United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. FRONTERA CONSTRUCTION, LLC, Respondent.	OSHRC Docket No. 20-0783

Appearances:

Felix Marquez, Esq., Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Steven McCown, Esq., Littler Mendelson, P.C., Dallas, Texas
For Respondent

Before: First Judge Patrick B. Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). Respondent, Frontera Construction, LLC (Frontera), is a general contractor in the construction industry. (Tr. 22-23, 40; Ex. C-5, at 1). In March of 2019, Frontera had contracted with Stat Real Estate II, LLC, for a construction project at a medical emergency facility called STAT Emergency Hospital-Laredo (STAT) located at 2502 N.E. Bob Bullock Loop in Laredo, Texas (Worksite). (Tr. 21-22; Ex. C-5, at 1).

On September 18, 2019, an employee of a subcontractor called B.G. Metals was performing ductwork at the Worksite when he fell from a ladder, resulting in his injury. After receiving a report of the worker's injury, the United Occupational Safety and Health

Administration (OSHA) sent Compliance Safety and Health Office (CSHO) Stephen Garcia to conduct an inspection of the Worksite of the accident. (Tr. 19-20). Following the inspection, OSHA issued a one-item Citation and Notification of Penalty (Citation) to Respondent alleging a serious violation of 29 C.F.R. § 1926.416(a)(1), which prohibits an employer from permitting an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit during the course of work. The Citation proposed a penalty of $9,446. (Citation 6). The Citation was issued on February 10, 2020. Respondent timely filed a Notice of Contest (Notice) to the Citation.

A one-day trial was held on October 26, 2021, in San Antonio, Texas under the Commission's Rules for Simplified Proceedings, 29 C.F.R. § 2200.200, *et seq.*[1] Two witnesses testified at the trial: 1) CSHO Garcia; and 2) Respondent's superintendent for the STAT Worksite, Isidro "Sid" Rojas. The Parties submitted post-trial briefs.

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and arguments of counsel, the Court issues this Decision and Order as its Finding of Facts and Conclusions of Law. Based on what follows, the Court VACATES the Citation.

II. Stipulations

[1] The Commission has adopted Simplified Proceedings, which apply in certain cases. *See* Subpart M of 29 C.F.R. Part 2200 (29 C.F.R. §§ 2200.200 - 2200.211). Under Simplified Proceedings, the "Judge will receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious, or unreliable. Testimony will be given under oath or affirmation." 29 C.F.R. § 2200.209(c). The Parties did not stipulate to the Federal Rules of Evidence applying in this case pursuant to 29 C.F.R. § 209(c). *See* Order dated August 7, 2020. Therefore, hearsay is admissible, "[p]rovided it is relevant and material," and under certain circumstances, "can constitute substantial evidence." *Bobo v. United States Dept. of Agriculture*, 52 F.3d 1406, 1414 (6th Cir.1995) (citation omitted). However, though the Simplified rules may be more permissive, that does not mean that any evidence the parties offer on a particular point is automatically deemed persuasive or reliable.

The Parties agreed to the following stipulations[2]:

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Occupational Safety and Health Act of 1970, (hereinafter "the Act"), 29 U.S.C. § 659(c).
2. Frontera Construction, LLC, is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5).
3. As a result of an inspection at the subject multi-employer jobsite, Complainant timely issued to Respondent a Serious violation pursuant to Section 9(a) of the Act, as set forth in Exhibit A to the Complaint in this proceeding.
4. As a result of OSHA Inspection no. 1432790, OSHA issued to Frontera Construction, LLC one citation on February 10, 2020, alleging a Serious violation of 29 C.F.R. 1926.416(a)(1) with a total proposed penalty of $9,446.00. Citations were also issued to other employers at this jobsite.
5. Respondent timely filed a notice of intent to contest the aforesaid citations and notification of proposed penalty, dated February 27, 2020.
6. On May 18, 2020, the OSHRC issued a Notice of Docketing and Instructions to Employer, which identified OSHRC Docket No. 20-0783 as the proceeding related to OSHA Inspection No. 1432790.

III. Jurisdiction

The Parties have stipulated, and the record supports, Respondent is engaged in a business affecting interstate commerce and is an "employer" within the meaning of section 3 of the Act. (Joint Stipulation Statement ¶¶ 1, 2); *see also Clarence M. Jones*, 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983) (holding there is an interstate market in construction materials and services

[2] *See* Joint Stipulation Statement marked as Joint Exhibit 1.

and therefore construction work affects interstate commerce). The Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act based on Respondent filing its Notice. (Joint Stipulation Statement ¶ 5; Tr. 6-7); *Joel Yandel*, 18 BNA OSHC 1623, 1628 n.8 (No. 94-3080, 1999).

IV. Factual Background

A. STAT Worksite and Accident Site

In March of 2019, Frontera was the general contractor for the STAT Worksite.[3] (Tr. 21-22; Ex. C-5, at 1). Frontera, in turn, subcontracted with a company called Bright Star for the electrical work required for the STAT project and a company called B.G. Metals for certain ductwork required for the project.[4] (Tr. 35, 68, 106, 131). Rojas was superintendent of the STAT Worksite on behalf of Frontera and the only Frontera employee at the Worksite on the day of the accident. (Tr. 98). As such, his duties included coordinating the work to be done at the Worksite amongst the various subcontractors onsite, including B.G. Metals. (Tr. 98-100, 104-08). Rojas also oversaw safety at the Worksite. (Tr. 82-83, 116).

The location where the accident occurred (Accident Site) consisted of a hallway with at least two rooms connected to it.[5] (Tr. 24-25, 104-05, 107, 131-32; Ex. C-10, at 1-3, 7, 11, 12). The entirety of the Accident Site had been divided from the main STAT facility by a plastic curtain. (Tr. 25-26, 107; Ex. C-10, at 1).

[3] The exact nature of the construction project is not clear from the record. It appears Frontera was contracted either to construct an addition on the STAT facility or else renovate an existing wing of the facility. (Tr. 24-25).

[4] CSHO Garcia's understanding was Frontera had subcontracted with Bright Star who in turn had subcontracted with B.G. Metals. (Tr. 39-40). The actual subcontract for the HVAC work for the STAT project was submitted as Exhibit C-5. That agreement was made directly between Frontera and a company called "Urban Heating & Air Conditioning," an entity which was never mentioned at the hearing. (Ex. C-5, at 1). Thus, it is not entirely clear whether B.G. Metals was a direct subcontractor of Frontera or a subcontractor of some other subcontractor for the project. In any event, because the Court finds Respondent was the controlling employer of the multi-employer worksite at the STAT Worksite (*see* Section V.A, *infra*), the exact contractual relationship between Frontera and B.G. Metals does not affect the Court's analysis.

[5] The rooms were connected to the hallway but were not themselves interconnected. (Tr. 71-72). CSHO Garcia's notes suggest the two rooms were intended to be a lab room and pharmacy once finished. (Ex. C-7, at 2).

B. The Accident

On the morning of September 18, 2019, work had commenced at the STAT Worksite. B.G. Metals had initially been assigned to a different work area away from the Accident Site. (Tr. 105-06, 117-18). Meanwhile, at the Accident Site, a framing company called Ramos Construction (Ramos) was laying sheetrock in the hallway while Bright Star was performing electrical work in the two adjoining rooms. (Tr. 102, 104-06, 117-18). The breakers had been shut off for all the electricity in the two rooms except: 1) a single electrical conduit or "box" connected to a work light which had been installed by Bright Star; and 2) the "critical breaker" for the medical facility, which could not be turned off without the permission of STAT's doctors.[6] (Tr. 90, 111-12, 119, 129; Exs. C-7, at 1, C-10, at 9). At the time the accident occurred, Bright Star had left the electrical box for the work light uncovered; thus, there was a live, unprotected electrical current in the room at the time the accident occurred. (Tr. 31-32, 81-82, 101-02, 127; Ex. C-10, at 14, 15).

At some point on September 18, 2019, Rojas "escorted" two B.G. Metals employees, [redacted] and a supervisor named "Chris," into the hallway of the Accident Site and directed them to remove a certain piece of ductwork so Ramos could "span" the wall. (Tr. 104-08, 132). The B.G. Metals employees understood the ductwork was to be limited to the hallway because the two adjoining rooms had not been fully de-energized. (Tr. 51, 82-83, 105, 119-23, 131-34; Ex. C-7, at 2). Rojas observed the B.G. Metals employees perform most of the removal of the ductwork. (Tr. 105, 108, Ex. C-7, at 1). At some point, however, Rojas received a call from an individual named "Fred" who had a question about the blueprints for the STAT project. (Tr. 105, 126). Because all that was left for the removal of the ductwork was for [redacted] to finish

[6] As Rojas explained, this "critical breaker" was connected to certain medical machines that needed a constant electrical current to function. (Tr. 111).

patching a hole, "come down, grab the ladder and leave," Rojas left the Accident Site to assist Fred. (Tr. 123; Ex. C-7, at 1).

The B.G. Metals employees were supposed to leave the Accident Site and return to their previous worksite after removing the ductwork in the hallway. (Tr. 105, 109, 119). After Rojas left, however, [redacted] went into one of the adjoining rooms and began performing ductwork in the presence of the uncovered electrical box. (Tr. 28-31, 101-02; Ex. C-10, at 8, 9, 14, 15). The ductwork apparently required [redacted] to be standing on a ladder. (Tr. 28-29, 32-34; Ex. C-10, at 7, 11, 12, 16-19). For reasons not entirely clear from record, [redacted] fell off the ladder and suffered some form of injury.[7]

C. OSHA's Investigation and Citation

Following a report of the accident, OSHA sent CSHO Garcia to investigate the same day. (Tr. 19-21). CSHO Garcia held an opening conference with Rojas, took his statement, and walked around the Accident Site. (Tr. 22-24; Ex. C-7). Following his investigation, CSHO Garcia concluded Respondent was the "controlling employer" of the multi-employer worksite at the STAT facility based on Rojas's oversight of the project. (Tr. 36-37, 61-64). He further

[7] While it is clear [redacted] received some medical treatment for his injuries, it is not clear whether [redacted] simply fell off the ladder and was injured as a result of his fall or whether he actually came in contact with the uncovered electrical box and suffered injuries as a result of that contact. CSHO Garcia's Violation Worksheet suggests [redacted] was actually electrocuted, i.e., killed by electricity, and subsequently revived by STAT's medical staff. (Tr. 40-42; Ex. C-6, at 2). At trial, however, CSHO Garcia's testimony was more ambiguous as to whether this was the case. (Tr. 76, 80). Rojas did not believe an electrocution was possible given the only accessible source of electricity in the room was the uncovered electrical box for Bright Star's work light. (Tr. 128-29). However, he acknowledged [redacted] was being treated by STAT's staff by the time he returned to the Accident Site. (Tr. 129). At trial, it was suggested that [redacted] simply fell off the ladder because he was using a six-foot ladder to reach into the 10-foot ceiling in the room. (Tr. 57-59, 73-74; Ex. C-10, at 13, 20, 21; Resp't's Br. 3). Because the main dispute before the Court is whether Respondent permitted [redacted] to work in proximity of the uncovered electrical box, not [redacted]'s exposure to an electrical hazard, the Court finds it is ultimately immaterial what caused [redacted] to fall from the ladder. (Tr. 139-41 (finding there was employee exposure)); *see also Ceco Concrete Constr., LLC*, No. 17-0483, 2021 WL 2311867, at *8 n.4 (O.S.H.R.C., Feb. 26, 2021) ("[D]etermining whether the standard was violated is not dependent on the cause of the accident.").

concluded the B.G. Metals employees had been permitted to work in the presence of the uncovered electric box in violation of 29 C.F.R. § 1926.416(a)(1). The CSHO's conclusion in this regard was based on Rojas's alleged failure to remove the B.G. Metal employees from the area where they could access the energized rooms by, for example, "hav[ing] them work on another day or wait until the electricians got to the area to remove and de-energize that area." (Tr. 85-86). He also believed that, while Rojas had explicitly told the B.G. Metal employees not to work in the rooms and to confine their work to the hallway, he then simply left the employees to go to another area of the worksite. (Tr. 92-93). Finally, CSHO Garcia faulted Rojas for failing to verify the electricians had de-energized the rooms. (Tr. 37-38, 93). Based on the CSHO's investigation, Complainant issued the one-item serious Citation to Respondent.

V. Discussion

A. Multi-Employer Worksite Doctrine

Before turning to the merits of the Citation, the Court will first determine whether Respondent was a "controlling employer" for purposes of imposing liability under the multi-employer worksite doctrine. While generally "a business organization is generally only liable under the Act for violations that affect the safety and health of persons with whom it has entered into an employment relationship,"[8] the Fifth Circuit, where this case arose,[9] has adopted Complainant's construction of the Act as imposing a duty on an employer at a multi-employer worksite to ensure the safety of non-employees in certain situations. *See* Multi-Employer Citation Policy, OSHA Instruction (Dec. 10, 1999); *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723 (5th Cir. 2018). More specifically, a "controlling employer" of a multi-employer

[8] *Van Buren-Madawaska Corp.*, No. 87-214, 1989 WL 223348, at *1 (O.S.H.R.C., April 21, 1989).

[9] *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000) ("Where 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.").

worksite i.e., an employer with "general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them," has a duty to protect more than its own employees working at the worksite. *See Hensel Phelps*, 909 F.3d at 729. As is relevant here, the Fifth Circuit in *Hensel Phelps* held:

> In a place of employment like a construction worksite, populated by subcontractors, sub-subcontractors, and their employees performing various (and often overlapping) tasks, only the general contractor maintains supervisory authority over—and has access to—the entire space. If a general contractor enjoys the benefits of project supervision, it follows that he should also bear the burdens, by being held to comply—and to direct its subcontractors to comply—with the Act's safety standards.

Id. at 735.

Here, Respondent has not contested Complainant's allegation it was a controlling employer for purposes of the multi-employer worksite doctrine, and Complainant has adduced sufficient evidence to conclude Respondent was. Rojas, as superintendent of the STAT Worksite, oversaw and coordinated the work of the various subcontractors, including the work of B.G. Metals. (Tr. 98-100, 104-08). He had the authority to correct safety violations onsite if he observed any. (Tr. 36-37, 83, 116). He directly oversaw the ductwork B.G. Metals was performing at the Accident Site on the date of the accident. (Tr. 105, 108, Ex. C-7, at 1). Based on these facts, the Court concludes Frontera was the controlling employer of the STAT Worksite. *See Hensel Phelps*, 909 F.3d at 729; *See Calpine Corp.*, 27 BNA OSHC 1014, 1021 (No. 11-1734, 2018) (employer's correction of safety violations of subcontractors was evidence of its status as a controlling employer) *aff'd*,774 F. App'x 879 (5th Cir. 2019) (unpublished); *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1206 (No. 05-0839, 2010) *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished) (general authority over worksite safety suggested employer was a controlling employer).

B. Applicable Law

For most standards, including the ones at issue here, Complainant is not required to prove the existence of a hazard each time a standard is enforced. *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981); *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978) (Secretary not required to prove violation related to walking and working surfaces constituted a hazard). Instead, the hazard is presumed, and Complainant's burden to establish a violation of a safety or health standard promulgated pursuant to section 5(a)(2) of the Act, us limited to whether: (1) the cited standard applies; (2) the terms of the standard were violated; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant must establish his case by preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

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

Preponderance of the Evidence, BLACK'S LAW DICTIONARY (10th ed. 2014).

C. Citation 1, Item 1 – The Alleged Electric Power Circuit Violation

Complainant alleged a serious violation of 29 C.F.R. § 1926.416(a)(a) as follows:

> 29 CFR 1910.416(a)(1): Employees were permitted to work in proximity to electric power circuits and were not protected against electric shock by de-energizing and ground the circuits or effectively guarding the circuits by insulation or other means:

> At this establishment, an employee was removing duct-work and came into contact with energized circuits.
>
> The cited standard provides:
>
> 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.

1. The Standard Applies

Under Commission precedent, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *KS Energy Servs., Inc.,* 22 BNA OSHC 1261, 1267 (No. 06-1416, 2008) (finding "the cited ... provision was applicable to the conditions in KS Energy's traffic control zone"), *aff'd*, 701 F.3d 367 (7th Cir. 2012); *Active Oil Serv., Inc.,* 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005) (finding "that the confined space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.,* 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004) ("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.")

Respondent has not contested, and the record supports, the cited standard applied to Respondent's use of electricity during construction activities at the Accident Site. The Court finds the cited standard applies. (Tr. 140); *see also* 29 C.F.R. § 1926.400(b) ("This subpart addresses electrical safety requirements that are necessary for the practical safeguarding of employees involved in construction work … Safety-related work practices are contained in [29

C.F.R. §§ 1926.416 and .417 and cover] the hazards arising from the use of electricity at jobsites …").

2. The Standard Was Not Violated

29 C.F.R. § 1926.416(a)(1) prohibits an employer from "permit[ting] 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 …." The regulation does not define the word "permit." However, as the Commission recently held, "[Commission] precedent makes it clear that an undefined term's meaning can be determined by consulting a contemporaneous dictionary." *Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785, at *2 (O.S.H.R.C., July 22, 2021). Dictionaries contemporaneous to this regulation[10] define "permit" as "to allow to do something"[11] "to allow to be done or occur,"[12] "to grant permission; allow liberty to do something,"[13] "to consent to expressly or formally: grant leave for the privilege of: allow, tolerate"[14] or "to make possible."[15] Thus, the definition of "permit" contemplates either explicit or implicit permission given for certain conduct. *See 84 Lumber Co.*, No. 20-0876, 2021 WL 7208612, at *6 (O.S.H.R.C.A.L.J., Dec. 13, 2021) (concluding similarly for the word "allow," a synonym of "permit"); *see also* RANDOM HOUSE DICTIONARY, *supra* note 11 (listing "allow" as a synonym of "permit"); WEBSTER'S THIRD NEW INT'L DICTIONARY, *supra* note 14 (same).

[10] With only minor, non-substantive changes since, the prohibition contained in 29 C.F.R. § 1926.416(a)(1) was first promulgated under 29 C.F.R. § 1926.400(c)(1) in 1979. *Compare* Part 1926 – Occupational Safety and Health Standards, 44 Fed. Reg. 8,577, 8,623 (Feb. 9, 1979), *with* 29 C.F.R. § 1926.416(a)(1). Thus, the Court has consulted dictionaries contemporaneous with the original promulgation of the standard. *See Roy Rock, LLC*, 2021 WL 3624785, at *3 (consulting a 1986 dictionary for a regulation promulgated in 1988).

[11] *Permit*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1073 (1971) (definition 1).

[12] *Id.* (definition 2).

[13] *Id.* (definition 5).

[14] *Permit*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1683 (1971) (definition 1:1).

[15] *Id.* (definition 1:4).

Likewise, in Texas where the accident occurred, an employer can be deemed to have authorized an employee's conduct either explicitly or implicitly. *See Kennedy v. Am. Nat'l Ins. Co.*, 107 S.W.2d 364, 366 (Tex. 1937) (finding that an employer can be liable for torts committed by an employee acting within the scope of employment "if the servant's use of the automobile or other vehicle was authorized, either expressly or impliedly."); *Mexico's Indus., Inc. v. Banco Mexico Somex, S.N.C.*, 858 S.W.2d 577, 583 (Tex. Ct. App. 1993) (finding that, in a principal-agent relationship, "actual authority includes both express and implied authority"); *see also* Restatement (Third) of Agency § 2.01 cmt. b (defining "actual authority" to include "implied authority," meaning, in relevant part "to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent.").

Indeed, in *Clements Paper Co.*, No. 419, 1972 WL 4101, at *5 (O.S.H.R.C., June 26, 1972), the Commission interpreted the term "allowed," a synonym of "permit,"[16] from a different but similarly worded regulation[17] as follows:

> It seems apparent that the connotation implied from this phrase is that the petitioner [Secretary] must prove that responded 'allowed' Sells to pass under the truck. Section 1910.178(m)(2) is not explicit as to what constitutes 'allowed' an employee to undertake a certain course of action. It seems axiomatic that the word 'allow' implies permission either implicit or explicit, given by the employer. The word permission in turn implies that the employer had knowledge of that act which he has given his permission to the employee to do so."

Although *Clements Paper* did not involve the word "permit" or the exact regulation at issue in this case, the Court nonetheless finds its interpretation of the synonym "allow" in a similarly worded regulation to be instructive and persuasive. *Cf. Morrison-Knudsen v. Director*, 461 U.S.

[16] *See* RANDOM HOUSE DICTIONARY, *supra* note 11 (listing "allow" as a synonym of "permit"); WEBSTER'S THIRD NEW INT'L DICTIONARY, *supra* note 14 (same).

[17] The regulation at issue in *Clements Paper* was 29 C.F.R. § 1910.178(m)(2), which reads: "No person shall be allowed to stand or pass under the elevated portion of any truck, whether loaded or empty."

624, 633 (1983) (holding that a word or phrase is presumed to have the same meaning when used in different parts of a statute).

Thus, the Court finds to prove a violation of 29 C.F.R. § 1926.416(a)(1), Complainant must prove Respondent either explicitly or implicitly permitted [redacted]'s conduct. Here, Complainant has proven neither.

i. Explicit Permission

As to explicit permission, CSHO Garcia admitted several times at trial that Rojas had not explicitly permitted [redacted] to access the room where the uncovered electrical box was located, but rather had instructed both B.G. Metals employees to only work in the hallway where no such electrical hazard was present. (Tr. 51, 82-86, 88-89; Ex. C-7, at 2). Rojas likewise credibly testified he had escorted the B.G. Metals employees onto the Accident Site, and they understood the requested ductwork was to be confined to the hallway because the adjoining rooms had not been de-energized. (Tr. 104-08, 119-23, 131-34).

Complainant makes no persuasive argument that Rojas gave [redacted] explicit permission to access the room with the uncovered electrical box. Rather, Complainant cites an errant statement from Rojas that "the only ones I told not to go in [the energized room] at the time was Ramos Construction." (Complainant's Br. 6 (citing Tr. 109)). However, considering the totality of Rojas's testimony, it is clear the B.G. Metals employees knew they were only supposed to be working in the hallway of the Accident Site and were to return to their previous worksite once their work in the hallway was complete. (Tr. 105, 109, 119-23, 131-34; Ex. C-7, at 2). The Court does not find Respondent gave explicit permission to [redacted] to work in proximity to the uncovered electrical box.

ii. Implicit Permission

As to implicit permission, Complainant makes two arguments in his post-trial brief on this point. First, Complainant argues Rojas knew the room in which [redacted] was injured had an exposed electrical hazard, and "Frontera could have complied with the cited standard by protecting employees against electrical shock had it effectively guarded the circuits by insulation or other means, such as requiring that electrical boxes remain covered when not being serviced by electricians when other contractors are in proximity." (Complainant's Br. 7). Complainant's argument in this regard is simply a restatement of the cited standard, which already recognizes an employer *can* permit employees to work in proximity to an electric power circuit if "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). Complainant's tautological argument does not demonstrate Rojas implicitly permitted [redacted] to work in proximity to the uncovered electrical box.

Second, Complainant argues "Rojas had the authority to temporarily stop the ductwork removal while momentarily away, or simply escort [redacted] to a safer area …." (Complainant's Br. 7). The cited regulation clearly does not require Respondent to do either of these actions. Complainant cites no caselaw to support his arguments in this regard. However, Rojas consistently testified he observed the B.G. Metals employees complete the majority of the ductwork in the hallway. (Tr. 104, 108; Ex. C-7, at 1). At the point he left to assist another contractor onsite, all that was left to do was finish patching a hole, "come down, grab the ladder and leave." (Tr. 123). He estimated the remaining work should have taken a matter of minutes. (Tr. 123, 133-34). It was only after Rojas left that [redacted], of his own accord, commenced ductwork in the adjoining room in proximity to the uncovered electrical box. (Tr. 28-31, 101-02; Ex. C-7, at 2). In this regard, the Commission has held employers do not need to constantly

monitor their employees to comply with OSHA's safety standards. *See Manganas Painting Co.*, 19 BNA OSHC 1102, 1104 n.5 (No. 93-3362, 2000) (rejecting a "per se rule that a safety policy is inadequate unless employees are being constantly monitored for safety violation.") *aff'd*, 273 F.3d 1131 (D.C. Cir. 2001); *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999) (employer not required to provide constant surveillance by supervisors); *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) (employer is not obligated to detect or become aware of every instance of existence of a hazard).[18] The Court does not find Rojas's actions here constituted implicit permission to work in the room with uncovered electrical box in violation of the cited standard.

Complainant has not proffered any other theory for how Respondent implicitly permitted the B.G. Metals employees' actions on the date of the accident. Accordingly, the Court finds the standard was not violated.

VI. Conclusion

Complainant has failed to establish Respondent violated the cited standard, and thus failed to make out an essential element of his case. *Atl. Battery Co.*, 16 BNA OSHC at 2138. Accordingly, the Citation is VACATED. In light of this, the Court need not address the remaining elements of Complainant's *prima facie* case.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

[18] Though all these cases dealt with the knowledge element of Complainant's *prima facie* case, the Court nonetheless finds them instructive and persuasive on the issue of whether Respondent permitted the B.G. Metals employees' actions in violation of the cited standard. As noted at trial, the Court finds the "permit" element of 29 C.F.R. § 1926.416(a)(1) to be intertwined with the knowledge element of Complainant's *prima facie* case. (Tr. 140-41).

Based upon the foregoing Findings of Fact and Conclusions of Law, is it ORDERED that Citation 1, Item 1 is VACATED.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
First Judge – OSHRC

Date: May 9, 2022
Denver, CO