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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 NINETEENTH STREET, SUITE 407
DENVER, CO 80202-407

SECRETARY OF LABOR, Complainant, v. NABORS DRILLING USA, LP Respondent.	OSHRC DOCKET NO. 11-3036

Appearances:

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For Respondent

Before John H. Schumacher, Administrative Law Judge

DECISION AND ORDER

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. § 651*et seq*. ("the Act"). Following a fatal accident at an oil rig operated by Respondent, the Occupational Safety and Health Administration ("OSHA") began an inspection of Respondent's worksite on May 12, 2011. The accident took place on Rig 177 in Williston, North Dakota. As a result of the inspection, OSHA issued to Respondent a Citation and Notification of Penalty

("Citation") alleging a serious violation of 29 C.F.R. § 1910.303(b)(1) and proposing a penalty of $7,000.00 and a second citation alleging a repeat violation of 29 C.F.R. § 1910.305(a)(2)(x) and proposing a penalty of $38,500.00. Respondent filed a timely notice of contest. The hearing in this case was held in Denver, Colorado, on March 4-5, 2014. Both parties have filed post-hearing briefs and the case is ready for decision.

Jurisdiction

In its Answer, Respondent admitted that it is engaged in the business of oil and gas drilling operations, has approximately 6,000 employees, is engaged in a business affecting commerce, and is an "employer" within the meaning of the Act. Therefore, the Court finds that Respondent was an employer within the meaning of sections 3(3) and 3(5) of the Act and that the Commission has jurisdiction over the parties and subject matter of this proceeding.

Background

Oasis Petroleum owns an oil and gas well lease in Williston, North Dakota. To drill the well, it hired Respondent. (Tr. 113). Respondent operated around the clock with both day and night crews. The employees work 12-hour shifts seven days a week. (Tr. 166, 231). This week-long work period is known as a "hitch." Each hitch runs from Sunday through Monday, after which they have seven days off. The shifts rotate, week to week, between day and night. (Tr. 166). A crew consists of five workers plus the boss, called a "tool pusher". (Tr. 231–232).

The rig complex is outfitted with a change house and a parts house. The change house is a climate-controlled building where employees change clothes, hold meetings, and take breaks. It also has lockers where employees keep their personal items. (Tr. 195). Electricity to the change house is provided by a generator that feeds power to a transformer. (Tr. 43, 287, Ex. R-1A). A 480-volt cord, connecting the generator to the transformer, ran along the top of the parts

house and was secured by a piece of rope that tied the cord to a bracket. (Tr. 72, 106, Exs. C-3, min. 6:19-7:00, C-10). Power cords to the various buildings on the site, including the change house, were plugged into the transformer. (Tr. 308).

The 480-volt cord also ran in front of the change house front door, where it was partially covered by a metal grate. (Tr. 39-40, 43, 45).[1] It had been raining heavily over the past several days and both the grate and the cord were partially submerged in mud. (Tr. 61). The grate was approximately 30-inches by 9-inches and had sharp edges. (Tr. 56, 60). It was a surplus piece that was normally used when repairing steps. (Tr. 56). The grate was placed near the door so employees could wipe off their boots before entering the change house. A sharp edge of the metal grate penetrated the insulation of the 480-volt cord, exposing the copper wire. (Tr. 58-60, Exs. C-15, C-16).

On May 9, approximately 40 days after Nabors Rig 177 had been set up, employee [redacted] stepped out of the change house onto the metal grate. Employees heard a groan and saw [redacted] frozen in place while apparently being electrocuted. Marcus Feddick, who was also in the change house, saw that [redacted] hand was on the door knob. He tried to knock [redacted] hand off the knob and got shocked himself. (Tr. 63, 209). He kicked the door open and ran outside. Feddick called to another employee, Dustin Hemilla, for help. Hemilla ran outside to have someone turn off the power. (Tr. 63, 209). Within a minute, the power was turned off. Tool pusher, Bruce Jensen, was awakened and immediately called 911. (Tr. 65, 209–211). [redacted] was carried into the rig manager's shed, where CPR was performed until the paramedics arrived. (Tr. 211). [redacted] died from his injuries. (Tr. 33, Ex. C-2).

Applicable Law

1. The evidence establishes that there was a back door to the change house. (Tr. 64, 185). However, it was the front door that was regularly used by the employees. (Tr. 237).

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To establish a violation of an OSHA standard, Complainant must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e. 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).

Citation 1, item 1

In Citation 1, item 1, Complainant alleges a serious violation of 29 C.F.R. § 1910.303(b)(1) and proposes a penalty of $7,000.00. The cited standard states:

> Electrical equipment shall be free from recognized hazards that are likely to cause death or serious physical harm. Safety of equipment shall be determined using the following considerations:
>
> > (i) Suitability for installation and use in conformity with the provisions of this subpart. Suitability of equipment for an identified purpose may be evidenced by listing or labeling for that identified purpose.
> > (ii) Mechanical strength and durability, including, for parts designed to enclose and protect other equipment, the adequacy of the protection thus provided.
> > (iii) Electrical insulation,
> > (iv) Heating effects under conditions of use.
> > (v) Arcing effects.
> > (vi) Classification by type, size, voltage, current capacity, specific use.
> > (vii) Other factors which contribute to the practical safeguarding of employees using or likely to come in contact with the equipment.

The citation states:

> Electrical equipment was not free from recognized hazards that were likely to cause death or serious physical harm to employees:
>
> > (a) For the employees working around the transformer cord with damage through the outer insulation at various locations along the cord, located at the Ross 5603-42-10H well site near Williston, North Dakota.

1. Applicability

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There is no dispute that, as a general matter, the standards at §§ 1910.302 through 1910.308 apply to the electrical installations and utilization equipment used on the rig. 29 C.F.R. §§ 1910.302–308 apply to electrical installations and utilization equipment installed or used within or on building, structures, and other premises, including (1) yards; (2) carnivals; (3) parking and other lots; (4) mobile homes; (5) recreational vehicles; (6) industrial substations; (7) conductors that connect the installations to a supply of electricity; and (8) other outside conductors on the premises. The 480-volt cord was part of an electric utilization system where several structures, including the parts house and change house, received electricity from an onsite generator connected to an onsite transformer. (Tr. 43-44, 52, 160, Ex. C-20). Furthermore, the 480-volt cord is specifically covered as a "conductor that connects the installations to a supply of electricity." 29 C.F.R. §1910.302(a)(1)(vii). Accordingly, the standard applies.

Respondent argues that the cited standard specifically applies only to "electrical equipment" and that "electrical equipment" does not include cords and cables. Respondent asserts that cords and cables bring power to electrical equipment, but are not themselves electrical equipment. In support, it cites Judge Spies decision in *Trinity Industries, Inc.,* 97 WL 166156 (No. 95-0455, 1997), *aff'd on other grounds* 18 BNA OSHC 1635, *rev'd on other grounds* 206 F.3d 539 (5th Cir. 2000). In that case, Judge Spies found that 1910.303(b)(1) does not apply to damaged cords. The judge stated:

> The fact that the language of the standard is broad is not an invitation to fit every circumstance relating to electrical equipment within its terms. The anticipated hazard addressed by this standard is the danger which comes from the equipment itself. Use of a damaged cord to energize properly functioning electrical equipment may be covered by other standards.

Trinity Industries, Inc., 97 WL 166156.

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Respondent correctly notes that a generally worded standard should not be read in a manner that would render a more specific regulation superfluous. It points out that §1910.303(b) addresses hazards inherent in electrical equipment itself and does not mention cords and cables that provide power. Furthermore, §1910.305(a)(2)(x), (a)(2)(xi), (g) and (h) treat flexible cords and cables as items connected to electrical equipment, but not as "electrical equipment" itself. *E.g.*, §1910.305(g)(1)(ii)(G) ("Flexible cords and cables may only be used for . . . connection of stationary equipment to facilitate their frequent interchange"). In its brief, Respondent highlights Subpart S's frequent references to "cords" and "cables" connecting to (or distinguished from) "electric equipment. " Respondent contends that this demonstrates that cords and cables are excluded from the meaning of "electrical equipment." (Resp. Br. at 17–24).

Despite Judge Spies' decision in *Trinity*, there have been numerous other cases where cords and cables have formed the basis of a 1910.303(b) violation. *E.g.*, *Alabama Salvage Auction Co., Inc., d/b/a Total Resource Auctions*, 2014 WL 1423289, (No. 13-1529, 2014) (1910.303(b)(1), damaged extension cord); *Bardav, Inc., d/b/a Martha's Vineyard Mobile Home Park*, 2012 WL 3642330 (No. 10-1055, 2012) (1910.303(b)(2), improperly installed cable), *directed for review*, March 2, 2012; *Drexel Chemical Co.*, 1995 WL 474130 (No. 94-1460, 1995) (improper extension cord), *aff'd in part, rev'd in part*, 17 BNA OSHC 1908 (1997) (1910.303(b)(2) (*Trinity Industries*, 1990 WL 333238 (No. 88-2691,1990), *aff'd* 15 BNA OSHC 1481, 1487 (1992) (1910.303(b)(1) (improper plug on cord). Although the applicability issues raised here and in Judge Spies' case were not raised in these other cases, the point remains that the standard has a long and frequent history of being applied to cords and cables.

The cited standard is akin to a general duty clause for electrical equipment, in that it requires that electric equipment shall be free from "recognized hazards" that are likely to cause

death or serious physical harm. Like Section 5(a)(1), the Act's "general duty clause," this standard would be preempted by a specifically applicable standard that addresses the cited hazard. *E.g. Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1966-1967 (No. 84-0546, 1991). Here, the alleged hazard is the use of cords or cables with damaged or missing insulation. The cited standard specifically lists "electrical insulation" as one of the considerations when determining the safety of electrical equipment. While Respondent properly points out that specific standards preempt general standards, it fails to point to a standard specifically applicable to cords or cables that would address the cited hazard: the use of cords or cables with damaged insulation.

Furthermore, to restrict the definition of "electric equipment" to exclude cords and cables would create an artificial and disorderly limitation to the standard. Here, for example, the cord at issue here was hard wired into the transformer. (Tr. 227, 290). As such, it was part of the transformer and, therefore, part of the equipment. Under the limitation proposed by Respondent, that cord would not be considered part of the equipment, even though it was a component of it.

The Supreme Court has held that the Commission must defer to Complainant's reasonable interpretation of standards. *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 150 (1991). The Court finds that Complainant's interpretation is reasonable and entitled to deference and, therefore, that the cited standard applies to cords and cables.

2. Compliance

Under the cited standard, Respondent is obligated to ensure that its cords and cables were free from "recognized hazards" that are likely to cause death serious physical harm. Complainant asserts that the 480-volt cord that was running along the top of the parts house had significant damage to its protective insulation. This damage could have electrified the parts

house and could have resulted in the electrocution of employees entering, exiting or coming in contact with it.

Cords and cables with damaged insulation are a recognized hazard. (Tr. 180). Respondent's own training manual recognizes the hazard of damaged insulation, stating: "REMEMBER TO ALWAYS MAKE SURE ALL WIRING IS FULLY INSULATED" (Ex. C-27 at 12).

The evidence establishes that the 480-volt cord was damaged at various places along its length. (Tr. 95). Where the cord ran along the top of the parts house, it had significant sections of missing and damaged insulation, which exposed the bare copper wires below. (Tr. 95, 125-126, Exs. C-3, min. 6:19–7:00, C-10, C-12). These exposed wires could result in employees receiving electric shocks or getting electrocuted. (T. 96, 180). The evidence also shows that the section of the cord that ran along the change house door was damaged when it was punctured by the metal grate. (Tr. 58-60, Exs. C-15, C-16). The insulation on another section of this same cord near the parts house was cut. (Tr. 97, Ex. C-12). The hazard was heightened by the wet and muddy conditions at the site. (Tr. 96).

Based on the foregoing, the Court finds that Respondent failed to comply with the standard.

3. Employee Exposure

Exposure to a violative condition is established when "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). Also, Complainant establishes exposure where he shows "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. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No, 90-2775, 2000). "The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Construction Co.*, 17 BNA OSHC 1229, 1233 (No. 91-2107, 1995).

Employees regularly entered the parts house whenever they needed parts. (Tr. 94). This exposed them to the hazard created by the damaged cord strung along the top of the parts house. (Tr. 97). They also regularly entered the change house by stepping on the metal grate, which had penetrated the cord near the door. (Tr. 96, 167, 170). Thus, Complainant established that employees were exposed to the hazard created by the damaged cord. This conclusion is bolstered by the fact that one of Respondent's employees was electrocuted while stepping onto the metal grate.

4. Knowledge

To establish the requisite employer knowledge, Complainant must show that the employer actually knew, or with the exercise of reasonable diligence could have known of the violation. *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1206 (No. 05-0839, 2010). The Commission has held that an employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work. Specifically, an employer must inspect the area to determine what hazards exist or may arise during the work before permitting employees to work in an area, and the employer must then give specific and appropriate instructions to prevent exposure to unsafe conditions. *Altor*,

Inc., 23 BNA OSHC 1458, 1473 (No. 99-0958, 2011), *aff'd*, 498 Fed. Appx. 145 (3d Cir. 2012); *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980.

Respondent's drilling superintendent, Robert Helde, testified that Respondent's roughnecks check the cables for damage when they set up the rig. (Tr. 290). If any defects are found in a cord, the rig manager is informed, and he calls an electrician to repair the equipment. (Tr. 291). Helde also testified that, every time a rig is mobilized, they go through a 29-page inspection. (Tr. 294, Ex. R-14). The inspection for Rig 177 was conducted on April 23, 2011. (Tr. 294). Respondent points out that it also conducts "hazard hunts," which are *ad hoc* inspections where employees go around the rig and look for potential hazards. If a hazard is found the employee either fixes it or has a third party fix it. Finding electrical hazards is one of the objectives of these hunts. (Tr. 317). These hazard hunts are conducted once per hitch. (Tr. 181, 322). Respondent's employees were not allowed to repair electrical cables. (Tr. 187, 190, 213). Helde testified that, if a damaged cord or cable is found, they are supposed to inform the rig manager, who gets an electrician to come out to repair the equipment. (Tr. 291). Respondent's motorhand, Marcus Feddick,[2] testified that if he saw a cable with damage or tape, he would call an electrician to determine whether the cord should be taken out of service. (Tr. 256–258).

Feddick testified that he never noticed the damaged cable by the parts house even though he walked by the damaged cable above the doorway of the parts house every day. (Tr. 265, 267). He never looked at the cord and does not recall if the damage was there when the cable was strung. (Tr. 269). Robert Helde testified that he never noticed any damage to the cable. (Tr. 290).

2. Feddick explained that a motorhand is in charge of the floorhands and is a problem solver and fixer. If something goes wrong, he gets the call and is expected to find some way to fix the problem so they can continue drilling. (Tr. 193).

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The evidence establishes that rig was set up approximately 16 days before the accident. (Tr. 71). The cords and cables had been set up for approximately two weeks. (Tr. 70). Once the rig is set up, the cables are permanently in place, until the rig is moved again. (Tr. 292). The cords and cables were inspected whenever a rig would be moved. (Tr. 180, 205). The damage to the cord memorialized by the photographs was large and contained jagged edges. It was not the type of damage expected merely from exposure to the elements. This evidence strongly suggests that the damage existed before or shortly after the cords were set-up. Yet, despite its hazard hunts and 29-page inspection, nobody from Respondent ever observed the damage to the sections of the cord that were in plain view.[3] Respondent points out that Section 10 of the 29-page inspection form contains a detailed checklist of electrical issues. Respondent specifically refers to Section 10.1 of the inspection form as evidence that the crew examined cords and cables. (Resp. Br. at 9). However, Section 10.1 only asks whether "[a]ll wires off the ground and secured? Or buried?" Nothing in section 10 asks employees to examine if the cords and cables are damaged.

Helde testified that, only when the damage is severe would he recognize that damage to a 480-volt cord could pose an electrocution hazard. That is why, he asserted, Respondent hires qualified electricians to look at them. (Tr. 301). However, the evidence reveals that, while the wiring is examined upon set-up of the rig, electricians are called in to evaluate damaged wiring only when a crew member detects a situation that might need repair. (Tr. 291) If the drilling superintendent could not recognize when a cord posed an electrocution hazard, the inescapable conclusion is that his subordinates would be even less likely to recognize when a damaged cable should be examined by an electrician. Indeed, master electrician, Wayne Erickson, testified that

3. The 29-page inspection report contains other references to the condition of electrical wiring. Section 10 which apply to electrical, generators and SCR, and asks whether receptacles and plugs are in good condition (Section 10.2). Section 10.3 asks "No splices in electrical wiring (except those completed by approved electrician)?"

he was called to the site after the accident, to perform electrical repair work. (Tr. 152). He was directed to repair or replace anything he found wrong or questionable on the rigs. (Tr. 154). The invoice for his work revealed numerous repairs/replacements for electrical devices other than the 480-volt cord.[4] (Ex. C-22). Had the accident not occurred, Mr. Erickson would not have been called to the site and, despite Respondent's 29-page inspection program and its hazard hunts, these conditions would have continued unabated.

In light of the foregoing, the Court finds that, with the exercise of reasonable diligence, Respondent could have known of the damaged cord surrounding the tool house.

Although the CSHO testified that the cord around the parts house was the primary reason for the item, the evidence also establishes that that section of the cord in front of the change house was damaged by the grate.[5] The citation states that the cord was damaged in various locations. That includes that section in front of the change house entrance. Nobody could recollect when the metal grate was placed in front of the door of the change house or who placed it. (Tr. 131, 186, 196, 293). Yet, there is no evidence that anyone ever inspected the cord to ensure that it was not damaged by the grate. Rather, employees were happy to use the grate to wipe their shoes when entering the change house. Again, had Respondent been reasonably diligent, it would have inspected the cord to ensure that it did was not damaged by the grate.

Accordingly, I find that Complainant has fulfilled his burden of establishing that Respondent knew, or with the exercise of reasonable diligence, could have known of the violation.

4. Among the items repaired/replaced was a "bad plug for mud mixer #1"; a "bad 2033 plug for mud tank lights"; "wiring in water pump shed"; "wiring for drill floor lights"; and "wiring for air compressor #3."
5. Both citations deal with various parts of the same 480-volt cord.

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5. Characterization and Penalty

Complainant asserts that the violation was serious. A violation is serious if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there is a substantial probability that an accident will occur; he need only show that if an accident occurred, serious physical harm would result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984).

The hazards posed by damaged insulation are shock and electrocution, which can result in death or serious physical harm. (Tr. 57, 100) The hazard was exacerbated by the very wet and rainy conditions at the site. Moisture could get inside the cord resulting in shorting. (Tr. 96).

Complainant proposed a penalty of $7,000.00. Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that, in assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the South, Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990).

At the hearing, Complainant was beginning to adduce evidence regarding the propriety of the penalties. (Tr. 90) Respondent interrupted Complainant's examination of the CSHO on this issue and stipulated that, if the violation was affirmed, the penalty was assessed in accordance with Complainant's policies and procedures.[6] (Tr. 90) However, in its brief, Respondent now asserts that the penalty failed to properly consider the quality of its safety program and, therefore, its good faith, when assessing the penalty. (Resp. Br. at 34). The Court shall now address this issue.

6. Those policies and procedures are set forth in the OSHA Field Operations Manual, Chapter 6 and give due consideration to the factors set forth in Section 17(j) of the Act.

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The Court observed, at arm's length, the entire testimony of William H. Dixon. (Tr. 311–380). He was Respondent's Health, Safety and Environmental Director. I found Mr. Dixon's demeanor to be straightforward and to the point on every question put to him, both during direct and cross. I assessed his testimony as very credible. He authored most of Respondent's Health, Safety and Environmental Program. (Tr. 313). During his testimony, Mr. Dixon articulated multiple safety and accident reduction programs the Respondent had implemented over the last several years. (Tr. 314–320). Mr. Dixon testified that Respondent had spent $40,000,000.00 on safety training during 2013. (Tr. 321). During the remainder of his testimony, (Tr. 314–377), Mr. Dixon expanded on a myriad of programs and policies that all centered around preventive safety measures initiated by Respondent. The Court would also note that Mr. Dixon was in Alaska when he was notified of the fatality in the instant case. He immediately flew from Alaska to North Dakota to begin assessing the situation. (Tr. 332–333).

Having considered the entire record, and specifically the testimony of Mr. Dixon, the Court is convinced by the totality of the evidence that Respondent had in place, prior to the fatality, a series of programs and policies that emphasized worksite safety. As just one example of its good faith, Respondent had spent $40,000,000.00 on safety training during 2013. (Tr. 321). Having likewise considered the entire record again, and specifically the testimony of Assistant Area Director Scott Overson, Respondent will not receive a penalty reduction for size, gravity or history. (Tr. 98–102). Accordingly, the $7,000.00 proposed penalty is not appropriate. Respondent will receive a good faith adjustment of $2,000.00. An adjusted penalty of $5,000.00 will be assessed.

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Citation 2, item 1

In Citation 2, item 1, Complainant alleges a repeated violation of 29 C.F.R. § 1910.305(a)(2)(x) and proposes a penalty of $38,500. The cited standard states:

> Flexible cords and cables shall be protected from accidental damage, as might be caused, for example, by sharp corners, projections, and doorways or other pinch points.

The citation alleges:

> Flexible cords and cables were not protected from accidental damage, as might be caused, for example, by sharp corners, projections, and doorways or other pinch points:
>
> (a) For the employee who suffered fatal injuries resulting from contact with a metal grate that had penetrated through the insulation of a 480-volt power cord that was running along the ground….

I. Are Citation 1 and Citation 2 Duplicative?

Respondent asserts that citations are duplicative if they involve substantially the same violative conduct, and essentially require the same means of abatement. *Capform,* 13 BNA OSHC 2219, 2224 (No. 84-556, 1989); *Cleveland Consolidated, Inc.*, BNA OSHC 1114, 1118 (No. 84-696, 1987). Respondent argues that both citations address the same hazard: damage to the transformer cable. Similarly, abatement for both citations is identical: removal of the transformer cable. Therefore, Respondent argues that the two citations are duplicative of each other and that one of the two citations should be vacated.

Under Commission precedent violations are considered duplicative only where they require the same abatement conduct or where abatement of one citation will necessarily result in abatement of the other item as well. *General Motors Corp.*, 22 BNA OSHC 1019, 1024 (No. 91-2834E, 2007); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207 (No. 87-2059, 1993); *Flint*

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Eng. & Constr. Co., 15 BNA OSHC 2052, 2056–57 (No. 90-2873, 1992); *R & R Builders*, 15 BNA OSHC 1383, 1391–92, 1991 (No. 87-2059, 1993). That is not the case here.

In Citation 1, Item 1, Respondent was cited for violating 29 C.F.R. §1910.303(b)(1), because it failed to remove defective cords or cables. Citation 2, Item 1 alleged a violation of 29 C.F.R. § 1910. 305(a)(2)(x), because Respondent failed to protect cords or cables from damage. The two citations represent two separate duties. First, an employer has a duty to adequately protect a cable from damage. Second, when a cord or cable is damaged, it has the duty to remove that cable from service. Although both items could have both been abated by replacement of the cord, had Respondent merely placed the new cord back below the sharp edged metal grate, it is likely that the cord would again have been pierced, thereby exposing employees to the hazard of electrocution. Thus, mere replacement of the cord would not have abated Citation 2, Item 1. Additional measures would have been required to protect the cord from the metal grate. Because the two citations required separate abatement measures, these citations are not duplicative.

1. Applicability

For reasons given for the applicability of 29 C.F.R. § 1910.303(b)(1), I find that the cited standard applied to the 480-volt cord.

2. Compliance

As noted, a sharp edge of the metal grate penetrated the insulation, leaving exposed copper wire. (Tr. 58-60, Exs. C-15, C-16). On May 9, 2011, [redacted] was electrocuted when he exited the change house and stepped onto the metal grate.[7] The OSHA inspection revealed

7. Before the investigation, Respondent suspected that [redacted] might have died from a heart attack. The autopsy report revealed electrocution to be the cause of death. (Tr. 33, 35, 395, Ex. C-2).

that the grate was electrified when its edge pierced then contacted the copper wire of the cord. (Tr. 59-60, Ex. C-16).

It could not be determined when the grate was placed in front of the change house or by whom. (Tr. 131, 186, 196). Respondent's employee, Marcus Feddick, who was working at the time of the accident, testified that, although the cord was there on his earlier hitch, he was certain that the grate was not present eight days earlier, the last day of his prior hitch. (Tr. 197, 252, 258). The lead driller told the CSHO that the grate had been there the entire time of his hitch, or about seven days. (Tr. 70). Jensen told the CSHO that the grate was in place when he arrived for the start of his hitch, about three days earlier. (Tr. 70). Respondent's drilling superintendent, Robert Helde, testified that Respondent does not use metal grates and did not know where it came from. (Tr. 293).

Regardless of who placed the grate in front of the change house entrance, or when it occurred, no attempt was made to protect the cord from its sharp edges. Insofar as Respondent failed to take any measures to ensure that the cord was protected from the sharp edges of the metal grate, it failed to comply with the terms of the standard.

In his brief, Complainant further alleges that the cord was exposed to accidental damage from foot traffic and from vehicle traffic where vehicles may have swerved and gone over the edge of the dirt roadway and over the cord. (Compl't Br. at 12). However, there is no evidence in the record to support Complainant's assertion that this cord could be damaged from foot traffic.[8] Similarly there is no evidence to support Complainant's assertion that the cord was

8. William Dixon, Respondent's health, safety and environmental director, testified that, in general, cords can be damaged from foot traffic. (Tr. 375). However, he did not testify how such damage would occur or if merely stepping on a cord could cause damage. He also agreed that employees could step on the 480-volt cord when exiting the change house. (Tr. 376). Absent any evidence how stepping on a cord would cause damage, the record does not support a conclusion that employees stepping on the change house cord would create a hazard. Variables abound, i.e., thickness of the insulation, frequency of stepping on the cord, nature of the shoes (cleated or plain).

exposed to errant vehicular traffic. There is no evidence demonstrating precisely where the cord was in relationship to the road or if any obstacles might have been located in a manner that would have stopped an errant vehicle before it hit the cord.[9] Therefore, I find that Complainant's assertion of a hazard posed by foot and vehicular traffic is merely speculative and not supported by a preponderance of the evidence.

I would also note that the Citation specifically mentioned the hazard posed by the grate, but said nothing about hazards from foot or vehicular traffic. The first clear assertion of these additional hazards came in Complainant's post-hearing brief. Accordingly, the issue was not tried by the implied or express consent of the Respondent and, under Federal Rule of Procedure 15(b), it would be inappropriate at this juncture to amend the citation to allege these additional hazards.

3. Employee Exposure

The evidence establishes that employees regularly used the change house to change clothes, have meetings, take breaks, and access their lockers. (Tr. 44, 167, 195, 259). Employees entered the change house through the front door with the metal grate. As they entered the change house, they would step on the grate and wipe their shoes to reduce the amount of mud they would track into the change house. (Tr. 167, 170). Accordingly, Complainant has established that employees were exposed to the hazard of electrocution posed by contact between the damaged 480-volt cord and the metal grate.

9. The evidence establishes that the cord ran very close to the change house door, suggesting that any errant vehicle that ran over the cord would also likely have run into the change house, exposing employees to vehicular injury. However, Complainant does not suggest that the configuration of the site was such that employees were exposed to a hazard from errant vehicles.

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4. Employer Knowledge

Respondent argues that the evidence fails to establish either actual or constructive knowledge of the violative condition and, therefore, that the citation must be vacated. Respondent relies heavily on the failure of the evidence to establish when the grate was placed in front of the change house or who placed it. Respondent asserts that there is no evidence that any member of Respondent's management had actual knowledge that the cord was damaged by the grate. It contends that the crew had just returned from seven days off and that the first time the crew saw the grate was at the start of the 6 p.m. shift. (Tr. 196). Furthermore, drilling superintendent Butch Helde testified that he did not notice the metal grate in front of the change house the last time he visited the rig, approximately two weeks earlier. (Tr. 292).

As to constructive knowledge, Respondent argues that it took reasonable steps to enforce its rules, including the exhaustive 29-page assessment of the safety rig, which included a section dedicated solely to electrical safety. It points out that several witnesses testified that Respondent's management, safety personnel, and employees routinely check job conditions and ensure that employees are observing safe working practices. (Tr. 318–319, 321–322, Ex. R-14)

Respondent's argument misses the point. The issue is not whether it had actual or constructive knowledge that the cord was damaged by the metal grate. The issue is whether it had knowledge that the cord was not protected from the possibility of damage from the sharp edges of the metal grate.

Respondent's safety program includes a program it refers to as to ABBI. Under this program, if an employee approaches a situation, he is instructed to look at it from above, below, behind and inside. (Tr. 218). There is no dispute that Respondent knew of the presence of both

the grate and the cord. Yet, even though the grate was placed on top of the 480-volt cord, it never occurred to anybody to look below the grate to ensure that it did not damage the cord.

Drilling superintendent Helde testified that the 480-volt cord was unprotected and that it was the duty of the rig manager, roughnecks and floorhands to protect the cords from accidental damage. (Tr. 305). He also testified that, if they had more linebackers,[10] they would have placed one over the cord running to the change house. However, they did not have any available. (Tr. 306). This testimony clearly establishes that the Respondent knew that the cord was exposed and unprotected. It also knew that the use of linebackers would have provided the requisite protection, including protection from the metal grate. Yet, when the metal grate appeared over the cord, nobody took any measures to ensure that the grate was not causing damage.

As drilling superintendent, Helde had an obligation to obtain the linebackers and protect the cord. Instead, he chose to do nothing. His failure to insist that a linebacker be obtained to protect the cord, gave imprimatur to employees to leave the cord unprotected. As drilling superintendent, Helde's knowledge is imputed to Respondent, and establishes that Respondent had constructive knowledge of the violation. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994).

5. Characterization

Complainant alleges that Citation 2, Item 1 is a repeat violation. The repeat allegation is based on a citation issued on December 28, 2007 and resolved through an informal settlement agreement signed on January 8, 2008. That citation alleged a violation of 29 C.F.R. §1910.305(a)(2)(iii)(G).[11] To establish that the earlier citation became a final order of the

[10] A linebacker is a fiberglass, insulated device used to house cords, hoses, cables so they don't get crushed or damaged. When placed, machinery can be driven over them. They are also put in walkways because they eliminate tripping hazards. (Tr. 203, Ex. R-1B-1D).

11. The underlying citation was based on a standard that was replaced by the current standard and ceased to exist on

Commission, Complainant introduced relevant parts of the informal settlement agreement. (Ex. C-26).

The standard in the underlying citation has since been renumbered and modified. Its closest parallel is the currently cited standard, 29 C.F.R. §1910.305(a)(2)(x). The standard cited in the underlying citation, 29 C.F.R. §1910.305(a)(2)(iii)(G), stated:

> Flexible cords and cables shall be protected from accidental damage. Sharp corners and projections shall be avoided. Where passing through doorways or other pinch points, flexible cords and cables shall be provided with protection to avoid damage.

The original citation alleged that:

> Flexible cords and cables of temporary circuits were not protected from damage in that
>
> (a) On or about October 28, 2007 employees were exposed to injury in that, a flexible cord lying on the ground had been run over by vehicles.

Asserting that the current violation was not properly characterized as "repeat," Respondent raises several arguments.

Respondent first argues that Complainant's documentation regarding the informal settlement is defective and insufficient to establish the underlying citation upon which a repeat violation can be based. (Ex. C-26). Specifically, Respondent asserts that the exhibit fails to provide competent evidence of a final order date. It asserts that only three things may qualify as a final order:

1) 15 days after issuance of a citation to which no Notice of Contest ("NOC") is filed;

2) A failure-to-abate notice where the employer fails to notify Complainant of its intent to contest the citation or proposed penalty; and

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August 13, 2007, prior to the date of the underlying citation. *See* 72 Fed. Reg. 7136 (Feb. 14, 2007). Whether the underlying citation was invalid because it was based on a rescinded standard cannot be challenged here. A party cannot launch a collateral attack on citations that have become final orders of the Commission. *Dun-Par Engineered Form Co.*, 8 BNA OSHC 1044, 1051 (No. 16062, 1980), *aff'd,* 676 F.2d 1333 (10th Cir. 1982).

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3) A report of an ALJ, which becomes a final order of the Commission within 30 days after such report, unless directed for review.

Nowhere, Respondent asserts, is there a provision stating when informal settlements can become a final order of the Commission. In support of this proposition, Respondent cites to an unreviewed judge's decision in *HRD Masonry*, 13 BNA OSHC 1029 (No. 86-0221, 1986). In that decision the judge stated that there was no statutory provision for finality of an informal settlement and that, not having been submitted to the Commission, the agreement lacks the finality to constitute the basis for a repeat. However, the judge also stated:

> [B]y the terms of the informal settlement agreement HRD waived its right to contest the citations, so it is apparent that no notice of contest was filed. Where no notice of contest is filed, the citations may nevertheless form the basis for a subsequent "repeat" citation.

HRD Masonry, 13 BNA OSHC 1029.

What the judge failed to recognize is that a defining element of an informal settlement is that no NOC has yet been filed. There are legions of cases where repeat violations have been affirmed based on informal settlements. *E.g.*, *Mike Neri Sewer & Water Contractor*, 24 BNA OSHC 1676 (No. 11-1915, 2013); *Ingalls Shipbuilding, Inc.*, 19 BNA OSHC 1323 (No. 99-1662, 2000); *MLB Industries, Inc.*, 12 BNA OSHC 1525 (No. 83-0231, 1983). In *Suttles Truck Leasing, Inc.*, 20 BNA OSHC 1953 (2005), the Commission clearly recognized that an uncontested citation, which results in an informal settlement agreement, can form the basis of a repeat violation where the evidence otherwise establishes the requisite factual similarity.[12]

12. Respondent agrees that the settlement is dated January 8, 2008. An interesting question would be whether the 15-day contest period counts from the date of the original citation, or the date the informal settlement is signed. That is not an issue that need be resolved here. Whether the date is measured from the time of the original citation, or signing of the informal settlement, this case was initiated by an inspection that occurred in May 2011, years after either date. By any reckoning, the underlying citation has long been a final order of the Commission.

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Respondent next argues that there was a sufficient lack of similarity between the two citations to allow the earlier citation to form the basis of the repeat. "A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996). However, where a repeat citation is based on a different standard, the burden is on Complainant to show that the two situations were substantially identical and that there is a sufficient similarity of circumstances to justify a repeat characterization. *J.L. Foti Constr. v. OSHRC*, 687 F.2d 853, 856 (6th Cir.1982); *Monitor Construction Co.*, 16 BNA OSHC 1589, 1593 (No. 91-1807, 1994). Respondent asserts that the requisite similarity of circumstances is not present. It points out that the underlying citation was concerned about protecting cords and cables from vehicular traffic. Here, however, the concern was limited to protection from "corners, projections, and doorways or other pinch points" and had nothing to do with potential damage from vehicular traffic.

Complainant argues that the only factual distinction between the two citations is that, in the underlying citation, Respondent was cited for failing to protect the electrical cord on the ground as it ran across the roadway, whereas in the instant citation, Respondent failed to protect the electrical cord as it ran across the ground along an employee footpath. This, Complainant asserts, is not a material distinction. In both instances, employees were exposed to an electrocution hazard because an electrical cord was left unguarded while lying on the ground. (Compl't Br. at 16). Complainant cites to *FMC Corp.*, 7 BNA OSHC 1419 (No. 12311, 1979), where the Commission rejected the employer's argument that a violation could not be "repeated" unless it was "repeated under the same circumstances as the preceding violation." 7 BNA OSHC at 1421. The Commission noted:

> Each violation created the same hazard—a tripping hazard. The only distinction among the various violations is the precise locations of the violative conditions on the ship. The fact that the violations occurred at different worksites is not a relevant factor in determining whether a violation is repeated. It clearly follows, therefore, that a difference in the location of violations at the same worksite is not a relevant consideration.

Id.

Based on *FMC*, Complainant concludes that it does not matter whether the violation occurred in a road or in front of a doorway. Whether by foot or by vehicle, the relevant fact is that Respondent failed to protect an electrical cord while it was on the ground running across the worksite. As a result of the earlier citation, Respondent adopted the use of linebackers to protect electric cords. Here, Helde testified that if another linebacker were available, he would have placed it on the section of cord in front of the change house. Duke Dixon, Respondent's safety director, acknowledged Respondent's obligation to protect the cord from traffic. (Tr. 375). In both instances, employees were exposed to an electrocution hazard because an electrical cord was not protected while running along the ground.

The Court finds that the two standards differ semantically, and although similar, there are substantive differences between the original standard, 29 C.F.R. §1910.305(a)(2)(iii)(G) and the current standard, 29 C.F.R. §1910.305(a)(2)(x). The original standard, 29 C.F.R. § 1910.305(a)(2)(iii)(G) stated that:

> Flexible cords and cables shall be protected from accidental damage. Sharp corners and projections shall be avoided. Where passing through doorways or other pinch points, flexible cords and cables shall be provided with protection to avoid damage.

The current standard, 29 C.F.R. § 1910.305(a)(2)(x) states that:

> Flexible cords and cables shall be protected from accidental damage, as might be caused, for example, by sharp corners, projections, and doorways or other pinch points.

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Because of the difference between the standards, the issue is whether Complainant met his burden to establish that the two violations were substantially similar. Complainant asserts that, in both instances, the hazard was electrocution. Complainant defines the hazard too broadly. Under Complainant's theory, dramatically different circumstances could form the basis for a repeat violation where the hazard in both instances is electrocution. To determine whether the circumstances were substantially similar, we must look beyond the nature of the injury and consider the factual circumstances of the violations.

The purpose of a repeat violation is to provide a financial incentive for employers to comply with the safety requirements of the Act.[13] To effectuate this policy, the violations must be sufficiently similar to make the employer aware that its safety precautions are inadequate. *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 841 (4th Cir. 1978). In *George Hyman Constr. Co.*, the court found that a violation for stacking material within ten feet of an exterior wall on a construction site was not substantially similar to an earlier citation of the same standard because material was stacked next to a floor opening. 582 F.2d at 841-842.

In *Cagle's, Inc.*, 21 BNA OSHC 1738 (No. 98-0485, 2006), the Commission found a lack of substantial similarity even though both citations involved the same standard. The first citation in *Cagle's* alleged that the employer failed to label cleaning and sanitation chemicals. The "repeat" citation alleged a failure to label containers holding waste bread mixed with CO_2. Finding nothing in the prior citation that would have made Cagle's "particularly alert for the condition that brought about the second citation," the Commission found that the prior violation was insufficient to place Cagle's on notice that it needed to label containers only temporarily holding a food/chemical mixture of CO_2 gas.

13. The maximum penalty for a serious violation is $7,000.00, while the maximum penalty for a "repeat" violation is $70,000.00. 29 U.S.C. §§666(a) & (b), Sections 17(a) & (b) of the Act.

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Here, the original citation plainly states that the hazard was from vehicular traffic and was issued because Respondent allowed unprotected cords to run along a driveway where they could be run over and damaged by vehicles. In contrast, the current citation states that the violation was for Respondent's failure to protect the cord from contact with the sharp edges of a metal grate that penetrated the insulation of the cord. Nowhere does the citation make any reference to vehicular traffic. Complainant asserts that, here, the cords were in danger of an errant vehicle slipping into the cord due to the wet and muddy conditions. However, as noted *supra*, that hazard was never alleged in the citation and was not tried during the hearing.

In the underlying citation, running electric cords across a driveway may have been necessary to provide electricity to certain areas of the worksite. Here, the grate was a convenience to employees that was placed at an unknown time by an unknown person after the cable had already been placed. That both hazards could be abated by the use of linebackers is not sufficient to establish the requisite substantial similarity to support a "repeat" characterization.[14] Here, the citation could have been avoided by simply not placing the grate over the cord or moving the cord so it didn't lie under the grate. Neither of these actions would have required use of a linebacker.

Although not "repeated," Complainant has established that the hazard exposed employees to the hazard of electrocution and was properly characterized as serious. Under section 17(a) of the Act, 29 U.S.C. §666(a), the maximum penalty for a repeat violation is $70,000.00. Under section 17(b) of the Act, 29 U.S.C. §666(b), the maximum penalty for a serious violation is $7,000.00. Because the item is affirmed as serious rather than repeat, a substantial reduction in the penalty is required.

14. I would also note that, even if it were determined that the cited standards were the same and, therefore, that Complainant made a *prima facie* showing of "substantial similarity," Respondent has successfully rebutted that showing.

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Respondent is a very large company. It is one of the largest land-based oilfield drilling contractors in the United States. (Tr. 378). Respondent has a prior history of serious violations. Although Respondent has an extensive safety program, it failed to take the reasonable measures that could have prevented the violation.[15] Most importantly, however, the gravity of the violation was extremely high and heightened by the wet and muddy conditions the cord and grate were lying in. (Tr. 99). This could and indeed did result in electrocution and death. On this record, the Court finds that the maximum penalty of $7,000.00 is appropriate.

ORDER

Based on the foregoing findings of fact and conclusions of law set forth in this decision, it is ORDERED that:

1. Citation 1, Item 1 is hereby AFFIRMED as a serious violation of 29 C.F.R. § 1910.303(b)(1) is AFFIRMED and a reduced penalty of $5,000.00 is ASSESSED.

2. Citation 2, Item 1 is hereby MODIFIED to a serious violation of 29 C.F.R. § 1910.305(a)(2)(x), AFFIRMED as modified and a penalty of $7,000.00 is ASSESSED.

SO ORDERED.

/s/
The Honorable John H. Schumacher
U.S. OSHRC Judge

Dated: Sept. 22, 2014
Denver, CO.

15. For example, Mr. Helde recognized that the cord should have been protected by a linebacker, but chose to do nothing when he learned that none were available.