United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. PETROPLEX PIPE AND CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 19-1498

FINAL ORDER

The parties have submitted a Joint Notification of Full Settlement pursuant to Commission Rule 100, 29 C.F.R. § 2200.100, informing the Commission that they have resolved all the contested citation items in this case. Since the parties have agreed to terminate the proceeding before the Commission, the case is hereby DISMISSED.

SO ORDERED.

BY DIRECTION OF THE COMMISSION

Dated: August 26, 2022

/s/
John X. Cerveny
Executive Secretary

Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PETROPLEX PIPE AND CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 19-1498

Appearances:

Amy S. Hairston, Esq., Department of Labor, Office of Solicitor, Dallas, Texas
For Complainant

Aaron J. Burke, Esq., and Kathleen M. Cruz, Esq., Burke Bogdanowicz PLLC, Dallas, Texas
For Respondent

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

DECISION AND ORDER

I. Procedural History

On March 4, 2019, Petroplex Pipe and Construction, Inc. ("Respondent") performed work at a jobsite located at Sale Ranch 17, Stanton, Texas ("worksite" or "site"). On that date, three of Respondent's employees, [redacted] ("[redacted]"), [redacted] ("[redacted]"), and [redacted], ("[redacted]"), entered the worksite in order to perform maintenance work. (Joint Stip. at 6, 7). While performing the maintenance work, [redacted] heard a loud pop. (Joint Stip. at 7). A large fire ensued, resulting in the deaths of Respondent's employees, [redacted] and [redacted]. (Joint

Stip. at 31). In response to the employees' worksite deaths, the Occupational Safety and Health Administration ("OSHA") began an inspection of the worksite that same day, on March 4, 2019. As a result of OSHA's inspection, the Secretary of Labor ("Secretary") issued a Citation and Notification of Penalty ("Citation") on August 30, 2019, to Respondent. The Citation consisted of eleven serious items. Prior to the hearing, the Secretary withdrew several items. The remaining items and Citation, as amended,[1] alleged a serious violation of the general industry standard 29 C.F.R. § 1910.147(c)(4)(ii), a serious violation of 29 C.F.R. § 1910.147(c)(6)(ii), a serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(A), a serious violation of 29 C.F.R. § 1910.147(8), and a serious violation of 29 C.F.R. § 1910.147(f)(2)(i).[2] The Citation, as amended, proposed a penalty of $59,670.

Petroplex filed a timely notice of contest bringing the matter before the Occupational Safety and Health Review Commission (the "Commission").[3] The matter was designated for Conventional Proceedings by the Chief Administrative Law Judge and assigned to this Court on December 6, 2019. A trial was held on September 21-23, 2021, via videoconference. The following individuals testified: (1) [redacted], a former crew supervisor for Respondent; (2)

[1] On June 4, 2020, the Secretary's Motion to Amend the Complaint and Citation was granted. The amendment set forth citation 1, item 5 be amended to allege a serious violation of 29 C.F.R. § 1910.147(c)(4)(ii).

[2] On August 10, 2020, pursuant to Rule 102 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.102, the Secretary withdrew citation 1, items 1, 2, 3a, 3b, 4, 10, 11a, and 11b and the penalties associated with each of those items in the Citation and Notification of Proposed Penalty. Prior to the hearing, Respondent filed a Motion for Summary Judgment contending that the Complaint should be dismissed. Among other arguments, Respondent argued that no material disputed facts existed as to whether the violations as alleged applied to Respondent and/or Respondent had complied with the cited standards.

Following review and consideration of Respondent's Summary Judgment Motion, the undersigned denied the motion finding material facts existed which prevented summary judgment from being entered against the Secretary.

[3] The Commission is an independent adjudicatory agency and is not part of the Department of Labor or OSHA. 29 U.S.C. § 661. It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the OSH Act and has no regulatory functions. 29 U.S.C. § 659(c).

Thomas Bridges, the President of Respondent; (3) Benjamin Muller, a safety specialist for Pioneer Natural Resources USA, Inc.; (4) Jesse Nevarez, Jr., a former lease operator for Pioneer Natural Resources USA, Inc.; (5) Compliance Safety and Health Officer ("CSHO") Patricia Smothermon; (6) Curtis Chambers, the President of OSHA Training Services, Inc.; (7) John Douglas Campbell, a safety manager for Respondent; and (8) Jason London, a foreman for Respondent.

Both parties submitted timely post-trial briefs.[4] Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law.

For the reasons discussed, citation 1, item 5, as amended, citation 1, item 6, and citation 1, item 8 are AFFIRMED. Citation 1, items 7 and 9 are VACATED.

II. Stipulations & Jurisdiction

The parties stipulated to various facts, including several jurisdictional details.[5] (Joint Stipulation Statement). Based on the Joint Stipulations, the Court finds the Commission has jurisdiction over this action pursuant to Section 10(c) of the Act, 29 U.S.C. § 659(c). Further, the Court obtained jurisdiction over this matter under section 10(c) of the Occupational Safety and Health Act ("Act") upon Respondent's timely filing of a notice of contest. 29 U.S.C. § 659(c). The Court also finds 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(3), (5).

[4] Affirmative defenses not raised at the hearing are deemed waived and abandoned by Respondent. *Corbesco, Inc. v. Dole,* 926 F.2d 422, 428–29 (5th Cir. 1991). Any affirmative defenses not raised at the hearing are deemed waived by Respondent. *Corbesco, Inc. v. Dole*, 926 F.2d 422, 428–29 (5th Cir. 1991). Respondent did not raise any affirmative defenses at the hearing or in its post-trial brief.

[5] The Joint Stipulations were received and admitted as a Joint Stipulation Statement and read into the record.

III. Factual Background[6]

A. The Company

Respondent is a general oil field service company, which provides construction and maintenance services for host employers. (Joint Stip. at 3). It is an oil and gas services company headquartered in Midland, Texas, with approximately 140 employees at the time of the incident. (Tr. 111-113). In 2019, Respondent was engaged in maintenance repair work at a worksite located in Stanton, Texas. (Citation; Joint Stip. at 5, 6). On March 4, 2019, Pioneer Natural Resources USA, Inc., ("Pioneer") had hired Respondent to perform the maintenance work. (Joint Stip. at 6). Specifically, Respondent was hired to perform maintenance work to replace a level controller and peanut valve and to ensure stainless steel air supply lines were clear on the oil boot of Heater Number 7. (Joint Stip. at 6).

Respondent's worksite management consisted of crew supervisor, alternatively known as a pusher, [redacted]. (Joint Stip. at 7). Respondent's maintenance crew further consisted of [redacted] and [redacted] (Joint Stip. at 7, 9). Pioneer's lease operator for the worksite was Jesse Nevarez. (Joint Stip. at 22).

B. The Tank Battery

On March 4, 2019, Respondent's crew arrived at the worksite to perform maintenance work on one of Pioneer's tank batteries located at Sale Ranch 17. (Tr. 114-115; Joint Stip. at 6). The tank battery consists of several heater treaters, which apply heat to the emulsion from wells to separate the oil, gas, and water. (Tr. 121-125). An oil boot, alternatively discussed as an oil pot, is part of the heater treater, which is a reservoir for oil after it has been separated. (Tr. 124-125). The oil boot has a top level controller and a bottom level controller, which screw into the side of

[6] The factual background is based on the credible record evidence, as discussed below, and consideration of the record as a whole. Contrary evidence is not credited.

the oil boot. (Tr. 160-161). A peanut valve is also part of the oil boot, which acts as a control valve that opens and closes the dump valve for the oil boot. (Tr. 160).

When Respondent's crew arrived, they performed a Job Safety Analysis before they began performing any maintenance work. (Joint Stip. at 20). Jesse Nevarez, Pioneer's lease operator, was not present at the site, and the oil boot had not yet been isolated and locked out or tagged out. (Joint Stip. at 23). Mr. [redacted] contacted his supervisor, Jason London, and asked him to contact the Pioneer lease operator. (Tr. 67-68; Joint Stip. at 24).

When Mr. Nevarez arrived, Mr. [redacted] instructed him to isolate and lock out the vessel so Respondent's crew could begin their work. (Tr. 67-69). Mr. [redacted] specifically instructed Mr. Nevarez to lock out the inlet and the outlet valves on the oil boot. (Tr. 68-69). Mr. Nevarez shut off the valves and placed his own locks on the inlet valve for the heater and the discharge valve for the oil boot. (Tr. 69; Joint Stip. at 25). Mr. Nevarez and Mr. [redacted] at no time discussed any of the potential hazards that could be associated with the lockout. (Tr. 69-70). In addition, there was no discussion between the individuals on what specific methods could be used to lock out and tag out energy sources. (Tr. 69-70, 372-373). However, Mr. [redacted] did inform Mr. Nevarez what needed to be isolated and locked out on the vessel before Respondent's crew could begin their work. (Tr. 67-69).

C. <u>The Incident</u>

Mr. Nevarez placed his own locks on the inlet valve for the heater and the discharge valve for the oil boot. (Joint Stip. at 25). Mr. [redacted] realized that two additional valves on the top of the oil boot needed to be closed to prevent product from going into the oil boot while Respondent's crew performed maintenance. (Tr. 70). Mr. [redacted] then sent Mr. [redacted] and Mr. [redacted] to the top of Heater Treater 7 in a manlift to close the valves to the gas line and

boot fill line, which could not be reached from the ground as it was over 20 feet high. (Tr. 70-73, 93, 172-173; Joint Stip. at 26). Mr. [redacted] and Mr. [redacted] proceeded to close the valves but did not apply any locks to them. (Tr. 72-73). Mr. [redacted], Mr. [redacted], and Mr. [redacted] did not place any of their own locks on any valves while at the worksite. (Joint Stip. at 27).

Mr. [redacted] then instructed Mr. Nevarez to reopen the outlet valve on the oil boot because he believed excess fluid and pressure needed to be removed. (Tr. 70-72). Mr. Nevarez opened the outlet valve and only heard gas coming out, which indicated to him that the oil was cleared out from the oil boot. (Tr. 72-73, 415). He then re-closed the outlet valve for the oil boot and reapplied his lock before leaving the worksite. (Tr. 72-73; Joint Stip. at 28).

Once Mr. Nevarez left, Mr. [redacted] opened the 1-inch valve on the top sight-glass assembly to check for pressure on the boot and make sure the boot was drained. (Tr. 73-74, 96; Joint Stip. at 29). When nothing came out of the valve, Mr. [redacted] became unsure whether all the pressure was relieved. (Tr. 73-74; Joint Stip. at 29). Mr. [redacted] then instructed Mr. [redacted] and Mr. [redacted] to take the stainless-steel air supply lines off the top float while they were still in the manlift. (Tr. 74; Joint Stip. at 30). Mr. [redacted] noticed that Mr. [redacted] was starting to remove the float from the oil boot and directed him not to because it was not ready to be removed. (Tr. 74-75). While Mr. [redacted] worked to remove the stainless-steel air supply lines to the peanut valve and remove the peanut valve, he heard a loud pop. (Tr. 74-75; Joint Stip. at 30, 31). A large fire ensued, causing the deaths of both Mr. [redacted] and Mr. [redacted]. (Tr. 75-76; Joint Stip. at 31).

D. <u>The Incident Inspection</u>

Following the incident, CSHO Patricia Smothermon was assigned to conduct an inspection. (Joint Stip. at 32). CSHO Smothermon traveled to the worksite and conducted an

inspection the following day. (Tr. 471-472; Ex. C-4). Through the course of her investigation, she spoke with various representatives of Respondent. (Tr. 471-473; Ex. C-5). As a result of the CSHO's investigation, she determined the victims were exposed to uncontrolled hazardous energy sources. (Tr. 479-480, 500-503; Exs. C-4, C-5). CSHO Smothermon found, *inter alia*, that three employees were exposed to hazardous energy hazards for approximately two hours, the severity of the violations was high due to the possibility of serious injury or death, and the probability of serious injury or death from uncontrolled hazardous energy was greater because work was being performed near uncontrolled hazardous energy for nearly two hours. (Tr. 478-488; Exs. C-4, C-5, C-7). Through her investigation, CSHO Smothermon determined that Respondent had violated the requirements covered under 29 C.F.R Part 1910 and recommended OSHA issue a citation. (Tr. 478-488; Exs. C-3, C-4, C-5, C-7). On August 30, 2019, OSHA issued the Citation that is at issue in this case. On September 24, 2019, Respondent timely contested the Citation.

IV. Discussion

A. Law Applicable to Alleged Violations

In order to establish a violation of a safety standard under the Act, in this case 29 C.F.R. § 1910.147(c)(4)(ii), 29 C.F.R. § 1910.147(c)(6)(ii), 29 C.F.R. § 1910.147(c)(7)(i)(A), 29 C.F.R. § 1910.147(8), and 29 C.F.R. § 1910.147(f)(2)(i), Complainant must prove by a preponderance of the evidence: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994); *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-531, 1991) (citation omitted); *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609 (No. 87-2007, 1992) (citation omitted).

The Secretary has the burden of establishing each element by a 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.

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

1. Citation 1, Item 5

Complainant alleged a serious violation of the Act in Citation 1, Item 5, as amended, as follows:

> 29 C.F.R. 1910.147(c)(4)(ii): Specific procedures shall clearly and specifically outline the scope, purpose, authority, and techniques to be utilized for the control of hazardous energy:
>
> > On or about March 4, 2019, and at times prior thereto, at the tank battery train #7, employees performed maintenance and/or repairs to a level controller/float on the heater treater oil boot and peanut valve. The employer did not develop or document specific procedures for this equipment for the control of hazardous energy. Specific procedures were not provided.
>
> *See* Citation as amended.

a. <u>The Standard Applies.</u>

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 is a general oil field service company, which provides construction and maintenance services for host employers. (Joint Stip. at 3). It is undisputed that Respondent was hired to perform maintenance work on Pioneer's equipment at the worksite. (Tr. 161-163; Joint Stip. at 6; Resp't Br. at 15). Therefore, the maintenance work Respondent performed would fall under the purview of Part 1910. The scope of the general industry Control of Hazardous Energy Sources (Lockout/Tagout) ("LOTO") standard 29 C.F.R. § 1910.147 covers the "servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees…" Maintenance is defined in the general industry LOTO standard 29 C.F.R. § 1910.147(b) as:

> Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the unexpected energization or startup of the equipment or release of hazardous energy.

Any hazards involving general industry maintenance and the control of hazardous energy during maintenance would fall within the scope of the aforementioned Subpart including its relevant sections.

The Court finds 29 C.F.R. § 1910.147(c)(4)(ii) applies.

b. <u>The Standard was Violated.</u>

Respondent does not dispute that its employees were performing maintenance and servicing at the time of the incident. (*See* Resp't Br. at 15-16). Respondent argues that it did not

violate the standard because it has a general LOTO program which applies when the host employer, Pioneer, did not have a LOTO program or if it was less stringent. (Resp't Br. at 15-16).

Here, the cited standard required Respondent to have specific procedures that clearly and specifically outlined the scope, purpose, authority, and techniques to be utilized for the control of hazardous energy. *See* 29 C.F.R. § 1910.147(c)(4)(ii). The standard further requires the means to enforce compliance including, but not limited to:

> (A) A specific statement of the intended use of the procedure;
> (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;
> (C) Specific procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them; and
> (D) Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.
>
> 29 C.F.R. § 1910.147(c)(4)(ii).

The record reveals that Respondent did not have a specific procedure for controlling hazardous energy during the maintenance conducted at the worksite. (Tr. 182-183). Instead, when working on the heater treater in question, Respondent's procedure was to rely on Pioneer to lock out and tag out hazardous energy. (Tr. 182-183). Although Respondent relied on Pioneer to have a specific energy control procedure when Respondent was performing maintenance on the heater treater, Respondent had never actually seen a copy of Pioneer's procedure. (Tr. 187-189). The record shows that Respondent did not even know if Pioneer had a specific energy control procedure for the heater treater Respondent's employee were working on. (Tr. 188-190). Although Respondent claims it relied on Pioneer's LOTO procedures, the record shows that Respondent never asked Pioneer to provide it with the procedures. (Tr. 196-198). When asked why Respondent never asked Pioneer for its LOTO procedures, Respondent's president, Mr. Bridges,

admitted he never asked Pioneer for its procedures because it would be unreasonable for Respondent to have thousands of procedures. (Tr. 196-198).

Respondent mistakenly relies on *Basic Grain Prods, Inc.*, 24 BNA OSHC 2024, 2032 (No. 12-0725, 2013) in support of its unreasonableness argument.[7] In *Basic Grain Prods, Inc.*, the employer had drafted LOTO procedures based on sample LOTO procedures found in Appendix A of § 1910.147. *See* Basic *Grain Prods, Inc.*, 24 BNA OSHC 2024, 2032 (No. 12-0725, 2013). The Commission in *Basic Grain Prods, Inc.*, found that "the overgeneralized LOTO procedures utilized by [r]espondent were insufficient to adequately apprise [r]espondent's employees of the types of energy associated with a particular machine" and thus violated the standard. Basic *Grain Prods, Inc.*, 24 BNA OSHC 2024, 2032 (No. 12-0725, 2013).

Here, Respondent did not have any specific LOTO procedures for the heater treater. (Tr. 182-183). Instead, Respondent claims it had a general policy of relying on Pioneer for LOTO procedures pertaining to the heater treater. (Tr. 182-183). However, Respondent did not even know if Pioneer had LOTO procedures and never asked if they did. (Tr. 187-190, 196-198).

What is even more troublesome is Pioneer's safety representative testified that it was Respondent's responsibility to lock out and tag out equipment. (Tr. 306-312; Ex. C-27). Both the Master Services Agreement between Respondent and Pioneer and the Contractor Handbook provided to Respondent from Pioneer show that Respondent was responsible for its employees' safety and LOTO procedures. (Tr. 198-206; Exs. C-12, C-23; Joint Stip. at 16, 18). Further, Respondent indicated to Pioneer, during the contractor onboarding process, that Respondent would

[7] Respondent mistakenly cites to *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) in further support of its unreasonableness argument. (Resp.t Br. at 17). Although Respondent is correct that performance standards "do not identify specific obligations" and "are interpreted in light of what is reasonable," it is unreasonable to rely on a LOTO procedure that one has never seen nor knows if it even exists. *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007).

be responsible for LOTO when performing maintenance for Pioneer. (Tr. 306-312; Ex. C-27; Joint Stip. at 16, 18). The weight of the evidence establishes that Respondent should have but did not have specific procedures to be utilized for the control of hazardous energy from the heater treater at the tank battery.

Accordingly, in light of the abovementioned, this Court finds Respondent violated the terms of the standard.

c. Employees were Exposed to a Hazardous Condition.

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission's longstanding test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing id.*). *See also Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).[8]

The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr*. Co., LLC, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). The zone of danger is determined by the hazard presented by the violative condition and is normally the area surrounding the violative condition that presents the danger to employees which the standard is

[8] In *Gilles & Cotting, Inc*., the Commission rejected the "actual exposure" test, which required evidence that someone observed the violative conduct, in favor of the concept of "access", which focuses on the possibility of exposure under the conditions. *See Gilles & Cotting, Inc*., 3 BNA OSHC at 2002 (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure").

intended to prevent. *RGM Construction*, Co., 17 BNA OSHC at 1234; Gilles *& Cotting, Inc*., 3 BNA OSHC at 2003.

Respondent's employees were directly exposed to a hazardous condition when they worked on one of Pioneer's tank batteries located at Sale Ranch 17 without any specific LOTO procedures in place. (Tr. 75-76, 114-115; Joint Stip. at 6, 7, 26, 27, 31). Courts have long held that exposure is met by an employee's mere access to a hazardous situation. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985); *S. Hens, Inc. v. Occupational Safety & Health Review Comm'n*, 930 F.3d 667, 681 (5th Cir. 2019). Here it is undisputed, Respondent's employees had access to and were performing servicing and maintenance on one of Pioneer's tank batteries. (Tr. 75-76, 114-115; Joint Stip. at 6, 7, 26).

Furthermore, it is undisputed that two of Respondent's employees died while performing servicing and maintenance on one of Pioneer's tank batteries. (Tr. 75-76, 114-115; Joint Stip. at 6, 7, 31). The victims' actual exposure to uncontrolled hazardous energy and deaths from their injuries also establish exposure. *See S & G Packaging, Co., LLC* (*S&G*), 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (injuries establish actual exposure to the violative condition). As such, this Court finds Respondent's employees were exposed to a hazardous condition.

d. Knowledge

Respondent's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known of the violative condition. 29 U.S.C. § 666(k); *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-531, 1991). When determining whether an employer has been reasonably diligent, the Commission considers "several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise

employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Precision Concrete Constr.*, 19 BNA OSHC 1404 (No. 99-0707, 2001). An employer's awareness of the violation may be shown through actual or constructive knowledge of said violation. It is not necessary to show the employer knew or understood the condition was hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079-1080 (citations omitted). "[An] employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard." *Ragnar Benson, Inc.*, No. 97-1676, 1999 WL 770809, at *3 (OSHRC Sept. 27, 1999). An employer is not automatically aware of a hazard in plain view, especially if not observed by a supervisory employee. *Cranesville Block Co., Inc./Clark Division*, Nos. 08-0316 & 08-0317, 2012 WL 2365498, at *10 (OSHRC June 12, 2012).

The Secretary contends that Respondent failed to exercise reasonable diligence to discover and to prevent violative conditions and that Respondent therefore had constructive knowledge of those conditions. According to the Secretary, Respondent, *inter alia*, lacked a specific energy control procedure and failed to provide the appropriate LOTO training to its employees. (Sec'y Br. at 25-26). The Secretary further argues that Respondent failed to ensure that lockout was performed by the authorized employees who were performing the maintenance. (Sec'y Br. at 25-26). Additionally, the Secretary argues that Respondent failed to effectively communicate LOTO procedures amongst its employees and Pioneer. (Sec'y Br. at 25-27). The Secretary contends that Respondent's crew supervisor, Mr. [redacted], and Respondent's foreman, Mr. London, knew or, with the exercise of reasonable diligence, should have known of the violative conditions at the worksite. (Sec'y Br. at 25-26).

Further, the Secretary makes the argument that Mr. [redacted]'s, Mr. London's, Mr. Bridges', and Mr. Campbell's knowledge of the violative conditions should be imputed to Respondent. (Sec'y Br. at 26). The Secretary claims that Mr. London should have had knowledge of the violative conditions because he knew Respondent's crew was performing maintenance at the worksite and knew the heater treater had not been isolated and locked out when Respondent's crew had arrived. (Sec'y Br. at 26). Mr. Bridges knew or should have known of the violative conditions because he admitted that Respondent did not have a specific procedure for controlling hazardous energy on the heater treater. (Tr. 182-183; Sec'y Br. at 26). Additionally, Mr. Bridges signed the Master Services Agreement between Respondent and Pioneer, which said Respondent was responsible for its employees' safety and complying with OSHA requirements while performing maintenance for Pioneer. (Tr. 198-206; Exs. C-23; Joint Stip. at 16; Sec'y Br. at 26). Lastly, the Secretary argues that, as Respondent's safety manager, Mr. Campbell knew or should have known of the violative conditions because Respondent lacked a specific energy control procedure, failed to provide the appropriate LOTO training to its employees, and failed to effectively communicate LOTO procedures amongst its employees and Pioneer. (Sec'y Br. at 25-26).

The credible record evidence reveals that Respondent had knowledge of the violative condition of not having specific procedures for the control of hazardous energy while employees performed maintenance at the tank battery. (Tr. 182-183). Respondent had been involved in the construction of hundreds of tank batteries, including the tank battery at question in this case. (Tr. 114-119). Respondent's president, Mr. Bridges, oversaw the construction of the Pioneer battery at the worksite and was present for most of the construction process. (Tr. 114-119). Respondent

was intimately familiar with the battery, as it even set up and installed the heater treater. (Tr. 116-118).

Respondent's crews routinely performed maintenance on Pioneer's tank batteries, changing level controllers and oil boots several times per month. (Tr. 161-163). Respondent was familiar with the type of maintenance required on Pioneer's tank batteries like the one involved in this case. (Tr. 161-163). Management specifically knew the importance of controlling hazardous energy during maintenance and servicing to prevent the release of stored energy. (Tr. 162-163). Mr. Bridges testified that he was familiar with the type of maintenance Respondent's crew was performing on the day of the incident, that hazardous energy needed to be controlled during the maintenance, and that if it was not, it could cause serious death or injury to Respondent's employees. (Tr. 161-163).

Knowledge of the violative condition is established. The Secretary has proven all elements of his *prima facie* case.

2. Citation 1, Item 6

Complainant alleged a serious violation of the Act in Citation 1, Item 6 as follows:

> 29 C.F.R. 1910.147(c)(6)(ii): The employer shall certify that the periodic inspections have been performed. The certification shall identify the machine or equipment on which the energy control procedure was being utilized, the date of the inspection, the employees included in the inspection, and the person performing the inspection:
>
> > On or about March 4, 2019, and at times prior thereto, at the tank battery train #7, employees performed maintenance and/or repairs to a level controller/float on the heater treater oil boot and peanut valve. The employer did not ensure periodic inspections were performed on the energy control procedures to ensure they were being followed.

Citation.

a. The Standard Applies and was Violated.

As previously addressed, the maintenance work Respondent performed would fall under the purview of Part 1910. The scope of the general industry Control of Hazardous Energy Sources (Lockout/Tagout) standard 29 C.F.R. § 1910.147 covers the "servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees…" Any hazards involving general industry maintenance and the control of hazardous energy during maintenance would fall within the scope of the aforementioned Subpart including its relevant sections.

Here, the standard requires employers to certify the periodic inspections of the energy control procedure have been performed. *See* 29 C.F.R. § 1910.147(c)(6)(ii). The certification shall identify and include the machine or equipment on which the energy control procedure was being utilized, the date of the inspection, the employees included in the inspection, and the person performing the inspection. 29 C.F.R. § 1910.147(c)(6)(ii).

Respondent argues that the cited standard does not apply because Respondent was following Pioneer's LOTO procedure. (Resp.t Br. at 17-18). However, the record reveals a different story. Mr. Bridges admitted that Respondent did not certify that periodic inspections of the energy control procedure for maintenance on the heater treater were performed. (Tr. 184-187). Mr. Bridges further testified that Respondent would defer to Pioneer to certify inspections of the specific procedure because it was Pioneer's procedure they were using. (Tr. 185-186). However, Respondent's own safety manager, Mr. Campbell, testified that he was unaware of Pioneer certifying any inspections of the energy control procedure in this case. (Tr. 759-760).

Respondent cites to an OSHA standards interpretation letter in support of its argument that it would be unreasonable to audit the procedures of another company. (Resp't Br. at 17-18).

Although the letter does state, "[a] contractor employee would not be obligated under the OSH Act to independently audit the host employer's energy control procedures," it further clarifies by saying, "[h]owever, the contractor employee must take reasonable steps consistent with its authority to protect its employees if the contractor knows, or has reason to know, that the host employer's energy control procedures are deficient or otherwise insufficient to provide the requisite protection to its employees." *Applicability of OSHA's LOTO standards; isolation and verification procedures*, OSHA Std. Interp. 1910.147 (D.O.L.), Nov. 16, 2000. The interpretation letter further explains that the host employer and contract employer are required to inform each other about their respective LOTO procedures as such coordination is necessary to protect all employees from hazardous energy. *Id.* Interestingly, the letter additionally states "[a]n 'affected employee' becomes an 'authorized employee' when that employee's duties include the performance of servicing or maintenance as defined under 1910.147(b)… When employees are working on machines or equipment in which the uncontrolled hazardous energy could cause injury to employees, both the host employer and the contractor employer have independent obligations to provide the protection under the standard for their respective employees." *Id.*

Here, Respondent did not have any independent LOTO procedures for the heater treater. (Tr. 182-183). Instead, Respondent claims it had a general policy of simply relying on Pioneer for LOTO procedures. (Tr. 182-183). However, Respondent did not even know if Pioneer had LOTO procedures, never asked if they did, and was completely unaware of Pioneer certifying any inspections of energy control procedures. (Tr. 187-190, 196-198, 759-760). Respondent took no reasonable steps, consistent with its authority to protect its employees, to ascertain if Pioneer's energy control procedures were deficient or otherwise insufficient.

The Court finds 29 C.F.R. § 1910.147(c)(6)(ii) applies and was violated.

b. Employees were Exposed to a Hazardous Condition.

The discussion and rationale addressed in Part IV(A)(1)(c), *supra*, likewise applies to employee exposure to a hazardous condition here and is incorporated herein. Respondent's employees were directly exposed to a hazardous condition when they worked on Pioneer's tank battery without any specific LOTO procedures in place and did not ensure periodic inspections were performed on energy control procedures to ensure they were being followed. (Tr. 75-76, 114-115, 182-183, 187-190, 196-198, 759-760; Joint Stip. at 6, 7, 26, 27, 31). As such, this Court finds Respondent's employees were exposed employees.

c. Knowledge

The discussion and rationale addressed in Part IV(A)(1)(d), *supra*, likewise applies to knowledge here and is incorporated herein. The Secretary contends that Respondent failed to exercise reasonable diligence to discover and to prevent violative conditions and that Respondent therefore had knowledge of those conditions. The Secretary argues that Respondent failed to certify that it performed periodic inspections of its energy control procedures. (Sec'y Br. at 16). The Secretary further argues Respondent knew or should have known of the violative conditions because Respondent lacked a specific energy control procedure, failed to provide the appropriate LOTO training to its employees, and failed to effectively communicate LOTO procedures amongst its employees and Pioneer. (Sec'y Br. at 25-26).

The record shows Respondent did not certify periodic inspections of the energy control procedure for maintenance on the heater treater were performed. (Tr. 184-187). Respondent claims it would defer to Pioneer to certify inspections of the specific procedure because it was Pioneer's procedure they were using. (Tr. 185-186). However, Respondent's own safety manager, Mr. Campbell, testified that he was unaware of Pioneer certifying any inspections of the energy

control procedure in this case. (Tr. 759-760). Respondent did not know if Pioneer had LOTO procedures, never asked if they did, and was completely unaware of Pioneer certifying any inspections of energy control procedures. (Tr. 187-190, 196-198, 759-760).

The record evidence reveals that Respondent had knowledge of the violative condition.

3. Citation 1, Item 7

Complainant alleged a serious violation of the Act in Citation 1, Item 7 as follows:

> 29 C.F.R. 1910.147(c)(7)(i)(A): Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control:
>
> > On or about March 4, 2019, and at times prior thereto, at the tank battery train #7, employees performed maintenance and/or repairs to heater treater oil boot level controller/float and peanut valve, and had not been provided adequate training in the recognition and control of hazardous energy sources, such as, but not limited to, chemical and thermal energy with the potential to result in a fire and/or explosion.

Citation.

a. The Standard Applies.

The discussion and rationale addressed in Part IV(A)(1)(a), *supra*, likewise applies to the applicability of the standard here and is incorporated herein. As such, the Court finds 29 C.F.R. § 1910.147(c)(7)(i)(A) applies.

b. The Standard was Not Violated.

Respondent does not dispute that its employees were performing maintenance and servicing at the time of the incident. (*See* Resp't Br. at 15-16). However, Respondent argues that it did not violate the standard because it trained its employees on LOTO. (Resp.t Br. at 19-21).

The cited standard requires authorized employees receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the

workplace, and the methods and means necessary for energy isolation and control. 29 C.F.R. § 1910.147(c)(7)(i)(A).

Here, the record reveals that Respondent provided some training on LOTO procedures. Mr. Campbell, Respondent's safety manager, testified that Respondent's employees complete an 8-hour course on SafeLand orientation training when they are hired. (Tr. 742-744).[9] The record corroborates that Respondent provided this training to both decedents. (Tr. 145-147; Exs. C-20, C-21; Joint Stip. at 11). The SafeLand training was a safety awareness orientation training, which covered many topics in addition to an overview of LOTO and hazardous energy control. (Exs. C-17, C-32; Joint Stip. at 11, 12).

Additionally, Mr. Campbell testified that he provided "BLR" training to Mr. [redacted] and both decedents, which included an hour of training on LOTO and hazardous energy control. (Tr. 716-720, 729-730, 765-770; Ex. R-91). Respondent's employees received training cards from Mr. Campbell to certify that they were trained specifically in LOTO. (Tr. 716-720, 765-770; Ex. R-91).[10] Mr. Campbell testified that he recalled training Mr. [redacted] and both decedents. (Tr. 716-720, 749).

Respondent further provided training to its employees through field training, tailgate meetings, and a mentorship program. (Tr. 83, 134, 233-234, 714-715, 779-781). Mr. Bridges testified that Mr. [redacted] went through additional field training with a mentor named Diego Franco. (Tr. 134, 233-234, 240-241).

[9] Although [redacted] was only provided SafeLand training from a previous employer, the weight of the evidence shows Mr. [redacted] received some LOTO training from Respondent. (Tr. 83, 134, 233-234, 714-720, 729-730, 749, 765-770, 779-781; Ex. R-91).

[10] Mr. Campbell claims to have discovered a stack of training cards from the BLR training he provided on the afternoon prior to his trial testimony. (Tr. 752, 765-770; Ex. R-91). Mr. Campbell's testimony as to what was on the cards is given more weight than the actual stack of cards found on the eve of trial.

The record shows Respondent provided some training to its employees in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control. (Tr. 721-727, 731-737).

Accordingly, considering the abovementioned, this Court finds the Secretary failed to prove Respondent violated the terms of the standard.

4. Citation 1, Item 8

Complainant alleged a serious violation of the Act in Citation 1, Item 8 as follows:

> 29 C.F.R. 1910.147(c)(8): Lockout or tagout shall be performed only by the authorized employees who are performing the servicing or maintenance:
>
> > On or about March 4, 2019, and at times prior thereto, at the tank battery train #7, employer did not ensure that employees Locked out and Tagged out all lines and valves leading into heater treater and oil boot.
>
> Citation.

a. The Standard Applies.

The discussion and rationale addressed in Part IV(A)(1)(a), *supra*, likewise applies to the applicability of the standard here and is incorporated herein. The Court finds 29 C.F.R. § 1910.147(c)(8) applies.

b. The Standard was Violated.

Respondent argues that it did not violate the standard because it was not authorized to operate Pioneer equipment. (Resp't Br. at 21). Respondent continues by arguing that Mr. Nevarez was the only authorized individual to perform LOTO as an employee for Pioneer. (Resp't Br. at 21).

The cited standard requires that LOTO be performed only by authorized employees who are performing servicing or maintenance. 29 C.F.R. § 1910.147(c)(8). The Preamble to OSHA's LOTO standard further explains the authorized employee requirement when it says:

> The new paragraph(c)(8) requires that lockout or tagout be performed only by authorized employees. These are the only employees who are required to be trained to know in detail about the types of energy available in the workplace and how to control the hazards of that energy. Only properly trained and qualified employees can be relied on to deenergize and to properly lockout or tagout machines or equipment which are being serviced or maintained, in order to ensure that the work will be accomplished safely.
>
> 4 FR 36644-01, *36676, 1989 WL 287855 (F.R.).

Further, 29 C.F.R. § 1910.147(b) defines "authorized employee" as:

> A person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. An affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section.
>
> 29 C.F.R. § 1910.147(b).

It is undisputed that Respondent's crew was performing maintenance on the heater treater and oil boot. (Joint Stip. at 6, 30, 31). Since Respondent's crew was performing maintenance and servicing on equipment covered under the above-mentioned section, Respondent's employees meet the definition of an "authorized employee." As authorized employees, Respondent's crew was required to put their locks on energy isolating devices during the LOTO procedure. It is undisputed that Respondent's crew failed to place locks on any valves at the worksite. (Joint Stip. at 27). As authorized employees performing the maintenance, Respondent's employees were required to place their own locks on the energy lockout devices so they could maintain lockout control as they performed the maintenance. *See* OSHA Instruction, Directive Number CPL 02-00-147 at 3-57.

Accordingly, this Court finds Respondent violated the terms of the standard.

c. Employees were Exposed to a Hazardous Condition.

The discussion and rationale addressed in Part IV(A)(1)(c), *supra*, likewise applies to employee exposure to a hazardous condition here and is incorporated herein. Respondent's

employees were directly exposed to a hazardous condition when they performed maintenance on Pioneer's tank battery without performing LOTO. (Tr. 75-76, 114-115; Joint Stip. at 6, 7, 26, 27, 31). It is undisputed, Respondent's employees had access to and were performing servicing and maintenance on one of Pioneer's tank batteries. (Tr. 75-76, 114-115; Joint Stip. at 6, 7, 26). Further, it is undisputed that two of Respondent's employees died while performing the servicing and maintenance. (Tr. 75-76, 114-115; Joint Stip. at 6, 7, 31).

This Court finds Respondent's employees were exposed to a hazardous condition.

d. Knowledge

The Court incorporates the discussion and rationale in Part IV(A)(1)(d), *supra*. It is undisputed that Respondent's employees were performing maintenance on the heater treater and oil boot. (Joint Stip. at 6, 30, 31). As authorized employees, Respondent's employees were required to put their own locks on energy isolating devices during the LOTO procedure. It is also undisputed that Respondent's employees failed to place locks on any energy isolating devices at the worksite. (Joint Stip. at 27).

Further, the Court finds that Mr. London should have had knowledge of the violative conditions because he knew Respondent's crew was performing maintenance at the worksite and knew the heater treater had not been isolated and locked out when Respondent's crew had arrived. (Sec'y Br. at 26). The record shows that when Mr. [redacted] arrived at the worksite, he contacted his supervisor, Jason London, because the oil boot had not yet been isolated and locked out and tagged out. (Tr. 67-68; Joint Stip. at 23, 24).

The record reveals that Respondent had knowledge of the violative condition while employees performed maintenance at the tank battery. (Tr. 182-183).

5. Citation 1, Item 9

Complainant alleged a serious violation of the Act in Citation 1, Item 9 as follows:

29 C.F.R. 1910.147(f)(2)(i): Whenever outside servicing personnel are to be engaged in activities covered by the scope and application of this standard, the on-site employer and the outside employer shall inform each other of their respective lockout or tagout procedures:

> On or about March 4, 2019, and at times prior thereto, at the tank battery train #7, employer did not ensure that the on-site employer and the contracted employees did not inform each other of their specific Lock Out Tag Out procedures, exposing employees to chemical and thermal energy hazards.

Citation.

a. The Standard Applies.

The Court incorporates and adopts the rationale and discussion in Part IV(A)(1)(a), *supra*, and accordingly finds that 29 C.F.R. § 1910.147(f)(2)(i) applies.

b. The Standard was Not Violated.

Respondent argues that it did not violate the standard because communication of procedures between Respondent and Pioneer occurred when Mr. Nevarez arrived at the worksite. (Resp't Br. at 23). Respondent further argues that the oral communications between Respondent and Pioneer comply with the cited standard. (Resp't Br. at 23). Moreover, Respondent argues that the cited standard was not violated as evidenced by Respondent's understanding that it could not operate Pioneer's equipment and through Pioneer's "Rules To Live By" shared with Respondent. (Resp't Br. at 22-23). The Secretary argues that Respondent and Pioneer failed to inform each other of their respective LOTO procedures, as no specific procedures were exchanged between the parties. (Sec'y Br. at 23-24).

The cited standard required Respondent to inform Pioneer of its respective LOTO procedures. 29 C.F.R. § 1910.147(f)(2)(i). The record reveals that some communication of LOTO occurred between Respondent and Pioneer. On the morning of the incident, Mr. Campbell had called Mr. Nevarez to inform him that Respondent's crew was waiting for Mr. Nevarez to lock out the equipment before they could begin work. (Tr. 362-363). When Mr. Nevarez arrived at the

worksite, he communicated with Mr. [redacted] about what needed to be completed for the job. (Tr. 68-69, 361-366). Additionally, Mr. [redacted] had instructed Mr. Nevarez what needed to be isolated and locked out on the vessel before Respondent's crew could begin their work. (Tr. 67-69). Mr. [redacted] had specifically informed Mr. Nevarez what inlet and outlet valves needed to be locked out on the oil boot. (Tr. 68-69). Mr. Nevarez had then spoken with and came to an understanding with Mr. [redacted] over which valves needed to be locked out and tagged out and which ones were already. (Tr. 365-366).

The record further shows that communication was had between Pioneer and Respondent, concerning LOTO procedures, through Pioneer's "Rules To Live By" and Safety Handbook. Pioneer had provided Respondent with its Safety Handbook and "Rules To Live By," which both address LOTO procedures. (Tr. 190-195, 283; Exs. C-12, R-20).

The record reveals there were multiple instances of communication between Respondent and Pioneer concerning LOTO. (Tr. 68-69, 362-366, 370-371). Accordingly, the Secretary has failed to meet its burden of showing that Respondent did not inform Pioneer of its LOTO procedures.

V. Serious Classifications

The Secretary classified the alleged violations in Citation 1, items 5-9 as serious. Respondent contends that none of the violations should be classified as serious. (Resp't Br. 23-24).

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 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, death or serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Wal-Mart Stores, Inc., v. Sec'y of Labor*, 406 F.3d 731, 735 (D.C. Cir. 2005);

Brock v. L.R. Willson & Sons, Inc., 773 F.2d 1377, 1388 (D.C. Cir. 1985).

In determining whether a hazard is "causing or likely to cause death or serious physical harm," the Commission does not look to the likelihood of an accident or injury occurring, but, instead, looks to whether, if an accident occurs, the results are likely to cause death or serious harm. *See Babcock*, 622 F.2d at 1164; *Beverly*, 19 BNA OSHC at 1188; *Waldon*, 16 BNA OSHC at 1060; *R.L. Sanders Roofing Co.*, 7 BNA OSHC 1566, 1569 (No. 76–2690, 1979), *rev'd on other grounds*, 620 F.2d 97 (5th Cir. 1980).

Here, the record is clear that potentially hazardous conditions existed at the worksite and resulted in serious harm and death to Respondent's employees. Mr. Bridges testified that it was important for hazardous energy to be controlled while Respondent's crew performed maintenance at the worksite. (Tr. 163). Mr. Bridges further testified that the release of stored energy would be dangerous. (Tr. 163). The record shows that the release of this stored energy could, and did, cause the risk of fire resulting in severe injury or death of Respondent's employees. (Tr. 162-164; Joint Stip. at 31).

Each of the alleged violations address Respondent's failure to comply with OSHA's standards for controlling hazardous energy. Here, the record is clear that the failure to control hazardous energy, while performing maintenance, from the heater treater could cause a risk of fire and severely injure employees. (Tr. 163; Joint Stip. at 31).

These violations were capable of causing serious injury or death. The Secretary established that uncontrolled hazardous energy from the heater treater was likely to cause death or serious physical harm. Thus, the violations were appropriately characterized.

VI. Penalty

Under section 17(j) of the Act, the Commission has the authority to assess civil penalties for the violation of citations. 29 U.S.C. § 666(j). In assessing penalties, the Commission is instructed to give due consideration to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of previous violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally afforded greater weight in assessing an appropriate penalty. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). A violation's gravity is determined by weighing the number of employees exposed, the duration of their hazard exposure, preventative measures taken against injury, and the possibility that an injury would occur. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 (No. 76-2644, 1981).

The Secretary, in assessing the penalties for items 5, 6, 7, 8, and 9, proposed a penalty of $11,934 for each violation of the cited standards. (Citation; *See* Ex. C-7). The Citation proposed a total penalty of $59,670.

Looking first at gravity, the CSHO explained that OSHA believed the violation's gravity was high because of the high likelihood of severe injury, permanent disability, or death. (Tr. 478-480). The record supports finding that the gravity of the violations warrants a high penalty as serious injury and death occurred. (Joint Stip. at 31). The CSHO noted that three employees were exposed to the violative conditions on the day of the accident. (Tr. 479-480). Additionally, she testified that the three employees were exposed to the hazard for approximately two hours. (Tr. 479-480).

The Secretary proposed that the penalty should not be reduced for good faith because of the severe nature of the violations. (Tr. 481; Sec'y Br. at 30). Respondent had a general policy of

relying on Pioneer for LOTO procedures pertaining to the heater treater. (Tr. 182-183). However, Respondent did not even know if Pioneer had LOTO procedures and never asked if they did. (Tr. 187-190, 196-198). Although the record shows Respondent provided some training to its employees in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control, it lacked any specific LOTO procedures for the heater treater. (Tr. 182-183, 721-727, 731-737).

Turning to history, although Respondent did not have any recent citations, it had not been inspected by OSHA within the previous five years of this current inspection. (Tr. 481). Therefore, the Secretary proposed no increase or decrease for history. (Tr. 481).

As for size, at the time of OSHA's investigation, Respondent employed between 125 and 140 employees. (Tr. Tr. 111-113, 480-481). The Secretary proposed that Respondent receive a 10 percent reduction for the employer's size. (Tr. 480-481; Sec'y Br. at 30).

Upon due consideration of section 17(j) of the Act, with regard given to the penalty calculation factors, the undersigned finds a penalty for each serious citation 1, item 5, serious citation 1, item 6, and serious citation 1, item 8 of $11,934 is appropriate, resulting in a total combined penalty of $35,802.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 5, as amended, is AFFIRMED, and a penalty of $11,934 is ASSESSED.
2. Citation 1, Item 6 is AFFIRMED, and a penalty of $11,934 is ASSESSED.
3. Citation 1, Item 7 is VACATED, and no penalty is ASSESSED.
4. Citation 1, Item 8 is AFFIRMED, and a penalty of $11,934 is ASSESSED.
5. Citation 1, Item 9 is VACATED, and no penalty is ASSESSED.

/s/ Christopher D. Helms

Dated: May 23, 2022
Denver, Colorado

Christopher D. Helms
Judge, OSHRC