COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 4813-11

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v.

SCHINDLER ELEVATOR CORPORATION — RESPONDENT

AND

KOSHRC NO. 4817-11

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v.

JEWISH HOSPITAL AND ST. MARY'S HEALTHCARE, INC.
D/B/A STS. MARY & ELIZABETH HOSPITAL — RESPONDENT

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Hon. Susan L. Draper, Frankfort, for the Secretary. Hon. Paul J. Waters, Clearwater, Florida, for Schindler Elevator Corporation. Hon. Timothy H. Napier and Hon. Victoria E. Boggs, Louisville, Kentucky, for Sts. Mary & Elizabeth Hospital.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us from Schindler Elevator Corporation's ("Schindler's") and Sts. Mary & Elizabeth Hospital's ("SMEH's") timely petitions for discretionary review of our hearing officer's recommended orders. We granted review and asked for briefs. *See* 803 KAR 50:010, Section 48. For the reasons discussed herein, we will: (1) dismiss all of the Items of Citation 1 against Schindler except for Item 12b; (2) affirm Citation

2 and Item 12b of Citation 1 against Schindler; (3) dismiss Items 1a, 1b, 2a, 3b, 3c, 4, and 6 of Citation 1 against SMEH; and (4) affirm Items 2b, 3a, 5a and 5b of Citation 1 against SMEH. We further find that a reduction of penalty is appropriate for each of the items affirmed.

Standard of Review

KRS § 336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky Occupational Safety and Health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the Commissioner of the Department of Workplace Standards issues citations. KRS § 338.141 (1). If the cited employer notifies the commissioner of his intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission ("Review Commission") "shall afford an opportunity for a hearing." KRS § 338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS § 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the Review Commission, which may grant the PDR, deny the PDR, or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Secretary of Labor v. O.S.H.R.C.,* 487 F.2d 438, 441 (8th Circ. 1973), the Eighth Circuit said when the Commission hears a case it does so "de novo." *See also Accu-Namics, Inc. v. O.S.H.R.C.*, 515 F.2d 828, 834 (5th Circ. 1975), where

the Court said "the Commission is the fact-finder, and the judge is an arm of the Commission . . ."[1]

As stated by our Supreme Court in *Secretary of Labor v. Boston Gear, Inc.*, 25 S.W.3d 130, 133 (Ky. 2000), "[t]he review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another." *Terminix International, Inc. v. Secretary of Labor*, 92 S.W.3d 743, 750 (Ky. Ct. App. 2002).

Facts and Summary of Proceedings[2]

SMEH contains several banks of elevators within its building located in Louisville, Kentucky. Schindler has an exclusive contract to maintain and service those elevators. The B-Bank contains four elevators, B1 through B4. The doors to B3 and B4 are directly across the hallway from B1 and B2. *See* Exhibit 63, 71. Each elevator car and its associated hoisting cables are contained within an approximate five-story shaft (hoistway). To enter the hoistway (other than by entering the car itself), a person must use a lunar key to unlock a hoistway door on a floor other than where the elevator car is positioned. An interlock otherwise disables the door when the elevator car is not directly behind it.

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[1] *See* Federal Commission rule 92 (a), 29 CFR §2200.

[2] The facts discussed in this section are relevant to several items of the citations. We discuss other facts in conjunction with our analysis of each item of the citations.

Each elevator car attaches to several redundant steel cables, which extend up the hoistway to a penthouse, around the sheaves of an electric motor-driven hoist mechanism and then back down to a counterweight that is also located in the hoistway. *See* Exhibit 36, 61. The hoist motor turns the sheaves, which in turn pulls on the cables causing the elevator to either move up or down. The counterweight will move in the opposite direction as the elevator. The elevator industry refers to this type of elevator as a traction elevator.

The hoistways include a pit located in the area below which the elevator car does not travel. *See* Exhibit 9, 61. There is a permanently affixed ladder in the hoistway reaching into each pit accessed by elevator personnel via the elevator door on the ground floor. *See id.*; Exhibit 78, 80. A four-foot high safe space exists between the floor of the pit and the bottom of the elevator car at its lowest level.

On December 1, 2010, an elevator car crushed Schindler mechanic Bill Motley to death while he was on the affixed ladder in the hoistway of the B1 elevator at SMEH. Schindler notified the Labor Cabinet's Division of Workplace Standards after which compliance officer, Seth Bendorf, reported to the site later that day and interacted with a Schindler mechanic named Jerry Hauck. Mr. Bendorf investigated the incident and inspected the site on several days, including December 2, 2010, during which time Mr. Bendorf observed two Schindler mechanics, Jason Pryor and Randy Woosley perform work on the counterweight guard located in the B3 elevator pit. The counterweight guard replacement was directed by Kentucky elevator inspector, Larry Layman.

The record evidence does not reveal why Mr. Motley entered B1 hoistway on December 1st. SMEH had reported a problem with the second floor door on its B4 elevator to Schindler on November 29, 2010. Mr. Motley responded the next day and worked on the B4 door continuing into December 1st. When hospital staff discovered Mr. Motley's body in the hoistway of B1, the top of the B4 elevator car was level with the second floor. Hospital employees observed Mr. Motley throughout the day working on top of the B4 elevator car prior to his death.

Schindler, and the entire elevator industry for that matter, has implemented procedures to prevent unexpected elevator car movement from injuring its employees while they work in hoistways. Schindler trains its mechanics to either lock out the elevator car, if they do not need power to the elevator to perform the maintenance work, or to utilize safe hoistway access procedures, if they need power to perform the work. The Secretary takes issue with the latter procedure, contending that it fails to provide adequate safety to Schindler's mechanics.

Safe hoistway access procedures direct the mechanic to employ and verify the function of at least two redundant safety controls that disable the elevator car prior to entry into the hoistway. When used correctly, these procedures prevent the elevator from responding to call buttons in the car or hallways and unexpectedly moving while a mechanic enters the hoistway to access the pit or the top of the elevator car. *See* Hoistway Access Procedures, Exhibit 38, 81. Schindler offered substantial testimony about the reliability of these procedures, which the Secretary failed to rebut. *See* Day 2, p. 165 – 67; 185; Day 3, p. 128 - 129. In fact, the public

takes for granted that the door interlock works each time they enter into an elevator. Even though these procedures are reliable, Schindler's employee training and written policies stress that mechanics shall use lockout/tagout to perform work when power to the elevator is not required. *See* Exhibit 81.

To access the pit using safe hoistway access procedures, the mechanic enters the elevator and pushes two upper floor buttons to make the car go up. The mechanic exits the elevator and while the car moves away, the mechanic uses a door unlocking key to open the door interlock. The mechanic will then open the hoistway door no more than six inches. Opening the door opens a contact in the motor controller circuit for the hoist motor, which in turn de-energizes the motor and stops the elevator. The mechanic verifies that the elevator car stops as expected and places a door wedge in the sill to prevent the door from closing. The mechanic then pushes a pit stop switch, which elevator code mandates be located near the door, and turns on the pit light. Pushing the pit stop switch opens yet another contact in the motor controller circuit, which independently will prevent movement of the elevator car even with the door shut. To verify that the pit stop switch is working, the mechanic removes the door wedge, closes the elevator door, and attempts to call the elevator with the push buttons in the hallway. At least ten seconds after pushing a button, the mechanic opens the door again to make sure that the elevator has not moved. The mechanic

will then open the door completely, placing the door wedge back into the sill. Once the mechanic is in the hoistway, he leaves the door open approximately five inches.[3]

Elevator mechanics must also access the top of cars to perform maintenance on the door mechanisms and sometimes ride the car up and down to inspect its operation. To access the top of the B-bank elevators using safe hoistway access procedures, the mechanic enters the elevator and pushes the elevator buttons in the car so that it will travel at least two floors below. He exits the elevator and as the elevator moves away, the mechanic will open the door no more than six inches to verify the elevator has stopped at a safe access position and the interlock is working. The mechanic then turns the stop switch on top of the car to "stop." He closes the door, places a hall call, waits ten seconds, then reopens the hoistway door about six inches to make sure that the car did not move. Then, the mechanic flips the inspection mode switch from normal to inspection, and puts the stop switch back to run. When in inspection mode, the hoist motor operates at a much slower speed than normal, the hall and car calls no longer control the elevator hoist motor, and the hoist motor will only respond to a pendant controller located on the top of the elevator car. The hoist motor will only turn on while the mechanic holds down a button on the controller. To verify that the inspection switch is operational, the mechanic closes the door, places a hall call, and then reopens the door to make sure that the elevator did not move. The mechanic will open the door completely, insert a wedge tool and put

[3] The door is wedged open only five inches to protect members of the public from accidentally falling into the pit.

the stop switch to stop. The mechanic then steps on top of the elevator car. Once safely on top of the car, he removes the door wedge, closes the door, puts the stop switch to run and verifies that the pendant controller works correctly. If the pit stop switch is pushed, the elevator stop switch at the top of the car is on stop, or the hoistway door is open, the hoist motor will not start even if a mechanic attempts to move the elevator using the pendant controller with the elevator in inspection mode.

Even though we can only speculate as to why Mr. Motley entered into B1 hoistway, he inexplicably failed to implement lockout/tagout or safe hoistway access procedures that were in place to protect him from the hazard that killed him. He did not even turn on the pit light. As discussed more below in conjunction with the alleged lockout/tagout violations, Schindler did not have constructive knowledge of Mr. Motley's reckless entry into B1.

Mr. Motley had locks in his vehicle and near where he was working on B4. When hospital staff discovered Mr. Motley's body in B1, B4 was in inspection mode and the hoistway door closed. Mr. Motley had neatly packed up his tool bag and left it on top of the B4 car. Mr. Pryor opined that Mr. Motley had completed work on the elevator door and was probably testing and making fine adjustments to the door just prior to going downstairs and entering into B1. According to Mr. Pryor, Mr. Motley needed power to perform these adjustments on B4. *See* Day 2, p. 218 - 219. The Secretary only speculated how Mr. Motley addressed the hazard posed by the elevator car while on top of B4.

On December 2nd, Mr. Layman inspected all of the B-bank elevators after the incident. He noticed that the counterweight guard in B3 elevator pit was off and directed Messrs. Pryor and Woosley to re-install it over the counterweight. The two mechanics locked out the elevator and reinstalled the guard. Both mechanics exited the pit and removed their locks from the elevator disconnect.

The two mechanics had to test the guard to make sure that the counterweight did not rub against it while the elevator was operating. Mr. Pryor testified that he positioned himself in the pit where the elevator car did not travel while Mr. Woosley had control of the car in inspection mode. There is significant void space in the B3 hoistway between one side of the car and the hoistway wall. This void space is about four feet wide and located on the same side of the pit as the counterweight guard. Mr. Pryor positioned himself there to observe the counterweight sliding past the guard and to make minor adjustments to the guard's position after noticing some rubbing. As stated above, the elevator car's limit of travel also stops four feet short of the pit floor. To get the counterweight to move, Mr. Woosley operated the car in inspection mode. The two men were close enough to communicate without radios and the elevator traveled at a controlled and slow speed.

Mr. Bendorf stood outside the door and could not observe these operations. He insisted that Mr. Pryor should not have been in the pit without the elevator locked out. Locking out the elevator, however, would have prevented testing of the counterweight guard.

Secretary's Burden of Proof

For each standard-based item of the citations, the Secretary must prove four elements by a preponderance of evidence:

> (1) the applicability of the standard;
> (2) the employer's noncompliance with the terms of the standard;
> (3) employee access to the violative condition; and
> (4) the employer's actual or constructive knowledge of the violation.

Bowlin Group, LLC v. Secretary of Labor, 437 S.W.3d 738, 744 (Ky. Ct. App. 2014) (quoting *David Gaines Roofing, LLC v. KOSHRC*, 344 S.W.3d 145, 148 (Ky. Ct. App. 2011)).

The Secretary claims that the Respondents violated the general duty clause as an alternative to the alleged violation of a standard governing guarding of machines. To sustain a general duty citation, the Secretary must prove:

> (1) that the employer failed to render its workplace 'free' of a hazard which was;
> (2) 'recognized;'
> (3) and 'causing or likely to cause death or serious physical harm; and
> (4) the Secretary must . . . specify the particular steps a cited employer should have taken to avoid the citation, and to demonstrate the feasibility and likely utility of those measures.

See Secretary of Labor v. United Parcel Services, Inc., KOSHRC 4869-11, slip opinion at *9 (*citing National Realty & Constr. Co. v. O.S.H.R.C*, 489 F.2d 1257, 1265, 1268 (D.C. Circ. 1973)). Like standard-based citations, the Secretary must also show that the employer has "actual or constructive knowledge that the allegedly hazardous condition exists at its work place" and that employees had access to the condition. Mark A. Rothstein, Occ. Safety & Health L., § 6:10 (2016 ed.).

Guarding of Hoist Machine Sheaves
Schindler, Citation 1 Item 1a, 1b & SMEH, Citation 1 Item 1a, 1b

The Secretary cited both Schindler and SMEH for failing to place guards on the hoist sheaves, an example of which is depicted in Exhibits 36 and 37. The citation avers that this is a violation of 29 §CFR 1910.219(g) providing:

> The driving point of all friction drives when exposed to contact shall be guarded, all arm or spoke friction drives and all web friction drives with holes in the web shall be entirely enclosed, and all projecting belts on friction drives where exposed to contact shall be guarded.

As an alternative to the alleged standard based violation, the Secretary claimed that failing to guard the hoist sheaves was also a violation of the general duty clause, KRS §338.031(1)(a).

As a preliminary matter, Schindler[4] argues that OSHA does not have jurisdiction over the guarding and design of elevator equipment pursuant to the following statute:

> No inspection agency shall conduct an inspection or employ a standard relating to a condition over which another inspecting agency or the federal government has primary jurisdiction, except under an agreement with the entity having primary jurisdiction, or an order of the Attorney General, adopted under KRS 15.605 to 15.635.

KRS §15.1610. Mr. Layman explained that the Public Protection Cabinet inspects elevator equipment to determine whether it complies with the correct version of ANSI elevator code. *See* Day 2, p. 236, 237. Equipment, such as the drive machines here, are governed by an older version of the ANSI code, which does not require guarding of the cables and sheaves at issue. *See* Day2, p. 130.

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[4] SMEH did not make this argument.

We do not find it necessary to decide which agency has primary jurisdiction and will dismiss these items on other grounds. We will note, however, that the proper venue for such a jurisdictional challenge is mandated by KRS §15.630(1). That statute states that the Attorney General or an aggrieved party "shall apply to the Franklin Circuit Court or to the Circuit Court of the county in which the alleged violation occurred or is likely to occur for injunctive relief against the inspecting agency." *Id.* Moreover, the definition of "inspection"[5] does not appear to capture the type of inspections performed by the Kentucky Department of Workplace Standards. *See* KRS §15.605(1). The Kentucky Department of Workplace Standards does not conduct on-site investigations for determining whether to issue permits or licenses or accreditations, and in particular, does not attempt to determine whether to issue an elevator-operating permit. Therefore, that agency does not appear to be an "inspecting agency," which is defined as "any agency of the state government or of a political subdivision of the state, other than an urban county department of health, that conducts inspections within the Commonwealth." KRS §15.605(3).

Before we consider the merits of the general duty clause citation, we must determine whether the applicable standard applies to the cited hazardous condition. If it does, then the Commission must dismiss the alleged general duty clause

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[5] Inspection means any regular, on-site investigation periodically conducted, or any request for information periodically solicited in lieu of an on-site investigation, by or on behalf of any public agency for the purpose of determining whether to award, renew, alter, suspend or revoke a license, permit, accreditation or rating of a public or private organization, or of any property employed by a public or private organization in conducting its business, in the Commonwealth.

violation. *See* Rothstein, *supra* at §6.1. The key issue here is whether the hoist sheave and cables constitute a "friction drive," which the regulation unfortunately does not define. As explained below, we find that the cables and sheaves on the hoist equipment is not a "friction drive," and therefore the cited guarding standard does not apply.

Schindler and SMEH argue that the friction drives contemplated by the regulation are those that use belts. The Petitioners stated that because Mr. Bendorf admitted that the cables traversing over the sheaves are not "belts," the friction drive regulation does not apply. In support of their argument, the Petitioners cite to subsection (a) of 1910.219, which states that this "section covers all types and shapes of power-transmission belts. . . ." Section 1910.219, however, obviously covers more than just belts; it covers pulleys, flywheels, chains, ropes, shafting and other mechanical contraptions. Petitioners also point to the specific provision concerning friction drives, which states that "all projecting belts on friction drives where exposed to contact shall be guarded." At the very least, this language suggests that friction drives will typically incorporate the use of a belt.

A friction drive is a type of "mechanical power transmission apparatus." Section 219, under which this particular friction drive regulation is found, is titled "Mechanical Power-transmission Apparatus." *See* 29 CFR §1910.219. Moreover, paragraph (a)(4) of 1910.219 states that this section "covers the principal features with which power transmission safeguards shall comply." Merriam-Webster's online dictionary also defines friction drives as, "a power-transmission system that

transmits motion by surface friction instead of teeth." Unfortunately, the guarding regulations do not define "power transmission apparatus."

A federal ALJ addressed the term "mechanical power transmission apparatus" in *Secretary of Labor v. MB Consultants*, LTD, 25 O.S.H. Cas. (BNA) 1146 (O.S.H.R.C.A.L.J., Sept. 30, 2014), 2014 WL 5825311. In that case, OSHA cited an employer for violating another provision in Section 219 governing horizontal shafting. *See id.* at * 21 – 23. OSHA claimed that two rotating cylinders on equipment used to spread the wings of a chicken prior to cutting them off the carcass were subject to this regulation. The ALJ noted that horizontal cylinders were performing the intended work of the machine, and therefore constituted the "point of operation." After quoting a definition of mechanical power transmission on OSHA's website under its Machine Guarding "Tool,"[6] the ALJ held that "the prescriptive paragraphs of § 1910.219 set forth standards that pertain unmistakably to the components of a machine that transmits energy to the part of the machine that does the work (i.e. the point of operation)." Because the horizontal cylinders of the machine performed the work, the mechanical power transmission apparatus guarding regulation did not apply to them.

Although not as detailed in its analysis, the Fifth Circuit took a similar approach in *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730 (5th Circ. 2016). In that case, the court analyzed whether an employer violated 29 CFR §1910.219 by

[6] That website information states: "The power transmission apparatus is all components of the mechanical system which transmits energy to the part of the machine performing the work. These components include flywheels, belts, connecting rods, couplings, cams, spindles, chains, cranks, and gears."

determining if an unguarded arbor was part of a chicken cutting machine's power transmission apparatus. In doing so, the court looked at the purpose of the arbor, which connected a horizontal rotating shaft and spinning saw blade. Noting that the sawblade would not spin without the arbor and motor shaft, the court held that the ALJ properly found that the arbor was a "vital and integral part of the power transmission apparatus." *Id.* at 736.

In light of these persuasive authorities, we find that a hoist sheave is not a mechanical power transmission apparatus. A shaft connected to an electric hoist motor rotates the sheave. The sheave performs the necessary work of the machine (i.e., lifting or lowering the elevator cables draped thereon). In other words, the sheave is the point of operation of the machine, and not a part of the power transmission apparatus of the hoist mechanism.

The fact that the friction drive regulation uses the term "belts", especially when viewed in tandem that the sheave is the point of operation, convinces us that the standard does not apply to nip points between sheave and the cables that hoist the elevator car. Therefore, we find that the Secretary failed to prove the applicability of 29 CFR §1910.219(g) to the hoist sheaves.

Since the friction drive standard does not apply, we must consider the general duty clause citation. Here, the Secretary believed that there was a possible nipping hazard if an employee of Schindler or SMEH stuck their fingers or hands directly between the sheave and the cables while the sheave rotated. *See* Exhibit 37, Day 1, p. 78 - 79. As explained below we hereby dismiss that citation because the Secretary

failed to prove (1) that the employers or elevator industry recognized this hazard; and (2) that employers sufficiently exposed their own[7] employees to this hazardous condition.

Neither Petitioners nor the elevator industry recognized the sheaths as hazardous. The only evidence of recognition by the Secretary was the compliance officer's testimony. He relied solely on the photographic evidence to illustrate his belief that the sheaves presented a nipping hazard. The actual exposure to a nipping hazard posed by those sheaves would have been extremely unlikely. There has never been an accident involving those sheaves since their installation at SMEH. The elevator industry also does not recognize unguarded sheaves on older elevator equipment as posing a serious hazard. Messrs. Pryor and Layman testified that unguarded sheaves on elevators of the same vintage as the B-bank elevators are "ubiquitous" in their industry and applicable elevator code does not require guarding.[8] Based on the testimony offered by people who actually work in the elevator industry, we find that the Secretary failed to prove recognition of the alleged nipping hazard.

The Secretary also failed to offer sufficient evidence of employee exposure to the alleged nipping hazard. *See Dept. of Labor v. Morel Constr. Co.*, 359 S.W.3d 438,

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[7] An employer can only be liable under the general duty clause if it exposes its own employees to the alleged hazardous condition. Rothstein, *supra* at § 6:13; *Brennan v. OSHRC & Underhill Constr. Corp.*, 513 F.2d 1032 (2nd Circ. 1975).

[8] The elevator code requires modern elevator sheaves to have guards. As explained by the elevator inspector, Mr. Layman, the industry does not view unguarded sheaves on older equipment sufficiently hazardous enough to warrant retrofitting it with guarding. *See* Day 2, p. 130.

449 (Ky. Ct. App. 2011). To do this, he had to offer evidence "showing that employees were actually exposed to a hazard, or by showing that access to the hazard was reasonably predictable" or they "will be, or have been within the zone of danger." *Id.* (citing to federal review commission precedent). "Reasonable predictability required more than a hypothetical possibility of exposure, though less than a certainty." *Id.*

As it relates to machinery, "exposure to a hazard is not established where employees have sufficient space to walk past unguarded machines such that contact with the hazardous nip points, while possible, is unlikely." *See Secretary of Labor v. Trinity Industries, Inc.*, 19 O.S.H. Cas. (BNA) 1351, (Feb. 1, 2001) (quoting *Jefferson Smurfit Corp.* 15 OSH Cas. (BNA) 1419, 1422)). The Commission should also consider whether an employee would have reason to stick their hand in a nip point as part of their normal job duties. *See id.*; *Secretary of Labor v. Idaho Trout Processor, Co.*, 19 O.S.H. Cas. (BNA) 1356 (O.S.H.R.C.A.L.J. Jan. 17, 2001), 2001 WL 50947 at *4. Imagining a possible accidental fall into the machinery is also not enough to find exposure. *Id.*

The Secretary only suggested that exposure was proven because he showed that employees of Schindler and SMEH entered the same room where the sheaves were located. This is insufficient to prove that employees were sufficiently within the zone of danger.

First, the sheaves' location makes employee exposure to the zone of danger unlikely. These sheaves were located in a locked room, which is only accessible by persons who understood the dangers posed by the mechanical and electrical hazards

in that room. *See* Day 3 p. 109. Two of the four sheaves were located on a top platform and surrounded by railing. *See* Exhibit 59. The other two were located such that employees could easily pass by without putting their hand underneath the cables in the zone of danger. *See* Exhibit 62.

Second, there was no evidence offered that Schindler's or SMEH's employees' normal work duties required them to stick their hands into the sheave's zone of danger. Schindler's mechanics serviced the elevator equipment contained in a locked room. *See* Day 2, p. 213, Day 3 p. 109. If a mechanic had to put his hand between the sheave and cables as part of maintenance activity, he or she would first lock out the machine. *See* Day 2 p. 208, Day 3 p.111. The only time SMEH's employees ever come close to the sheaves is when they enter to change the filters of some HVAC equipment four times a year. *See* Day 3, p.199. Those employees had no reason to put their hand in the zone of danger, and these unguarded sheaves have not injured anyone since their installation. *See* Day 3, p. 215.

For these reasons, we hereby dismiss the general duty clause citation against both Schindler and SMEH.

Alleged Permit-Required Confined Spaces Violations

A. The B-Bank Elevator Pits Are Permit-Required Confined Spaces

The Secretary cited Schindler and SMEH for various permit-required confined space regulation infractions based on its opinion that the B-Bank elevator pits were permit-required confined spaces (PRCS's) at the time entered by Messrs. Motley, Woosley, and Pryor. *See* Schindler Citation 1, Items 2 through 8; SMEH Citation,

Items 2a, 2b, 3a, 3b and 3c. Schindler and SMEH disagreed, and argued the only elevator pits that are PRCSs are those that contain potentially hazardous atmospheres, which the B-bank elevators do not have.

The B-Bank elevator pits meet the definition of a confined space. 29 CFR §1910.146(b) defines a confined space as one that:

> (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
>
> (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry.); and
>
> (3) Is not designed for continuous employee occupancy.

Schindler's mechanics are required to perform maintenance activities and cleaning in elevator pits; the spaces have limited access by a ladder; and the pits are not designed for continuous employee occupancy.

Not every confined space is a permit-required confined space ("PRCS"). 29 CFR §1910.146(b) states that a permit-required confined space is a confined space that contains one or more of the following characteristics:

> (1) Contains or has a potential to contain a hazardous atmosphere;
>
> (2) Contains a material that has the potential for engulfing an entrant;
>
> (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross section; or
>
> (4) Contains any other recognized serious safety or health hazard.

Id.

The only dispute between the parties is whether the B-Bank elevator pits contain a "recognized serious safety or health hazard." The Secretary maintains that

Mr. Motley's demise is clear evidence that those pits contain a mechanical hazard[9] (unexpected elevator car movement) that constitutes an "other recognized serious safety or health hazard." Schindler and the elevator industry in general believe that elevator pits are not PRCSs unless there is a potential for a hazardous atmosphere. *See* Exhibit 50, National Elevator Industry, Inc. Memorandum.[10] The elevator industry maintains this position because its service mechanics recognize and eliminate the dangers posed by unexpected movement of elevator cars prior to entry into an elevator hoistway by complying "with applicable OSHA safety regulations, elevator code requirements, standard industry work practice and/or company policies and procedures." *See* Exhibit 50. Schindler trains it mechanics to eliminate or control the hazard posed by a moving elevator by either using lockout/tagout or safe hoistway access procedures as discussed above. With these procedures in place, Schindler argues that the elevator pit does not contain any "recognized serious safety or health hazard" when entered by its mechanics.

We agree with the Secretary's position and find that the B-Bank elevator pits are generally permit-required confined spaces because there is a risk of death posed by unexpected elevator car movement. Clearly, the entire elevator industry recognizes this serious safety risk to its mechanics and has implemented procedures to address it. Moreover, the Secretary's position is consistent with an OSHA

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[9] Schindler disputed whether Mr. Motley was in the pit when crushed. It claims that he was on part of the ladder above the pit. Regardless, mechanics will break the plain of the pit while using the ladder to enter the pit and are subject to the crushing hazard that killed Mr. Motley.

[10] Day 2, p. 163-64 (testimony of Mr. Layman); Day 3, p. 24 -25 (testimony of Mr. Karosas)

interpretation, which he offered as part of his proof in this matter. *See* Exhibit 49, OSHA Interpretation, Oct. 27, 1995 (an elevator pit is "generally" a PRCS by "virtue of the electrical-mechanical hazards" associated with "elevator-related equipment"). With that said, Schindler's arguments are still pertinent to the issue of whether its mechanics perform entries into elevator pits while classified as permit-required confined spaces.

Most of the PRCS regulation's requirements contemplate entry into a space where an entrant may be overcome by a hazardous atmosphere, trapped or engulfed by a liquid or fluidized solid material, or put in another situation where self-rescue is not possible. The regulations therefore provide for safeguards to protect entrants subject to those hazards, including testing the space for noxious atmospheres prior to entry; posting an attendant and entry supervisor to observe the entrant and make sure entry procedures are followed; having an available rescue team and equipment in the event the entrant needs rescued; and written permit requirements. None of these entry procedures makes sense, however, when a confined space is a permit-required confined space simply because it contains a mechanical hazard from equipment such as in this case.

The PRCS regulation provides a means by which an employer can re-classify such a PRCS by eliminating the mechanical hazard before entry. Paragraph (c)(7)(i) provides:

> If the permit space poses no actual or potential atmospheric hazards and if all hazards within the space are eliminated without entry into the space, the permit space may be reclassified as a non-permit-required

> confined space for as long as the non-atmospheric hazards remain eliminated.

29 CFR §1910.146(c)(7)(i). This reclassification procedure provides that the employer document how it eliminates the hazards in a permit space through a certification made available to each employee entering the space. *See* 29 CFR 146(c)(7)(ii). While re-classified, employees need not follow the laundry list of entry requirements applicable to permit-required confined spaces, most of which address atmospheric and engulfment hazards anyway. "OSHA believes that employees are fully protected from the hazards of permit space entry once all hazards within the space have been eliminated. Clearly, if there are no hazards within the permit space, an entrant is in no danger." Permit-Required Confined Spaces, 58 FR 4462-01, 4490 (Final Rule, Jan. 14, 1993).

Schindler's arguments about eliminating unexpected elevator car movement implicate the concept of reclassification. Schindler never documented its "reclassification" of the B-Bank elevators each time it employed procedures to eliminate the hazard because it followed the industry position that elevator pits are generally not permit-required confined spaces. With that said, OSHA has issued guidance that this documentation would not be required under instances where an elevator mechanic is the only entrant and is the person who evaluates and declassifies the space. *See* OSHA Interpretation, Guidance in Determining Whether Elevator Pits Meet the Definition of Confined Spaces, 10/27/1995.[11] Moreover, OSHA has opined

[11] That interpretation letter to members of the elevator industry states: "In our meeting, you referred to standard industry entry practices and training associated with pit entry (Lockout/Tagout, Hazcom, etc.) established in the NEII developed "Field Employee Safety Handbook." You also stated

that this failure to document under similar circumstances is a *de-minis* violation, which warrants neither a citation nor a penalty. *See* OSHA Interpretation, 10/29/1995, Applying Permit-Required Confined Spaces (PRCS) Standard to a Workplace that is a Multi-family Residential Commercial Building.[12]

Schindler's arguments about employing lockout/tagout or safe hoistway access procedures prior to entry have relevance to whether it's mechanics conducted PRCS entries and therefore whether it violated some of the PRCS related items of the citation against it. A permit-required confined space, however, is only reclassified as a non-permit-required confined space for as long as the hazard has been effectively eliminated. *See* 29 CFR 1910.146(c)(7); *Secretary of Labor v. Omaha Paper Company*, 1999 O.S.H.D. (CCH) P 32017 (O.S.H.R.C.A.L.J., Feb. 7, 2000), 2000 WL 192810, at *6; OSHA Interpretation, Applicability of Confined Space Standard to Dock-leveler Pits, Dec. 2, 2002, (space only declassified while electrical and mechanical hazards in

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that the vast majority of pit entries are accomplished by one employee who, with respect to 1910.146(c)(7)(iii), would be the evaluator, certifier, and entrant. Since the purpose of the certification is to document that the hazards have been eliminated and identify the person making the determination for entrants, it appears that employees who were adequately trained to do the 1910.146(c)(7)(iii) evaluation would not need to document that the hazards were eliminated if the only employee working at the site is the one doing the (c)(7) determination."

[12] "With respect to 1910.146(c)(7)(iii) and when entry is accomplished by one employee who, is the evaluator, certifier, and entrant, not providing a certification document will be viewed as a *de minimis* violation (one in which no citation and civil penalty will be issued) under the following conditions:

1. The only actual or potential hazards in the space are electrical or mechanical.

2. The hazards of the space have been previously identified and the employee is trained on the hazards and the proper lockout methods.

3. The servicing employee has absolute control of the locks.

4. No additional hazards are introduced into the space."

pit are locked out). If certain procedures are not employed to prevent unexpected elevator movement, a hospital employee or mechanic entering the pit is subject to the same hazard that killed Mr. Motley. Thus, an elevator pit is a PRCS prior to eliminating that hazard.

B. Even if the B-Bank Elevator Pits are Permit-Required Confined Spaces, There Was No Evidence that Schindler Condoned or Had Knowledge of a PRCS Entry.

Even if the B-Bank elevator pits are permit-required confined spaces because they contain a mechanical hazard, Schindler trained its employees to use procedures to eliminate the hazard prior to entering an elevator pit or hoistway. As explained above, when power to the elevator is not needed, elevator mechanics must either lockout the elevator or employ safe hoistway access procedures. We find that these procedures, when employed, "eliminate" the mechanical hazard as that term is used in 29 CFR §1910.147(c)(7). Accordingly, the myriad of permit-space entry requirements should not apply when elevator mechanics enter the B-bank elevator hoistways or pits.

The regulations and OSHA guidance clearly indicate that lockout is one proper method to eliminate mechanical hazards. As explained in the preamble to the confined space regulation:

> [Paragraph (c)(7)(i)] applies only to permit spaces containing no actual or potential atmospheric hazards. OSHA expects that this provision will apply primarily to spaces containing hazardous energy sources or containing engulfment hazards. The control of hazardous energy sources is addressed by existing standard 1910.147, The Control of Hazardous Energy Sources (lockout/tagout). That standard covers the service and maintenance of machines and equipment in which the unexpected energizing start-up of the machines or equipment or release of stored energy could cause injury to employees. OSHA believes that it is possible

> in some cases to de-energize and lock out machinery and equipment, using the procedures specified in §1910.147, so that the energy hazards are eliminated without any entry into the permit space.

Id. at 4491. If the main disconnect for a hoist motor is locked out, the elevator will not move and poses no threat to the mechanic who enters the hoistway or pit. *See* testimony from Schindler Safety Manager, Fred Witt, Day 3, p. 22 - 23. At that point, entry is safer than entry employing permit procedures, most of which do not even address mechanical hazards.

Based on the record testimony in this case, we find that the safe hoistway access procedures also sufficiently "eliminate" the hazard. Those procedures rely on at least two redundant safety interlocks to prevent unexpected movement of the elevator car while a mechanic is in the hoistway or pit. Moreover, the mechanic is required to verify that these two redundant interlocks are operational prior to entry. Schindler adequately demonstrated the effectiveness and reliability of these procedures with competent testimony, including an elevator inspector who works for the Commonwealth.

Even the preamble to the PRCS regulation states that OSHA should consider industry customs to determine if the space contains a recognized serious hazard during entry:

> The Agency will be able to determine, based on inspection of a confined space, whether or not the conditions found pose hazards serious enough to warrant designating the spaces as a permit-required confined space. In making this determination, OSHA will use the same sources of information any knowledgeable person would: national consensus standards and government and industry guidelines.

Id. at 4479 (emphasis added). The entire elevator industry believes that a typical elevator hoistway and pit does not contain a recognized serious hazard warranting permit-required entry steps after mechanics employ safe hoistway access procedures. Schindler offered significant unrebutted testimony to support the validity of this position. The Secretary, however, takes a contrary and unprecedented stance[13] that elevator pit entries mandate the observance of permit-required confined space entry procedures even after these procedures are employed.

Based on the forgoing, we conclude that the subject elevator pits do not contain an "other recognized serious safety or health hazard" when industry protocols are followed prior to entry into the hoistway. Those protocols sufficiently "eliminate" the possibility of unexpected elevator car movement such that PRCS permits and entry procedures are not warranted.

C. Specific Pit Entries Offered by the Secretary as Proof of Employee Exposure to a PRCS.

The Secretary highlights two pit entries that he believes were PRCS entries. The first was Mr. Motley's entry into B1 on December 1st, which resulted in his death. The other was Messrs. Pryor and Woosley's entry into B3 to affix and adjust the counterweight guard.

Mr. Motley entered B1 elevator shaft without employing any procedures to eliminate the mechanical hazard that killed him. As will be explained below in the analysis of the lockout/tagout violation, the record does not support that Schindler

[13] Mr. Bendorf stated that he had never cited another property owner for failing to treat an elevator pit as a permit-required space. *See* Day 2, p. 85.

had constructive knowledge of Mr. Motley's clear violation of company policy. Because Schindler could not have known that Mr. Motley would enter into B1 in the manner that he did, this entry cannot support the PRCS standard citations.

The Secretary also failed to prove that Messrs. Pryor and Woosley did not sufficiently eliminate the mechanical hazard prior to entering into B3 hoistway. Both men locked out the elevator prior to entering the pit to replace the counterweight guard. The Secretary failed to offer a plausible method for how Mr. Pryor could later test the counterweight guard installation without having power to the elevator. Instead, he offered pure speculation, without evidence to support it, that Schindler could have used video cameras and microphones to observe the counterweight move past the guard. There was also no evidence that Mr. Pryor was subject to a mechanical hazard while he entered the hoistway or while he was in the pit to observe the counterweight. Mr. Pryor testified that he always employed safe hoistway access procedures when entering elevator pits, and the evidence shows that Mr. Woosley was in full control of the elevator car in inspection mode during the test. Based on these facts, we find that this entry also fails to support the PRCS regulation citations against Schindler.

D. Specific Items of the Citations Issued Pursuant to the PRCS Standard.

1. Schindler Citation 1, Item 2; SMEH, Citation 1, Item 2a

The Secretary alleges that Schindler and SMEH violated 29 CFR §1910.146(c)(1), which mandates that "[t]he employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces." In particular, the citation alleged that Schindler and SMEH had not evaluated whether the workplace

at SMEH, including the B-bank elevators, contained permit-required confined spaces. The primary basis for these alleged violations was the Secretary's contention that the elevator pits were PRCSs and that neither Schindler nor SMEH acknowledged that they were.

Schindler points out that OSHA's Enforcement Directives allows it to rely on its extensive knowledge of elevator pits in general rather than requiring an evaluation of every space. *See* OSHA Enforcement Directive, CPL 02-00-100, Application of the Permit-Required Confined (PRCS) Standards, Section C, p. E-7. Based on its knowledge, Schindler recognized the hazard posed by the elevator equipment, which is why it established its lockout/tagout and safe hoistway access procedures to eliminate that hazard prior to entry into elevator hoistways and pits. Schindler also notes that OSHA guidance provides that a determination need not be in writing. *See id.*, Appx. E, Section C. Last, Schindler argues that it was proper to rely on its customers to inform them if there were potentially hazardous atmospheres in the pit, since they were in the best position to recognize those hazards.

SMEH argues that it had evaluated the entire hospital for permit-required confined spaces. Mr. Steve Humphrey, an SMEH employee working as the lead mechanic in the engineering department, testified that SMEH had designated at least three specific areas as permit-required confined spaces. Day 3, p. 201. Although the B Bank elevator pits were not included in those areas, SMEH says that the standard only requires evaluation of the work site, which it had obviously performed by designating some spaces as PRCS.

Secretary v. Drexel Chemical Co., 17 O.S.H. Cas. (BNA) 1908 (O.S.H.R.C. 1997), 1997 WL 93945, addressed a citation issued pursuant to 29 CFR §1910.147(c)(1). Drexel's regulatory manager evaluated the plant based on his knowledge of the spaces therein and his qualifications to make such determinations. The Secretary cited the employer because this evaluation failed to identify one particular vat as a PRCS during its overall evaluation of a plant. The Commission vacated the citation and held:

> Although we conclude that 29 C.F.R. § 1910.146(c)(1) does require the identification of all permit spaces in a workplace, we find that the Secretary has not established a violation in this case. The Secretary alleges that Drexel did not conduct the type of specific evaluation required by the standard because it did not physically inspect the plant for permit spaces and because it failed to include batch hoppers and mixing vats in the list of permit spaces in its written program. However, Drexel's regulatory manager based his evaluation of the plant upon his knowledge of the equipment and machines, and the record indicates that he had the information necessary to determine which spaces in the plant were permit spaces and was qualified to make such determinations. Drexel's failure to specify the vats and hoppers in its written program may result in an incomplete written program, but it does not follow that an initial evaluation was not conducted. We do not find the evaluation by a qualified person who was familiar with the plant to have been so deficient as to constitute a failure to evaluate.

Id. at *2. The Federal Review Commission also noted that OSHA Instruction CPL 2.100 concerning PRCSs does not mandate that an employer's determination be in writing, nor does it require a "specific physical survey of each space if the determination can be made through existing records and knowledge of the spaces in the workplace, provided that this information is adequate." *Id.*

Like the employer in *Drexel*, both Schindler and SMEH had conducted an evaluation of the workplace. Schindler relied on its own experience, industry

knowledge and coordination with SMEH to conclude that the B-Bank elevator pits were not PRCSs as long as the mechanical hazards are eliminated prior to entry into the hoistways. There is no dispute that the B-bank elevators contained no such atmospheric hazards, nor was Schindler unreasonable in relying on SMEH to notify it of such hazards. SMEH also identified which spaces in its workplace that it determined were PRCSs. It simply neglected to identify the elevator pits in B-Bank as PRCSs. SMEH even had a third party consultant to conduct a review and file a report on identifying confined spaces and PRCS at the hospital after Mr. Motley's accident. This report, Exhibit 90, concluded B-Bank elevators were not permit-required confined spaces. Any error in Schindler's or SMEH's determinations does not constitute a violation of the obligation to conduct an evaluation pursuant to 29 CFR §1910.146(c)(1). *Id.* at *2; *Omaha Paper Stock Co.*, 2000 WL 192810, at *3 ("The standard does not require that the employer make the correct determination; the employer may be in violation of other sections of the PRCS standard, but if it made a reasonable evaluation of the workplace, it is in compliance with §1910.146(c)(1)").

Schindler entangled its PRCS determination that an elevator pit was not a PRCS with its position that lockout/tagout and/or safe hoistway access procedures eliminated the hazards prior to entry. An employer in *Secretary v. Superior Tank & Trailer, Co.*, 17 O.S.H. Cas. (BNA) 2116, (O.S.H.R.C.A.L.J. Sept. 16, 1996), 1996 WL 534699, took a similar position regarding hazardous atmospheres that may have been present in tanks being serviced at its shop. The employer stated that the tanks were safe for entry because it took the following precautions: (1) it confirmed that the

inside of the tanks had been washed prior to arrival; (2) that someone tested for oxygen prior to entry and; (3) that continuous ventilation of the tanks was performed while employees were inside the tanks. Based on these precautions, the employer took the position that the tanks were not PRCSs. The ALJ dismissed the citation for violation of 29 CFR §1910.146(c)(1) in part because the Secretary failed to offer expert testimony attacking the adequacy of the employer's evaluation of whether the tanks contained hazardous atmospheres after being washed and ventilated.

Like the employer in *Superior Tank & Trailer*, Schindler had procedures for eliminating the potential hazard in the subject space. Through implementation of protocols, Schindler effectively eliminated the hazard of unexpected movement of an elevator while its employees were present in elevator pits. The Secretary, however, failed to offer sufficient evidence refuting Schindler's evaluation that there were no sufficient hazards present in the pits when its mechanic used these protocols.

Based on the record evidence and the above persuasive authorities, we find that the Secretary failed to prove a violation of 29 CFR §1910.146(c)(1) against either Schindler or SMEH.

2. Schindler Citation 1, Item 3, SMEH Citation 1, Item 2b.

Item 3 against Schindler and Item 2b against SMEH allege that each employer violated 29 CFR §1910.146(c)(2), which provides:

> If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location and the danger posed by the permit spaces.

> Note: A sign reading "DANGER—PERMIT–REQUIRED CONFINED SPACE, DO NOT ENTER" or using other similar language would satisfy the requirement for a sign.

Neither employer considered the elevator pits to be permit-required confined spaces. It is therefore no surprise that neither posted PRCS signs. The total proposed penalty for both Item 2a and 2b in the citation for SMEH was $2125.

By its own terms, the standard does not necessarily require signs to protect employees from the hazards posed by the confined space at issue. As explained by OSHA, equally effective alternative means may be used:

> Alternative methods, such as additional training, may be used where they are truly effective in warning all employees who could reasonably be expected to enter the space. It is the employer's obligation to assure that an alternative method is at least as effective as a sign. . . .
>
> If a space has a locked entry cover or panel, or an access door that can only be opened with special tools, the use of sign's may be unnecessary. If the employer ensures that all affected employees are informed about such spaces and know that they are not to be opened without taking proper precautions, including temporary signs, to restrict unexpected or unknowing entry.

OSHA Std. Interpretation, Requirements for Posting Signs for PRCSs (July 22, 1998).

We have only found one federal decision providing a substantive discussion of this standard. A federal ALJ in *Secretary of Labor v. Clean Fuels of Indiana*, 2016 O.S.H.D. (CCH) P 33529 (O.S.H.C.A.L.J. June 6, 2016), 2016 WL 3856171, addressed whether an employer should be cited for failing to post signs on submersible turbine pump wells that could have potentially dangerous low levels of oxygen. The employer did not post signs, but trained its employees to stay out of wells that were greater than four feet deep, which it determined was the depth of a well at which hazardous atmospheres could develop. The ALJ stated that it was not enough to tell employees

to stay out of those spaces. *Id.* at *21. It also had the obligation to train its employees on the type of hazards to which they may be exposed if they entered those spaces. *Id.* Therefore, the ALJ stated that the employer had failed to comply with the standard.

The ALJ in *Clean Fuels* then analyzed whether the Secretary proved employee access to the hazard posed by failure to comply with the standard. Finding employee access, the ALJ noted:

> Failure to place employees on notice of the hazards of permit-required confined spaces exposes them to the hazards associated with entry. As previously noted, entry into the STP well exposed CFI employees to an oxygen deficient atmosphere. Employees had not been trained on those hazards, only that they were not to enter the STP well if it was deeper than 4 feet. As previously discussed, that notice was insufficient. Based on Addam Vanover's testimony, the Side Technician would not have been trained on the hazards of permit-required confined spaces. There is no evidence he was warned about the hazards he might encounter if he entered the STP well. The record contains no evidence the Lead Fuel Technician told the Side Technician the depth of the STP well or warned him not to enter it. The memorandum regarding CFI's policy on entry into wells deeper than 4 feet was issued in 2013, a year before the Side Technician began work for CFI and there is no evidence he was ever provided the memorandum. The Secretary has established the Side Technician was exposed to the hazard addressed in the cited standard.

Id. at 29.

We dismiss this item of the citation against Schindler. Schindler did not own the elevators and had no authority to post signs on SMEH's premises. Unlike the employer in *Clean Fuels*, Schindler did more than just tell its employees to stay out of elevator pits. It adequately trained its mechanics to recognize and mitigate the hazard posed by unexpected elevator car movement. Mr. Motley entered the elevator hoistway of B1 without applying his training, but Schindler did not have actual or constructive knowledge of his entry.

SMEH does not have a similar defense to its alleged violation of 29 CFR §1910.146(c)(2). Essentially, SMEH argues that the we should excuse it from application of this standard because the testimony from those in the elevator industry established that the elevator pits were not PRCSs.[14] As a fallback position, SMEH claims that even if there were a violation, we should down grade it to other-than-serious.

Unlike Schindler, SMEH offered no evidence that they adequately notified its employees of the hazards in the elevator hoistway, the nature of hazards therein, and that certain precautions are required for entry. Even though access was restricted to the elevator pits through lock and key, SMEH's own witness, Steve Humphrey, acknowledged that employees entered into the elevator pits on occasion to retrieve items for patients and visitors who dropped them through the small gap near the elevator doorsills. *See* Day 3, p. 216- 17. The SMEH employees who entered the hoistway and pits were not elevator mechanics trained to properly recognize and eliminate the hazard of unexpected elevator movement. Evidence was presented that SMEH employees used a key on the control panel in the elevator car itself to disable the elevator. *See* Day 3, p. 217 - 18. SMEH, however, did not offer any evidence supporting the control panel key sufficiently eliminated the unexpected elevator

[14] Citing *Drexel, supra*, SMEH also claimed that its compliance of this regulation with respect to other identified permit-required confined spaces was sufficient to show overall compliance with the standard. We do not read *Drexel* to stand for this proposition. SMEH had an obligation to notify its employees that the elevator pits were PRCSs, the nature of hazards therein, and that certain procedures must be followed to prevent unsafe entry.

movement hazard as contemplated by the PRCS standard. We therefore affirm this item of the citation against SMEH.

Even though we affirm this item of the citation against SMEH, we reduce the $2125 proposed penalty to $1000. The Secretary intended the $2125 amount to also serve as a penalty for Item 2a, which we have dismissed. Moreover, Item 2b relates to Item 3a, which alleges SMEH violated 29 CFR §1910.146(c)(3) by not taking adequate precautions to prevent entry into a PRCS. Mr. Bendorf testified that both 2b and 3a would have the same abatement measures: to post a sign or to inform SMEH employees that the elevator pits are permit-required confined spaces accessible only by a specialized tool or key, and that there are procedures put in place to prevent entry into those spaces when the elevator hazard has not been sufficiently eliminated.[15] Day 2, p. 103 – 104. Essentially, both these items of the citation enforce SMEH's obligation to train and restrict its employees from entering the elevator pits. The Secretary should have grouped those items together. This provides another reason why a reduction in penalty is appropriate.

3. SMEH Citation 1, Items 3a, 3b, and 3c.

Item 3a asserts that SMEH violated 29 CFR §1910.146(c)(3), which provides:

> If the employer decides that its employees will not enter permit spaces, the employer shall take effective measures to prevent its employees from entering permit spaces and shall comply with paragraph (c)(1), (c)(2), c(6), and (c)(8) of this section.

[15] SMEH could implement training and policies providing for elimination of the mechanical hazard if there were ever a need to retrieve a patient or visitor's keys. Because SMEH employees do not service the elevators, there should never be a need for the elevator to have power while employees access the pit. Thus, lockout of the elevator disconnects should be required for declassification and entry into that space.

Items 3b and 3c allege that SMEH violated paragraphs (c)(8)(i) and (ii) by not telling Schindler that the elevator pits were PRCSs because of the possibility of unexpected movement of the elevator cars. SMEH was assessed a total $5000 penalty for all three of these sub-items.

We affirm Item 3a. As mentioned above with respect to Item 2b, SMEH employees entered into the pit to retrieve keys of hospital patients and/or visitors. Mr. Humphrey, the lead mechanic of the SMEH engineering department, testified that he did not direct those entries, nor was his department involved. *See* Day 3, p. 216 - 217. There was also no evidence that SMEH trained its employees or had formal procedures in place regarding elimination of the moving elevator car hazard prior to entering the space. We find that SMEH failed to establish effective measures to protect its employees from entering the elevator pits and exposed them to the mechanical hazards therein.

Items 3b and 3c focus on alleged violations of 29 CFR §1910.146(c)(8)(i) and (ii), which provide:

> When an employer (host employer) arranges to have employees of another employer (contractor) perform work that involves permit space entry, the host employer shall:
>
> (i) Inform the contractor that the work place contains permit spaces and that permit space entry is allowed only through compliance with a permit space program meeting the requirements of this section;
>
> (ii) Apprise the contractor of the elements, including hazards identified and the host employer's experience with the space, that make the space in question a permit space.

We dismiss both of these items because SMEH did not arrange and Schindler did not perform PRCS "entries" into the hospital's elevator pits. As stated above, we

find that Schindler's mechanics effectively eliminated the mechanical hazard of the moving elevator car prior to entering the elevator pits. Therefore, those spaces were not PRCSs when entered.

Even though we affirm Item 3a of the Citation against SMEH, we reduce the proposed $5000 penalty assessed for Item 3a to $3000. The Secretary intended the $5000 penalty to include sub-items 3b and 3c, both of which we have dismissed. The Secretary should also have grouped Items 2b and 3a under one penalty because they relate to protecting SMEH's employees from the same hazard, an elevator car that unexpectedly moves while someone is in an elevator pit or hoistway.

4. Schindler Citation 1, Item 4.

Schindler was cited for violating 29 CFR §1910.146(c)(4), which provides:

> If an employer decides employees will enter a PRCS, the employer shall develop and implement a written permit space program that complies with this section.

The citation provides that Schindler violated this regulation because it did not implement a written permit space program "for its employees who regularly entered and worked in permit spaces such as those found in the B Bank elevator pits at [SMEH]."

Schindler has a written permit-required confined space entry program that it uses when a host employer informs it of a potential atmospheric hazard in the elevator pit. *See* Exhibit 46; Day 3, p. 24. Mr. Bendorf testified that this program had deficiencies, but did not specify what those were. *See id.* Mr. Bendorf also opined that Schindler violated this regulation because it did not follow this written PRCS program in practice. According to him, Schindler should have used the PRCS entry

procedures for all elevator hoistways and pits, even those without any atmospheric hazards. *See* Day 1, p. 127.

The Secretary failed to prove a violation of this standard. Mr. Bendorf offered no reasons why the written program had deficiencies under the confined space regulations, and it is improper for us to guess what those are. The Secretary also did not prove that Schindler ignored its PRCS written program. Schindler trained its employees to eliminate the mechanical hazard of unexpected elevator movement prior to entering into a hoistway. As stated above, this made its PRCS written program inapplicable to the B-Bank elevators that did not have any atmospheric hazards. Schindler's position in this case is also entirely consistent with its written PRCS program stating that permit-required confined spaces should be reclassified prior to entry by "[e]liminating or controlling the possibility of inadvertent movement of equipment that could cause an injury to an entrant (lockout/tagout, redundant safety switch procedure) and certifying the same." *See* Exhibit 46.[16] We hereby dismiss this Item of Schindler's citation.

5. Schindler Citation 1, Items 5, 6, 7.

These items relate to Schindler's alleged violations of several subsections of 29 CFR §1910.146(c)(9), all of which apply to a "contractor who is retained to perform permit space entry operations." As stated above, SMEH did not retain Schindler to

[16] In section 3.12.1, the policy states, "During those operations where the confined space must be entered, it will be done only after all the hazards, that would define the spaces as PERMIT-REQUIRED CONFINED SPACE, are eliminated, if possible." In section 3.126, the policy also states, "Schindler employees will not normally perform work in a space classified as permit-required confined space. They will perform work in spaces that have been reclassified to non-permit-required confined space."

perform PRCS entries. In fact, neither thought the elevator pits were permit-required confined spaces. Schindler also offered sufficient evidence to suggest that implementation of its policies eliminated the only hazard associated with the elevator pits prior to entry. Thus, Schindler did not have to "perform permit space entry operations." The Commission hereby dismisses these three items.

6. Schindler Citation 1, Item 8.

This item provides that Schindler violated 29 CFR §1910.146(g)(1), which provides that employers must train all employees who perform PRCS duties. The Secretary claims that Schindler "did not provide a training program for four employees who worked in the permit-required confined spaces including B Bank Elevator Pits."

The four employees mentioned were most likely Jerry Hauck, Bill Motley, Jason Pryor and Robert Woosley. The Secretary offered no evidence that any of these employees, except for Mr. Motley, entered the elevator pits without effectively eliminating the mechanical hazard of unexpected car movement. Mr. Motley entered B1 without employing any procedures in place to keep him safe, but Schindler did not even have constructive knowledge of his entry.

Schindler provided training to these employees on lockout/tagout and safe hoistway access procedures so that the hoistway would not contain a mechanical hazard upon entry. Cathy Morgan also offered uncontroverted evidence that whenever an employee is involved in a PRCS entry, Schindler follows its PRCS policies and makes sure it and the host employer follows PRCS regulations, including the part thereof stating:

> Confined spaces awareness training will be provided to all Schindler employees who may need to enter confined spaces. Additional training is required for employees who are required to enter permit-required confined spaces.

Exhibit 46; *see also*, Day 3, 68 – 76.

The Secretary failed to offer sufficient evidence to prove that these four employees entered into permit-required confined spaces with the knowledge of Schindler. Thus, Schindler did not have to offer the training required by this standard to those employees. Even if an employee had to perform such an entry, its policies required that such employee receive the required PRCS training. Moreover, Schindler offered substantial evidence that it provided training to all its employees on how to eliminate mechanical hazards prior to entry into elevator hoistways and pits. We therefore dismiss this item of the citation against Schindler.

Alleged Lockout/Tagout Violations.

A. Schindler, Citation 1, Item 9

This item charges Schindler with a violation of 29 CFR §1910.147(c)(4)(i), which provides:

> Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

Schindler had developed and documented a lockout/tagout procedure program. *See* Exhibit 39. The Secretary, however, contends that it was not "utilized" on or around December 1, 2010 when four employees worked on elevator equipment at St. Mary

and Elizabeth Hospital. *See* Exhibit 1, Citation 1, Item 9.[17] We find that the Secretary failed to prove that Schindler did not utilize its lockout/tagout program when required by either the regulation or its own procedures. We therefore dismiss this item.

In its brief, the Secretary maintains that Schindler's lockout/tagout policies allow its employees to substitute safe hoistway access procedures for lockout/tagout. In support thereof, the Secretary claims Bendorf testified Mr. Wilt told him that, "lockout/tagout would not be used unless the work required an employee to spend most of the day in a pit or hoistway; otherwise, the hoistway access procedure was deemed acceptable." Labor Brief, p. 21, citing to Day 1, pp. 88, 102, 208. We did not find this quoted testimony in the record. Additionally, Mr. Wilt never testified to this; what he said was that lockout/tagout is required unless a mechanic needs power to perform the maintenance. *See* Day 3, p. 25. Schindler's lockout/tagout and safe hoistway access procedures state this maxim too. *See* Exhibits 39, 81.

In addition to Mr. Wilt's purported statements, the Secretary relies on the same set of facts that relate to Items 13 a, b, and c discussed below. With the exception of Mr. Motley's entry into B1, those events do not evidence a violation of the lockout/tagout regulations or Schindler's own polices. Mr. Motley's entry in B1, was completely unexplainable and contrary to the policies established by Schindler to eliminate the hazard of a moving elevator car prior to entry into a hoistway, and as

[17] The citation is not accurate. Only Mr. Motley worked on the B-bank elevator on December 1, 2010. Mr. Hauck did not enter a hoistway or pit when he responded to SMEH on that day. Day 3, Page 231. Messrs. Woosley and Pryor did not work on the elevators until the following day.

also explained below, Schindler did not have actual or constructive knowledge of the same.

Schindler sufficiently refuted the Secretary's contention that the mere existence of its safe hoistway access procedures amounts to a violation of the lockout/tagout regulation. These procedures provided a safe means to disable the elevator when lockout/tagout does not apply to Schindler's employees work. Several elevator mechanics, an inspector, and experts testified that these procedures provided redundant and effective means to prevent the elevator from moving unexpectedly while entering and exiting the hoistway.

B. Schindler Citation 1, Item 10.

This item charges Schindler with a violation of 29 CFR §1910.147(c)(4)(ii)(B), which provides:

> (ii) [Energy control] procedures shall clearly and specifically outline the scope, purpose, authorization, rules and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance, including, but not limited to, the following:
>
> (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy.

The Secretary alleged that Schindler violated the regulation because there was no machine specific lockout/tagout procedures in place for the traction elevators at SMEH. *See* Exhibit1, Citation 1, Item 10.

Schindler did not develop machine specific procedures for every traction elevator that it services throughout the world, including the B-Bank elevators at SMEH. Its lockout/tagout procedures go through the general steps required to isolate and de-energize all the equipment it services, including traction elevators, escalators

and hydraulic elevators. Schindler, however, argues it was not required to create machine specific procedures for each traction elevator it services because all traction elevators are designed pursuant to elevator code and are therefore all locked out the same way. Thus, its written general company-wide lockout/tagout policy was sufficient to lock out all of the traction elevators it serviced, including the B-Bank elevators at SMEH.

An OSHA compliance directive, CPL 02-00-147, supports Schindler's argument. The lockout/tagout regulation is a performance based standard allowing employers the leeway to group similar pieces of equipment under one procedure. *See id.*, at p. 3-48. The germane inquiry is whether the group procedure "provides sufficient detail and adequate guidance for authorized employees to clearly understand how to safely and effectively utilize hazardous energy control measures for the particular machine or piece of equipment being serviced and/or maintained." CPL 02-00-147, p. 3-48.

OSHA distills this concept further and provides that if a group procedure is used, it must list all the specific equipment and machines that fall within its scope. *See* CPL 02-00-147, p. 3-44. Moreover, the equipment listed must have the same or similar:

> A. Procedural steps for shutting down, isolating, blocking, securing and dissipating stored energy in machines or equipment;
> B. Procedural steps for the placement, removal, and transfer of the lockout/tagout devices and the responsibility for them; and
> C. Requirements for testing a machine or equipment to determine and verify the effectiveness of lockout/tagout devices and other control measures.

Id.

In conjunction with its grouping argument, Schindler argues that its lockout/tagout procedure, although general, provided sufficient guidance for locking out traction elevators. In doing so, it claimed the exception to 29 CFR §1910.147(c)(4) applied:

> The employer need not document the required procedure for a particular machine or equipment, when all of the following elements exist: (1) The machine or equipment has no potential for stored or residual energy or re-accumulation of stored energy after shut down which could endanger employees; (2) the machine or equipment has a single energy source which can be readily identified and isolated; (3) the isolation and locking out of that energy source will completely de-energize and deactivate the machine or equipment; (4) the machine or equipment is isolated from that energy source and locked out during servicing or maintenance; (5) a single lockout device will achieve a locked out condition; (6) the lockout device is under the exclusive control of the authorized employee performing the servicing or maintenance; (7) the servicing or maintenance does not create hazards for other employees; and (8) the employer, in utilizing this exception, has had no accidents involving the unexpected activation or re-energization of the machine or equipment during servicing or maintenance.

The compliance directive provides that general energy control procedures may be acceptable for use for an entire facility. *See id.*, p. 3-46. If a particular machine does not meet the exception to having machine specific procedures, however, an employer should supplement its general procedures with additional specificity. *See id.* This specificity should provide necessary guidance for employees to safely and effectively control hazardous energy when working with that particular machine.

Taking it all together, we find that Schindler had to prove two issues to defend item 10 of citation 1. First, it must show that the regulations allow grouping of traction elevators so that its company-wide policy may cover the B-bank elevators at SMEH. And second, it must demonstrate that traction elevators fall under the above

exception to 1910.147(c)(4) such that it did not have to supplement its procedures with specific guidance on how to lock out those type of elevators. We find that Schindler met its burden of proof on these two issues and we hereby dismiss this item of the citation.

We find based on unrebutted testimony that all traction elevators meet the requirements for grouping. All traction elevators are designed under the same elevator code. *See* Day 2, p. 19 – 24; 182 – 84; Day 3, p. 19 – 23, 124, 125 – 28. Accordingly, all of these elevators are locked out by opening a single main disconnect to the hoisting mechanism. *See id.* The procedural steps for placement, removal and transfer of lockout devices and responsibility for them is the same under Schindler's lockout/tagout program. *See* Exhibit 39. Additionally, the requirements to verify the effectiveness of the lockout/tagout devices is the same for all traction elevators. *See* Day 2, p.183.

We also find that Schindler showed the traction elevators met the above exception to having machine specific procedures. Traction elevators do not have stored or residual energy that could endanger employees. *See* Day 3, p.22. There is only one electrical power source to the hoisting mechanism on traction elevators. Mechanics can easily identify the main disconnect for that mechanism and lock it out with a single lock to prevent unexpected movement during maintenance activities. *See id.*; See Day 3, p. 22. That lock is under the control of the authorized employee performing the service or maintenance as governed by Schindler's lockout/tagout

program. Last, Mr. Wilt also testified that he was not aware of an incident where a locked out elevator unexpectedly started. *See* Day 3, p. 33, 41.

In face of this testimony, the Secretary urges that the federal decision of *Secretary of Labor v. Drexel Chemical Co.*, 17 O.S.H. Cas. (BNA) 1909 (O.S.H.R.C 1997), 1997 WL 93945, supports the violation. The employer in that case failed to prove that the exception applied to its generic lockout/tag out procedures that purported to apply to every piece of equipment in its chemical plant. In that case, the compliance officer offered unrebutted testimony to show that some of the equipment had potential stored or residual energy and that some of the equipment had more than one energy source.

Like the employer in *Drexel*, Schindler's procedure is quite generic and does not contain a section on how to lockout/tag out traction elevator hoist motors, versus control cabinets, versus hydraulic elevators, etc. Unlike the employer in *Drexel*, however, Schindler offered unrebutted testimony to show that all traction elevators are properly grouped and meet the exception to the requirement that an employer must develop machine specific procedures. *Drexel* is properly distinguished and does not support this item of the citation against Schindler.

C. Schindler Citation 1, Item 11

This item charges Schindler with violating 29 CFR §1910.147(c)(5)(i):

> (i) Locks, tags, chains, wedges, key blocks, adapter pins, self-locking fasteners, or other hardware shall be provided by the employer for isolating, securing or blocking of machines or equipment from energy sources.

The Secretary alleges that Schindler violated this regulation because it did not provide an "adequate" number of locks to its service mechanics on or around December 1, 2010.

The Secretary's basis for the alleged violation is Mr. Bendorf's observation of the accident scene and his interaction with Jerry Hauck, another elevator mechanic who Schindler called to the scene after Mr. Motley was found in B1. *See* Labor Brief, pp. 25 – 27. Mr. Bendorf noted that there was only one group lock[18] near Mr. Motley's safety bag, which he had left outside the B4 elevator. Day 3, p. 33- 36, 77 – 81, Exhibits 84, 85. There were multiple personal locks and group locks in his vehicle parked at the hospital. See Exhibit 84. When Mr. Hauck showed up at SMEH, he did not know exactly what he would encounter. *See* Day 3, p. 231. The fire department had locked out all four B-bank elevators. Day 3, p. 232 – 33. Mr. Hauck had one personal lock and one group lock, which Mr. Bendorf stated was not enough to tag out all four elevators after the fire department removed its locks. *See id.*, p.232. In any event, Mr. Hauck did not enter an elevator hoistway that night so he would have no reason to need personal locks to lock out the elevators. *See* Day 3, p. 231 – 232; Day 1, p. 240 – 41.

[18] Schindler's policy allowed for personal locks, which were red, and group locks, which were black. Personal locks open with a key possessed only by the mechanic who uses them. Group locks open with a key that unlocks all Schindler's group locks. Mechanics use group locks to facilitate shift changes. *See* Exhibit 39. A person working on equipment at the end of their shift places a black lock on the isolating breaker/valve and then removes their personal red lock. A person who continues to work on that equipment the next shift will place a red lock on the equipment and then remove the company lock. *See id.*

We find the Secretary failed to carry his evidentiary burden to sustain a violation of this standard by Schindler. The record shows that Schindler provided all of its mechanics with safety bags containing a sufficient number of locks to perform their work. It would have only taken one lock in many instances to lock out power to an elevator. The Secretary does not sufficiently explain why Mr. Hauck needed more locks when he arrived at an accident scene, or why the locks Mr. Motley had in his car would have been unavailable to him to use if he needed them. Mr. Wilt testified he believed Mr. Motley "absolutely had an adequate quantity of locks and tags to perform his procedures". See Day 3, p. 80 – 81. We hereby dismiss this item of the citation.

D. Schindler Citation 1, Item 12a and 12b.

These grouped items of the citation against Schindler relate to its inspections aimed at ensuring that its employees follow lockout/tagout requirements. The Secretary alleges that Schindler "did not properly certify that periodic inspections of the lockout/tagout program had been conducted on an annual basis and did not identify the machine or equipment on which the energy control procedure was utilized." Citation, Items 12a, and 12b. According to Labor this same allegation amounts to a violation of both 29 CFR §1910.147(c)(6)(i),[19] requiring at least annual inspections to ensure compliance with lockout/tagout requirements, and 29 CFR

[19] This subsection of the regulation provides that the "employer shall conduct a periodic inspection of the energy control procedure at least annually to ensure that the procedure and the requirements of this standard are being followed." This inspection shall include "a review, between the inspector and each authorized employee, of that employee's responsibilities under the energy control procedure being inspected."

§1910.147(c)(6)(ii),[20] requiring certification that periodic inspections have been performed.

Mr. Bendorf testified that he reviewed all annual safety evaluation records provided by Schindler and summarized those records in Exhibit 41. *See* Day 1, p. 95. According to him, those records show that Schindler had not performed lockout/tagout inspections on a strict annual basis, and that the records did not contain information required by the standard, such as the machine on which the energy control procedures are used. *See id.*, p. 100-101.

Cathy Morgan testified that all elevator mechanics in her district receive the annual inspection contemplated by this standard. *See* Day 2, p. 302 – 309. She also noted that Exhibit 41 was an inaccurate summary document and that Exhibit 82 showed that lockout/tagout inspections were performed during what it called annual safety evaluations. *See id.* Mr. Pryor and Mr. Wilt also testified that Schindler reviewed lockout/tagout procedures with its employees every year at which time each employee had to demonstrate how to perform a lockout. *See* Wilt's testimony Day 2, p. 18 – 19, 26, 85 – 87; Pryor's testimony, Day 1, p. 255 – 256. Mr. Wilt also stated that supervisors periodically observe employees in the field so that they could demonstrate locking out equipment. *See* Day 3, p. 26. We find that the weight of the

[20] This part of the regulation states, "The employer shall certify that the periodic inspections have been performed. The certification shall identify the machine or equipment on which the energy control procedure was being utilized, the date of the inspection, the employees included in the inspection, and the person performing the inspection."

evidence shows that Schindler in fact conducted the annual inspections required under the regulation. We therefore dismiss Item 12a.

As for Item 12b, we only have summary documents showing that Schindler performed annual safety evaluations. Neither party introduced the underlying documents to which those summaries apply. We do not have Schindler's records and therefore cannot ascertain whether they contain the certified information mandated by §1910.147 (c)(6)(ii), particularly the type of equipment on which the control procedure was being utilized. Mr. Bendorf, however, testified that such information was not included in the records provided to him that he used to create his summary. Schindler did not rebut this part of Mr. Bendorf's testimony. Based on that, we affirm this item of the citation.

Even though we affirm Item 12b, we believe that it amounts to an other-than-serious record keeping violation. In light of that and our finding that Schindler conducted the annual inspections that were to be certified, we do not believe that this citation warrants a $4500 penalty on par with the proposed penalties for the other alleged serious violations in the citation. We therefore reduce the penalty for Item 12b to $1000.

E. Schindler Citation 1, Items 13(a), (b), (c).

The Secretary cited Schindler for allegedly violating three lockout standards[21] because he contended that Schindler's employees failed to properly shutdown, isolate

[21] The cited standards are as follows:

(1) 1910.147(d)(2) Machine or equipment shutdown. The machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment. An orderly shutdown

and lockout the elevators during maintenance activities that occurred on December 1st and 2nd of 2010. As explained below, the Secretary failed to prove a violation of these standards and we hereby dismiss these items of the Citation against Schindler.

1. Maintenance Activities on December 1, 2010

On this date, Mr. Motley performed repairs on elevator B4 and entered into B1 hoistway for reasons unknown. The Secretary alleged that Mr. Motley failed to lock out elevator B4 while he performed repairs in violation of these regulations. He also maintained that Schindler violated these regulations because Mr. Motley inexplicably entered the hoistway of elevator B1 without isolating the elevator prior to entry. We find that the events on this date do not constitute a violation of the above lock out/tagout regulations.

At the time Mr. Motley's body was discovered in B1, his tools were neatly packed up and laying on top of the B4 car. B4 was not locked out, but there was a black group lock near the work site. There were also personal locks in Mr. Motley's vehicle. Based on these facts, the Secretary speculates that Mr. Motley violated the subject lockout/tagout regulations.

The Secretary's speculation about how Mr. Motley performed his work on elevator B4 cannot support a violation. Schindler's policies mandate that it's

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must be utilized to avoid any additional or increased hazard(s) to employees as a result of the equipment stoppage.

(2) 1910.147(d)(3). Machine or equipment isolation. All energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy source(s); and

(3) 1910.147(d)(4)(i). Lockout or tagout devices shall be affixed to each energy isolating device by authorized employees.

mechanics lockout elevators when they do not need power to the elevator to perform their work. The weight of the evidence suggests that Mr. Motley followed this policy. Mr. Motley had locks available to him, and one black lock was lying near the B4 doors. Although it might have been the wrong colored lock under Schindler's policy, Mr. Motley would have complied with the standard if he used it to lock out the elevator while performing repairs.[22] Mr. Pryor also opined at the hearing that the type of work performed by Mr. Motley required power to test the door operation after his work was complete. Because Mr. Motley had neatly packed up his tool bag, we find that he had finished his work and had proceeded to the testing phase. The elevator was also in inspection mode and there was a door wedge located near where he was working. This suggests that he used safe hoistway access procedures as Schindler trained him to do to enter into the hoistway to perform this testing.

The record is completely devoid of any evidence indicating why Mr. Motley entered B1. No one knows the reason why he was there. Even if he had a valid reason to be in there, we find that he should have isolated the elevator prior to entering into the hoistway. The evidence, however, reveals that Mr. Motley had not locked out the elevator or even activated the pit stop switch prior to entering B1. Under these circumstances, Mr. Motley's entry constituted a violation of the subject lockout/tagout regulations.

[22] Another Schindler mechanic would have had to purposely remove the black lock, if used in lieu of a red one, to expose Mr. Motely to unexpected energization of equipment. Mr. Motley, however, worked alone on December 1, 2010. Moreover, the subject performance-based standard does not specify what types of locks must be used.

The Secretary, however, had to prove that "the employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Bowlin Group, LLC*, 437 S.W.3d at 746. Schindler did not have actual knowledge of Mr. Motley's actions because he was working alone on December 1st. Thus, the central issue regarding the alleged violation on December 1st is whether Schindler could have known of Mr. Motley's actions with the exercise of reasonable diligence. Failure to use reasonable diligence constitutes constructive knowledge sufficient to establish a violation. Factors relevant in determining reasonable diligence include:

> the duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules.

Id. (quoting *David Gaines Roofing*, 344 S.W.3d at 148).

The Secretary argues that Schindler had constructive knowledge based on its failure to adequately supervise Mr. Motley. Mr. Motley's supervisor had quit and that position had been vacant for about a month and a half preceding Mr. Motley's death. He also noted that the person filling in for the supervisor, Cathy Morgan, admitted that she was expected to do three safety walks per month and was only doing two, and that she had not observed Mr. Motley working while serving in her temporary role. She also testified that Schindler conducts three district wide audits once a year, which the Secretary contends amounts to failure to exercise reasonable diligence as a matter of law.

We find that the Secretary failed to establish constructive knowledge based on alleged inadequate supervision. Mr. Motley was an experienced mechanic with more

than forty years of experience, and had been the Schindler mechanic with the responsibility for servicing the SMEH elevators for over five years. He was well aware of the hazard posed by the elevator equipment, which makes his death so unexplainable. Schindler had properly trained him on lockout/tagout policies, and had not observed him commit, nor was he ever disciplined for, any safety violations. Under these circumstances, Schindler had no reason to provide one-on-one supervision for Mr. Motley. *See Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 569 – 570 (5th Circ. 1976) (finding that employer could rely on experienced foremen with no prior history of not following safety instructions); *Brennan v. OSHRC*, 502 F.2d 946, 949 (3d Circ. 1974) (noting that close supervision of an experienced employee with no previous accidents or safety issues may not be feasible); *Sec. of Labor v. Conn. Light & Power Co.*, 13 O.S.H. Cas (BNA) 2214 (O.S.H.R.C. April 26, 1989), 1989 WL 223325 at *6 (noting that "an employer is justified in placing a great deal of reliance on the judgment of highly experienced and trained employees with good safety records").

We also find that the Secretary failed to demonstrate that Schindler lacked due diligence in training and enforcement of its written lockout/tagout policies. Schindler communicated these rules to all its employees and expected its mechanics to follow them. Schindler offered evidence showing that its mechanics, including Mr. Motley, received required annual lockout/tagout training and all required weekly training. *See* Exhibit 82, Day 2, p. 303 – 309. Schindler also offered evidence that it took reasonable steps to discover violations and effectively enforce those rules

through progressive discipline procedures. Day 2, 295 – 302, Day 3, p. 16 -19. These included site safety walks and observation of employees by direct supervisors. In addition to that, upper level managers conducted yearly audits to make sure that supervisors were properly auditing compliance with these rules. Day 2, p. 317.

In sum, the evidence fails to support a lock out/tagout violation pertaining to Mr. Motley's activities on December 1, 2010. The Secretary failed to prove that Mr. Motley violated lockout/tagout rules while working on B4 elevator. The weight of the evidence also shows that Schindler did not have actual or constructive knowledge of Mr. Motley's inexplicable entry into B1, which led to his death.

2. Maintenance Activities on December 2, 2010

On this date, the compliance officer observed Messrs. Pryor and Woosley replacing the counterweight guard in the B3 hoistway. The mechanics locked out the elevator, entered the hoistway, went into the pit, and replaced the guard over the counterweight. When the work was finished, the mechanics ensured that the counterweight would move past the guard without contacting it. The mechanics removed their locks and Mr. Pryor positioned himself in the pit to observe and listen to the counterweight move past the guard while Mr. Woosley moved the elevator in inspection mode. Mr. Pryor was in a safe area where the elevator car could not strike him.

Schindler argued that the lockout requirements did not apply because the scope of the testing of the counterweight was not "the servicing and maintenance of machines and equipment in which the unexpected energization or startup of the machines or equipment, or release of stored energy could cause injury to employees."

29 CFR §1910.147(a)(i) (emphasis added). As explained by the Sixth Circuit Court of Appeals:

> We conclude that the plain language of the lockout standard unambiguously renders the rule inapplicable where an employee is alerted or warned that the machine being serviced is about to activate. In such a situation, "energization" of the machine cannot be said to be "unexpected" since the employee knows in advance that machine startup is imminent and can safely evacuate the area. The standard is meant to apply where a service employee is endangered by a machine that can start up without the employee's foreknowledge. In the context of the regulation, use of the word "unexpected" connotes an element of surprise, and there can be no surprise when a machine is designed and constructed so that it cannot start up without giving a servicing employee notice of what is about to happen.

Reich v. General Motors Corp., 89 F.3d 313, 316 (6th Circ. 1996). We adopt this holding as our own and believe it supports Schindler's argument.

Mr. Pryor was in no appreciable danger from unexpected movement by the elevator while in the B3 hoistway. The elevator was in inspection mode and under the control of Mr. Woosley for the test. The two could easily communicate concerning the elevator's movement.[23] The lockout/tagout regulations did not require the elevator to be locked out under these circumstances.

Schindler also argued the counterweight guard test fell under a testing and positioning exception found in 29 CFR §1910.147(f)(1), which provides:

> (1) Testing or positioning of machines, equipment or components thereof. In situations in which lockout or tagout devices must be temporarily removed from the energy isolating device and the machine or equipment energized to test or position the machine, equipment or component thereof, the following sequence of actions shall be followed:

[23] Mr. Bendorf was outside the hoistway during the test and could not see what the two men were doing. If the elevator doors were open, the interlocks would have prevented the car from moving.

(i) Clear the machine or equipment of tools and materials in accordance with paragraph (e)(1) of this section;

(ii) Remove employees from the machine or equipment area in accordance with paragraph (e)(2) of this section;

(iii) Remove the lockout or tagout devices as specified in paragraph (e)(3) of this section;

(iv) Energize and proceed with testing or positioning;

(v) De-energize all systems and reapply energy control measures in accordance with paragraph (d) of this section to continue the servicing and/or maintenance.

Id.

This exception is applicable when viewed in tandem with an OSHA interpretation. The procedure contemplates that employees are removed from the machine area in accordance with paragraph (e)(2) at all times after tags and locks are removed. Paragraph (e)(2) provides employees must be safely positioned or removed from the work area. In this case, Mr. Pryor had to pass through a zone of the hoistway where the elevator could theoretically strike him before he could reach a position where it was impossible for the elevator car to do so. Although that appears to eliminate the availability of this exception, OSHA acknowledges practical realities where "it is impossible to remove employees from the machine area and still conduct the type of inspection that must be performed." OSHA Interpretation, Lockout/Tagout and the Provisions for Testing or Positioning of Machines While They Are Energized, May 4, 2007. Under those circumstances, OSHA has stated the employer should implement alternative safeguarding measures. Mr. Pryor entered the pit while the car was under the exclusive control of Mr. Woosley in inspection mode. He would have only been in an area where the elevator car travels during

normal operation for a short period of time while entering the hoistway and climbing down into the pit. He also could have hit the pit stop switch if the elevator were to move towards him unexpectedly. We find that these alternative safeguarding measures were sufficient.

The practical reality was that the mechanics needed to move the elevator to perform their test and Mr. Pryor needed to position himself where he could see and hear the counterweight move past the guard. The Secretary offered pure speculation in its brief that the mechanics should have placed a video camera and microphone in the pit to observe the counterweight in lieu of Mr. Pryor having to do so. Nobody from the elevator industry, however, testified that was feasible or even an accepted practice in the elevator industry.[24] The above testing exception provides yet another reason for dismissing these Items of the Citation against Schindler.

F. Schindler Citation 1, Item 14, and SMEH Citation 1, Item 4

These items allege that Schindler and SMEH violated 29 CFR §1910.147(f)(2)(i) providing:

> Whenever outside servicing personnel are to be engaged in activities covered by the scope and application of this standard, the on-site employer and the outside employer shall inform each other of their respective lockout or tagout procedures.

The Secretary cited Schindler and SMEH because neither provided each other with copies of their written lockout/tagout programs. The Secretary alleged that SMEH

24 Day 2, p. 233, 234 – testimony from Pryor. Day 3, p. 32:5 – testimony from Wilt. Day 3, p. 117-122 – testimony from Karosas.

employees were exposed to the hazard resulting from this violation because they were "involved in service work on the elevators in the B Bank at the hospital."

Schindler argues that it met the spirit of the regulation because SMEH was fully aware of its maintenance activities. The regulation, however, requires the contractor to do more than just inform a host employer of the work it is performing. The D.C. Court of Appeals affirmed a citation under the same regulation when an elevator technician failed to provide a copy of his employer's lockout/tagout procedures to the host employer prior to repairing a jammed gate on a freight elevator. *See Otis Elevator Co. v. Sec. of Labor*, 762 F.3d 116 (D.C. Circ. 2014). A federal OSHA directive also makes clear that an actual exchange of lockout/tagout procedures between a contractor and host employer is required. *See* The Control of Hazardous Energy – Enforcement Policy and Inspection Procedures, CP 02-00-147, p. 3-57.

Schindler also argues that it did not expose SMEH employees to a hazard because it neglected to exchange its lockout/tagout procedures. The regulation presumes that failure to exchange lockout/tagout procedures exposes employees engaged in maintenance activities to a hazard. *See Otis Elevator, supra* at 124. As explained by the preamble to the lockout/tagout regulation:

> The requirements are necessary when outside personnel work on machines or equipment because their activities have the same or greater potential for exposing employees to servicing hazards as would exist if the employers own employees were performing the work. These hazards can pose a threat to both the outside service representatives and the employees in the plant or facility.
>
> The outside servicing personnel would certainly be expected to know about the specific equipment being serviced, but they might not be

> familiar with the energy control procedures being used in the particular workplace. Similarly, the employees at the worksite might be familiar with the procedures being used by their own employer, but they might not know what to do if the contractor has a procedure which differs from their own. If such procedures were not coordinated, each group of employees might be endangered by the actions of the other, even if each one followed its own procedures.
>
> This standard is intended to ensure that both the employer and the outside service personnel are aware that their interaction can be a possible source of injury to employees and that the close coordination of their activities is needed in order to reduce the likelihood of such injury.

54 FR 36644-01, 36680 - 81 (Sept. 1, 1989).

In *Otis Elevator*, the employer argued, as Schindler does here, that it did not expose the host employer's employees to any potential hazard arising from the employer's maintenance and servicing activities. The court disagreed and found that the host employer's employees were exposed to the hazard posed by the jammed freight elevator gate that the employer was hired to fix:

> The citation was factually reasonable because the Commission specifically found that the mechanics repair work exposed Boston Store employees in the building to a zone of danger in that they "were present at the store and had access to the elevator gate while the Otis mechanic was servicing the elevator," and the slamming down of the gate could have harmed a person in its path.

See Otis Elevator, supra at 124. Even though the employer's arguments failed, this case instructs that we should determine whether either the host or the contract employer has exposed the other's employees to the hazards arising from the equipment being serviced or maintained. If not, then the Secretary has not proven the necessary element of employee access to the violative or hazardous condition. *See Morel Constr. Co.*, 359 S.W.3d at 443.

We find that the record does not support that Schindler exposed SMEH employees to a potential hazard arising from its elevator maintenance activities. Mr. Bendorf admitted that no hospital employees would have any reason to be working with Mr. Motley when he was repairing B4 elevator, nor would they have any reason to wander into the elevator pit of B3 when Messrs. Pryor and Woosley were working there. *See* Day 1, p. 264 – 65. Because there is no basis upon which to conclude that any SMEH employee had access to the mechanical dangers associated with a moving elevator car during Schindler's work, we hereby dismiss Item 14 of Citation 1 against Schindler.

Item 4 of the citation against SMEH also fails for similar reasons. SMEH had no reason for its employees to work on or near the elevator equipment; it contracted with Schindler to maintain that equipment. In fact, the elevator equipment could only be serviced by qualified elevator mechanics, like those employed by Schindler. *See* Day 1, p. 131. Thus, the Secretary failed to prove that SMEH's failure to provide Schindler with its lockout/tagout procedures, or require the same from Schindler, exposed SMEH's employees any hazard arising from Schindler's work on the elevators.

Labeling Violations

A. Schindler, Citation 1, Item 15a and SMEH, Citation 1, Item 5a.

Both SMEH and Schindler were cited pursuant to 29 CFR §1910.303(f)(1), which provides:

> Motors and appliances. Each disconnecting means required by this subpart for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so that the purpose is evident.

The alleged violation of this regulation by Schindler and SMEH are based, in part, on certain soapstone markings etched on the elevator cars located in hoistway B1 and B4.[25] These markings labeled the car in B1 and B4, "Car 05" and "Car 1," respectively. *See* Trial Exhibit 5 and 6. Moreover, fused electrical disconnects for B1 and B4, which were located in the penthouse on panel "7CHP," also have faint pencil markings ("Car #5" on disconnect for B1, and "Car #4" for B2). *See* Trial Exhibits 11 and 12. The fused disconnects power other disconnects located on the elevator control panels that in turn power the hoist motors and elevator equipment for B1 and B4. *See* Trial Exhibits, 52 – 56. Mr. Bendorf testified at the hearing that the inconsistent labeling could possibly cause confusion.

We find that the elevator equipment was properly labeled, notwithstanding the extraneous markings on the cars and references thereto on two breaker panels. All the hoist motors and control cabinets are designated by a hoistway number. *See e.g.*, Exhibits 25, 26, 30, 52 – 56. None of Schindler's witnesses said that the soap stone markings on the cars or the pencil markings on the fused disconnects in the penthouse confused them. *See* Day 1, p. 267. The elevator mechanics were only concerned with hoistway designations, which were clearly marked above the elevator

[25] The citation against Schindler stated, "[T]he fused electrical disconnects that fed the disconnects for the elevator control panels, located in the elevator penthouse were not properly labeled, the elevator control panel disconnects which powered the hoist motors and elevator equipment were labeled B1, B2, B3, and B4, the elevator cars and equipment located in the hoistways were not properly labeled to correspond to the disconnects or control panels, or hoist motors." Citation 1, Item 15a. SMEH's citation, described the cited condition as, "the labeling for disconnects and elevators was not clear and consistent including the fact that an elevator car labeled "Car #05" was present in the hoistway labeled B1 and an elevator car labeled "Car#1 Rear" was present in hoistway labeled 4." Citation 1, Item 5a.

door for each hoistway. *See* Day 2, p. 275; Exhibit 45. Witnesses stated that the markings were etched on the cars for installation, but served no purpose thereafter. *See* Day 2, p. 274.

The Secretary also claims that extraneous handwritten writing on the B3 motor controller disconnect constitutes another violation of the above labeling standard by SMEH and Schindler. *See* Day 1, p. 45. This disconnect depicted by Exhibit 17 and 55 is affixed directly to the control cabinet. The presence of some handwritten numbers on the panel does not constitute a violation of the above standard. The large label titled "B3"and the location of the disconnect makes the purpose of that breaker evident. This alleged deficiency also fails to support these items of the citations against Schindler and SMEH.

Last, the citation against SMEH states that it "did not ensure proper labeling of an electrical disconnect means located in the elevator penthouse near the 7CHP circuit panel." The citation against Schindler does not refer to this panel. Trial Exhibits 11 and 15 depict this panel, which is not labeled at all. Mr. Humphrey, who happens to be an electrician by trade, testified that this panel powered cell tower equipment located on the floor below. *See* Day 3, p. 303. A contractor of AT&T installed the panel and neither Schindler's nor SMEH's employees had reason to touch it.

Although Mr. Humphrey stated that he knew the purpose of the panel, the standard clearly requires labeling unless its purpose is evident from its location. The panel was not labeled and its purpose was not evident from its location because the

equipment it powered was on the floor below. SMEH owns and controls its building, and therefore should be responsible for proper labeling of equipment installed there. Even though SMEH employees generally had no reason to operate the AT&T equipment powered by this breaker, some had access to the location where this breaker was located and may have had to use in case of emergency, such as an electrical fire in that equipment. *See Secretary of Labor v. KECO Industries, Inc. and International Assoc. of Machinists and Aerospace Workers.*, 1982 O.S.H.D. (CCH) P 26104 (O.S.H.R.C.A.L.J. June 21, 1982), 1982 WL 22431 at *6 (noting that a hazard existed for failure to label disconnect boxes because workers could not quickly locate the appropriate disconnect during an emergency).

In sum, we affirm Item 5a of Citation 1 against SMEH based on the breaker near the 7CHP panel not having any label whatsoever, and dismiss Item 15a of Schindler's citation. Schindler's citation did not encompass the breaker near the 7CHP panel. Even if it did, there is no evidence that Schindler ever exposed its employees to any hazard associated with this unlabeled disconnect.

B. Schindler Citation 1, Item 15b and SMEH Citation 1, Item 5b.

Schindler and SMEH were cited pursuant to 29 CFR §1910.303(f)(2), which provides:

> Services, feeders, and branch circuits. Each service feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so that the purpose is evident.

Both citations allege that neither employer ensured "proper labeling of the electrical services, feeders, and branch circuits for the B1, B2, B3 and B4 elevator equipment located in the elevator penthouse and a closet on the 4th floor of the hospital."

The Secretary claims that these items are based, in part, on the extraneous handwriting on the fused disconnects located on the "7CHP" panel (Trial Exhibit 11) discussed above. The elevator equipment powered by these disconnects are indicated on the panel with labels B1, B2, B3 and B4. These labels match the pertinent hoistway designation found above the elevator doors and the associated equipment in the penthouse. As stated above, these fused disconnects are sufficiently labeled.

The other labeling violations for these items relate to two other electrical panels depicted by Trial Exhibits 19 - 24.[26] Labor's Brief to the Commission, p. 36 - 37. Specifically, it offers Exhibit 19 to show a circuit panel (4CLI) with a circuit labeled "elevator circuit" that does not specify the elevator to which it is referring. This panel was located in a closet on the fourth floor, and there was no evidence showing that Schindler ever accessed or used that panel to maintain the elevators. *See* Day 2, p. 261. The Secretary also criticizes another circuit panel depicted in Trial Exhibits 22 and 23. That panel contains a labeling placard showing two breakers for "lights car #5" and "lights car #4." These labels are not consistent with other elevator equipment designations that refer to hoistways. Even though the placard states that breakers 8 and 12 are "spares," pencil markings indicate that those breakers serve "B7 panel" and "B1 2 Light." A "B7 panel" is common model type of dispatch controls for elevators, which elevator mechanics know is installed on B1 and B2 elevator. *See*

[26] There was another panel depicted by Exhibit 24, which appears unlabeled. Mr. Humphrey of SMEH, however, testified that Exhibit 91 depicts the panel ID card that provides adequate labeling. The record does not support a violation based on that panel, and the Secretary did not specifically mention any deficiencies with that panel in its brief to the Review Commission.

Day 2, p. 262 – 263. The "B7 panel" label may be confusing to a layperson, but it sufficiently identified the load for the elevator mechanics who use it. The purpose of the breaker labeled "B1 2 Light" is also evident.

We find that the Secretary offered sufficient evidence of minor labeling violations. The non-descript "elevator circuit" label in circuit panel 4CLI should have been more specific in identifying the elevator to which it referred. The panel placard shown in Exhibit 22 also contains inadequate markings because it refers to lights in cars # 5 and #4. Schindler argued that its mechanics ignored similar "car" labels on the main fused disconnects for B1-B4 elevators and instead identified the elevators by hoistway designation. Accordingly, this placard should also refer to the elevator hoistway designations instead of cars.

Who should be responsible for these relatively minor labeling deficiencies, SMEH, Schindler or both? Schindler argues that this issue implicates the multiple employer work-site doctrine. This doctrine arose in the context of the construction industry where multiple employers may be on the same work site, creating hazardous conditions or exposing their employees thereto. *See* Rothstein, Occupational Safety & Health Law, § 7.5 (2016 Ed.). Generally, an employer may be cited if it controls the work site or has the ability to correct a hazardous condition. *See id.* Even if an employer does not create a hazard, the Secretary may cite it for exposing its own employees to the hazard, depending on the circumstances. *See id.*

SMEH owns the equipment subject to these items of the citation. It should therefore be cited for any inadequate labeling thereof. We therefore affirm Citation 1, Item 5b as it relates to SMEH.

The Secretary did not prove that Schindler was a controlling employer for these labeling violations. He never established that Schindler undertook the contractual responsibility to label these panels even though he argued to the contrary in his post-hearing brief.[27] Mr. Bendorf even acknowledged that he cited Schindler as an exposing employer. Day 1, 199 – 201. So, the issue really becomes whether the Secretary properly cited Schindler for exposing their employees to these inadequate labels.

Schindler states that the applicable rule to apply under these circumstances was developed in *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199 (1976) 1976 WL 5967, and *Grossman Steel & Alum. Corp.*, 4 BNA OSHRC 1185, 1188 – 89 (May 12, 1976). Under the *Anning-Grossman* rule, an exposing non-controlling employer who does not create the hazard does not have to literally comply with the standard. *See* Rothstein, *supra* at 7:7. When approached with a hazard, the employer must "do something" to protect its employees and it must "be reasonable under the circumstances." *Id.* As Rothstein points out, however, the Federal Commission has not applied this rule outside of the construction industry. *See id.*

[27] The Labor's post hearing brief provided that Schindler had liability for these labeling violations because it had a contract to maintain the elevators. *See* Labor's Post Hearing Reply Briefs, p. 20 – 21. Labor did not offer any evidence to support that Schindler undertook the responsibility to label the equipment.

Rothstein states that, in non-construction cases such as this, the Secretary must only show that employees were sufficiently exposed to the violative condition. *See id.* As stated in *Secretary of Labor v. California Stevedore & Ballast Co.*, 1 O.S.H. Cas. (BNA) 1757 (O.S.H.R.C. 1974), 1974 WL 4153:

> In the usual case an employer is in violation of section 5(a) when his employees are affected by a violative condition. It is no defense that others created the violative condition, were responsible for its existence, or had control of the site or the equipment where such condition exists.

Id. at *2. In that case, the Federal Review Commission held a stevedore company liable for allowing its workers to use unguarded winches that were part of a vessel's gear.

In this case, the Secretary has failed to offer evidence that Schindler's mechanics operated the breakers with deficient labeling. There was no evidence that any employee used the panel in the fourth floor closet for maintenance activities or that they would have had to use the breaker labeled "elevator circuit." Mechanic Jason Pryor began working with Schindler in 1997 and the SMEH elevators were part of his service route for three to four years. *See* Day 2, p. 211 – 212. He did not even recognize the panel located on the fourth floor. *See* Day 2, p. 261. The only breaker that Mr. Pryor used on the panel depicted in Exhibits 22 and 23 is the one labeled "B7 panel," which as stated above was sufficiently labeled. Day 2, p. 262. There was no evidence that Schindler mechanics had to work on the elevator car lighting systems such that they would have to operate the breakers labeled "car lights #4" and "car light #5." *See* Day 2, p. 262. Because there was no evidence that

Schindler required its mechanics to operate any of these deficiently labeled breakers as part of their work, Item 15b of the Citation against Schindler is hereby dismissed.

C. Schindler, Citation 1, Item 15c

This citation relates to a specific regulation concerning elevator equipment, 29 CFR §1910.306(c)(6)(ii), which provides:

> The disconnecting means shall be provided with a sign to identify the location of the supply-side overcurrent device.

In this instance, the supply-side overcurrent device for the controller cabinet for the hoist motors is located at panel 7CHP (Exhibit 11 - 13). The downstream disconnects (*see e.g.*, Trial Exhibit 17), however, do not indicate the location of the supply-side overcurrent protection device. The Secretary maintains that the breakers on the control cabinets should be labeled similar to the panel depicted by Trial Exhibit 21, indicating that it is "fed" from the 7CHP panel. We agree with this position based on the unambiguous language of the regulation.[28]

With that said, the Secretary did not cite SMEH with failing to label these breakers that it owns and controls. It cited Schindler, presumably for exposing its employees to this mislabeling, or, based on its misunderstanding that Schindler had a contractual responsibility to label elevator equipment breakers. The Secretary failed to prove either of these theories. The Secretary neglected to offer evidence that Schindler disabled the hoist motors using the 7CHP panel or was somehow confused as to the purpose of that panel. If Schindler needed to isolate power to the hoist

[28] Westlaw Key-cite did not identify a single case or administrative decision that cites to this regulation.

motors, it locked out the breakers shown on the motor control cabinets. *See* Trial Exhibits 53 – 56. Moreover, the contract between Schindler and SMEH does not obligate Schindler to label equipment, nor did Schindler install those electrical panels. *See* Day 2, p. 263. We therefore dismiss Item 15c of the citation against Schindler.

D. Reclassification of Citation to Other Than Serious and Elimination of Penalty for Items 5a and 5b against SMEH.

The Commission has the authority to change the classification of citations from serious to other than serious. *See* Rothstein, at § 14.7. To show that a violation is serious, the Secretary must prove that "1) that an injury could result from an employee's exposure to the cited condition; and 2) a substantial likelihood that the injury would cause an employee death or serious injury." *Dep. of Labor v. Morel Const. Co.*, 359 S.W.3d 438, 450 (Ky. Ct. App. 2011).

The Secretary categorized Items 5a and 5b of the Citation against SMEH as serious based on the assumption that employees "would not know the proper disconnect means for equipment to be serviced." Day 1, p. 63. It assessed a $5000 penalty because it found that there was a greater probability of death of an employee. If the breakers used to isolate the elevator cars were mislabeled, then the Secretary's position seems viable. After all, an uncontrolled elevator killed Mr. Motley.

That logic crumbles here because the breakers used by mechanics to isolate the elevator cars have sufficient labels. Only a few circuits required additional labeling, and the Secretary failed to show how mislabeling those circuits were likely to result in death or serious injury of any employee. Under these circumstances, these

violations are properly categorized as other than serious. *See e.g., Secretary of Labor v. KECO Industries, Inc. and International Assoc. of Machinists and Aerospace Workers.*, 1982 O.S.H.D. (CCH) P 261014 (O.S.H.C.A.L.J. June 21, 1982), 1982 WL 22431, at * 8; *Secretary of Labor v. Thermal Reduction Corp.*, 1986 – 1987 O.S.H.D (CCH) P 27583 (O.S.H.R.C.A.L.J. April 14, 1986) at *21 1986 WL 53480. We therefore re-classify Item 5a and 5b of SMEH's citation to other than serious and eliminate the $5000 penalty.

Exposed Electrical Components
Schindler, Citation 1, Item 16 & SMEH, Citation 1, Item 6

The Secretary cited both Schindler and SMEH for violation of 29 CFR §1910.303(g)(2)(i), which provides:

> Except as elsewhere required or permitted by this standard, live parts of electrical equipment operating at 50 volts or more shall be guarded against accidental contact by use of approved cabinets or other forms of approved enclosures or by any of the following means:
>
> (A) By location in a room, vault, or similar enclosure that is accessible only to qualified persons. . . .

Mr. Bendorf inspected the elevator penthouse on three different occasions and took pictures of what he believed were exposed electrical parts in violation of the standard. The Secretary introduced these pictures as Exhibits 25 – 34 and Mr. Bendorf testified why he thought these pictures reflected violations. The pictures show cabinets with their covers off, exposing mainly insulated wires and electrical components, and motors and generators with access panels taken off the shrouds covering them. Mr. Bendorf testified that his handwriting on Exhibits 25 and 26 reflects the voltages of the exposed parts as provided to him by Fred Wilt, a safety director of Schindler. He also relied on a "440 Volts" label on the outside of the cabinet reflected in Exhibit 29

to support his conclusion that there were exposed parts greater than 50 volts. Mr. Bendorf, however, did not use a voltmeter to test any exposed parts himself. The Secretary also failed to elicit testimony from Mr. Wilt, who testified at the hearing, about the voltage information that Mr. Wilt allegedly told Mr. Bendorf.

Schindler and SMEH made several arguments about why the Commission should dismiss these citations. Schindler pointed out that the Secretary failed to offer sufficient evidence of the voltage of the exposed electrical parts. Even if the Secretary sufficiently proved voltage, the Petitioners stated that because the components were located in a locked mechanical room that was only accessible by "qualified persons," those exposed parts were guarded by location. Last, both Petitioners claimed that their employees did not have sufficient access to the live parts to suffer "accidental contact" therewith.

The Commission has previously held that the Secretary must prove that the voltage of any exposed parts is greater than 50 volts to support this type of alleged violation. *See Secretary of Labor v. Fuji Steel*, KOSHRC No. 5145-14 (KOSHRC Feb. 2, 2016), slip opinion at pp. 19 - 21. A compliance officer should normally test the voltage of exposed and uninsulated parts by using a voltmeter. *See id.* Mr. Bendorf did not do that here. Instead, he offered pictures with his handwritten notes that reflect an alleged conversation he had with Mr. Wilt about the voltage of the components depicted. Mr. Bendorf only authenticated his notes and pictures without providing supporting testimony describing which uninsulated parts depicted in the pictures had voltage greater than 50 volts. The only other mention of voltage during

the entire hearing was when Mr. Humphrey testified that the supply voltages to the equipment in the penthouse was either 208 volts or 480 volts. Day 3, p. 220.

We cannot ascertain from the record whether the uninsulated parts in the open ERL controller, distance direction detector, brake micro-switch, and the panel depicted in Exhibit 26 are greater than 50 volts, or whether the handwritten notes merely refer to operating voltages found in the insulated components. The panel depicted in Exhibit 27 does not even have notes written on it for voltages. At most, Mr. Bendorf testified that he thought certain wires "appeared" to be connected to the main disconnects. Day 1, p. 66. In sum, we find that the Secretary did not offer the necessary proof of voltage needed to sustain this type of alleged violation based on these components.

There was, however, sufficient evidence to conclude that certain exposed uninsulated copper wires reflected in the hoist motors and motor generator sets depicted on the first page of Exhibit 25 were greater than 50 volts. Mr. Humphrey testified that this equipment runs on at least 208 volts. Mr. Bendorf also stated that he could see sparks when those pieces of equipment were in operation. *See* Day 1, p. 70.

Even if the Secretary proved that the uncovered component of the hoist motors and motor generator sets were greater than 50 volts, both Schindler and SMEH contend that the mechanical room was locked and only accessible by employees who are "qualified persons." If they are correct, then 29 CFR §1910.303(g)(2)(i)(A) provides that the electrical parts at issue here are guarded by location. *See also, Sec. of Labor*

v. Con Agra, Inc., 12 O.S.H. Cas. (BNA) 1071 (O.S.H.R.A.L.J.) (Oct. 29, 1984),1984 WL 34955 at *4 (dismissing a citation based on 1910.303(g)(2)(i) and noting that the record provided no probative evidence that persons operating a particular switch were not qualified persons).

The applicable regulations define a "qualified person" as "one who has received training in and has demonstrated skills and knowledge in the construction and operation of electric equipment and installations and the hazards involved." 29 CFR §1910.399. A note regarding this specific definition provides:

> Whether an employee is considered to be a "qualified person" will depend upon various circumstances in the workplace. For example, it is possible and, in fact, likely for an individual to be considered "qualified" with regard to certain equipment in the workplace, but "unqualified" as to other equipment.

Id., Note 1.

The training required of a "qualified person" is set forth in 29 CFR §1910.332, and includes the following topics:

> (b)(1) . . . [S]afety-related work practices required by §§ 1910.331 through 1910.335 that pertain to their respective job assignments. . . .
>
> (b)(3)(i) The skills and techniques necessary to distinguish exposed live parts from other parts of electric equipment.
>
> (b)(3)(ii) The skills and techniques necessary to determine the nominal voltage of exposed live parts, and
>
> (b)(3)(iii) The clearance distances specified in § 1910.333(c) and the corresponding voltages to which the qualified person will be exposed.

We find that SMEH failed to offer sufficient evidence that all employees who had access to the mechanical room received this training.[29] This is particularly true with the security guards who had keys to the room and would inspect the mechanical room from time to time.

Even if the Secretary sufficiently proved that some of voltages of exposed parts were greater than 50 volts and that those components were not guarded by location, he still must prove employee exposure to a violative condition. *See Morel Constr. Co.*, 359 S.W.3d at 449. Exposure, as applied to live parts, is specifically defined in the regulation as "capable of being inadvertently touched or approached nearer than a safe distance by a person," and "[i]t applies to parts not suitably guarded, isolated or insulated." 29 CFR §1910.399. The standard also explicitly states that it requires protection against exposure to "accidental contact." In order to prove exposure generally in any alleged violation, the Secretary must offer evidence "showing that employees were actually exposed to a hazard or by showing that access to the hazard was reasonably predictable" or they "will be, or have been within the zone of danger." *Morel Constr. Co., supra* (citing to Federal Review Commission precedent). Here, the Secretary only proved that some persons had access to the penthouse room. We find this proof insufficient to show employee exposure to accidental contact.

Pictures in the record show that a shroud encapsulates the motors and motor generators even though some of the access ports in those shrouds had their covers off.

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[29] Mr. Humphrey testified that all members of his team are "qualified" to go into the mechanical room. However, there is no proof that anyone other than the trained electricians had training set forth in 29 CFR §1910.332.

Somebody would have to stick their body parts into those access ports to contact any potentially live copper wires in order to be exposed. Two of the hoist motors were also on an elevated platform surrounded by a guard railing. We find that the Secretary failed to prove that accidental contact with the copper wires within the motor and generator shrouds was reasonably predictable. *See Sec. of Labor v. Hackney, Inc.*, 14 O.S.H. Cas. (BNA) 1300 (O.S.H.R.C.A.L.J. Aug. 24, 1989), 1989 WL 223424, at *2 (vacating citation based on 29 CFR §1910.303(g)(2)(i) based on failure to show sufficient likelihood of exposure to accidental touching).

The cabinets had a larger surface area of exposed parts, but the Secretary failed to offer evidence of how much room a person had to walk around the front of the cabinet that was open, and whether that put someone in the zone of danger. And, as stated above, the record does not even reveal whether some of the uninsulated components that a person could accidentally touch were greater than 50 volts.

The Secretary's proof of SMEH's employee exposure to the alleged hazards of the subject equipment was even more lacking. The Secretary did not offer evidence that an SMEH employee actually went near the equipment when it was open. Nor would it be reasonably predictable for the few SMEH's employees who entered the penthouse on rare occasion to be in the zone of danger. The tradespeople who worked in SMEH's engineering department had absolutely no reason to approach this equipment, and only entered the penthouse four times a year to change air filters on some HVAC equipment. These specialized tradespeople were sufficiently trained to

know the dangers of electrical equipment. Security guards did enter the room on occasion, but only entered to take a quick glance from time to time.

Based on the foregoing, we find that the Secretary failed to meet his burden of proof for Item 16 of the Citation against Schindler, and Item 6 of the Citation against SMEH. We therefore dismiss those items of the Citations.

Schindler Citation 2, OSHA 300A Logs

This citation provides that Schindler violated 29 CFR §1904.29(a) by failing to maintain OSHA forms 300A for recordable injuries and illnesses, as demonstrated by Exhibit 70, which contains copies of Schindler's OSHA Form 300A summaries. According to the citation, Schindler recorded the 2005 and 2006 summaries on the incorrect form; and the 2006 summary contained errors.[30] Schindler contends that the applicable statute of limitations, which it contends is six months, bars the alleged paper work violations. The Secretary states that the statute of limitation is five years.

Schindler's relies on a federal case, *AKM LLC v. Sec. of Labor*, 675 F.3d 752 (D.C. Circ. 2012), for its statute of limitations argument. In that case, the employer successfully argued that the Secretary only had authority to cite it for deficient injury logs within six months of when the employer should have created the log. The employer in that case, however, relied on a federal statute of limitations that specifically applied to OSHA citations, 29 U.S.C. §658(c). That statute provides that

[30] The Citation also stated that the summaries (Form 300A) for 2007, 2008, and 2009 contained no recordable injuries. There was no evidence to support that there were injuries in 2007 – 2009 that Schindler did not report.

"[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation." *Id.*

Kentucky, however, did not explicitly adopt a statute of limitations analogous to 29 USC §658(c). The only specific time requirement provided by a Kentucky regulation is that "[a]ny citation shall be issued with reasonable promptness after termination of the inspection." 803 KAR 2:120 Section 1. Labor nonetheless argues that KRS §413.120(2) provides the applicable statute of limitations.

That statute provides that "an action upon liability created by statute, when no other time is fixed by the statute creating the liability" shall be commenced within five years after the cause of action accrued. Labor contends that its' "cause of action" against an employer "accrues from the last date an employee is exposed to the hazard, the citation becomes a final order or the last abatement date, whichever is later." We have found no cases interpreting this statute to include citations issued by the Labor Cabinet or other Kentucky agencies, nor did the Secretary cite to any cases when making his argument. Without such guidance, we will abstain from deciding whether this five-year statute of limitations applies without more guidance from the Legislature on this issue.

Instead, we rely on 29 CFR §1904.33(a), which provides that employers must save summary forms 300A for five (5) years following the end of the calendar year that they cover. Kentucky has incorporated this document retention regulation by reference. *See* 803 KAR 2:180 Section 2. Since this regulation required the subject forms 300A to be maintained and available for inspection, it would only make sense

that the Secretary retains the authority to cite an employer for substantive deficiencies with these records. The Secretary, however, should issue a citation with "reasonable promptness" after it discovered or reasonably should have discovered a deficiency with the records. *See Sec. of Labor v. Johnson Controls, Inc.*, 15 O.S.H. Cas. (BNA) 2132 (O.S.H.R.C. Feb. 3, 1993), 1993 WL 35627 at *5 (adopting a similar approach). A citation was issued within six months of Mr. Bendorf's initial inspection, which we find was reasonably prompt. We shall therefore examine these alleged deficiencies with the forms to determine whether the Secretary proved a violation of 29 CFR §1904.29(a).

The Secretary complained that all of the summaries for 2005 through 2009 used a pre-2004 version Form 300A. The regulation, however, allows the use of equivalent non-OSHA forms that contain all the information required by the OSHA issued form. The substantive changes from the pre-2004 to the post-2004 forms are immaterial. The pre-2004 form had an entry for musculoskeletal injury types whereas the post-2004 does not. The post-2004 form lists the number of days away from work and the total number of days of job transfer or restriction in columns K and L, respectively. These columns were flip flopped on the post-2004 form. Other than that, the forms are essentially identical. We hold that Mr. Bendorf's criticism of Schindler using a pre-2004 version of Form 300A does not support a violation.

Taking away the Secretary's complaint about Schindler using an outdated OSHA Form 300A, there was only one substantive error noted with the 2006 form. The 2006 form did not include a number for the total number of cases with job transfer

or restriction. There was only one injury for that year, and it appears that the employee injured took one day off work and then had four days of work restrictions. Technically, Schindler should have put "1" under the total number of cases with job restrictions instead of leaving it blank. Day 1, p. 285. This is technically a violation of the standard and we must affirm Citation 2 against Schindler.

With that said, this one minor mistake does not justify a $1800 penalty. Not only is this properly characterized as an other-than-serious violation, Schindler acted in good faith when completing the forms and there is no reason to penalize them for such a minor omission, especially when it was obvious that both the days off work and restricted work days resulted from the only injury reflected on the form. We therefore eliminate the penalty associated with this citation.

Order

For the reasons discussed above, we hereby order as follows:

1. As pertains to Schindler Elevator Corporation,
    a. Dismiss Citation 1, Items 1a, 1b, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12a, 13a, 13b, 13c, 14, 15a, 15b, 15c, and 16;
    b. Affirm Citation 1 Item 12b, reclassify that violation from serious to other-than-serious, and reduce the proposed penalty of $4,500 to $1,000; and
    c. Affirm Citation 2, but eliminate the proposed penalty of $1,800.
2. As pertains to Jewish Hospital and St. Mary's Healthcare, Inc.
    a. Dismiss Citation 1, Items 1a, 1b, 2a, 3b, 3c, 4, and 6;

b. Affirm Citation 1 Item 2b, and reduce the proposed penalty of $2,125 to $1,000;

c. Affirm Citation 1 Item 3a, and reduce the proposed penalty of $5,000 to $3,000; and

d. Affirm Citation 1, Items 5a and 5b, reclassify these items from serious to other-than-serious and eliminate the proposed penalty of $5,000.

Respondents shall pay the penalties stated herein and complete all required abatements within thirty (30) days of entry of this Order. Payments shall be made payable to the Kentucky State Treasurer and mailed to the Office of General Counsel, 1047 US 127 South, Suite 4, Frankfort, Kentucky, 40601.

It is so ordered.

July 5th, 2017.

Paul Cecil Green
Chair

DeBorah J. McCormack
Commissioner

Steven Griffin
Commissioner

Certificate of Service

I certify that a copy of the foregoing brief has been served this 5th day of July, 2017, on the following as indicated:

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