No. 18-1282

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,

Petitioner,

v.

NORTH EASTERN PRECAST LLC; and MASONRY SERVICES, INC. dba MSI,

Respondents.

On Petition for Review of a Final Order of the Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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September 17, 2018

STATEMENT REGARDING ORAL ARGUMENT

This case presents an issue of first impression: whether the Occupational Safety and Health Review Commission exceeded its statutory authority by vacating as duplicative one of two proven Occupational Safety and Health Act willful citations issued to an employer without demonstrating that affirmance of both citations would be fundamentally unfair to the employer and thus violate due process. The Secretary of Labor believes that oral argument would aid the decisional process by allowing the court to ask questions about the new issue, and enabling the parties to explain their positions. Accordingly, the Secretary requests oral argument.

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JURISDICTIONAL STATEMENT

The Secretary of Labor seeks review of a February 28, 2018 final order of the Occupational Safety and Health Review Commission. Notice of Comm'n Dec. (Feb. 28, 2018), OSHRC Docket, Vol. 7, #78; *N.E. Precast, LLC*, 26 BNA OSHC 2275 (Nos. 13-1169 & 13-1170), 2018 O.S.H. Dec. (CCH) ¶ 33646, 2018 WL 1309480. The Commission had jurisdiction under section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. § 659(c). The Commission's final order adjudicated all the claims, rights, and liabilities of the parties. This Court has jurisdiction to review the Commission's February 28, 2018 final order because the Secretary's petition for review was filed on April 27, 2018, within the statutory sixty-day period from the date of the Commission's final order. 29 U.S.C. § 660(a).

STATEMENT OF THE ISSUES

(1) Whether the Commission exceeded its authority in vacating one of two proven willful violations of OSHA standards under the Commission's duplicativeness doctrine, which is properly grounded only in the due process guarantee of fundamental fairness, where the violations were entirely separate and distinct and affirmance of both would not hold the employer liable twice for the same violation.

(2) Whether the Commission abused its discretion by departing from its

prior precedent on duplicativeness without providing a reasoned explanation, and arbitrarily and capriciously adopted a new "same abatement" test as its sole test for determining duplicativeness without considering the other factors relevant to the analysis under its prior precedent, or explaining its choice.

STATUTORY AND REGULATORY BACKGROUND

I. The OSH Act and the Separation of Enforcement and Adjudicatory Powers

The fundamental objective of the OSH Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve this purpose, the OSH Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health standards promulgated by the Occupational Safety and Health Administration (OSHA).[1] *Id*. § 654(a)(2).

[1] The Secretary's responsibilities under the OSH Act have been delegated to an Assistant Secretary who directs OSHA. *See Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor*, 557 F.3d 165, 175 (3d Cir. 2009); Secretary of Labor's Order 1-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (January 25, 2012). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

The OSH Act separates rule-making and enforcement powers from adjudicative powers and assigns these respective functions to two different administrative actors: OSHA and the Commission. *Martin v. OSHRC (CF & I),* 499 U.S. 144, 147, 151 (1991). OSHA is charged with promulgating and enforcing workplace health and safety standards, and the Commission is responsible for carrying out the Act's adjudicatory functions. *CF & I,* 499 U.S. at 147. OSHA prosecutes violations of the Act and its standards by issuing citations requiring abatement of violations and assessing monetary penalties. 29 U.S.C. §§ 658-59, 666. The Commission is an independent agency that is a "neutral arbiter" for adjudicating disputes between employers and OSHA that arise from those citations. *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (per curiam); *CF&I*, 499 U.S. at 147-48, 154-55.

An employer may contest a citation by filing a written notice of contest with OSHA within fifteen working days of receiving the citation. 29 U.S.C. § 659(a); *Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528 (7th Cir. 1991).

A Commission ALJ provides an opportunity for a hearing and issues a decision on the contest. 29 U.S.C. §§ 659(c), 661(j). The Commission may review and modify the ALJ's decision, or may allow it to become a final order automatically by operation of law by not directing the decision for review. *Id*. §§ 659(c), 661(j).

Either the Secretary or an aggrieved party may seek judicial review in a United States court of appeals of a Commission final order. *Id*. § 660(a)-(b).

II. OSHA's Crane Power Line Safety and Electrical Proximity Standards

There are two OSHA standards at issue in this case: the crane power line safety standard (29 C.F.R. § 1926.1408(a)(2)) and the electrical proximity standard (29 C.F.R. § 1926.416(a)(1)).[2] The crane power line safety standard is located in "Subpart CC—Cranes and Derricks in Construction." Section 1926.1408(a)(2) applies to equipment, specifically "power operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load." § 1926.1400(a). Under § 1926.1408(a)(2), before using a crane the employer must:

> Determine if any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone could get closer than 20 feet to a power line. If so, the employer must meet the requirements in Option (1) [deenergize and ground], Option (2) [twenty-foot clearance], or Option (3) [Table A clearance] in this section . . . .

[2] OSHA cited North Eastern for willful violations of the electrical proximity standard and the crane power line safety standard. *See* Citation 2, items 1 and 2 (May 31, 2013), OSHRC Docket, Vol. 5, #2; *infra* pp. 6-8 (describing OSHA's citation of North Eastern)**.** A "willful violation" is one done either with an intentional disregard of, or plain indifference to, the OSH Act. *A. Schonbek & Co. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981).

Id.

The electrical proximity standard is part of "Subpart K—Electrical," which contains OSHA's "electrical safety requirements that are necessary for the practical safeguarding of employees involved in construction work." *Id*. § 1926.400. Section 1926.416(a)(1) 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 it effectively by insulation or other means.

Id.

STATEMENT OF THE CASE

I. Nature of the Case and the Course of Proceedings Below

This enforcement action arises under section 10 of the OSH Act, 29 U.S.C. § 659. After inspecting a North Eastern Valley Stream, New York work site in December 2012, OSHA issued four citations alleging various willful, repeat, serious and other-than-serious violations. ALJ Dec. 2, 63-64, OSHRC Docket Vol. 6, #67. The two remaining citation items now before the Court alleged that North Eastern willfully used a crane near a power line, without taking the required safety precautions, in violation of § 1926.1408(a)(2), the crane power line safety

standard, and willfully permitted employees to work too close to power lines in violation of § 1926.416(a)(1), the electrical proximity standard. ALJ Dec. 12, 19, 20-21, 27, OSHRC Docket, Vol. 6, #67.

North Eastern timely contested the citations, and, after hearing the case, a Commission ALJ affirmed the two willful violations and assessed the associated proposed penalties of $123,200. ALJ Dec. 63-64, OSHRC Docket, Vol. 6, #67. North Eastern filed a petition for discretionary review of the ALJ's decision; the Commission directed the case for review; and, on February 28, 2018, a divided Commission (Chairman MacDougall and Commissioner Sullivan, majority; Commissioner Attwood, dissent) vacated the crane violation as duplicative, affirmed the electrical violation, and assessed a penalty of $70,000. *N.E. Precast*, 26 BNA OSHC at 2276-77. The Secretary's timely petition for review to this Court followed on April 27, 2018.

II. Statement of Facts

A. OSHA's Citation of North Eastern's Reckless Proximity to Live Power Lines

In the summer of 2012, North Eastern, a construction company, worked as a subcontractor on a project in Valley Stream, New York, on the corner of Brooklyn Avenue and Fourth Street. *N.E. Precast*, 26 BNA OSHC at 2277. Power lines owned by Long Island Power Authority (LIPA) ran along both streets and shared a common utility pole at the intersection. *Id*. North Eastern was hired to erect

steel, set precast concrete planks, and lay block and brick at a mixed retail/residential construction project to build a five-story building. *Id*. Over the next few months, after twice discovering North Eastern operating its crane within ten feet of a live power line, LIPA issued two cease-and desist orders, which the company ignored. *Id*.

On December 1, 2012, OSHA inspected the worksite and found North Eastern using the crane to help hoist and set planks on the east side of the third floor. Citation 2, item 2(a), OSHRC Docket Vol. 5, #2. North Eastern was operating the crane eight feet from a live line on Fourth Street, and OSHA warned the company that the crane's use constituted an imminent danger. *N.E. Precast, 26 BNA* OSHC at 2278. North Eastern told OSHA that it would stay further away from the line. *Id*. After OSHA left, however, the company continued to work too closely to the line, with the crane just a few feet away. *Id*.

A few days later, on December 3rd, employees who were installing a fall protection system along the north and east sides of the third floor worked directly under and three feet from the energized Fourth Street power line. ALJ Dec. 12-13, OSHRC Docket, Vol. 6, #67; Citation 2, item 1, OSHRC Docket Vol. 5, #2. And, on December 4th and 5th, employees in the same area constructed a masonry block wall on the north and east sides of the third floor, coming within a few inches of energized power lines. ALJ Dec. 13, OSHRC Docket, Vol. 6, #67;

Citation 2, item 1(b) & 1(c), OSHRC Docket Vol. 5, #2. At one point, masonry workers came as close as four inches as they built a masonry block wall around the live wire in order to continue working. ALJ Dec. 13, OSHRC Docket, Vol. 6, #67; Citation 2, item 1(d), OSHRC Docket Vol. 5, #2.

On December 5, 2012, a LIPA engineer returned to the site and, "shocked" to see a wall around a live wire, called the police to shut down the site, and issued a third cease-and-desist order. ALJ Dec. 7-8, OSHRC Docket, Vol. 6, #67. He also notified OSHA about the violation. *N.E. Precast, 26 BNA* OSHC at 2279. OSHA returned to the site on December 6, 2012, to finish its inspection, and subsequently cited North Eastern for willful violations of § 1926.1408(a)(2), the crane power line safety standard, and § 1926.416(a)(1), the electrical proximity standard. *Id*.; ALJ Dec. 19, 27, OSHRC Docket, Vol. 6, #67. Afterwards, the project general contractor, Vordonia Contracting & Supplies Corp./Alma Realty Corp. (Vordonia), paid LIPA a $70,000 fee to move the power line. *N.E. Precast*, 26 BNA OSHC at 2279.

B. The ALJ's Decision

The ALJ affirmed the two willful violations of § 1926.1408(a)(2) and § 1926.416(a)(1), and the associated penalties of $123,200.[3] ALJ Dec. 63, OSHRC

[3] The ALJ also affirmed all the other citation items issued by OSHA. ALJ Dec. 2, 63-64, OSHRC Docket Vol. 6, #67. North Eastern did not appeal these items or

Docket, Vol. 6, #67. The ALJ rejected North Eastern's defense that the two violations were duplicative. Although the crane violation and the electrical violation resulted in the same general hazard – electrocution – the violations were not duplicative because the conditions giving rise to the violations were separate and distinct. ALJ Dec. 54-57, OSHRC Docket, Vol. 6, #67. The ALJ noted that the crane violation alleged that the crane rigging was operating within ten feet of the energized lines, whereas the electrical violation did not involve the crane but masonry employees working on the building within inches of the power line. ALJ Dec. 55, OSHRC Docket, Vol. 6, #67.

The ALJ also found that the violations were not duplicative because no single action would fully abate both of them. ALJ Dec. 55-57, OSHRC Docket, Vol. 6, #67. Although the crane violation could have been abated by moving the crane a safe distance from the lines, moving the crane would not have abated the electrical violation because that violation stemmed from employees installing a fall protection system and erecting a masonry wall near the energized lines. ALJ Dec. 55, 57, OSHRC Docket, Vol. 6, #67. The ALJ further found that the violations could not have been abated by moving the power line because only the general contractor, Vordonia, had the authority to ask LIPA to move the line.

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the associated penalties. Only the two willful violations under review by the Court will be discussed in this brief.

ALJ Dec. 54-55, OSHRC Docket, Vol. 6, #67.

C. The Commission's Decision

1. *The Majority Opinion*

The Commission majority (Chairman MacDougall and Commissioner Sullivan) conceded that the ALJ's affirmance of both violations was not at issue on review, i.e., that the violations were proven, and that the only issues were whether the violations were duplicative, and the appropriateness of the penalty assessed. *N.E. Precast*, 26 BNA OSHC at 2276 & n.3**.** The majority found the two willful violations duplicative because they both could be abated by moving the power line; accordingly, the majority vacated the crane violation, and affirmed the electrical violation.[4] *N.E. Precast*, 26 BNA OSHC at 2280-81. The majority also increased the penalty for the remaining electrical violation from $61,600 to $70,000. *Id*. at 2282-83. The majority rejected the ALJ's finding that moving the power line could not abate the violations because North Eastern did not have the ability to move the line, holding that abatement is not limited to methods that the cited employer alone controls. *Id*. Although the majority acknowledged the wide variety of tests for duplicativeness in the Commission's prior case law, it asserted that the Commission's precedent "has reached a common conclusion that

[4] The Commission provided no explanation for why it vacated the crane violation rather than the electrical violation.

violations are not duplicative when 'abatement of one of the violative conditions . . . would not have abated the other violative condition.'" *Id*. at 2279-80 & n.11 (citation omitted).

2. *The Dissent*

According to the dissent (Commissioner Atwood), "the two violations at issue here arise out of entirely different conditions and involve such different factual situations that to vacate one on duplicativeness grounds constitutes plain error." *N.E. Precast*, 26 BNA OSHC at 2289. Under prior Commission case law, violations were found not duplicative, even where the same actions would abate both violations, because either the cited standards addressed fundamentally different conduct, or the Secretary had statutory authority to cite both violations. *Id*. at 2286. Rejecting the majority's adoption of a new "same abatement" test of duplicativeness, the dissent pointed out that in every case in which the Commission had previously found duplicative violations, the cited standards were closely related, and regulated the same or very similar workplace conditions and conduct. *Id*. at 2288.

In contrast to this pattern, the dissent observed that the two cited violations here were of separate and distinct standards that regulated completely different workplace conduct. *N.E. Precast*, 26 BNA OSHC at 2289-90. Furthermore, the cited violative conditions occurred on different days and in different areas of the

workplace, and exposed different employees, working in different circumstances. *Id*. at 2290. Since the majority therefore could not show that the two violations constituted only one bad act, the Commission lacked authority to vacate one of them as duplicative because only the Secretary has prosecutorial discretion under the OSH Act. *Id*. at 2290-94. Importantly, although "in appropriate circumstances – which do not exist here – the Commission may vacate 'duplicative' citations . . . it can do so only when to affirm both citations would violate due process." *Id*. at 2290.

As Commissioner Atwood explained, North Eastern:

> is an employer with an extensive history of OSHA violations; that, over a period of months, repeatedly thumbed its nose at enforcement efforts designed to protect its employees from the dangers of electrocution; that assured OSHA it would comply with the crane standard but never did; and that knowingly exposed more employees to those electrocution dangers by permitting them to, among other things, build a wall around and within inches of a 7,620-volt primary power line. . . . [North Eastern] has not been unfairly cited for what is essentially one bad act – the essence of duplicative citations – it has been cited for two willful violations of distinct standards that occurred independently of each other at the worksite.

Id. at 2294.

SUMMARY OF THE ARGUMENT

In enacting the OSH Act, Congress vested the Secretary with sole investigative and civil prosecutorial authority to enforce the statute and its

implementing occupational safety and health act standards, and full rule-making and policy-making authority. *Cuyahoga*, 474 U.S. at 6-7; *CF & I*, 499 U.S. at 147. At the same time, Congress also created the Commission, a separate administrative agency, to serve as a neutral arbiter of contested OSH Act citations, but without any occupational safety and health rule-making or policy-making authority. *Cuyahoga,* 474 U.S. at 7; *CF & I*, 499 U.S. at 154. Given the clear demarcation of agencies and separation of powers, the Commission lacks authority under the OSH Act to interfere with the Secretary's prosecutorial discretion and vacate a proven citation as a matter of law. Furthermore, the Commission also cannot curb the Secretary's prosecutorial authority as a matter of policy because, unlike agencies with combined adjudicatory and policy-making roles, the Commission has no policy-making role to play under the OSH Act. *CF&I*, 499 U.S. at 154.

The only basis for a Commission vacation of a proven citation is a higher authority than the OSH Act, such as the Constitution. The applicable constitutional right in the context of alleged duplicative OSHA citations is the due process guarantee of fundamental fairness. This fundamental constitutional right protects employers against being cited or penalized multiple times for the same violation.

Here, the Commission impermissibly encroached upon the Secretary's

prosecutorial discretion and improperly vacated the proven crane violation as duplicative of the electrical violation. The Commission lacked the authority to vacate the crane violation because there is nothing fundamentally unfair about holding North Eastern liable for two separate and distinct willful violations. The crane violation and the electrical proximity violation arose from separate and distinct hazardous activities; involved two different standards regulating completely different workplace conduct; occurred on different days, and in different areas of the work site; and exposed different groups of employees to the cited hazards.

In addition, the Commission abused its discretion by departing from its prior precedent on duplicativeness without providing a reasoned explanation. The Commission also arbitrarily and capriciously adopted a new "same abatement" test as its sole test for determining duplicativeness without considering the other factors relevant to the analysis under its prior precedent, or explaining its choice.

ARGUMENT

I. Standard of Review

The issues before the Court are related to the question of whether the Commission exceeded its authority in vacating a proven willful citation. This Court will set aside an order by the Commission if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §

706(2)(A); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2d Cir. 2002).

A Commission order is not in accordance with law when, for example, it usurps the authority of the Secretary. *Sec'y of Labor v. Cranesville Aggregate Cos.*, 878 F.3d 25, 36 (2d Cir. 2017) (Commission order failed to give Secretary's reasonable determination proper deference in deciding whether Mine Act or OSH Act applied). A Commission order is an abuse of discretion when it ignores the clear intent of the statute, the language of the standard, and the interpretive cases. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985) (Commission abused its discretion by requiring proof of exposure, not merely access, to danger). A Commission order is arbitrary and capricious when it fails to consider the relevant factors and rationally explain the choice it made. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (ICC certification decision failed to address the merits of the available remedies or explain its choice).

II. The Commission Unlawfully Vacated The Crane Violation as Duplicative.

A. The Commission Lacked Authority to Vacate the Proven Crane Violation as Duplicative Absent a Showing of Fundamental Unfairness to the Employer.

In enacting the OSH Act, Congress expressly allocated responsibilities between the Secretary and the Commission. The Secretary has sole prosecutorial

authority to enforce the statute, and full rule-making and policy-making authority, while the Commission serves as a neutral arbiter of contested citations between the Secretary and an employer, but lacks any rule-making or policy-making authority. *Cuyahoga*, 474 U.S. at 6-7; *CF & I*, 499 U.S. at 147. As such, under the OSH Act, the Commission lacks authority to vacate a proven citation. The Commission may exercise such authority, however, where an employer's constitutional rights are violated. Thus, the Commission may vacate one of two proven citations where the cited violations are so alike that affirming both would amount to a double citation for the same violation, and would therefore be fundamentally unfair and a violation of due process. *See, e.g., Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776, 1778-79 (No. 90-0050 1996); *United States Steel*, 10 BNA OSHC 2123, 2132-33 (No. 77-3378, 1982).

As explained in detail below, properly assessing whether two citations are duplicative and therefore violate due process necessarily must be a fact-intensive inquiry that in essence examines, based on multiple factors, whether the two instances of violative conduct are so alike that it would be fundamentally unfair to hold an employer liable for both. Here, the crane and electrical proximity violations are not duplicative because they involved two different standards regulating completely different workplace conduct; they arose from separate and distinct actions and hazardous conduct; they occurred on different days in different

locations on the North Eastern worksite; and different groups of employees were exposed to the hazards created. The Commission therefore unlawfully vacated the crane violation as duplicative of the electrical proximity violation, and the Court should reverse the decision and affirm the citation and associated penalties of $123,200.[5]

1. *Under the OSH Act, the Secretary Has Sole Prosecutorial Authority to Enforce the Statute and Its Implementing Standards.*

The OSH Act grants the Secretary sole investigative and civil prosecutorial authority to administer the statute, and full rule-making and policy-making authority, while vesting the adjudicatory function in the Commission, which lacks any rule-making or policy-making authority. 29 U.S.C. § 658; *Cuyahoga*, 474 U.S. at 6-7 (1985); *CF & I*, 499 U.S. at 147, 154; *Wetmore & Parman, Inc.*, 1 BNA OSHC 1099, 1101 (No. 221, 1973); *see also Donovan v. OSHRC* ("*Mobil Oil*"), 713 F.2d 918, 927 (2d Cir. 1983) (Secretary has sole statutory responsibility to enforce the OSH Act and exclusive prosecutorial discretion). As the statutory prosecutor, the Secretary has the prosecutor's traditional freedom of discretion to initiate and control the course of his prosecution, to decide when and under what

[5] As noted above, *supra* p. 10, the Commission majority conceded that the ALJ's affirmance of both violations was not at issue on review, i.e., that the violations were proven, and that the only issues were whether the violations were duplicative, and the appropriateness of the penalty assessed. *N.E. Precast, 26 BNA* OSHC at 2276 & n.3.

circumstances a violation will be charged, the exact nature of the charge, and whether to withdraw it. *Cuyahoga*, 474 U.S. at 6-7; *Wetmore*, 1 BNA OSHC at 1101 n.5. Thus, in *Cuyahoga*, the Supreme Court reversed an attempt by the Commission to prevent the Secretary from withdrawing a citation, holding that the Secretary's discretion to withdraw a citation was "unreviewable" by the Commission. 474 U.S. at 7-8.

As the adjudicator under the OSH Act, the Commission has "no more power" than to make findings of fact and to apply the Secretary's standards to those facts in making a decision.[6] 29 U.S.C. § 660(a); *CF&I*, 499 U.S. at 155 (1991). Thus, the Commission has no authority under the Act to limit the Secretary's prosecutorial discretion as a matter of law. *See, e.g., Cuyahoga*, 474 U.S. at 7 (Commission has no authority to overturn the Secretary's decision not to issue or to withdraw a citation). Furthermore, the Commission cannot curb the Secretary's prosecutorial authority as a matter of policy because, unlike agencies with combined adjudicatory and policy-making roles, the Commission has no policy-making role to play. *CF&I*, 499 U.S. at 154. Just as the constitutional separation of powers prohibits an Article III court from disturbing a criminal

[6] The Commission is also authorized to review the Secretary's interpretations of his regulations "only for consistency with the regulatory language and for reasonableness," *CF&I*, 499 U.S. at 154-55 (reviewing court defers to Secretary's, not Commission's, reasonable interpretation of an ambiguous OSHA standard), but this power is not at issue here.

prosecutor's discretion, the OSH Act's separation of powers bars the Commission from interfering with the Secretary's prosecutorial discretion unless he violates the employer's constitutional rights. *See, e.g., United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (federal courts may not interfere with U.S. attorneys' free exercise of their discretionary powers over criminal prosecutions); *Wetmore*, 1 BNA OSHC at 1101-02 & n.5 (Congress did not intend the Commission to supervise the Secretary by dictating the citations that he must issue to an employer); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (federal prosecutor's broad enforcement discretion subject to constitutional constraints); *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978) (Commission may review any viable constitutional defense to enforcement). Thus, the Commission had no jurisdiction under the OSH Act to vacate the proven crane violation as duplicative; if the Commission possessed such authority at all, it must have come from another source.

2. *The Constitutional Right to Due Process Constrains the Secretary's Prosecutorial Authority.*

The Secretary's exercise of prosecutorial discretion under the OSH Act is subject to constitutional constraints. In assessing potentially duplicative citations, the relevant concern is the employer's due process right to fundamental fairness. *See* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 633 (7th ed. 2004) ("the essential guarantee of the due process clause is that of fairness"); *see also*

Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978) (noting the "due process guarantee of fundamental fairness"). The due process safeguard at issue in this case is "substantive due process," protecting the exercise of fundamental constitutional rights, such as those found in the Bill of Rights, *Nowak & Rotunda, Constitutional Law* at 467, 471.

In the context of alleged duplicative OSHA citations, "fundamental fairness" means the right not to be cited or penalized multiple times for the same violation. *Catapano*, 17 BNA OSHC at 1778-79. In *Catapano*, the Commission found that multiple citations for violations of trenching standards were not duplicative, and thus "did not violate Catapano's due process rights," because the alleged trenching violations occurred at many different sites on different days. *Id*. at 1778-79. By contrast, in *United States Steel*, 10 BNA OSHC at 2132-33, the Commission vacated an overexposure violation as duplicative of specific engineering control and respirator violations, where the cited provisions regulated the same conduct, after noting (Chairman Rowland) that multiple penalties for the same misconduct are "fundamentally unfair."

The same principle of fundamental fairness underlies the Fifth Amendment's guarantee against double jeopardy: the right not to be prosecuted or punished more than once for the same offense, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999). The double

jeopardy clause prohibits putting a person twice in jeopardy of "life or limb" for the same offense. U.S. Const. amend. V. The Supreme Court has applied this prohibition to civil monetary penalties where the statutory scheme was so punitive in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. *Hudson v. United States*, 522 U.S. 93, 99 (1997). An OSHA penalty need not be "punitive" in this respect to violate the Commission's rule against duplicativeness, but the underlying principle of fundamental fairness is identical: a double penalty shall not be assessed for a single violation. *S.A. Healy Co.*, 17 BNA OSHC 1145, 1158 (No. 89-1508, 1995).

Likewise, there is a close analogy between duplicative OSHA citations and multiplicitous indictments in the criminal law. A multiplicitous indictment is one that charges a single offense in separate counts multiple times when, in fact and law, only one crime has been committed. *Chacko*, 169 F.3d at 145. Similarly, OSHA citations are duplicative when they cite an employer multiple times for what is really a single violation. *Catapano*, 17 BNA OSHC at 1778-79. Multiplicitous indictments violate the double jeopardy clause by subjecting a person to punishment for the same crime more than once. *Chacko*, 169 F.3d at 145. Duplicative citations violate the fundamental fairness requirement of the due process clause by subjecting an employer to multiple citations and penalties for the same violation. *United States Steel*, 10 BNA OSHC at 2132-33 (overexposure

violation duplicative of engineering and respirator violations because the cited provisions regulated the same conduct, and multiple penalties for the same misconduct would be fundamentally unfair). The rule against multiplicitous indictments "reflect[s] fundamental due process rights of defendants [and] inhibit[s] the otherwise broad prosecutorial discretion in the drafting of indictments." *United States v. Uco Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). Similarly, the rule against duplicative citations reflects the due process guarantee of fundamental fairness, and constrains the Secretary's sole prosecutorial discretion to issue or withdraw OSHA citations.

3. *The Test for Duplicativeness Is Multi-Factor and Fact-Based and Should Assess the Fundamental Fairness of Holding an Employer Liable for Two Violations.*

Historically the Commission has tended to apply one of two tests to determine whether OSHA citations allege duplicative violations:

(1) whether the violated standards and conditions from which the violations arose were the same or very similar, *see, e.g., H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981); or (2) in the case of violations of closely related standards, whether the same action abated (or would have abated) the violations,

see, e.g., Gen. Motors Corp., 22 BNA OSHC 1019, 1024 (Nos. 91-2834 & 91-2950, 2007).[7]

These Commission tests for duplicative violations have generally failed to address the due process basis for the Commission's authority to vacate a proven violation as duplicative, or to say when proven violations are so fundamentally unfair as to warrant curbing the Secretary's prosecutorial discretion. They are also somewhat inconsistent: the *General Motors* line of cases says that violations may be duplicative when the same abatement measure will abate both of them, even as these cases take into account other factors. *See, e.g., Gen. Motors Corp.*, 22 BNA OSHC at 1024. But the *Hall* line of cases holds that violations that had the same abatement are not duplicative if the violative conditions are separate and distinct conditions, the violated standards regulated fundamentally different conduct, or the Secretary had statutory authority to cite both violations. *Hall*, 10 BNA OSHC at 1046; *Burkes Mech. Inc.*, 21 BNA OSHC 2136, 2141-42 (No. 04-475, 2005).

Nevertheless, despite the inconsistent Commission precedent, a review of prior Commission duplicativeness cases highlights the numerous factors "that could in any given case be relevant to determining whether affirmance of two citations would violate due process notions of fundamental fairness." *N.E.*

[7] In addition, the dissent notes two other lines of Commission duplicativeness cases, and points out that Commission precedent on this issue is inconsistent. *N.E. Precast*, 26 BNA OSHC at 2285-87 (Atwood, C., dissenting).

Precast, 26 BNA OSHC at 2292 (Atwood, C., dissenting); *cf. Lassiter v. Dep't of Soc. Services of Durham County, NC*, 452 U.S. 18, 25 (1981) (assessing procedural due process and fundamental fairness by "considering any relevant precedents and then assessing the several interests at stake"). These factors, derived from Commission cases in which the factors were present, or were actually applied, *N.E. Precast*, 26 BNA OSHC at 2288, provide the basis for a multi-factor fundamental fairness test, a list of relevant factors for determining duplicativeness, which the Commission should apply. The list is not unchangeable or exhaustive. Nor is any one factor dispositive. Instead, which factors are appropriate, and the importance of each factor, will vary on a case-by-case basis. *Id.*, 26 BNA OSHC at 2292-93 (Atwood, C., dissenting); *see also Lassiter*, 452 U.S. at 25.

This Court has previously recognized that multi-factor tests are an appropriate tool for determining whether an organization has been charged criminally more than once for the same offense. For example, to determine whether two counts under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-68 (1970), charge the same pattern of racketeering activity, this court applies a multi-factor test, known as the *Russotti* test, which considers whether (1) the charged activities occurred at the same time; (2) the same persons were involved in the activities; (3) the charged statutory offenses are the same; (4) the activities have the same nature and scope; and (5) the activities

occurred at the same place. *United States v. Russotti*, 717 F.2d 27, 33 (2d Cir. 1983).

As explained in more detail below, the relevant factors for assessing the duplicativeness of proven OSHA citations include whether: (1) the conditions giving rise to the violations are the same or very similar; (2) the two standards violated are closely related "sister standards"; (3) the two violations occurred on the same date and at the same location, and the facts supporting both violations are the same; (4) the same employees were exposed to the hazards involved in the two violations; and (5) compliance with one standard would ordinarily presuppose or substitute for compliance with the other, and the same abatement would abate both violations.[8]

To assess whether violations are duplicative or not, the Court should first assess whether the conditions giving rise to the violations are separate and distinct. *See. e.g.*, *H.H. Hall*, 10 BNA OSHC at 1046 (trenching violations for operating

[8] Thus, the test for considering due process challenges to alleged duplicative OSHA citations strongly resembles this Court's *Russotti* test, 717 F.2d at 33, for assessing double jeopardy challenges to alleged multiplicitous RICO indictments. Both tests determine whether the cited violations/charged offenses occurred at the same time and place, affected the same employees/involved the same offenders, arose from similar or the same standards/statutes, and had the same violative conditions/nature and scope. All of these factors consider aspects of the underlying fairness inquiry: whether the two citations are directed at the same wrongful conduct.

heavy equipment near an excavation, and improper support of trench walls, not duplicative, because they arose from separate and distinct violative conditions). Second, whether the two standards violated are closely related "sister standards" may bear on the duplicativeness inquiry. *N.E. Precast*, 26 BNA OSHC at 2292-93 (Atwood, C., dissenting). Importantly, on this point, and as Commissioner Atwood noted in her dissent in this case, "[i]n *every case* in which the Commission has found violations to be duplicative, the standards at issue were closely related, usually sister-standards (i.e., subprovisions of the same parent standard), and regulated the same or very similar workplace conditions and conduct)."[9] *Id*. at 2288.

[9] *See Alpha Poster Serv.*, Inc., 4 BNA OSHC 1883, 1884-85 (No. 7869, 1976) (sub-provisions of the flammable liquids standard, coverage and transfer of containers); *Lee Way Motor Freight*, 4 BNA OSHC 1968, 1970 (No. 10699, 1977) (sub-provisions of the walking-working surfaces standard, positioning of dock plates); *Stimson Contracting Co.*, 5 BNA OSHC 1176, 1178 (No. 13812, 1977) (sub-provisions of the excavation standard, cave-in protection); *United States Steel*, 10 BNA OSHC at 2132-33 (sub-provisions of the coke oven emissions standard, permissible exposure limit); *Cleveland Consol. Inc.*, 13 BNA OSHC 1114, 1118 (No. 84-696, 1987) (sub-provisions of the electrical proximity standard, protective measures); *Capform Inc.*, 13 BNA OSHC 2219, 2224 (No. 84-0556, 1989) (sub-provisions of the excavation standard, cave-in protection); *Trinity Indus.*, 20 BNA OSHC 1051, 1064 (No. 95-1597, 2003) (sub-provisions of the confined spaces in shipyards standard, training), *aff'd on other grounds*, 107 F. App'x 387 (5th Cir. 2004); *Manganas Painting Co.*, 21 BNA OSHC 1964, 1975 (No. 94-0588, 2007) (sub-provisions of the lead standard, permissible exposure limit) ; *E. Smalis*, 22 BNA OSHC 1553, 1561 (No. 94-1979, 2009) (sub-provisions of the lead standard, permissible exposure limit).

Third, the Court should determine the circumstances surrounding the two violations; for example, whether they occurred on the same date and at the same location. Related to this factor is whether the facts supporting both violations are the same or different. *See Westar Mech., Inc.*, 19 BNA OSHC 1568, 1572 (No. 97-0226 & 97-0227, 2001) (excavation violations separate violations where they occurred on different days and different sites, and involved different work in a different work environment); *Catapano*, 17 BNA OSHC at 1778-80 (multiple citations for violations of trenching standards at several different sites committed on different days not a violation of due process) *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2212-14 (No. 87-2059, 1993) (fall protection violations not duplicative where they occurred on different floors and at different locations on the same floors); *Koppers Co.*, 2 BNA OSHC 1354, 1354-55 (No. 3449, 1974) (respiratory protection violations not duplicative because each violation involved different facts). Fourth, an examination of the employees exposed to the cited hazards may shed light on whether two violations are duplicative. *Id*. (respiratory protection violations not duplicative because each violation affected a different employee).

Finally, the Court should also examine whether compliance with one standard would ordinarily presuppose or substitute for compliance with the other; and somewhat relatedly, whether both cited standards require the same abatement,

or abatement of one violation will necessarily result in abatement of the other.[10] But in evaluating this factor, that an employer could have only abated both violations by taking the same action does not necessarily establish that it is fundamentally unfair to affirm both violations. "[T]he Act requires an employer to comply with all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards *may* be satisfied by compliance with the more comprehensive standard." *Hall*, 10 BNA OSHC at 1046 (citing 29 U.S.C. § 654(a)(2)). In *Hall*, the Commission noted that the conditions giving rise to the two violations were "separate and distinct" and found that "there is no unfair burden imposed on an employer when the same or closely related conditions are the subject of more than one citation item and a single action may bring an employer into compliance with the cited standards." *Id.*

4. *The Commission Erred in Vacating the Crane Violation as Duplicative Because it Is not Fundamentally Unfair to Hold North Eastern Liable for Both Cited Willful Violations.*

Application of the relevant factors to test for duplicativeness (factors that are derived from Commission case law, *supra* pp. 25-28) shows that there is nothing fundamentally unfair about holding North Eastern liable for the two willful

[10] Commissioner Atwood also noted that whether the employer acted in good faith was another of the factors "that could in any given case be relevant to determining whether affirmance of two citations would violate due process notions of fundamental fairness." *N.E. Precast*, 26 BNA OSHC at 2292-93 (Atwood, C., dissenting).

violations in this case. The crane power line safety and the electrical proximity violations arose from separate and distinct violative conditions. The crane violation concerned willfully failing to confirm that power lines had been de-energized and visibly grounded, or to take the alternative steps required by the cited provision, before using a *crane* to help hoist and set planks within eight feet of overhead power lines. Citation 2, item 2, OSHRC Docket, Vol. 5, #2; ALJ Hearing Transcript (Tr.), 374, 492-94, OSHRC Docket, Vols. 1-2.

The electrical proximity violation, on the other hand, involved willfully permitting *employees* to install a fall protection system within three feet of an energized overhead primary power line, and to erect a masonry wall within four inches of the energized lines. Citation 2, item 1, OSHRC Docket, Vol. 5, #2; Tr. 477-81, OSHRC Docket, Vol. 2. "The crane operated at the worksite without regard to the employees working on the wall near the northeast corner . . . and the employees near the northeast corner performed their work without regard to the operation of the crane. The only thing common to these two violations were the overhead power lines, which did not by themselves constitute a violation." *N.E. Precast*, 26 BNA OSHC at 2293 (Atwood, C., dissenting).

Additionally, the two violated standards are not closely related sister standards but are separate and distinct standards (cranes in 29 C.F.R. § 1926.1400 -.1442, and electrical safety in § 1926.400 -.449) that regulate fundamentally

different workplace conduct (crane operations in proximity to energized power lines, and employee proximity to electrical power circuits). The crane standard regulates the safe operation of cranes and requires North Eastern to take a series of actions both before and after beginning work with the crane to protect employees from an electrocution hazard. 29 C.F.R. § 1926.1408(a)(2)(i)-(iii). In contrast, the electrical proximity standard does not mandate any advance preparation; it requires only that North Eastern keep unprotected employees away from energized power lines. § 1926.416(a)(1).

The two violations also involved completely different workplace activities. The violations occurred on different days and in different areas of the work site, and exposed at least some different employees, working in different circumstances. The crane violation occurred on December 1, 2012, on the east side of the third floor, where employees were using a crane to help hoist and set planks. Citation 2, item 2, OSHRC Docket, Vol. 5, #2. This violation directly exposed employees in proximity to the crane, including the crane operator and the employees guiding and placing the crane's precast plank loads, as well as the employees located in or around the base of the crane at street level, to the electrocution hazard.[11] Tr. 373-74, 379-82, 385, OSHRC Docket, Vol. 1.

[11] The violation also indirectly exposed all employees on the work site because of the conductivity of the precast planks that the directly exposed workers were handling. Tr. 375-76, OSHRC Docket, Vol. 1.

The electrical proximity violation occurred on December 3, 2012, on the north and east sides of the third floor, where employees were installing a fall protection system, and on December 4-5, 2012, on the northeast corner of the third floor, where employees were erecting a wall. Citation 2, item 1, OSHRC Docket, Vol. 5, #2. The electrical proximity violation exposed only those employees installing the fall protection system or constructing the wall. Tr. 477-81, OSHRC Docket, Vol. 2. Thus, the facts supporting each of the two willful violations are different; violations that occur on different dates and in different locations, or expose different employees cannot reasonably be considered duplicative.[12]

Importantly, separate citations and penalties here serve the Act's fundamental preventive purpose in deterring egregious conduct through higher penalties. *Kent Nowlin Constr. Co. v. OSHRC*, 648 F.2d 1278, 1282 (10th Cir. 1981) ("The obvious purpose of § 666(a) [establishing enhanced penalties for

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[12] As Commissioner Attwood emphasized, "[i]f, as the Commission has held, the Secretary may cite employers for violations of the same standard when the violative conduct occurs on separate dates or locations, or when the conduct exposes different employees to a hazard, it seems a forgone conclusion that the Secretary may also cite [North Eastern] for violating *two different* standards on different dates, in different locations, and exposing different employees to an electrocution hazard." *N.E. Precast*, *26 BNA* OSHC at 2290; *see MJP*, 19 BNA OSHC at 1647 (Secretary may appropriately cite separate violations of the same standard where each individual instance occurred on separate dates, times, and locations).

repeat violations] is to encourage employers who have previously violated a standard to take necessary precautions to prevent the recurrence of similar violations").[13] Higher penalties are especially important in inducing habitual offenders like North Eastern,[14] who would otherwise ignore ordinary enforcement sanctions, to comply with OSHA standards. *Reich v. Sea Sprite Boat Co., Inc.*, 50 F.3d 413, 415-16 (7th Cir. 1995) (holding employer in contempt for disobeying 29 U.S.C. § 660(b) order and assessing penalty of $1.4 million).

Finally, an analysis of how North Eastern could comply with and/or abate the crane and electrical proximity violations weighs heavily against a finding of duplicativeness. To comply with the crane standard, an employer must determine before beginning operations whether any parts of its crane could get closer than twenty feet to a power line. 29 C.F.R. § 1926.1408(a)(2). If so, the employer must

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[13] As the dissent points out, the majority's decision to vacate the crane violation also prevents the Secretary from citing North Eastern for a repeat violation (with its associated higher penalty of up to $70,000, ten times as much as the $7000 maximum for a serious violation, the next highest penalty category, 29 U.S.C. § 666(a)-(b)) of the cited crane standard in the future. *N.E. Precast*, 26 BNA OSHC at 2294 (Atwood, C., dissenting). The decision thus undermines the preventive purpose of the OSH Act by depriving the Secretary of the use of an important deterrent against future misconduct by a reckless habitual offender, *see supra* pp. -31-32 and *infra* n.14.

[14] Since 2000, North Eastern has been inspected twenty-eight times and issued ninety-six citations, including multiple serious and repeat violations that were either affirmed through settlements or informal settlement conferences. Tr. 486-87, OSHRC Docket, Vol. 2.

comply with one of the standard's three protective options. *Id*. By contrast, the electrical proximity standard simply requires that an employer not permit an employee to contact an energized electric power circuit in the course of work. § 1926.416(a)(1).

With respect to abatement, no single action by North Eastern would have fully abated both violations. *See* ALJ Dec. 55-57, OSHRC Docket, Vol. 6, #67. Only the general contractor, Vordonia, had the authority to ask LIPA to move the power line. ALJ Dec. 54-55, OSHRC Docket, Vol. 6, #67. But only the cited employer, North Eastern (not Vordonia) had the responsibility to abate its own violations by taking appropriate measures within its control.[15] 29 C.F.R. § 1903.19(a)-(b)(1) ("abatement" means action by a *cited* employer to comply with a cited standard or recognized hazard); *Flint Eng'g Constr. Co.*, 15 BNA OSHC

[15] Vordonia was cited for the same two willful violations at issue here in connection with the same construction project at the Valley Stream work site, but settled its citations before the hearing. *N.E. Precast*, 26 BNA OSHC at 2281 n.13; ALJ Dec. 2 n.1, OSHRC Docket, Vol. 6, #67. Thus, Vordonia's authority to ask LIPA to move the Fourth Street power line was relevant to whether *Vordonia's* willful violations met the "same abatement" test, but not, contrary to the Commission majority, *N.E. Precast*, 26 BNA OSHC at 2281, to whether *North Eastern's* willful violations met the same test. Only the *cited* employer, not an outside party, can abate its own violations. *Cleveland Consolidated, Inc.* 13 BNA OSHC 1114, 1118 (No. 84-696, 1987) (whether citations are duplicative depends upon the actions that the *cited* employer would, as a practical matter, have to take to comply with the cited provisions in the performance of the work).

2052, 2056-57 (No. 90-2873, 1992) (citations not duplicative where *cited* employer could not meet two standards with one abatement effort).

Although North Eastern could have abated the crane violation by moving the crane a safe distance from the lines (and stopping work on the building), moving the crane would not have abated the electrical proximity violation because that action would not have moved the employees installing a fall protection system, or those erecting the wall, away from the energized lines. That violation could only have been abated by stopping work or de-energizing or insulating the line, the latter two of which were not within North Eastern's ability.

In sum, under the circumstances of this case, there is nothing fundamentally unfair about holding North Eastern liable for both willful violations. Accordingly, because the Commission's authority to vacate a proven violation on duplicativeness grounds is limited by the bifurcated structure of the Act which empowers the Secretary, not the Commission, with prosecutorial discretion, the Commission unlawfully vacated the crane violation, and its decision should be reversed.

B. Alternatively, the Commission Abused Its Discretion by Departing from its Prior Precedent, and Arbitrarily and Capriciously Adopted a New "Same Abatement" Test.

Even ignoring the lack of any due process basis for the Commission's decision to vacate one of the proven citations here as duplicative, the Commission

abused its discretion by departing from its prior precedent on duplicativeness. The Commission departed from its prior precedent by narrowly considering only whether the two violations could have been abated by the same action, *N.E. Precast*, 26 BNA OSHC at 2279-82, whereas the Commission has previously examined other factors besides abatement in determining duplicativeness. This departure was an abuse of discretion because the majority provided no reasoned explanation for its action. *Adams Steel*, 766 F.2d at 807 (agency's departure from established precedent without announcing a principled reason is an abuse of discretion, and should be reversed). Moreover, the Commission's adoption of a new "same abatement" test as the sole factor for determining duplicativeness, without considering the merits of the other relevant factors or explaining its choice, was arbitrary and capricious. *Burlington Truck*, 371 U.S. at 168 (ICC certification decision that failed to address the merits of the available remedies or explain its choice was arbitrary and capricious).

The majority's failure to consider other relevant factors here was particularly arbitrary since the majority squarely recognized that such factors have been dispositive in prior cases. [16] The majority recognized that "[v]iolations are not

[16] In at least four prior cases, the Commission has found that violations that had the same abatement were nevertheless not duplicative. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981);*Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1112 (No. 76-256, 1981); *Dec-Tam Corp.*, 15 BNA OSHC 2072,

duplicative where they involve standards directed at fundamentally different conduct, or where the conditions giving rise to the violations are separate and distinct." *N.E. Precast*, 26 BNA OSHC 2279-80 (internal citations omitted). Despite this acknowledgement, the majority wholly failed to consider whether the cited standards in this case were directed at fundamentally different conduct or whether the conditions giving rise to the violations were separate and distinct. This was clear error.

In *Hall*, for example, the Commission found that two trenching violations, one for operating heavy equipment near an excavation, and the other for improper support of trench walls, were not duplicative, even though they could be abated by the same action - adequate shoring or bracing of the trench wall - because the violative conditions were separate and distinct. *Hall*, 10 BNA OSHC at 1046; *see also Wright & Lopez, Inc.*, 10 BNA OSHC at 1112 (trenching violation for failure to take additional precautions when vibrations are present did not duplicate violation for failure to slope or shore trench, despite same abatement, because the violative conditions were distinct). *Hall* also found that the "specific duty" clause of the OSH Act, 29 U.S.C. § 654(a)(2), requires compliance with all standards applicable to a hazardous condition even though the abatement of the violations

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2085-86 (No. 88-523, 1993); *Burkes Mech. Inc.*, 21 BNA OSHC 2136, 2141-42 (No. 04-475, 2005).

may be the same. *Hall*, 10 BNA OSHC at 1046; *accord Dec-Tam Corp.*, 15 BNA OSHC 2072, 2081 (No. 88-523, 1993) (although two asbestos monitoring violations could have been cured by the same abatement measures, the Secretary not barred from enforcing both of them since the OSH Act requires compliance with all applicable standards).

Similarly, in *Burkes Mech. Inc.*, 21 BNA OSHC 2136, 2141-42, the Commission found violations of the lock-out/tag-out standard, and the lock-out provision of the pulp, paper, and paperboard standard, not duplicative, despite having the same abatement, because the standards covered fundamentally different conduct. The lockout/tagout standard "primarily focuses on an employer's specific procedures for controlling hazardous energy, including verification" whereas the pulp, paper, and paperboard mills standard is "solely concerned with the act of locking out the machinery and equipment." *Id*. at 2142.

Thus, prior to the Commission's decision in this case, the Commission considered these factors, as well as other applicable factors, *see supra* pp. 25-28, rather than focusing solely on the "same abatement" factor. Indeed, the Commission has historically viewed the similarity of the cited standards as the most important factor. In every previous case in which the Commission had found duplicative violations, the cited standards were closely related, and regulated the same or very similar workplace conditions and conduct. *See Alpha Poster Serv.*,

Inc., 4 BNA OSHC 1883, 1884-85 (No. 7869, 1976) (flammable liquids standards, coverage and transfer of containers); *Lee Way Motor Freight*, 4 BNA OSHC 1968, 1970 (No. 10699, 1977) (walking-working surfaces standards, positioning of dock plates); *Stimson Contracting Co.*, 5 BNA OSHC 1176, 1178 (No. 13812, 1977) (excavation standards, cave-in protection); *U.S. Steel*, 10 BNA OSHC at 2132-33 (coke oven emissions standards, permissible exposure limit); *Cleveland Consol.*, 13 BNA OSHC at 1118 (electrical proximity standards, protective measures); *Capform Inc.*, 13 BNA OSHC 2219, 2224 (No. 84-0556, 1989) (excavation standards, cave-in protection); *Trinity Indus.*, 20 BNA OSHC 1051, 1064 (No. 95-1597, 2003) (confined spaces in shipyards standards, training), *aff'd on other grounds*, 107 F. App'x 387 (5th Cir. 2004); *Manganas Painting Co.*, 21 BNA OSHC 1964, 1975 (No. 94-0588, 2007) (lead standards, permissible exposure limit) ; *E. Smalis*, 22 BNA OSHC 1553, 1561 (No. 94-1979, 2009) (lead standards, permissible exposure limit).

This focus is not surprising given the due process origins of the duplicativeness doctrine, since affirming separate violations of closely related standards is more likely to raise fundamental fairness concerns. While the question of whether the cited standards address fundamentally different conduct is important – even dispositive in some cases – the similarity of the abatement measures that might be used to remedy violations is relatively unimportant. This is

because if the cited standards apply to entirely different work activities, non-compliance should result in two separate citations regardless of whether the employer *might* have utilized the same abatement method in each instance.

So it is here. As discussed above, the two violated standards address wholly separate and distinct work activities. Section 1926.1408(a)(2) governs crane operations and requires the employer to take measures to ensure no part of the crane contacts a power line. Section 1926.416(a)(1) has nothing to do with cranes; it addresses safety-related work practices and requires employers to ensure that no employee works in proximity to an electric circuit unless the employee is protected against electric shock. The two standards imposed separate duties upon North Eastern to protect two separate groups of employees performing different types of work at different times. The crane standard imposed a duty to protect the employees using the crane to hoist planks on December 1, 2012, while the electrical proximity standard imposed a duty to protect employees installing a fall protection system in a different location several days later. In no prior case has the Commission invoked the duplicativeness doctrine where the cited standards imposed separate duties like the crane power line safety and electrical proximity standards cited here.

The Commission erred not only in its failure to consider additional factors such as whether the violated standards regulated different conduct, but also in its

application of the one factor – same abatement – it did consider. As the ALJ expressly found, Northeast Precast lacked authority to have the power line relocated – only the general contractor could do that. ALJ Dec. 54-55, OSHRC Docket, Vol. 6, #67. The majority's observation that the means of abatement do not have to be solely controlled by the cited entity, *N.E. Precast***,** 26 BNA OSHC at 2280-81, completely misses the point. Northeast Precast did not simply lack "sole control" over the relocation of the power line, it lacked any ability whatsoever to implement this abatement measure. The Commission has never before considered a single abatement method to be the dispositive factor where the employer lacked the ability to implement it.

In sum, the Commission's abrupt departure from prior precedent in this case without explanation warrants reversal.

C**ONCLUSION**

For the above reasons, the Commission's February 28, 2018 final order should be reversed, and the two cited violations and total assessed penalties of $123,200 affirmed.

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