SECRETARY OF LABOR,	:	
Complainant,	:	OSHRC Docket No. 96-1749
v.	:	
KEYSTONE CONSTRUCTION CORP.	:	
Respondent.	:	

Appearances:

Susan B. Jacobs, Esq.
Office of the Solicitor
U.S. Department of Labor

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Before Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

Keystone Construction Corp. (Keystone), was cited on October 29, 1996, for serious and nonserious violations of several construction safety standards and a reporting violation. The citations carried penalties proposed by the Secretary totaling $21,500. At the start of the three-day hearing, the Secretary withdrew item 2 (all three parts: 2a, 2b, 2c) and item 4 from citation 1, and item 2 from citation 2 (Tr. 5). The citation items remaining in issue involve three standards for safety instruction and safety-related work practices when working in proximity to an electrical power circuit, and a regulation governing the reporting of a fatality.

Keystone was engaged by New Jersey Transit Corporation (NJT) to remove lead paint and repaint the so-called Newark Drawbridge in New Jersey. Two tall structural steel towers formed an

arch through which two parallel railroad tracks ran. The towers were equipped with a series of high-voltage catenary lines which provided the electric traction for the railcars.

In order to minimize disruption of NJT's rail service, Keystone's work was performed only on Saturdays and Sundays. On Saturday, May 4, 1996, at about 1:15 p.m., Israel Arteaga was electrocuted while he was engaged in applying paint on the top portion of the east tower. It was Arteaga's first day on the job. The Secretary contends, in substance, that Keystone failed to meet its responsibilities for: instructing each of its employees in the recognition and avoidance of the unsafe electrical condition at the jobsite; posting proper warning signs at work location; protecting employees against electric shock by deenergizing the circuits or by effective guarding; and reporting a work fatality within 8 hours after the occurrence.

The Secretary presented four witnesses including Antonio Garcia, the only one called by the Secretary who had the opportunity for providing a firsthand account of the events leading up to Arteaga's death. Garcia testified that he had started working for Keystone at the Newark Drawbridge the weekend before the accident. Because of his long-standing friendship with Israel Arteaga who was in need of a job, Garcia brought Arteaga to the drawbridge jobsite the following Saturday hopeful that Keystone would employ him as part of the paint crew. Both Garcia and Arteaga were members of the painter's union and both had worked together for other employers in the past.

They arrived together at the site one or two hours after the normal 8:00 a.m. start of the workday. Keystone's job supervisor was John Kokakoglu who hired Arteaga and immediately put him to work (Tr. 76). When questioned on cross-examination as to whether other Keystone employees were present at the drawbridge already at work when he and Arteaga arrived at the jobsite, Garcia gave somewhat conflicting statements regarding some details. Initially, Garcia testified that he and Arteaga had just ascended to their work stations on the tower of the bridge where the other crew members were already at work, when Keystone's supervisor and a NJT "inspector" called everyone down from the bridge and notified them that work would be discontinued for the day because of impending rain ("a little raindrops...you can feel a little bit"). As he and Arteaga were about to drive away from the jobsite, they were called back to resume work at about 10:00 a.m. or 10:15 a.m. (Tr. 283-86).

When Garcia went over the same subject immediately following that testimony, he stated that he and Arteaga were still at the base of the tower and ready to ascend with their paint cans, at which point they encountered the other crew members who had just come down from the tower and informed them that everyone was going home as directed by a NJT inspector because of rain (Tr. 287-88). Before anyone left the site, they were called back to resume work.

While Garcia and Arteaga were in the process of painting the tower structure, an unidentified person called out from the ground that "a small pipe in the top of the tower" had been overlooked and needed to be painted. Arteaga told Garcia that he would handle it. Garcia continued on with his painting when, suddenly, he heard "an explosion" and when he looked in the direction of the noise he saw Arteaga lying on the structural members of the tower (Tr. 82-84).

Garcia's testimony was unequivocal as to whether he and Arteaga received any instructions concerning high-voltage wires before starting their work on the tower. Garcia testified that they were not told by anyone where the live electrical lines were located at the towers (Tr.76-77).[1] He stated that a high-voltage warning sign was posted at the bottom of the tower. This corroborates the testimony of Keystone's safety officer, William Carnegie, who testified that he himself had posted a high-voltage warning sign at the lower-level entrance to the tower work area. It was a 24-inch-square sign marked with an arrow indicating the general location of the electrical lines. The sign was posted adjacent to the hydraulic staging device that was used to convey personnel to and from different levels of the tower (Tr. 329-35).

The Secretary offered the testimony of NJT's high-tension lineman, Sean Kelly, to shed light upon the role of NJT and its on-site personnel under the painting contract. Kelly testified that his job at the drawbridge was to deenergize the circuits in certain specified areas where the painting was to be done by Keystone, and then inform Keystone personnel "when it was safe to go to work." On May 4, 1996, one cable, located at the middle of the tower, was deenergized while two other cables

[1] Garcia acknowledged that he had been informed about the location of the live electrical power lines when he worked on the tower the previous weekend. While he admitted that he failed to pass that information on to Arteaga, the evidence is not clear as to whether the same lines were energized and deenergized on the day of the accident (Tr. 77-78). In any event, the 21(b)(2) safety instruction standard calls for more effective action than reliance on employees casually spreading the word around.

were energized, and at about 8:00 a.m. that day, he so informed Keystone personnel including the supervisor, the foreman and all the members of the paint crew (Tr. 116, 119, 120-21).

Kelly testified that he did not see anyone arrive late for work at the jobsite on May 4, and prior to the accident he did not notice anything unusual as he walked along the railway track between the bridge towers, "just watching back and forth" (Tr. 131). When asked on cross-examination to describe the weather conditions of May 4, Kelly stated it was "an overcast day" but not raining (Tr. 131). He was then asked: "At any point in the morning were the employees directed not to go up on the tower due to the weather conditions?" The answer was: "no" (Tr. 131-132).

Keystone called only two witnesses: safety director Shaher Tadross, and former safety officer William Carnegie, neither of whom presented any significant testimony relating to the May 4 series of events leading up to the accident testified to by Garcia. Tadross testified that he visited the jobsite on May 4 for about 10 minutes at around 10:00 a.m. apparently for the purpose of lending one of NJT's employees a portable telephone. He returned to the site later that day after he was notified about the accident. Tadross stated that there were two Keystone supervisory employees assigned to the site that day, job supervisor John Kokakoglu and foreman Bill Stergiou (Tr. 175, 177, 182-83).

William Carnegie had worked for Keystone from June 1993 to October 1996 as safety officer. He first learned about the accident when he received a phone call from Keystone's chief executive officer on Sunday morning of May 5. Carnegie's testimony was directed to the issues of the timely reporting of the work fatality to OSHA and the posting of high-voltage warning signs.

Carnegie testified that he faxed the following letter to OSHA's local area office at 7:10 a.m. on Monday, May 6 (Exh. R-5):

> Under Part 1904.8 of the Occupational Safety & Health Administration's Recordkeeping Regulations all employers are required to report fatalities within 48 hours of an occurrence.[2]
>
> At this time we are sadly notifying your agency of an employee fatality that occurred on May 4, 1996 in Newark, NJ. Israel Arteaga, SS# 102 80 0098 died approximately at 1:00 p.m. Saturday after he came into contact with a high voltage cable located on the Newark Drawbridge in Newark, NJ.

[2] The regulation on reporting of fatality, 29 C.F.R. §1904.8, was revised effective May 2, 1994, requiring the employer to orally report the fatality within 8 hours after the employer learns of it, instead of 48 hours by either written or verbal communication. 59 Fed. Reg. 15600, April 1, 1994.

> The employee was painting the "Tower" portion of the bridge when he strayed from his work area and was electrocuted by a high voltage wire. Mr. Arteaga was thoroughly trained in railroad safety and had a certification card from Local 806 Painters Union. Despite two NJ Transit Railroad Inspectors watching the work, Israel left his post and wandered into a danger area.
>
> Please refer to attached OSHA form 101 for more details into this tragic accident. Do not hesitate to contact me with any further questions.

The OSHA form 101 contains the following details regarding the accident:

> Employee was painting a overhead bridge tower approx. 40 feet off the bridge deck. He had a can of paint/brush/roller.
>
> Employee wandered from designated work area despite two NJ Transit watchman [sic], came into contact with High Voltage cable thus causing his death.

Later that same day Carnegie contacted the compliance officer by telephone to discuss certain matters regarding the fatal accident. Carnegie's telephone call was prompted by the compliance officer's own telephone call to Keystone's office earlier that day (Tr. 225-28, 323-25). The compliance officer testified that his area office never received any notification from Keystone concerning the fatality (Tr. 34-35). His inspection, which began on May 6, was actuated by a report of the accident appearing in a Newark newspaper published on Sunday, May 5, 1996, which was read by an OSHA assistant area director (Tr. 15, 228-30).

The three citation items that comprise serious citation 1 allege that Keystone failed to comply with the following standards: (1) §1926.21(b)(2) which requires the employer to instruct each employee in the recognition and avoidance of unsafe conditions; (2) §1926.416(a)(3) which directs the employer to post and maintain warning signs where energized electric power circuits are located if performance of work may bring any person, tool, or machine into physical or electrical contact with the circuits; (3) §1926.416(a)(1) which forbids permitting an employee to work in proximity to an electrical power circuit unless the employee is protected either by deenergizing the circuit or by effective guarding.

The alleged violations under the three items were described in the citation as applying to one employee (i.e., Israel Arteaga). The Secretary amended the first two items in the complaint "to

reflect that more than one employee was not instructed as to the location of energized high voltage lines." This amendment was apparently intended to encompass both Garcia and Arteaga.

Keystone's initial defense concerns its claim that Garcia's testimony should be stricken because Garcia's videotape interview with the compliance officer was not disclosed during the discovery process and was not revealed by the Secretary until the first day of the hearing. Keystone argues that the following factors militate against the Secretary's claim of informer's privilege: at the time of the videotape interview in August 1996, Garcia was not an employee of Keystone; Garcia neither sought nor was promised confidentiality; Garcia's identity was disclosed by the Secretary as a witness who would be called to testify. Keystone also points out that substantial parts of the interview were in Spanish and Keystone's attorneys and representative at the hearing did not understand Spanish which "compounded" the "belated disclosure." Keystone's posthearing proposed findings at 2-5.

The informer's privilege is firmly established. "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law" *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct 623, 627 (1957). Although *Roviaro* is a case involving criminal law, the privilege applies in civil cases as well. *Usery v. Local Union 720 Laborer's Intern. Union*, 547 F. 2d 525 (10th Cir. 1977).

The privilege in civil enforcement actions brought by the Secretary of Labor permits the Secretary to withhold the names of people who have given statements as well as the statements themselves. *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F. 2d 303, 306-07 (5th Cir. 1972). As the court of appeals stated in *Brennan v. Engineered Products, Inc.*, 506 F. 2d 299, 302 (8th Cir. 1974):

> The rationale behind the privilege is that enforcement of the Act is highly dependent on the cooperation of, and statements given by, employees. See, *United States v. Julius Doochin Enterprises, Inc.*, 370 F. Supp. 942, 944 (M.D. Tenn. 1973). That cooperation may not be forthcoming unless the government can assure confidentiality:
>
> > * * *The average employee involved in this type of action is keenly aware of his dependence upon his employer's good will, not only to hold his job but also for the necessary job references essential to employment elsewhere. Only by

> preserving their anonymity can the government obtain the information necessary to implement the law properly.* * *
>
> *Wirtz v. B. A. C. Steel Products, Inc.*, 312 F. 2d 14, 16 (5th Cir. 1962)

There is no ground for affording any less protection to an employer's former employees than to it's present employees. *Id.* 312 F. 2d at 16; *Quality Stamping Products Co.*, 7 BNA OSHC 1285, 1288, 1979 CCH OSHD ¶ 23,520 (No. 78-235, 1979).

The appeals court in the *Engineered Products* case had the occasion to consider whether the prehearing statements of prospective government witnesses must be given to the employer. Although resolution of the issue was left to the trial court, the appeals court proposed three alternatives, including employment of the procedure permitted in criminal cases under the Jencks Act, 18 U.S.C. §3500(b), allowing the defendant to examine the statements of witnesses only after completion of direct examination. The court concluded its decision with the following language:

> In summary, although we do not here lay down any fixed rules governing pretrial disclosure of the names and statements of employees, and although the balancing of the competing interests must be left to the sound discretion of the trial court, we urge the court to take seriously the government's reasons for desiring to withhold the statements as long as possible. ...

Engineered Products, Inc., *supra,* 506 F. 2d at 305

Guided by the foregoing principles, the Commission has held that "submission of a witness list or a summary of prospective witnesses' testimony does not constitute a waiver of the confidentiality of the identities of informers or their statements." *Massman-Johnson* (Luling), 8 BNA OSHC 1369, 1373, 1980 CCH OSHD ¶ 24, 436 (No. 76-1484, 1980). The Commission summarized some principles applicable to the present case:

> In summary, we hold that the public interest in keeping confidential both the identities of persons who have given the government statements regarding alleged OSHA violations that are the subject of an ongoing investigation and the contents of those statements outweighs the respondent's interest in prehearing disclosure unless the respondent shows that the information is essential to its preparation for the hearing and that it is unable to obtain the information by other means. The need to effectively cross-examine a witness is not sufficient justification in and of itself for prehearing disclosure of such a witness's statement. After a witness

> has completed testifying on direct examination, however, respondents are entitled, upon request, to obtain copies of all statements in the government's possession relating to the subject matter of the witness's testimony.
>
> Under no circumstances should the judge reveal the identities of persons who have given such statements to the government, or the contents of any such statements, over the Secretary's objection. The judge may make appropriate orders, however, in the event of unjustified refusal to comply with disclosure requirements, including dismissal of the action if necessary.

Id. 8 BNA OSHC at 1378.

With respect to the problem presented in this case during the hearing due to the video recording of Garcia's interview statements given in Spanish, the matter was resolved by continuing cross-examination until Keystone completed the English translation.

Keystone argues that the informer's privilege cannot be applied here because the compliance officer stated on cross-examination that when Garcia was interviewed he did not request "confidentiality" (Tr. 63); and when Garcia was asked on redirect examination whether the compliance officer told him during the course of the interview that his "name would be kept quiet," Garcia said: "No" (Tr. 311).

The hearing record shows that Garcia's testimony on this point suffers from internal contradiction and ambiguity, as illustrated by the following exchanges during cross-examination (Tr. 272, 309-10):

> Q: BY MR. PERNICK: How many times have you met with OSHA people concerning this accident?
>
> A: How many times have I met with this people?
>
> Q: Yes.
>
> A: Yes.
>
> JUDGE DeBENEDETTO: Now, Mr. Garcia, that's before the hearing.
>
> THE WITNESS: Before here?
>
> JUDGE DeBENEDETTO: Before this hearing.
>
> THE WITNESS: Just one time, they go my house.
>
> Q: BY MR. PERNICK: When was that that they went to your house?
>
> A: They go asking to — they — they said they coming to investigate me, and I say before I don't want to talk to. I don't know

who is it, but they tell me, no, I get OSHA protection to give words to the United States on it. And I explain what's going on.

Q: How long after the accident was it that you had this meeting? Are you talking weeks or months?

A: I don't remember sure, I think it's about three days or five days. I don't remember sure.

* * *

Q: BY MR. PERNICK: In any of your conversations with either [compliance officer] Jensen or anyone else from OSHA concerning this accident—

THE INTERPRETER: [Speaking in Spanish.]

Q: BY MR. PERNICK: —did you ever tell any of them that you wanted your name to be kept confidential?

THE INTERPRETER: [Speaking in Spanish.]

A: [Replying in Spanish.]

THE INTERPRETER: No. First I told them that I didn't want to have to come to court or anything because I didn't want to.

A: [Replying in Spanish.]

THE INTERPRETER: I didn't want to happen that afterwards I wouldn't be given work.

A: [Replying in Spanish.]

THE INTERPRETER: I have four children. [3]

The burden of proving the factual elements required to establish the claim of confidentiality rests with the Secretary. The Secretary would normally meet this burden by proving either that the witness provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. *L&C Marine Transport, LTD. V. United States*, 740 F. 2d 919, 923-24 (11th Cir. 1984). An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality. *See T.V. Tower, Inc. V. Marshall*, 444 F. Supp. 1233, 1236 (D.D.C. 1978).

To quote the circuit court in *Hodgson v. Charles Martin Inspectors of Petroleum, Inc., supra*, 459 F. 2d at 306:

[3] At the end of this colloquy, the judge expressed the view that Garcia's response indicated he did not understand the question as it related to the term "confidential" (Tr. 310). The Secretary correctly notes in her reply brief at 4 n. 2, that Keystone's counsel made no attempt to clarify the apparent confusion.

> The possibility of retaliation, however, is far from being "remote and speculative" with respect to former employees for three reasons. First, it is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job. Defendant's former employees could be severely handicapped in their efforts to obtain new jobs if the defendant should brand them as "informers" when references are sought. Second, there is the possibility that a former employee may be subjected to retaliation by his new employer if that employer finds out that the employee has in the past cooperated with the Secretary. Third, a former employee may find it desirable or necessary to seek reemployment with the defendant. In such a case the former employee would stand the same risk of retaliation as the present employee.

The third reason was voiced to some degree at the very start of Garcia's cross-examination (Tr. 268):

> Q: BY MR. PERNICK: Before we get underway, I would just like to let you know that I feel and Keystone feels very deeply for the loss of your friend.
>
> THE INTERPRETER: [Speaking in Spanish.]
>
> Q: BY MR. PERNICK: The fact that I will be asking you questions doesn't mean that we're not human beings and that we don't feel your loss.
>
> THE INTERPRETER: [Speaking in Spanish.]
>
> Q: BY MR. PERNICK: We do.
>
> THE INTERPRETER: [Speaking in Spanish.]
>
> A: [Replying in Spanish.]
>
> THE INTERPRETER: The loss of my friend, why, when he dies, was I part of it, why wasn't I given more work?

There is sufficient evidence to support the Secretary's claim of informer's privilege. There is another reason for denying Keystone's motion to strike Garcia's testimony based on the Secretary's failure to disclose the videotape interview during the discovery process. In its posthearing proposed findings and conclusions at 3, Keystone asserts that the Secretary's "sole basis" for not producing or even disclosing the existence of Garcia's videotape interview was "Informant's Work Product." The Secretary's use of the term informant's work product was an obvious attempt by the Secretary to link the informer's privilege with the qualified privilege for materials prepared in anticipation of litigation, sometimes referred to as work-product privilege,

codified in Fed. R. Civ. P. 26(b)(3). The Secretary's hybrid designation of two distinct doctrines perhaps was inspired by the Commission's comments in the *Massman-Johnson* case:

> Even where there is no question of the informer's privilege involved, witness statements may be subject to the provisions of Federal Rule of Civil Procedure 26(b)(3). That Rule provides that documents prepared by or for a party's representative in anticipation of litigation or for trial are not discoverable except upon a showing that the party seeking discovery has substantial need for the materials in the presentation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Rule 26 defines the scope of discovery for all discovery devices. 9 Wright & Miller, *Federal Practice and Procedure*, §2452. Thus, if materials are not discoverable under Federal Rule 26, they would not be subject to prehearing disclosure under the prehearing conference provisions of Federal Rule of Civil Procedure 16, 6 *Id*., §1528, and would not be subject to a subpena duces tecum under Federal Rule of Civil Procedure 45(d)(1). 9 *Id*., §2452.
>
> Where the Secretary's representatives take statements from persons in connection with an ongoing investigation of alleged violations of the Act, they do so in anticipation of litigation or for trial. Thus, such statements are not subject to disclosure without a showing of need and inability to obtain the information by other means without undue hardship, regardless of whether the informer's privilege applies. (Citations omitted.)

Massman-Johnson, supra, 8 BNA OSHC at 1375.

Both the informer's and the work-product privileges are qualified and limited by the underlying purposes of the privileges as balanced against the fundamental requirements of fairness and disclosure in the litigation process. *Roviaro v. United States, supra*, 353 U.S. 53. The burden of establishing the need for disclosure is upon the party who seeks it, and disclosure is not to be directed unless the need for the information outweighs the claim of privilege. *In Re United States*, 565 F. 2d 19, 23 (2d Cir. 1977). Keystone did not establish a need outweighing either the informer's privilege or the work-product privilege claimed by the Secretary.

Garcia's testimony is critical to the Secretary's case relating to the 21(b)(2) standard which requires the employer to instruct each employee in the recognition and avoidance of unsafe conditions. The Secretary charges that Keystone violated the standard by failing to instruct both

Garcia and Arteaga as to the location of the live high-voltage lines before they were assigned to paint the upper level of the tower on Saturday, May 4, 1996.

As previously noted, Garcia was clear and explicit in his testimony when he stated that both he and Arteaga arrived late at the jobsite, about two hours or so after the paint crew began their scheduled work day on Saturday. Garcia also unequivocally testified that both he and Arteaga were not informed about the location of the energized lines or where the electrical hazards existed that were to be avoided before they started their job assignment. It is undisputed that Arteaga was hired at the jobsite and immediately put to work by Keystone's job supervisor, John Kokakoglu.

Keystone contends that no credence should be given to Garcia's testimony because of the conflicting accounts presented in the testimony of NJT lineman Sean Kelly and Garcia's inconsistent testimony. In its posthearing proposed findings and conclusions at 17-21, Keystone cites the following pieces of evidence to support its position: Kelly stated that at about 7:45 a.m. on the day in question, he informed or briefed everybody in Keystone's painting crew as to which lines were energized and which were deenergized. This point is not disputed.

Keystone then cites Kelly's testimony (at Tr. 121) for the proposition that "[t]here was no person who came to the job site after the briefing session on the day in question." Proposed finding No. 3. This stretches the testimony well beyond reasonable limits. Here is what Kelly actually said when questioned on direct examination (Tr. 121):

> Q: Throughout the — when they started — when the Keystone men started work, were you supervising them at all?
> A: I was watching where they were going, yes.
> Q: Did you see anyone come late?
> A: No.
> Q: Did you see the accident happen?
> A: No. ...

There is no evidence to suggest that Kelly's job as NJT's lineman was such that he had the opportunity for seeing and knowing all of the affairs and events that transpired among Keystone's personnel on the Saturday in question.

Keystone's main arguments for impeaching Garcia's testimony are encompassed in its proposed findings of fact Nos. 8, 9 and 10:

> 8. The sole explanation why Mr. Arteaga allegedly did not receive any advice on the day in question is Mr. Garcia's claim that he and Mr. Arteaga arrived late to the job site on Saturday, May. 4. Mr. Garcia gave inconsistent testimony as to when he and Mr. Arteaga arrived. He first claimed that they arrived between 9:40-9:50 a.m. [75]. On cross-examination, however, he testified that it was "about 9 something, 9:20, 9:30. I don't — I don't remember" [276].
>
> 9. In addition, Mr. Garcia claimed that whatever time he and Mr. Arteaga arrived at the job site on the morning of Saturday, May 4, they were directed not to work due to adverse weather conditions, a direction that was subsequently countermanded [75-76]. He maintained that he and Mr. Arteaga were initially directed not to work that day because it was raining, even though he also admitted that the other employees of respondent were already working [76].
>
> 10. By contrast, NJT lineman Kelly — obviously not laboring under the same type of guilt as Mr. Garcia, and in addition, a disinterested witness — specifically testified that at no time during the morning of the day in question were the employees not directed to work due to weather conditions [131-132]. Mr. Kelly had been at the job site for an appreciably longer time that day than Messrs. Garcia and Arteaga, having arrived before 8:00 a.m. [Complainant Exhibit 2].

We are asked to consider two events testified to by Garcia which allegedly weigh against his credibility. One involves the arrival of Garcia and Arteaga at the jobsite at a time in the morning varyingly ranging from 9:20 a.m. to 9:50 a.m. Given the fact that Garcia's testimony was given some 18 months after the May 4 accident, one would not expect Garcia's memory faculty to perform with the precision of a timekeeper tracking the elapsed time in a sporting event. The core of his testimony — that he and Arteaga arrived at the jobsite an hour or two after the start of the scheduled work day — has not been subverted.

The second circumstance concerns Garcia's account of experiencing a slight delay in commencing work because of impending rain. As previously noted, not only was Garcia's testimony about the weather condition contradicted by NJT's lineman Kelly, Garcia's testimony was inconsistent as to whether he and Arteaga were at the base of the bridge and about to start their climb up the tower or whether they had reached their work station on the tower when they were informed that painting was suspended for the day due to rain. He also gave a conflicting account as to who actually told him to call it a day. However, this inconsistent testimony does not have any

bearing on the basic issue presented by the Secretary's citation and clearly does not have sufficient force or impact to be a prevailing influence in raising serious doubts about his entire testimony.

In its proposed conclusions of law at 20-21, Keystone maintains that it was justified in relying upon NJT to instruct its painting crew concerning the danger of working near electrical wires, that NJT carried out its contractual responsibility to provide such safety instructions, and that Keystone had no reason to believe that the work would be performed in an unsafe manner. To support this position, Keystone invokes the case of *Archer-Western Contractors Ltd.,* 15 BNA OSHC 1013, 1018 (No. 87-1067, 1991) which said:

> When an employer contracts with a specialist, the employer is justified in relying upon the specialist to protect against hazards related to the specialist's expertise, as long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely.

Keystone's argument misses the point of the Secretary's case. Garcia's credible and uncontradicted testimony establishes that both he and Arteaga arrived late at the jobsite on May 4 and were detailed to paint the tower without being informed about the respective locations of the energized and deenergized electrical lines running through the tower. It is undisputed that Arteaga was hired for the job by Keystone's job supervisor, John Kokakoglu, and immediately put to work with Garcia. Under these circumstances, it was the responsibility of Keystone's job supervisor to assure that Garcia and Arteaga were given instructions by NJT's lineman or any other knowledgeable person authorized to inform the paint crew regarding the electrical hazards that were present on the tower and the areas to stay clear of because of those hazards. Keystone failed to produce any evidence to show that job supervisor Kokakoglu carried out his responsibility. This item of the citation is affirmed.

Keystone is also charged with failure to comply with the electrical safety standard at §1926.416(a)(3), specifically as to those parts of the regulation which require the employer to post warning signs and impart necessary safety information:

> The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of

> the location of such lines, the hazards involved, and the protective measures to be taken.[4]

There is an obvious overlapping of charges set forth in the first two items of the citation regarding safety instruction and disclosure of information. This overlay has been recognized by the Secretary (and noted in the citation) by designating the two items as items 1a and 1b; by proposing a single penalty of $7,000 covering both items; and by the following note prefacing the descriptions of the two alleged violations: "The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident." The Secretary's chief concern in the second item involves the posting of warning signs.

The Secretary contends that the high-voltage warning sign with directional arrow posted by Keystone at the entrance of the tower work area (and approximately 100 feet below the actual work area) did not adequately alert employees as to the specific locations of the energized lines on top of the bridge tower.

The Secretary's argument overlooks two major factors that derail the Secretary's case. First, there is nothing in the record to inform us as to whether Arteaga was electrocuted because his work assignment required him to be located on the tower where he or his tools would come into physical or electrical (i.e., within 10 feet) contact with an energized line, or because he slipped on a structural member of the tower and fell some unknown distance onto the energized line. Garcia, the only eyewitness to the circumstances surrounding the accident, believed Arteaga might have slipped on wet paint and fallen to an area where the lines were energized: "...I think he is sliding on the wet paint, something like that, but I don't know why he go over there" (Tr. 90-91). Garcia's

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[4] The complete text of the §1926.416(a)(3) standard states:

> Before 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. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

testimony shows that he knew where Arteaga was to be positioned in order to paint the unfinished portion of the tower that he volunteered to undertake, and apparently it was not where Arteaga's body was observed when he was electrocuted.

The second factor is the contractual arrangement between NJT and Keystone to deenergize the lines in an area where employees were to perform their work. This was accomplished by NJT's linemen before the start of the work day. These two factors place Keystone outside the scope of the §1926.416(a)(3) which applies only where "the performance of the work may bring any person, tool, or machine into physical or electrical contract with the [energized] electric power circuit." This does not include contact with a circuit as a result of an accidental fall from an undetermined height and locale.

The third and last item of the serious citation alleges that Keystone failed to comply with the §1926.416(a)(1) standard which states:

> 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 it effectively by insulation or other means.

The citation and the complaint describe this item as applying specifically to the conditions to which Arteaga was exposed: "An employee involved in a railroad bridge painting operation, obtained access into an area on the bridge where he could make contact with a high-voltage line..." What has been said regarding the Secretary's case under the §1926.416(a)(3) standard is equally applicable to item 3 and the 416(a)(1) standard. Consequently both items cannot be sustained.

Citation 2 charges Keystone violated the regulation at 29 C.F.R. §1904.8 which requires employers to orally report a work-related fatality within 8 hours after the employer learns of it. The oral report is to be communicated by telephone or in person to the local OSHA area office, or "by using the OSHA toll-free central telephone number." Keystone acknowledges that it did not comply with the 8-hour time limit, and stands by its disputed claim that written notification of the fatality was faxed to OSHA's area office at 7:10 a.m., on Monday, May 6, as testified to by Keystone's then safety officer, William Carnegie.

Keystone argues that the violation of the notice regulation should be classified as *de minimus* without any monetary penalty attached because of the following reasons: the 8-hour deadline expired at 9:15 p.m. on May 4; no work was performed shortly after the 1:00 p.m. accident and no Keystone employees would have been available to be interviewed that day; OSHA knew about the accident on Sunday, May 5, as a result of a newspaper article, and no action was taken by OSHA that day; there is no evidence that OSHA was unable to interview anyone because of Keystone's delay in notifying OSHA. Keystone's posthearing proposed findings and conclusions at 6-10, and reply brief at 6-7.

On publishing its final rule for reporting fatality incidents, OSHA described why the rule as adopted would enhance its ability to conduct effective workplace investigations:

> Reducing the reporting period from 48 hours to 8 hours enables OSHA to inspect the site of the incident and interview personnel while their recollections are more immediate, fresh and untainted by other events, thus providing more timely and accurate information pertaining to possible causes (Ex. 2: 15, 47, 94). The shorter reporting time also makes it more likely that the incident site will be undisturbed, affording the investigating compliance officer a better view of the worksite as it appeared at the time of the incident (Ex. 2: 11, 15, 47, 55, 94, 107). The 8-hour criteria also coincides with a "standard work shift" for most employers and thus provides a logical cut-off point for fulfilling the reporting requirement.

59 Fed. Reg. 15600, *supra* at _____.

The nub of Keystone's no-harm-done argument rests upon the following two proposed findings, which are supported by uncontradicted testimony:

> 8. Due to the fatal accident involving Mr. Arteaga, work was discontinued at the site that weekend. Thus, no further work was done on Keystone's contract with NJT after 1:17 p.m. on Saturday, May 4, 1996, or on Sunday, May 5, 1996 [235-236].[5]
>
> 9. OSHA learned of the accident on Sunday, May 5, 1996. An article in the Newark Star Ledger describing the fatality was seen by Charles Savko. Mr Savko at that time was Assistant Area Director and had the authority to direct OSHA personnel to go immediately to

[5] Arteaga's body was removed from the worksite at about 7:30 p.m., on Saturday, May 4, almost two hours before the 8-hour time limit elapsed for reporting the incident.

> the accident site that Sunday [228-230]. Nevertheless, no such direction was given.

At first blush, Keystone's argument seems to have some merit until one grasps the reality that the failure to comply with the 8-hour reporting requirement prevented OSHA from making a timely decision regarding the investigative steps which, in its judgment, could have been undertaken appropriate to the circumstances.

The compliance officer testified that although OSHA's local area office was not open for business on Saturdays and Sundays, anyone reporting a fatality to that office by telephone would be informed by recorded voice to call OSHA's toll-free central telephone number. He testified further that in the past he had investigated incidents involving fatalities on Sundays as a result of fatality reports being made by employers using the OSHA 24-hour toll-free central telephone number (Tr. 37, 221-23).

A report of a workplace fatality appearing in a Sunday newspaper cannot be expected to actuate OSHA's information-gathering system in the same measure as the use of the OSHA toll-free phone number. In fact, in its comments prefacing the final rule OSHA expressly noted that "neither media coverage, nor reports to insurance carriers or others constitute reporting to OSHA as required under this regulation." 59 Fed, Reg. 15600, *supra* at _____.

The Secretary has proposed a single penalty of $7000 for the grouped items 1a and 1b, the maximum penalty allowed by the OSH Act for both serious and nonserious violations, 29 U.S.C. §666(b) and (c). Inasmuch as the 1b item, concerning the warning-sign standard at §1926.416(a)(3), has not been sustained, the penalty for the remaining item dealing with hazard instruction is reduced to $3500. The Secretary has proposed a $3000 penalty for noncompliance with the requirement for reporting a fatality within 8 hours, a critical element in the Secretary's investigative process. Both the $3500 penalty for the hazard instruction violation and the $3000 penalty for the fatality reporting violation are in line with penalty assessment criteria of 29 U.S.C. §666(j) of the OSH Act.

Based upon the foregoing findings and conclusions, it is

ORDERED that item 1a of citation 1 relating to hazard instruction pursuant to §1926.21(b)(2) is affirmed, and a penalty of $3500 is assessed. It is further

ORDERED that items 1b and 3 of citation 1 relating to the safety standards at §1926.416(a)(3) and (a)(1) are vacated. It is further

ORDERED that item 1 of citation 2 relating to the reporting regulation at §1904.8 is affirmed, and a penalty of $3000 is assessed. It is further

ORDERED that all other items contained in citations 1 and 2 having been withdrawn by the Secretary, are vacated.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: _____
Boston, Massachusetts