds Respondent failed to prove it enforced its policies when it discovered violations of its work rule(s). In fact, although Respondent submitted a copy of its disciplinary policy, Respondent failed to submit any evidence of specific discipline for any of its safety rules. Respondent stipulated, other than the general group meeting, it did not impose

discipline on any of the individuals using the saw on the day of the inspection. (Stip. No. 2N). According to Respondent's own disciplinary policy, a general group meeting does not meet the definition or standards of "discipline", which requires an investigation, a counseling session with the employee(s) involved in the infraction, and documentation of the counseling/discipline. (Ex. R-2 at 2.087). Without evidence of discipline being applied in this or any other case, the Court finds Respondent's defense of unpreventable employee conduct fails.

Based on the foregoing, Citation 1, Item 1 will be AFFIRMED as a serious violation of the Act.

Citation 2, Item 1

Complainant alleged a repeat violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.416(a)(1) [or alternatively, 1926 .405(j)(1)(i)]: Employee(s) were permitted to work in proximity to electric power circuits that were not protected against electric shock by de-energizing and grounding the circuits or effectively guarding the circuits by insulation or other means:
>
> (b) Portland Air National Guard Base – Medical Clinic building 135 – On or about September 15th, 2017 and at times prior thereto Pacific Tech Construction allowed employees to work around live and uncovered 110V outlets and switches throughout the building.
>
> Pacific Tech Construction was previously cited for a violations of this occupational safety and health standard or its equivalent standard 29 CFR 1926.416(a)(1), which was contained in OSHA inspection number 899984, citation number 1, item number 1 and was affirmed as a final order on 5/14/2013, with respect to a workplace located at 6801 NE Cornfoot Rd #255 Portland, OR 97218.

Citation and Notification of Penalty at 7.

The cited standard provides, in relevant part:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

29 C.F.R. § 1926.416(a)(1).

The Standard Applies, Was Violated, and Respondent Knew of the Violation

The parties stipulated that Complainant "found uncovered outlets and switches in the Medical Clinic that had live electrical 110-volt current." (Stip. No. 3T). Respondent admitted it was "common practice" to have its employees remove cover plates from outlets and switches for painting, to cover the faces of those outlets with tape, and to paint in those areas while the switches and outlets remained energized. (Stip. Nos. 3F, 3G, 3J, 3K, 3L). In addition to the written stipulations, Respondent's counsel confirmed Respondent was not disputing employer knowledge as to the condition described in Citation 2, Item 1. (Tr. 327–28).

Based on these facts, the Court finds the standard applies, was violated, and Respondent was aware of the violative conditions.

Respondent's Employees Were Exposed to the Hazard Caused by the Violation

To establish access under Commission precedent, the Secretary must show Respondent's employees were exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). Respondent contends employee exposure to the electrical hazard was not reasonably predictable and the probability of injury was "highly remote and speculative." *Resp't Br.* at 15. The Court disagrees.

Respondent stipulated it was "common practice" for its employees to not only remove cover plates from 110-volt outlets and switches to prepare for painting, but also that it was common practice for its employees to place tape over the face of energized 110-volt outlets to prevent paint from entering the outlets after the covers were removed. (Stip. Nos. 3J, 3K). CSHO Potter found outlets and switches without covers and with tape over the face in at least 5 locations. (Tr. 131;

Ex. C-6, C-10). In many cases, the tape over the face of the outlets was wrapped around the side of the outlets, which means the employees placed their fingers near the location where the uninsulated portion of the electrical wires attached to the outlets' terminal screws. (Tr. 117–18; Ex. C-10). The Court is further persuaded Respondent's employees were exposed to an electrical hazard as illustrated by Exhibit No. C-10, which shows how close to the surface the energized terminal screws were, and by other outlet and switch locations where the gap was large enough to permit either tools or fingers. (Ex. C-10). The fact of exposure is particularly acute in the case of the two outlets that had been pulled out, hanging away from the wall. (Ex. C-10 at 3–4).

Respondent argues that, other than an employee intentionally touching the live wires with their fingers or tools, painters could not have been exposed to the energized elements of the outlets. This argument is inconsistent with how the Commission views the requirements of the standard, which encompasses unintentional, inadvertent contact:

> The standard speaks not of an employee working in "proximity" to an electric power circuit, but "in such proximity to any part of an electric power circuit that he may contact [it] in the course of his work...." The clear meaning and evident purpose of the standard is therefore 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. Thus, the standard, when read in its entirety, prescribes a specific and ascertainable standard of conduct, for an employer can determine by objective means whether employees are within reach of, and therefore may contact, an energized power circuit while they work.

Cleveland Consolidated, Inc., 13 BNA OSHC 1114, 1987 WL 89048 at *3 (No. 84-696, 1987).[4] First, the act of placing tape on and around the faces of the uncovered outlets was intentional, and, in so doing, employees placed their fingers within an inch or less of uninsulated, energized circuits. (Tr. 117–18). Second, whether using paint brushes or rollers, the Court finds it is reasonably

4. Although the numbering of the standard is different, the language is still the same. The requirements of former 29 C.F.R. § 1926.400(a)(1) were transferred to the now-current § 1926.416(a)(1). *See Electrical Standards for Construction*, 51 Fed. Reg. 25294 (July 11, 1986).

predictable that an employee could accidentally contact the unguarded, energized wires. Finally, in addition to the tape and painting, Respondent was also actively using the unguarded outlets, as illustrated by the extension cord plugged into one of them during the inspection. (Ex. C-10 at 5). In that photograph, not only is the outlet being used, but the voltage detector shows just how shallow the energized parts were located. (*Id.*).

As for the switches hanging out of their boxes, CSHO Potter opined on the possibility of slipping or tripping and falling into the energized, hanging wires. (Tr. 116). While this was certainly possible, there were much simpler scenarios in which Respondent's employees working in and around the Medical Clinic could have contacted the exposed switch wires—for example, unknowingly reaching for the light switch as a person entered the room.

Respondent also seems to suggest there was no evidence the outlets or switches were energized at the point in time when the tape was applied or when employees were working in the areas. This suggestion is counter to the evidence: Pavel Zabarenko, an electrician for one of Respondent's subcontractors, testified at deposition, "Pretty much every other time when they painting, some repainting and retouch—retouching, I would see covers off. Somebody took it off." (Ex. C-32 at 13). He further testified electrical current was always running to those outlets. (*Id.* at 13, 15).

Respondent also attempts to downplay the hazard posed by the exposed energized circuits by suggesting any resulting injury would be minimal. Respondent's position runs counter to the testimony of its own superintendent, Brock, who admitted death was a possible result of touching 110-volt wires. (Tr. 393). Commission case law also establishes that exposure to 110-volt power can be lethal. *See Orion Electric, Inc.*, 18 BNA OSHC 1851 (No. 99-212, 1999) (ALJ) (electrician

killed while installing dimmer switch to an energized 110-volt circuit). Thus, Respondent' argument as to minimal potential injury is rejected.

The Court finds Respondent's employees were exposed to the violative condition. Accordingly, Complainant established a *prima facie* violation of Citation 2, Item 1.[5]

The Violation Was Properly Characterized as Repeat

Respondent presented some evidence as to the question of whether Citation 2, Item 1 was a repeat violation, but failed to further pursue that argument in its post-trial brief. Nevertheless, the Court will address the evidence on that issue.

According to the Act, a violation is repeated if "at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). For violations issued under section 5(a)(2) of the Act, "[T]he Secretary may establish a prima facie case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard." *Id.* Where the prior and present violations are based on an employer's failure to comply with the same specific standard, it will be difficult for the employer to rebut the claim of substantial similarity, "because in many instances the two violations must be substantially similar in nature in order to be violations of the same standard." *Id.* "Although the 'principle [sic] factor' in assessing repeat liability 'is whether the two violations resulted in substantially similar hazards', this assessment may also take into consideration other factors that bear on the similarity of the two violations." *Angelica Textile Svcs., Inc.*, 2018 OSHD (CCH) ¶ 33675, 2018 WL 3655794 at *11 (quoting *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005) (internal citation omitted)).

5. In the *Complaint*, Complainant also pled 29 C.F.R. § 1926.405(j)(1)(i) as an alternative basis for the violation. Because the Court finds Respondent violated § 1926.416(a)(1), it need not address the alternative standard.

Respondent was previously cited for a violation of the same standard, 1926.416(a)(1), which became a final order of the Commission in 2013 by virtue of a settlement agreement. (Ex. C-21, C-22). The prior citation, which forms the basis of the repeat, was issued for two separate conditions: (1) an energized, electrical junction box did not have a cover installed; and (2) an HVAC unit only had cardboard covering the opening of an energized 200 Amp 240 VAC unit. (Ex. C-21). According to Reetz, the first instance referred to an uncovered junction box on the ceiling of the space they were working in, and the second instance actually referred to an electrical panel with breakers, because "there aren't any HVAC equipment that have a 200 Amp circuit." (Tr. 341–343). In both instances, however, Respondent left electrical circuits uncovered and/or improperly protected in an area where its employees were working, exposing its employees to electric shock and burn hazards.

Because both the present and 2013 violations were issued under the same standard, Complainant established a *prima facie* case of substantial similarity. In response, Respondent presented evidence to suggest the violations are not substantially similar because the equipment was different in size, location, and voltage. (Tr. 341–43). In *Potlatch*, the Commission declined to distinguish between "various subcategories of equipment on the basis of its function and location", so long as the hazard presented was the same. ("That the equipment which was the subject of the present citation is of a different type that that previously cited is of little moment."). In that case, as in this one, the Commission was convinced by the fact that the subject of both citations was electrical equipment and presented the same hazard to employees—exposure to an unguarded, energized circuit. In this case, while the voltage was higher in the 2013 citation than in the citation currently at issue, the Court finds this does not detract from the substantially similar hazards presented by uncovered electrical circuits. In either case, employees were exposed to shock, burns,

and even electrocution had they contacted the uncovered electrical circuits. Thus, the Court finds Citation 2, Item 1 was properly characterized as a repeat violation of the Act. Accordingly, Citation 2, Item 1 will be affirmed.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

According to the record, Respondent is a medium-sized employer, with approximately 100 to 200 employees. (Tr. 348). Complainant applied a 10% penalty reduction to each of the citation items. (Tr. 102). As for Citation 1, Item 1, the table saw violation, Complainant proposed a penalty of $11,408. Complainant determined the violation was high gravity due to the possibility for amputation and hospitalization resulting from exposure to an unguarded saw blade. (Tr. 101). Multiple employees worked near the unguarded blade on a daily basis for approximately one month, which Complainant argues increased the likelihood an accident would occur. (Tr. 101). However, while evidence clearly established use of the unguarded saw on the day of the accident, it was less clear as to the location, or frequency of use during previous days at the job. Considering

the totality of the circumstances, the Court finds that a penalty of $7,000 is appropriate for Citation 1, Item 1.

Complainant proposed a penalty of $16,297 for Citation 2, Item 1. Complainant determined that the severity of the potential injuries was low because contact with 110 volts would be more likely to cause minor burns and shock than death, but determined probability of an accident was high based on the number of uncovered, energized outlets and switches found throughout the building, and the number of employees on site. (Tr. 140). The Court considers the likelihood of contact with most of the energized outlets to be low, except for the switch and wiring pulled out from the box. Considering the totality of the circumstances, including the repeat nature of the violation, the Court finds that a penalty of $12,500 is appropriate for Citation 2, Item 1.

Order

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

1. Citation 1, Item 1 is AFFIRMED as a serious violation of the Act, and a penalty of $7,000 is ASSESSED; and
2. Citation 2, Item 1 is AFFIRMED as a repeat violation of the Act, and a penalty of $12,500 is ASSESSED.

/s/ Brian A. Duncan

Date: September 3, 2019
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission