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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. FURMANITE AMERICA, INC., Respondent.	OSHRC Docket No. 13-0307

Appearances:

Aaron J. Rittmaster, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri,
For Complainant

Marc A. Young, Esq. & Bryan P. Marshall, Esq., Cokinos, Bosien & Young, San Antonio, Texas,
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Furmanite America, Inc. ("Respondent") that began on August 17, 2012, at Respondent's worksite in Beatrice, Nebraska. As a result, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging three serious violations with total proposed penalties of $21,000.00. Respondent timely contested the Citation. The trial took place on February 19–20, 2014, in Omaha, Nebraska. Both parties timely submitted post-trial briefs.

II. Stipulation

The parties stipulated that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act (29 U.S.C. § 651, *et seq.*). (Compl't Br. at 1; Resp't Br. at 1).

III. Employer Engaged in Interstate Commerce

Respondent admits that it is an employer engaged in a business and industry affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). (Resp't Br. at 1). *Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

IV. Factual Background

Four witnesses testified at trial: (1) Brian Elmore, OSHA Compliance Safety and Health Officer ("CSHO"); (2) Craig Olson, U.S. Technical Support Director for Respondent; (3) Mike Struble, a supervisor for Respondent; and (4) Thomas Scott, proposed expert for Respondent.[1]

Respondent is a corporation with its principal office in Houston, Texas, and, as is relevant to the instant matter, performed work at a Koch Industries facility in Beatrice, Nebraska. Koch Industries contracted with a company called Cust-O-Fab, who in turn, contracted with Respondent to perform services on pipelines within the Koch Industries' facility. Respondent provides sixteen different services or "lines", as it refers to them. (Tr. 171). Each of these lines is comprised of crew members that have been trained and tested in that particular discipline. (Tr. 171–172). Some of the crew members are trained in multiple lines, and, based on their respective amount of experience, may be designated as a crew lead. (Tr. 172, 183, 193).

One of these lines involves the installation of isolation plugs (also referred to as mechanical plugs) into pipelines. (Tr. 156). These plugs serve as a barrier between flammable gases in the pipelines and hot work, such as welding. (Tr. 163, 167–68, 201; Ex. C-6). The plug

1. After *voir dire*, Respondent withdrew Mr. Scott as an expert in this matter. (Tr. 258).

has a series of bolts that are tightened in order to expand a two-part rubber seal that presses outward against the pipe. (Tr. 156, 161; Exs. C-4, C-6). Once the rings are expanded, the plug is filled with water and pressurized by bleeding off the air within the plug. (Tr. 161–63, 203). A through-port is installed and connected to a hose, which is placed in a bucket of water approximately 35 to 50 feet away. (Tr. 165–66, 203–204, 208–209; Ex. C-4). The purpose of the hose and bucket is to detect the accumulation of pressure behind the plug, which results from hydrocarbons being released from the pipe due to the presence of heat. (Tr. 208). If there is pressure build-up, the hot work is supposed to be stopped by the individual monitoring the plug and will not recommence until the pressure is reduced. (Tr. 209–212). The plug also has a gauge that measures the pressure of the water in between the rubber seals. (Tr. 204–205; Ex. C-7). As was the case here, improper installation and/or handling of the plug can result in serious injuries. (Tr. 58–59, 79).

On August 17, 2012, [redacted], a team lead for the bolting crew, received head injuries when he attempted to remove an isolation plug from an eight-inch-wide section of vertical pipe. (Tr. 59–60). A build-up of pressure occurred behind the plug, which caused it to fire out of the pipe and strike [redacted] in the head. (*Id.*). [redacted] was neither trained in that particular service line, nor was there any indication that he had ever performed this type of work prior to the accident. (Tr. 59, 92, 173–74, 181, 212). In fact, during a face-to-face meeting with Craig Olson, [redacted] was specifically told "not to touch the [expletive deleted] plug." (Tr. 175). Olson also told both [redacted] and Matt Crosby, both of whom did not testify, that Mike Struble was coming to the worksite in order to remove the plug. (Tr. 175). Olson's instructions went unheeded.

Struble, who had extensive training and practical experience installing plugs, had come to the worksite approximately one week before the incident to install the plug in question. (Tr. 199). Prior to installing the plug, Struble attempted to obtain a safe work permit from a Koch Industries representative. (Tr. 210, 218). Struble testified that the representative told him that a permit had already been issued to Cust-O-Fab and that he should sign onto that permit. (Tr. 210, 218). This was unusual because Struble had previously worked on Koch Industries projects and was always required to get his own permit for the installation of isolation plugs. (Tr. 220). Nevertheless, Struble testified that he signed off on Cust-O-Fab's permit and indicated the work that he was going to perform. (Tr. 219). The only safe work permit submitted into evidence does not contain the signature of either [redacted] or Struble, nor does it contain specific information as to the work Respondent was to perform. (Ex. R-6).

Through a media report, CSHO Elmore was notified that there was an accident at the Koch Industries facility. (Tr. 28–29). He began his inspection of the facility the next day. The inspection resulted in the following citation items.

V. Applicable Law

To establish a *prima facie* violation of section 5(a)(2) of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

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). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser*

Constr., Inc., 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Id.*

As part of the Court's Briefing Order, the Court directed the parties to address the test for analyzing training violations discussed in *Compass Environmental v. Occupational Safety and Health Review Commission*, 663 F.3d 1164 (10th Cir. 2011). In *Compass*, the Tenth Circuit addressed the propriety of the Commission's training-specific test to establish a violation of 29 C.F.R. § 1926.21(b)(2). *Compass*, 663 F.3d at 1168. In order to prove a violation of a training standard, the Commission held that "the Secretary must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." Id. (citing *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2125 (No. 96-0606, 2000)). Ultimately, the Tenth Circuit found that the use of such a test was proper and that the Commission did not abuse its discretion in finding a violation.

Complainant asserts that the test discussed by the Tenth Circuit in *Compass* is inapposite to the present matter on three bases: (1) the "reasonably prudent employer" test was only intended to address a broad construction industry standard as opposed to the narrow focus of 29 C.F.R. § 1910.119(h); (2) the test has never been applied outside the context of 29 C.F.R. § 1926.21(b); and (3) *Compass* is not the law outside of the Tenth Circuit. Further, Complainant argues that, even if the test is applied by this Court, he has established a violation of the cited standard. The Court disagrees on all counts.

First, the Court does not agree with Complainant's distinction between the two training standards. Both standards are formulated in general terms to allow the employer some measure

of discretion in determining what kind of training is necessary. Compare 29 C.F.R. § 1910.119(h)(3)(i) ("The contract employer shall assure that each contract employee is trained in the work practices necessary to safely perform his/her job.") with 29 C.F.R. § 1926.21(b)(2) ("The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment . . . ."). Complainant's argument that 1910.119(h)(3)(i) applies much more narrowly to contractors subject to Process Safety Management (PSM) conditions does not justify applying a different test.[2] The language of the respective standards is very nearly the same and implies a similar level of discretion on behalf of the employer regardless of the context in which the work is being performed.

Second, Complainant is incorrect that the *Compass* model has never been applied outside the context of 29 C.F.R. 1926.21(b)(2). According to the Commission, "To establish noncompliance with a training standard, the Secretary must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *N & N Contractors, Inc.*, 18 BNA OSHC at 2125 (emphasis added). The foregoing language implies that the test applies to training standards generally, not just section 1926.21(b)(2). In fact, the training standard at issue in *N & N* was 29 C.F.R. § 1926.503(a)(1), which, although it "supplement[s] and clarif[ies] the requirements of 1926.21", applies much more narrowly to worksites that present fall hazards. *See id*.; *see also* Compl't Br. at 22 (arguing that training standards at 1910.119(h) "apply much more narrowly ONLY to worksites at which large amounts of highly hazardous chemicals are stored"). Further, a simple Westlaw search

2. The Court rejects any argument from the Complainant, directly or indirectly, which argues that somehow contract employees for training purposes should have a different standard apply to them. The Court rejects this argument since the Act does not indicate that they are to be treated differently. Also, accepting this argument would impose upon the Respondent a two-tier standard—one applying to regular employees and one applying to contract employees—creating a much more complex administrative and management system which could undermine application of the Act and its safety regulations being enforced depending on the circumstance. The easier the administration of the Act and its regulations is made—the more effective the coverage and administration of the Act.

would have shown that there are other cases wherein the Commission applied the foregoing test to different training standards. *See, e.g., Trinity Industries, Inc.*, 20 BNA OSHC 1051 (No. 95-1597, 2003) (applying test to 29 C.F.R. § 1915.12(d)(2)(ii)). For similar reasons, the Court disregards Complainant's third argument because whether the Eighth Circuit has adopted the "reasonably prudent employer" test is irrelevant—it is the Commission test for training standards and is thus applicable to the present case.

VI. Discussion

A. Citation 1, Item 1

Complainant alleged a serious violation of section 1910.119(h)(3)(i) of the Act as follows:

> 21178 SW 89th Rd., Beatrice, NE 68310 (Jobsite): The employer did not ensure that each contract employee was trained in the work practices necessary to safely perform their job. On August 17, 2012, one (1) contract employee was hospitalized after a mechanical plug installed on the High Temperature Shift suddenly came out as an employee was releasing the bolts and struck the employee. The vessel was not checked by the employee for pressure prior to attempting to release the mechanical plug.
>
> The cited standard provides:
>
> The contract employer shall assure that each contract employee is trained in the work practices necessary to safely perform his/her job.

29 C.F.R. § 1910.119(h)(3)(i).

In addition to satisfying the "reasonably prudent employer" test discussed above, the Commission has held that the Secretary "must also establish the usual elements of a violation." *See El Paso Crane & Rigging Co., Inc.*, 16 BNA OSHC 1419 (No. 90-1106, 1993).

A. Does the Standard Apply?

The first element, as always, is whether the standard applies to the cited condition. *Ormet Corp.*, 14 BNA OSHC 2134. In this particular instance, the Court finds that the standard

applies. Section 1910.119(a)(1)(ii) states, "This section applies to . . . a process which involves a Category 1 flammable gas (as defined in 1910.1200(c)) or flammable liquid with a flashpoint below 100 °F (37.8 °C) on site in one location, in a quantity of 10,000 pounds (4535.9 kg) or more . . . ." CSHO Elmore testified Koch's facility stores more than 10,000 pounds of ammonia, which, based on his training, subjects Respondent to the PSM standards found at 29 C.F.R. § 1910.119. (Tr. 34). This testimony was not disputed by Respondent. Accordingly, the Court finds that the standard applies.

B. Has the Standard Been Violated?

The Court, however, does not find that the terms of the standard were violated. As noted above, Complainant must prove that Respondent failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances. *See N & N*, *supra.* "Thus, the obligation to train 'is dependent upon the specific conditions [at the worksite], whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard.'" *Compass Environmental, Inc.*, 23 BNA OSHC 1132 (No. 06-1036, 2010) (citing *W.G. Fairfield*, 19 BNA OSHC 1233, 1236 (No. 99-0344, 2000)).

The particular condition at issue in this case is the presence of the isolation plug. The plug, on its own, does not present a hazard absent someone working on or near it. This is not a case like *Compass*, where training was required to ensure that employees did not come into contact with an open, obvious, and easily accessible hazard like an adjacent power line. *Compass*, 23 BNA OSHC 1132; *see also Capform, Inc.*, 19 BNA OSHC 1374 (No. 99-0322, 2001) (holding employer had responsibility to train regarding hazards associated with the particular job duties). Rather, an isolation plug serves to mitigate the hazards associated with hot work that occurs in the vicinity of the isolated pipe. (Tr. 166–68). In those instances, Struble

testified that he would be present to monitor pressure build-up behind the plug and take any actions necessary to address that eventuality. (Tr. 209, 212). Further, due to the possible presence of pressure behind the plug, it was imperative that an employee be properly trained to perform that type of work. Struble and Olson testified that intensive training, examination, and practical experience were necessary to become proficient in that or any other of the sixteen lines of service provided by Respondent.[3] (Tr. 170–71, 197). At the time of the accident, there was only one individual present at the worksite that was trained and proficient in line isolation—Mike Struble. (Tr. 175–76).[4]

[redacted] was trained as a bolting technician, and his extensive experience in that service line qualified him as a crew lead. (Tr. 181, 183–86). It is undisputed, however, that [redacted] was not trained in line isolation. *See Resp't Br.* at 1–2. Further, there was no reliable evidence to suggest that, with the exception of the incident in question, [redacted] had ever performed work on plugs at the Koch worksite. As noted above, Olson had a meeting with [redacted] and told him, in no uncertain terms, not to touch the plug. (Tr. 175). At the same meeting, Olson also told [redacted] that he had asked Struble to come to the worksite to uninstall the plug. (Tr. 182). Consistent with that conversation, Struble was present at the worksite at the time of the accident. (Tr. 213).

Complainant contends that Respondent failed to train [redacted] in work practices necessary to safely perform his job, such as identifying hazards that he may reasonably be expected to encounter in the performance of his duties. According to Complainant this includes "not only what to do, but what NOT to do." *Compl't Br.* at 11. The Commission has stated that

3. In that regard, Struble testified that he was trained and certified in six service lines. (Tr. 213).
4. Complainant did not cite Respondent for Struble not having adequate training for installation or removal of the plug.

safety rules need not be written so long as they are clearly and effectively communicated and identify the hazards associated with the "particular circumstances confronting [employees], including the ways in which those hazards can be avoided." *Capform*, 19 BNA OSHC 1374 (citing *El Paso*, 16 BNA OSHC at 1425 n.7). Given the strict division of labor between the various service lines, and the strict admonishment reinforcing that division of labor that was given not only to [redacted], as crew lead, but also to Wayne Watts, Respondent's Project Manager, the Court finds that Olson's directive not to touch the plug was sufficient to clearly identify the hazard and effectively communicated the hazard to be avoided. (Tr. 182). Because of the division of labor, which was reinforced by the intensive training provided on the various service lines, there was simply no reason for [redacted] to be working on the plug, nor, in light of his conversation with Olson, was it reasonable for Respondent to expect that [redacted] would touch the plug.[5]

Complainant also argues that a reasonable employer, such as Respondent, would have three ways of ensuring the safe work practices of its employees regarding the isolation plugs. First, Complainant argues that a reasonable employer would have trained its bolt-up crews "with great specificity" to recognize the plugs and not to work on them. In that regard, Complainant contends that Olson's mandate did not constitute training and, if it did, it was insufficiently documented to comply with the standard.[6] There was no suggestion, however, that [redacted], Crosby, or Watts did not understand Olson's instructions, nor was there any testimony that Respondent's employees were unaware of what an isolation plug was or how to identify it. *See*

5. The Complainant's argument that the Respondent should have trained [redacted] on what "not" to do is rejected. [redacted] was told to not touch or work on the plug. The Court will not impose on a reasonable employer the duty to train an employee on duties or responsibilities that are not within that employee's scope of responsibility and which have expressly been excluded by the employer via communication to the employee.
6. The Court agrees with Complainant that Olson's statement was not training but a re-enforcement of the division of labor between the lines.

N & N, 18 BNA OSHC 2121 ("Critical to the Secretary's failure to meet her burden here is the absence of direct testimony from N&N's foremen, safety officials, or employees to demonstrate that its employees did not receive the training required here."). Further, whether the "training", if it may be so called, was documented is not an element of the cited standard—the standard only requires Respondent to train its employees in work practices necessary to safely perform their respective jobs. *See* 29 C.F.R. § 1910.119(h)(3)(i).

As to the remaining ways in which Complainant suggests Respondent could have ensured safe work practices, the Court finds that they are irrelevant to the question of whether Respondent's employees were properly trained. Whether Respondent was obligated to monitor the location of its crews and actively enforced the division of labor is not germane to the question of whether [redacted] was properly trained. *See N & N*, 18 BNA OSHC 2121 ("The failure to enforce compliance with work rules on the job does not establish a failure to train or instruct, and we cannot infer on the basis of these practices that the training was deficient."). Nor, for that matter, does the presence or absence of specially trained individuals at a worksite indicate such a failure.

In conclusion, Complainant cited Respondent for its failure to train [redacted] with respect to the hazards associated with removing an isolation plug from a pipe. *Citation* at 6. Based on the foregoing, the Court finds that Complainant failed to establish that a reasonably prudent employer in Respondent's position would have provided such training to an employee whose job did not include engaging in such an activity, especially in light of Olson's explicit instructions. Further, the Court does not find that Olson's instructions constitute "training" to the extent that it was required to be documented; rather, it was merely a reiteration of the already

existing division of labor between the separate service lines. Accordingly, Citation 1, Item 1 shall be VACATED.

B. Citation 1, Item 2

Complainant alleged a serious violation of section 1910.119(h)(3)(iii) of the Act as follows:

> 21178 SW 89th Rd., Beatrice, NE 68310 (Jobsite): The employer did not have a record prepared which contained the identity of the contract employee, the date of training, and the means used to verify that the employee understood the training in regard to removal of a mechanical plug. On August 17, 2012, one (1) contract employee was hospitalized after a mechanical plug installed on the High Temperature Shift suddenly came out as an employee was releasing the bolts and struck the employee. The vessel was not checked by the employee for pressure prior to attempting to release the mechanical plug.
>
> The cited standard provides:
>
> The contract employer shall document that each contract employee has received and understood the training required by this paragraph. The contract employer shall prepare a record which contains the identity of the contract employee, the date of training, and the means used to verify that the employee understood the training.

29 C.F.R. § 1910.119(h)(3)(iii).

The cited standard requires that an employer shall document that its employees have received and understood the required training. *Id.* As noted above, Complainant failed to prove that Respondent was required to provide the training indicated in the citation narrative; namely, how to properly remove an isolation (mechanical) plug. In light of Complainant's failure to prove that such training was necessary, there was no training to properly document. Nevertheless, Complainant argues that, in addition to Respondent's failure to document, let alone provide, isolation plug training, Respondent failed to properly document the safety orientation training provided by Koch Industries.

Respondent was charged with failing to train its employees, or at the very least one employee, how to properly remove an isolation plug. In its brief, however, Complainant attempts to expand the scope of the original allegation by including Respondent's failure to properly document orientation training. *See Compl't Br.* at 17. There is no question that the sign-in sheet, which addresses orientation training, fails to comply with the requirements of section 1910.119(h)(3)(iii), as it fails to indicate the means of verifying that employees understood the training. (Ex. R-2). The problem, however, is that Complainant did not allege deficiencies in the orientation training; the Citation specifically targeted training with respect to the isolation plug. Such an expansion of the original allegations, in effect, constitutes an amendment to the original pleadings.[7] The Court finds such an amendment would be improper for two reasons.

First, the failure to properly document orientation training does not arise out of the same conduct, transaction, or occurrence as the allegation regarding isolation plug training. *See* Fed. R. Civ. P. 15(c)(1)(B). The original allegations were specifically targeted at one aspect of Respondent's training program. To allow Complainant to amend the Citation to include Koch's safety orientation, as he has done here, would require additional facts that were not included in the original allegations. *See Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013) ("[A] new pleading cannot relate back if the effect of the new pleading 'is to fault [the defendants] for conduct different from that identified in the original complaint,' even if the new

7. Fed.R.Civ.P. 15(b) allows pleadings to be amended to conform to the evidence presented at trial. The rule is "designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *U. S. v. Hougham*, 364 U.S. 310, 316 (1960). A judge's post-hearing *sua sponte* amendment is proper under *Morrison-Knudsen Co./Yonkers Contrac.*, 16 BNA OSHC 1105 (No. 88-572, 1993), *petition for review filed*, No. 93-1385 (D.C.Cir. June 15, 1993) (Commission upheld a judge's post hearing *sua sponte* amendment under the second part of Rule 15(b). The second part of Rule 15(b) requires an inquiry as to whether the employer is prejudiced by the amendment).

pleading 'shares some elements and some facts in common with the original claim.'") (internal citations omitted).

Second, the Court cannot discern anywhere in the trial transcript where the sufficiency of the *orientation training* documentation was tried by consent of the parties. "[A] court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue." *McWilliams Forge Co.*, 11 BNA OSHC 2128 (No. 80-5868, 1984). The target of this investigation was the isolation plug and associated training—Complainant failed to prove that Respondent was required to provide that training. Complainant cannot now expand the scope of the allegations to include all training and all documentation merely because it introduced an exhibit that was marginally relevant to the issue of whether isolation plug training was provided to [redacted]. (Ex. C-2). Respondent directed testimony to that document to rebut the allegation that it was required to provide training in the first place, let alone document it. Thus, the Court finds that the issue was not tried by consent, whether express or implied, and that the Respondent would be prejudiced by the Court permitting a *sua sponte* amendment.

Based on the foregoing, the Court finds that Complainant failed to prove a violation of the cited standard. Accordingly, Citation 1, Item 2 shall be VACATED.

C. Citation 1, Item 3

Complainant alleged a serious violation of section 1910.119(h)(3)(iv) of the Act as follows:

> 21178 SW 89th Rd., Beatrice, NE 68310 (Jobsite): The contract employer did not assure that a contract employee filled out a safe work permit as required by the contracting employer prior to removing a mechanical plug. On August 17, 2012, one (1) contract employee was hospitalized after a mechanical plug installed on

> the High Temperature Shift suddenly came out as an employee was releasing the bolts and struck the employee. The vessel was not checked by the employee for pressure prior to attempting to release the mechanical plug.
>
> The cited standard provides:
>
> The contract employer shall assure that each contract employee follows the safety rules of the facility including the safe work practices required by paragraph (f)(4) of this section.

29 C.F.R. § 1910.119(h)(3)(iv).

A. Does the Standard Apply?

As a preliminary matter, the Court finds that the standard applies for the same reasons discussed in Section VI.A, *supra*.

B. Has the Standard Been Violated?

For the reasons that follow, the Court finds that the terms of the standard were violated.

As noted above, Struble testified that he spoke to a Koch representative in order to procure a safe work permit for the installation of the isolation plug. The Koch representative told Struble that he should sign onto the permit that was already issued to Cust-O-Fab for the hot work that was being performed in the area. (Tr. 210). Struble testified that signing onto another contractor's safe work permit was unusual and that he had worked at other Koch facilities where he was required to obtain his own safe work permits. (Tr. 220). He also testified that the practice of signing onto another contractor's permit was contrary to the requirements expressed in the Koch Industries training video, which was shown during orientation. (Tr. 221). Notwithstanding the foregoing, Struble testified that he signed onto Cust-O-Fab's permit and updated it with information relevant to the work he was going to perform. (Tr. 219). There was

no evidence that [redacted] signed, procured, or even attempted to procure a safe work permit for the removal of the plug.[8] (Tr. 121, 213).

CSHO Elmore testified that he spoke with a Koch representative about its safe work permit system. (Tr. 64). According to this individual, all subcontractor employees performing work in Koch's facility are required to procure a safe work permit. (Tr. 64–65). Thus, in the opinion of CSHO Elmore, the only way Furmanite would be unable to procure a safe work permit is if its employees failed to ask for one. (Tr. 127–128). It is important to note, though, that Elmore did not identify any formal, written rule requiring the use of safe work permits. (Tr. 122).

There is one issue that needs to be resolved in order to determine whether Respondent violated section 1910.119(h)(3)(iv): What, in light of the discrepancy between Struble's and Elmore's testimony, was Koch's work rule regarding the issuance of safe work permits? The Court previously noted that work rules need not be written, so long as they are clearly and effectively communicated. *See Capform*, 19 BNA OSHC 1374 (citing *El Paso*, 16 BNA OSHC at 1425 n.7); *see also Stuttgart Machine Works, Inc.*, 9 BNA OSHC 1366 (No. 77-3021, 1981). Thus, the fact that the particular rule regarding the issuance of safe work permits was not memorialized in a formal document is not fatal to either party's case; however, the fact that there are two competing accounts of how to comply with the rule makes its determination more challenging.

On the one hand, Respondent contends that Koch's alleged refusal to supply Struble with a safe work permit and telling him to sign on to permits previously obtained by Cust-O-Fab "*was* the 'safety rule of the facility'" and thus provided an explanation as to why [redacted] did not

8. According to CSHO Elmore, [redacted] procured a safe work permit for a different job approximately two to four weeks prior to the accident, but that permit was unrelated to the removal or installation of the plug. (Tr. 67–68).

have a permit when he attempted to remove the isolation plug. *Resp't Br.* at 13. On the other, Complainant points to the fact that: (1) Struble testified that signing onto Cust-O-Fab's permit was contrary to the instructions in Koch Industries orientation video, which stated that such permits were required; (2) other Koch facilities required Struble to procure a safe work permit for each job and that the practice of signing onto another contractor's permit was unusual;[9] and (3) the contract documents between Koch and Respondent place the burden of compliance with on-site safety rules on the contractors and therefore it was the obligation of Respondent to resolve any inconsistency.

The Court agrees with Complainant. Although CSHO Elmore's testimony, standing alone, is of questionable value given its reliance on unidentified sources, it is consistent with Struble's testimony regarding the orientation training video and work rules at other Koch facilities and his own actions at the Beatrice facility in requesting a work permit be issued, thereby giving it credibility. Further, the Court is somewhat circumspect about Struble's testimony regarding his conversation with Koch's representative:[10] He testified that he was told to sign onto Cust-O-Fab's permit, and yet the Court cannot find, nor did Respondent attempt to introduce, a safe work permit that corroborates Struble's testimony. (Ex. R-6). Further, the permit that was introduced into evidence (R-6) does not mention, even indirectly, the installation or removal of the plug. (*Id.*). While Elmore's testimony regarding the work rule was corroborated by Struble, there was no evidence to substantiate Struble's claim that Koch required him to piggyback onto Cust-O-Fab's permit.[11] The weight of the evidence compels the

9. At trial this process was referred to as "piggybacking." Neither party has directed to the Court any case law which has specifically has addressed this practice.

10. For the reasons stated herein, the Court gives no weight to Struble's versions of the facts.

11. In addition, Struble offered no testimony as to how he attempted to reconcile his understanding of what the Koch Industries work rule required to what he was told. As the sole person responsible for the work to be performed, and as a prudent and trained supervisor, he should have made those attempts.

conclusion that the work rule required the pulling of an independent permit for the installation and removal of the plug, which did not occur in this case either by Struble or [redacted].

Alternatively, the Court finds that, even if the work rule allowed for piggybacking, Respondent failed to comply with that rule as well. Struble testified that he signed Cust-O-Fab's work permit and that it mentioned the "installation of the Furmanite plug on there" and that it went into detail about the hazards associated therewith. (Tr. 219). The work permit submitted into evidence by Respondent contains no such information relative to the work performed by either [redacted] or Struble. (Ex. R-6). Further, Respondent failed to rebut CSHO Elmore's testimony that [redacted] had failed to procure or even sign onto a Cust-O-Fab permit—there was simply no evidence introduced to show that [redacted] had piggy-backed onto an existing permit for the purpose of removing the isolation plug. Accordingly, the Court finds that Complainant proved that Respondent failed to comply with the terms of the standard.

C. Were Respondent's Employees Exposed to the Hazard?

The Court finds that Respondent's employees had access to the hazardous condition. According to CSHO Elmore, the purpose of obtaining a safe work permit is to ensure that all hazards associated with a specific work activity have been identified and addressed. (Tr. 83). The failure to procure a permit or properly document the hazards associated with a work activity exposes employees to potentially dangerous conditions. (Tr. 67). In this case, [redacted] and Struble were exposed to the hazards associated with hot work occurring adjacent to or on a pipeline, which had an isolation plug installed.

D. Did Respondent have Knowledge of the Hazard?

Respondent also knew, or with the exercise of reasonable diligence, could have known of the violative condition. "The actual or constructive knowledge of an employer's foreman can be

imputed to the employer." *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82–928, 1986). "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381–82 (No. 76–4271, 1981).

According to Commission precedent, both [redacted] and Struble qualify as supervisors. [redacted], according to Olson, was a crew leader and was responsible for directing the work of his crew. (Tr. 181–83). Although he did not have the authority to discipline, the Commission has noted that job titles are not controlling and that the power to hire and fire "is not the *sine qua non* of supervisory status . . . ." *Rawson Contractors, Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003); *see also Kern Bros. Tree Serv.*, 18 BNA OSHC 2064, 2068–69 (No. 96-1719, 2000) (knowledge of crew leader who was responsible for seeing that the work was done safely and properly was imputed to employer even though he had no authority to actually discipline an employee). Struble, by his own admission, was a supervisory level employee. (Tr. 192). Both [redacted] and Struble failed to procure a permit or, alternatively, failed to properly document their activities on an existing permit procured by Cust-O-Fab. As supervisory employees, it was their job to ensure that work rules were complied with, and they failed. The Court finds that [redacted] and Struble had actual knowledge and therefore it is properly imputable to Respondent irrespective of the foreseeability of their actions.[12]

E. Was the Violation Properly Classified as Serious?

12. The Court would note that this case emanates from the 8th Circuit, which has not addressed the question of whether the violative acts of a supervisor can be imputed to an employer on the basis of implied or constructive knowledge without also establishing whether those actions were foreseeable. *See ComTran Group., Inc. v. DOL*, 722 F.3d 1304 (11th Cir. 2013). In the absence of such precedent, the Court has applied Commission case law, which allows such imputation. *See A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007–2008 (No. 85-369, 1991).

The Court finds that the violation was properly classified as serious. The failure to follow safe work rules in an otherwise unfamiliar environment can, and in this case did, result in serious physical injuries. As previously discussed, Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. In this case, [redacted]'s failure to follow Koch's work rules regarding safe work permits not only exposed him to the possibility of a serious physical injury, but he actually suffered a head injury that has caused permanent damage. (Tr. 79, 82).

Based on the foregoing, the Court finds that Complainant has established his *prima facie* case of a violation of Citation 1, Item 3.

VII. Affirmative Defenses

Respondent has proffered two separate affirmative defenses to Citation 1, Item 3. First, Respondent contends that 29 C.F.R. § 1910.119(h)(3)(iv) is unenforceably vague. Second, Respondent argues that the violation was the result of unpreventable employee misconduct on behalf of [redacted]. The Court disagrees on both counts.

A. Standard is Not Unenforceably Vague.

First, though some standards require the use of broad terms that are not necessarily defined within the regulations, the use of those terms does not render a standard unenforceably vague; rather, "it means that an employer must read it in light of the conduct to which it applies and guide his actions accordingly." *Dravo Corp.*, 7 BNA OSHC 2095 (No. 16317, 1980) (citing *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952)). Because specific standards cannot begin to cover all of the infinite variety of hazardous conditions that employees face, general regulations are not constitutionally unenforceable on due process grounds as long as a

reasonableness requirement is read into them. *W.G. Fairfield Co. v. OSHRC*, 285 F.3d 429 (6th Cir. 2002). Although an employer is not required to guess at what the definition means, a standard does not become unenforceably vague simply because an employer must exercise "experience, knowledge, and judgment." *Id.* (citing *Allis-Chambers v. OSAHRC*, 542 F.2d 27, 30 (7th Cir. 1976)).

Respondent takes issue with the phrase "safety rules of the facility." The ordinary meaning of this phrase, it claims, does not give any guidance as to how those rules, regardless of how they are defined, are established. Thus, Respondent expresses confusion as to whether the rules testified to by CSHO Elmore or those testified to by Struble are the actual "safety rules of the facility." Because the standard does not answer such a question, Respondent asserts that the standard is unenforceably vague. The Court fails to see any such issue. As Respondent itself pointed out, the Commission does not require that the rules be written, so long as they are effectively communicated. Respondent's confusion stems not from the failure of the standard, but from its failure to follow up on the disconnect between what Koch typically required (and showed in its video) and what the Koch representative told Struble when he attempted to procure a safe work permit. This is not an instance where Respondent was clutching at straws in an attempt to discern what its responsibilities were at the Koch facility—Respondent had plenty of experience working at Koch facilities and was familiar with their method of operation. In light of this context, Respondent could reasonably use its experience, knowledge, and judgment to guide its actions. If Respondent could not determine what the rules were or if it was unclear as to the source of Koch's rules, it was incumbent upon a reasonably responsible employer to gain clarification from Koch. *See* 29 C.F.R. § 1910.119(h)(3)(iv) (indicating that it is the contract *employer's* responsibility to ensure compliance with facility safety rules); (*See also* Exs. C-10,

C-11). Accordingly, the Court concludes that the standard sufficiently warned Respondent of the conduct required. *See Nat'l Industrial Contractors, Inc. v. Occupational Safety and Health Rev. Comm'n*, 583 F.2d 1048 (8th Cir. 1978).

B. Unpreventable Employee Misconduct Conduct has not been Established.

Second, the Court also finds that Respondent failed to establish the defense of unpreventable employee misconduct with respect to Citation 1, Item 3. In order to prevail on this defense, Respondent must prove that: (1) it has work rules designed to prevent the violation; (2) that it has adequately communicated those rules; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations are discovered. *Burford's Tree, Inc.*, 22 BNA OSHC 1948 (No. 07-1899, 2010). Respondent's arguments with respect to this defense focus entirely on [redacted]'s removal of the plug without the authority or know-how in order to do so. Citation 1, Item 3, however, is a slightly different animal, in that the misconduct at issue is the failure to comply with the rules regarding safe work permits.

With respect to the first element, there was clearly a rule that required contract employees to get a safe work permit prior to engaging in certain types of work. Whether that rule was effectively communicated, however, is less certain. Clearly, Koch Industries may not have been consistent in its application of the safe work permit rule across facilities; however, as noted in the agreement between Koch Industries and Respondent, it was Respondent's responsibility to ensure the safety and health of its own employees and to ensure that its employees complied with all applicable rules and regulations. If there was confusion as to what the rules were, as seems to be the case here, it was incumbent upon Respondent to clarify the misunderstanding and ensure that the rule was consistently applied. This responsibility presumably devolved to Wayne Watts, whom both Struble and Olson referred to as the project manager for Furmanite on the Koch

facility project but about whom little else was said. (Tr. 177, 182, 198). Further, since Struble testified as to his experience regarding the issuance of safe work permits in the past, it was not only an issue that Respondent was aware of, but it illustrated how important it was that Respondent ensured consistent application of the rule. Thus, the Court finds that Respondent failed to effectively communicate the rule to its employees.

As to the last two elements, the Court is not convinced that Respondent established either. With respect to (3), it does not appear as if there was any system in place for Respondent's management to ensure the proper issuance of safe work permits to its employees on Koch's worksite. That is not to say that the issuance of those permits was Respondent's responsibility; rather, because it was incumbent upon Respondent to monitor its own employees' compliance with the rules, Respondent should have been engaged in the permit review process. *See N & N Contractors, Inc.*, 18 BNA OSHC 2121 (holding that employers must exercise reasonable diligence to discern presence of violations, including adequate supervision of employees, inspecting work area, anticipating hazards, and taking measures to prevent occurrence of violations); *see also Burford's Tree*, 22 BNA OSHC 1948 (rejecting defense of employee misconduct because respondent failed to monitor compliance with seatbelt rule on daily basis).

Finally, with respect to (4), although Olson testified that no one had ever attempted to remove a plug without proper training as [redacted] had, Respondent did not introduce any evidence of a disciplinary policy or of its enforcement of any of its safety rules. (Tr. 176). *See GEM Industrial, Inc.*, 17 BNA OSHC 1861 (No. 93-1122, 1996) ("To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred."). Further, the

fact that two supervisory level employees engaged in the violative behavior speaks to the level of oversight exercised by Respondent and the enforcement of its work rules. *See Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1017, 1991), *aff'd without published opinion*, 978 F.2d 744 (D.C. Cir. 1992) ("A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax."). Based on the foregoing, the Court finds that Respondent failed to establish the defense of unpreventable employee misconduct. Accordingly, Citation 1, Item 3 shall be AFFIRMED.

VIII. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to 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. 29 U.S.C. § 666(j). 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 Constr. Co.*, 15 BNA OSHC 2201, 2214 (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. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

Respondent employs over 250 employees. (Tr. 80). The Court agrees with Complainant that the violation was of high gravity—not only were multiple individuals violating the standard at issue, but, in doing so, they were exposing themselves to the potential for very serious injuries.

The injuries suffered by [redacted] illustrate how serious a violation of this nature can be. That said, Respondent has no prior history of violations, which entitles them to a ten-percent reduction in penalty. Accordingly, the Court hereby assesses a penalty of $6,300.

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 1 and the associated penalty is hereby VACATED.
2. Citation 1, Item 2 and the associated penalty is hereby VACATED.
3. Citation 1, Item 3 is AFFIRMED and a penalty of $6,300.00 shall be ASSESSED.

SO ORDERED

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: June 25, 2014
Denver, Colorado