UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant, v. U.S. UTILITY CONTRACTOR COMPANY, Respondent.	OSHRC DOCKET No. **14-0744**

DECISION AND ORDER

COUNSEL: M. Patricia Smith, Solicitor of Labor, Christine Z. Heri, Regional Solicitor, Benjamin T. Chinni, Associate Regional Solicitor, Paul Spanos, Trial Attorney, for Complainant.

David W. Zoll, Esquire, Zoll, Kranz & Borgess, LLC, for Respondent.

JUDGE: Hon. John B. Gatto.

I. INTRODUCTION

The above-styled action came before the Court pursuant to a Citation and Notification of Penalty[1] (the citation) issued on April 15, 2014, to U.S. Utility Contractor Company (U.S. Utility) under section 9(a)[2] of the Occupational Safety and Health Act of 1970 (the Act)[3] by the United States Department of Labor's Occupational Safety and Health Administration (OSHA).[4] U.S. Utility timely filed a notice of contest on May 8, 2014, appealing the citation. The citation alleged one serious violation of 29 C.F.R. § 1926.416(a)(1), related to alleged improper protection of employees working in proximity to an electric power circuit. The Secretary asserts

[1] Since this action was heard under the Commission's Simplified Proceedings, 29 C.F.R. §§ 2200.200 - 2200.211, the complaint and answer requirements were suspended. *See* 29 C.F.R. § 2200.205(a).

[2] 29 U.S.C. § 658(a).

[3] 29 U.S.C. §§ 651-678.

[4] The citation was issued by Thomas E. Perez, Secretary of Labor, United States Department of Labor (the Secretary), through OSHA's Toledo, Ohio Area Director. By regulation, the Secretary has authorized OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

that U.S. Utility "violated the Act when it failed to protect its employees from electrical hazards as they worked on live circuits."[5] (Compl't's Post Hr'g Brief at 7; *see also* Tr. 6, 8; Cit. at 6.) Although initially a penalty of $5,390.00 was proposed, at trial the Secretary moved to increase the proposed penalty to $7,000.00. (Trial Tr. 9, Oct. 21, 2014.) The Commission has jurisdiction of this proceeding pursuant to section 10(c)[6] of the Act. For the reasons indicated *infra*, the Court **VACATES** the citation.

II. BACKGROUND

Ronnie Lopez, a former U.S. Utility employee, was injured at the worksite on October 17, 2013, and filed a complaint with OSHA several months later after U.S. Utility denied his workers' compensation claim. (Tr. 38, 161-163.) U.S. Utility denied his workers' compensation claim on the basis that its investigation showed that there had been no potential for electrical injury on October 17, 2013, from the area in which Lopez had been working. (Resp't's Proposed Findings of Fact and Conclusions of Law at ¶ 25.) Rather, U.S. Utility concluded that since there was no power to the box that Lopez was working on and there was no evidence of burn marks on his tools or the box, which would be expected in such a situation, that Lopez's injuries were the result of falling due to his failure to use a ladder on the job site. (*Id.*; *see also* Tr. 9.) Thus, the crux of the dispute in this case stems from Lopez's claim that he received an electrical shock while stripping the neutral orange (red) wire. (Tr. 17, 19, 52-53.)

III. ANALYSIS

The Court observed the demeanor of each witness that testified and assessed their credibility, considering their motivation, and whether the testimony was plausible, consistent and

[5] The citation did not allege a violation of the Act, but rather, alleged a violation of 29 CFR § 1926.416(a)(1). (Cit. at 6.)

[6] 29 U.S.C. § 659(c).

corroborated. Three U.S. Utility employees with management responsibility testified at the hearing: Matthew Dearth, the general foreman at U.S. Utility, John Retzke, the on-site project manager for U.S. Utility, and Leonard Schramm, U.S. Utility's Safety Director. Michael Blasingim, an employee with management responsibility for Industrial Power Systems, a U.S. Utility competitor, also testified. Each management witness testified with confidence, specificity, and certainty. They reflected a forthright and truthful demeanor. The testimony of each was consistent and favorable to U.S. Utility, which is not surprising considering U.S. Utility was contesting the citation. Importantly, however, their testimony generally was not contradicted by testimony elicited at trial from other witnesses subject to cross-examination, except Lopez, which for the reasons indicated *infra*, the Court does not find credible. Accordingly, the Court credits the testimony of each of the management witnesses.

During his testimony, Lopez displayed an untruthful demeanor and appeared to have an ax to grind with U.S. Utility. The Court's assessment of his demeanor and motivation was substantiated by testimony at trial that Lopez only filed a complaint with OSHA after U.S. Utility denied his workers' compensation claim. Lopez's testimony seemed disingenuous, self-serving, designed to support his complaint against U.S. Utility, and was not sincere or believable. Rarely was Lopez's testimony corroborated by the testimony of other witnesses and he made pretrial statements that directly conflicted with his trial testimony. Accordingly, the Court discredits Lopez's testimony and credits it only where it was corroborated by witnesses who were subject to cross examination and who themselves did not rely on his testimony or statements.

OSHA's Compliance Safety and Health Officer, Darin Von Lehmden,[7] also testified. While he stated that he had some training relating to electrical hazards, and had performed at least one investigation involving multiple injuries from an electrical hazard, he admitted that he had never served as an apprentice or journeyman electrician and was not a licensed electrician. (Tr. 58, 92.) While he stated he had investigated six to seven hundred cases in his eight years with OSHA, he described only one other electrical case and could not state the percentage of cases he had investigated that involved electrical issues. (Tr. 91-92.) He admitted that he was "not providing any expertise here other than what I have been informed of during - through the course the inspection." (Tr. 105.) Von Lehmden extensively relied on Lopez's statements during his investigation, report, and recommendations and admitted that he had received no training, had seen no textbook, and had reviewed no manual to support his theories of the case. Therefore, the Court does not credit Von Lehmden testimony, except where it was corroborated by witnesses who were subject to cross examination (other than Lopez).

On October 17, 2013, Lopez was working for U.S. Utility as an electrician and received his work instructions from Hester. (Tr. 12-13.) As Lopez explained, "[t]here was a light with wires going into the box that [Hester] wanted me to tie into existing wires. And the existing wires were energized." (*Id.* 14, 29, 39- 40; Compl't's Ex. 1, p. 4.) Lopez testified that "I tested it, it was hot. [Hester] tested it, it was hot. [Hester] de-termed only the hot wire and it was hanging loose. We tested it, it was not hot. So it was not being back fed." (Tr. 14.) Hester did not de-energize all the circuits because he wanted power to continue for the lights and other motorized equipment in the building. (Tr. 14-15, 79; *see also* Resp't's Ex. 4 at 2.) Therefore, Hester de-energized "the hot wire alone that was feeding the box he wanted [Lopez] to work on."

[7] Von Lehmden initiated the OSHA inspection on January 23, 2014, after having received Lopez's complaint and subsequently recommended on April 14, 2014, that U.S. Utility be cited for a serious violation of section 1926.416(a)(1) and proposed a penalty of $5,390.00. (Resp't's Ex. 3.)

(*Id.* 14) Lopez testified that "[w]e went over to this other box that I was to work on. We tested it, it was dead. ... I retested the wire at the intended box of my assigned work. It read dead still." (*Id.* 14, 43-44, 48; *see also* Resp't's Ex. 1.) "And so I went over to the box and I started to terminate the wires according to normal procedure." (Tr. 15, 17.) "I then went forth with the trained procedure. I did the green ground wires first. Then I did the grey neutral wires. Pushed the finished two into the box, then paused, got off the ladder went back to the hot circuit to retest my tester to assure its integrity" "to make sure [the] tester was working." (Tr. 48, 51; *see also* Resp't's Ex. 1.) Lopez immediately went back up the ladder and twice checked the orange wire[8] "and it absolutely read dead." (*Id.* 51, 52.) The Court credits this portion of Lopez's testimony as there is ample evidence in the record to support it from other witnesses.

However, Lopez then testified that he cut the orange wire and stripped one side but claims that when he began to strip the other side he "at once was grabbed by the now present 277 volt hot circuit." (Tr. 52.) Lopez claims that "[t]he neutral wire was now feeding a potential through the lighting circuit and it was coming back through that bottom red wire" and that even though the red wire was a dead wire, "the neutral [red wire] going through the light, through the filament, and [was] coming back this way [and] has the unbalanced neutral potential on it[,]" which touched his finder and shocked him. (Tr. 29-31.) The Court does not find Lopez's theory plausible.

First, Lopez had already been working on the neutral orange (red) wire without being shocked and had just tested and confirmed that it was dead. Therefore, the Court finds no merit in Lopez's assertion that the neutral orange (red) wire, which he had already worked on and was deenergized, became energized and somehow activated the hot line through a light bulb. Von Lehmden, admitted at trial that his investigation had concluded that the "neutral line had in fact

[8] The orange wire was also referred to as the red wire. (Tr. 52.)

been blocked off at the time of the claimed incident." (Tr. 99.) Nonetheless, Von Lehmden's concluded in his investigative report that "Interviews and photos indicate that was not the case." (Resp't's Ex. 2 at 2.) However, the Court finds that neither the photos nor the interview statements corroborate Von Lehmden', except Lopez's statements, which the Court does not credit.

Relying on Lopez's assertions, the Secretary also argues that U.S. Utility violated 29 C.F.R. § 1926.416(a)(1) since, according to the Secretary, "[i]t is also undisputed that Hester performed work on energized electrical equipment, without use of barrier guarding or PPE." (Compl't's Post Hr'g Brief at 5; *see also* Tr. 23-24.) The Court finds no merit in this assertion. The Court does not find Lopez's testimony credible, in particular since his written statement on October 17, 2013, immediately after the accident made no such allegation.[9] Thus, the Court finds no merit in Lopez's claim or the Secretary's assertion that Hester was not wearing appropriate and adequate Personal Protective Equipment at the time of the incident.

Significantly, in Lopez's written statement, he also indicated that he "retrieved a ladder, whether 6' or 8' I do not remember" and had been standing on the ladder at the time of his injury. (Resp't's Ex. 1.) However, contrary to this written statement at the time of the accident, Lopez admitted at trial that he was actually standing on a handrail, not a ladder, at the time of his accident. (Tr. 18-19.) Von Lehmden also admitted that Lopez was not using a ladder at the time he was hurt. (Tr. 99-100.) This of course is consistent with U.S. Utility's theory of the case that Lopez's injury was not a result of an electrical burn, but rather, resulted from his failure to use a ladder on the job site, causing him to fall and cut his hands.

[9] The only other evidence in close proximity to the time of the accident was Hester statement, which was memorialized by Von Lehmden in his interview notes, which indicated that Hester had been wearing safety glasses, a hard hat, and protective gloves when he made the hot splice. (Tr. 70-71; *see also* Compl't's Ex. 4 at 3.)

Dearth, who has been a journeyman electrician since 2003, was the General Foreman at U.S. Utility at the time of the incident and was working on October 17, 2013, onsite at the time of the injury. (Tr. 111-113.) Immediately after the incident, Dearth testified that he performed testing on the junction box circuit with a voltage meter, and found that it was still dead and concluded that "to the best of my knowledge I cannot see where anybody would get [an] electrical shock from that junction box." (Tr. 113-114.) "This orange [red] circuit on the left was the hot feed coming from the conduit on the right. And the orange [red] circuit on the right coming from the conduit on the left was going downstream." (Tr. 115.) Dearth tested both of those orange (red) lines and "didn't find any voltage present." (*Id.*)

When he was asked at trial if he had any understanding as to how Lopez could have been shocked by the orange (red) neutral line on the right, Dearth said "I do not." When asked whether power could have been fed through the neutral up to the load and then back into that line, Dearth stated "[p]resent code, electrical code, states separate neutrals for everything. So if it was a shared neutral it could have been a possibility but that's not a standard practice since 2011 electrical code." (*Id.* 116.) When he was asked whether or not this particular construction project that they had been working on at the time of the accident had separate neutrals or tied in neutrals, Dearth testified that "[t]here is separated neutrals due to the fact that the job was performed under the 2011 electrical code, which states separate neutrals for all circuits or handle ties on the breakers." (*Id.* 118.) The Court finds Dearth to be a credible witness.

After the incident, Blasingim, a journeyman electrician since 1999, was working on October 17, 2013, as a foreman for Industrial Power Systems, a U.S. Utility competitor, at another part of the job at the incident location, and was asked by U.S. Utility to perform independent testing on the junction box circuit. (*Id.* 124-125, 127, 130.) Blasingim testified that

he "tested the ground and neutral in both sides of the orange line" and found "no voltage between anything." (*Id.* 128, 129.) And in layman's terms, no voltage, means a Zero potential for shock. (*Id.* 129.) Thus, Blasingim testified that he did not see how it was possible for the orange (red) line to be hot by being fed through the grey neutral. (Tr. 130-131.) "In my encounters I've never had the neutral side connected and got a shock backwards . . . I've never seen a neutral back-feed to a hot wire." (Tr. 131-132.) The Court also finds Blasingim to be a credible witness.

At the time of the incident, Retzke was working as the On-Site Project Manager for U.S. Utility and was there every day that the job was in progress. (Tr. 134, 135.) Retzke has worked in the electrical industry for forty-four years, as an electrician working in the field, a general foreman, a foreman, an estimator, a vice president of operations, a senior estimator, a business owner, a project manager and for ten years an instructor for the Joint Apprenticeship Training Committee of Local 8. (Tr. 133, 134.) Retzke testified that after the accident, the junction box circuit was tested in his presence and was found not to have any power in it or any voltage. (Tr. 138.) There was also no evidence of any damage to Lopez's tools that he saw and no evidence that there had been a shock in the box or the wiring. (*Id.* 137.) When asked if it was possible for the load line to have been activated by power feeding through the neutral, Retzke testified that "I have no idea how that could be possible." (*Id.* 138.) The Court finds Blasingim to be a credible witness as well.

Schramm, U.S. Utility's Safety Director for eight years, testified that it was his decision to oppose Lopez's workers' compensation claim, because he "felt from [his] investigation that Mr. Lopez did not receive an electrical shock at that time" because "[t]here was no electric current in that box and [Lopez] was not on a ladder, he was standing on a guardrail and just from

looking at everything, I felt that he fell and when he fell he grabbed and cut himself falling." (Tr. 162-163.) He also did not see any evidence of any shock or burn marks on the tools that Lopez was using or any burn marks on the electrical box or around the wire or on the tool, which is something you would have expected to see if there had been an electrical injury. (Tr. 163.)

The Secretary argues that "[i]f we look at the individuals who have no dog in the fight, the doctors and the EMT, they say uniformly this was a burn, this was an electrical injury." (Tr. 168-169.) Thus, the Secretary argues that "[a]ll of the medical evidence in this matter supports the fact that Lopez worked on an energized circuit and suffered electrical injuries." (Compl't's Post Hr'g Brief at 4; *see also* Compl't's Ex. 7; Compl't's Ex. 9, Compl't's Ex. 10.) However, "the individuals who have no dog in the fight" were never called by the Secretary to testify; instead, he relied on their out-of-court statements.[10] With hearsay evidence the Court must still determine the underlying reliability and probative value. See e.g. *School Bd. of Broward Cnty. v. Dep't of Health, Educ. & Welfare*, 525 F. 2d 900, 906 (5th Cir. 1976).

Although the Federal Rules of Evidence do not apply, they nonetheless can provide guidance as to the types of evidence that may be less reliable and, therefore, properly excluded without violating due process. See e.g., *Lacinaj v. Ashcroft*, 133 F. App'x 276, 287 (6th Cir. 2005). Rule 807(a)(3) of the Federal Rules of Evidence provides in relevant part that evidence

[10] Since this action was heard under the Commission's Simplified Proceedings, the Federal Rules of Evidence did not apply. *See* 29 U.S.C. §§ 2200.200(b)(6), 2200.209(c). The Court therefore was required to "receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious or unreliable." 29 U.S.C. § 2200.209(c). "[W]hen there is no objection, relevant out-of-court statements are admissible and entitled to their natural probative weight." *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1111, 1113 (No. 12-0379, 2012). Thus, the out-of-court statements contained in the Secretary's exhibits were admitted into evidence without objection and are "entitled to their natural probative weight." The Secretary's exhibits that included out-of-court statements, which were not subject to cross examination at trial, were: an Ohio Bureau of Workers' Compensation Settlement Agreement and Application for Approval of Settlement Agreement (Compl't's Ex. 2), an Ohio Bureau of Workers' Compensation Physician File Review (Compl't's Ex. 7), Acute Care Surgery Clinic Progress Notes (Compl't's Ex. 9), a City of Perrysburg Fire Division Out of Hospital Care Report (Compl't's Ex. 10) and Hester's statement (Compl't's Ex. 4).

that would otherwise constitute inadmissible hearsay, is admissible if "it is more probative on the point for which it is offered than any other evidence that the proponent can obtain *through reasonable efforts*[.]" Fed.R.Evid. 807(a)(3). Here, the Secretary could have obtained more probative evidence through reasonable efforts had he simply called the EMT and the doctors to testify. He chose not to do so.

In *Morrissey v. Brewer,* 408 U.S. 471, 488-89, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the Supreme Court discussed the "minimum requirements of due process" applicable in a parole revocation hearing where the Federal Rules of Evidence also do not apply. The Court held that one of those due process requirements is "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* at 489, 92 S.Ct. 2593; *see also Gagnon v. Scarpelli,* 411 U.S. 778, 781-787, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (holding that the same due process requirements apply in probation revocation proceedings as in parole revocation proceedings). In *United States v. Bell,* 785 F.2d 640, 642-43 (8th Cir.1986), the Eighth Circuit set forth a balancing test that district courts are to employ when determining the admissibility of hearsay testimony offered by the government in revocation hearings. Although the *Bell* Court's opinion is not binding in the present case, the Court nonetheless finds its analysis instructive and useful when determining the admissibility of hearsay testimony. In *Bell*, the court indicated that to comport with *Morrissey v. Brewer,* the district court must "balance the probationer's right of confrontation against the government's reasons for proffering the hearsay." *Id.* at 642. "Factors which aid in this analysis are the government's stated reason for not having the witness testify in person, and whether the evidence is of a type generally reliable." *Id.* at 643.

In the present case, the Secretary gave no explanation for his failure to call the doctors or the EMT testify. As to their out-of-court statements that the Secretary relied on in lieu of their testimony, the Court finds them unreliable. The Workers Comp File Review record (Compl't's Ex. 7) indicates that Dr. Freeman relied on the hearsay within hearsay (double hearsay) "medical findings" supposedly contained in an October 17, 2013, emergency room notes from St. Vincent's Medical Center, which was not offered by the Secretary and is not part of the trial record. Dr. Freeman also indicates that the emergency room notes from St. Vincent's were based in part upon Lopez's self-serving statements purportedly made at the emergency room that "he was shocked with a 277 volt and 20 amps from his left hand and his right hand." The EMT's statements (Compl't's Ex. 10) necessarily would have also relied on the self-serving factual information reported by Lopez that he "had an injury from electricity to his hands."[11] The Acute Care Surgery Clinic Progress Notes (Compl't's Ex. 9) include a statement by Dr. Ahmed that Lopez suffered from "electrical injuries." However, Dr. Ahmed's statement was based not only on his own examination of Lopez, but on double hearsay, i.e. his agreement with the assessment of the resident, Dr. Edgerton, as well as based upon his review of the "pertinent" history, which of course included the previous "electrical burn" diagnosis allegedly made on October 17, 2013, at St. Vincent's. The Court finds each of these out-of court statements to be unreliable and gives them little weight.

[11] Robert Scott Goodwin has 30 years in the fire service and the last 16 of those as an officer was a medical first responder for over fifteen years and an EMT prior to that, and is the current Director of Safety and Training for the National Electrical Contractors Association of Southeast Michigan and Northwest Ohio. He testified that EMT's "rely on the factual information that [the person who's claiming an injury] have provided us" and stressed that EMT's are "at the mercy of the individual providing us the facts." (Tr. 157.) The Court credits Goodwin's testimony.

IV. ALLEGED VIOLATION

To establish a prima facie violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that "(1) the standard applies to the cited conditions, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or should have known of the hazardous condition with the exercise of reasonable diligence." *All Erection & Crane Rental Corp.,* 23 BNA OSHC 1923 (No. 11-0745, 2011), aff'd *All Erection & Crane Rental Corp.* v. *Occupational Safety & Health Review Comm'n,* 507 F. App'x 511, 514 (6th Cir. 2012) (citing *R.P. Carbone Constr. Co. v. Occupational Safety & Health Review Comm'n,* 166 F.3d 815, 818 (6th Cir.1998)). See also *All Erection & Crane Rental Corp.*, 24 BNA OSHC 1353 (No. 09-1451, 2014). In the citation, the Secretary alleged a serious violation of section 1926.416(a)(1), which provides:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding[12] it effectively by insulation or other means.

29 CFR § 1926.416(a)(1).[13]

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[12] Article 100 of the National Electrical Code (NEC), or NFPA 70, defines guarded as "covered, shielded, fenced, enclosed, or otherwise protected by means of suitable covers, casings, barriers, rails, screens, mats or platforms to remove the likelihood of approach or contact by persons or objects to a point of danger." *See* http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=70. *National Electric Code*, Article 100, Chapter 1, p. 70-31 (2014). The NFPA 70 is part of the National Fire Codes series published by the National Fire Protection Association (NFPA), a private trade association.

[13] U.S. Utility raised for the first time in its post-trial submission the argument that section 1926.416(a)(3) rather than section 1926.416(a)(1) is the applicable standard and that it complied with that standard. Section 1926.416(a)(3) provides in relevant part that "[b]efore work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit." U.S. Utility argues that it "did ascertain by inquiry, direct observation and instruments that the electrical power circuit exposed in the box in which Lopez was working was not energized," thus satisfying the duty imposed on it by section 1926.416(a)(3). Thus, U.S. Utility argues that "[i]n the absence of any other knowledge that the circuit was activated, there could be no violation [ ] under 29 CFR 1926-416(a)(1)." The Court does not agree since sections 1926.416(a)(3) and 1926.416(a)(3) are separate and distinct requirements and employers can be cited for having violated either or both provisions.

> A serious violation shall be deemed to exist in a place of employment if
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> there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 U.S.C. § 666(k).

The Court concludes that all of the *credible* evidence establishes that the circuit Lopez was working on was not active and that he did not receive an electrical injury. Since there were no witnesses to the accident, Lopez's credibility is of the utmost importance. Based on the Court's careful observation and assessment of the credibility and demeanor during his testimony at trial, as indicated *supra*, the Court found Lopez not to be credible and concludes that the electrical injury scenario described by him is implausible. Therefore, the Court does not credit Lopez's testimony that his injury resulted from an electrical shock. Rather, as indicated *supra*, the Court credits the testimony of each of the management witnesses that Hester had disconnected the hot wire in the junction box prior to Lopez performing the work.

All of the experienced electricians who inspected the junction box after the accident confirmed that in their experience there was no way that the junction box could have been energized. Lopez, himself a journeyman electrician, also stated that it never occurred to him that he might be injured. (Tr. 19.) Therefore, the Court concludes that it was impossible for Lopez to have received an electrical shock once the neutral he was working on had been de-energized. Thus, the Court concludes that a preponderance of evidence establishes that Lopez was injured when he fell off the ladder and not by an electrical shock.

Therefore, the Court concludes that the Secretary failed to establish by a preponderance of evidence that either Lopez or Hester "could contact the electric power circuit in the course of

work" and therefore, failed to establish that U.S. Utility violated section 1926.416(a)(1). Accordingly,

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

VI. ORDER

IT IS HEREBY ORDERED THAT Citation Item 1, alleging a serious violation of 29 CFR § 1926.416(a)(1) is **VACATED** and no penalty shall be issued.

SO ORDERED THIS 4th day of **December, 2014**.

/s/
JOHN B. GATTO, Judge
U.S. Occupational Safety and
Health Review Commission