



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

BERKEBILE AUTO SERVICE, INC.,

Respondent.

OSHRC DOCKET NO. 17-0923

APPEARANCES:

John M. Strawn, Esquire
U.S. Department of Labor, Philadelphia, PA
For the Secretary

Brian P. Litzinger, Esquire
Leventry, Haschak & Rodkey, LLC, Johnstown, PA
For the Respondent

BEFORE: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

Berkebile Auto Service, Inc. (BAS or Respondent) operates an automotive garage and towing service at 337 Oakland Avenue in Johnstown, Pennsylvania. A tow truck driver for BAS was fatally injured when he was pinned between the bed of a tow truck and an off-loaded vehicle on December 13, 2016. As a result of the fatal injury, the Occupational Safety and Health Administration (OSHA) began an inspection of BAS. On May 5, 2017, OSHA issued a one-item citation and notification of penalty (citation) to BAS for violation of section 5(a)(1) of the Act, the general duty clause, as a result of the inspection. The citation alleged that the tow truck driver was not protected from the crushing hazard in the area between the tow truck and the off-loaded towed vehicle. BAS filed a timely notice of contest bringing this matter before the Occupational Safety

and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

A hearing was held in Pittsburgh, Pennsylvania on March 27 and 28, 2018.¹ At the hearing, the parties stipulated to many facts.² (Tr. 323-24; Ex. J-1). Both parties filed post-hearing briefs.

The key issues in dispute are (1) whether BAS was an employer under the Act, (2) whether there was a violation of the general duty clause, and (3) whether there was unpreventable employee misconduct related to the alleged violation.

For the reasons discussed below, BAS is found to be an employer within the meaning of the Act, the general duty clause citation is affirmed, and a penalty of \$ 3,803.00 is assessed.

Jurisdiction

Based upon the record, I find that at all relevant times BAS was engaged in a business affecting commerce in accord with section 3(3) of the Act. (Ex. J-1). For the reasons that follow, I find BAS was an employer within the meaning of section 3(5) of the Act. I also find that the Commission has jurisdiction over the parties and subject matter in this case.

Findings of Fact

The Company

BAS is an auto repair and towing company owned by Harold Berkebile. (Ex. J-1, Fact ¶¶ 2, 3). Mr. Berkebile has been the owner and operator since he purchased the company from his father and brother in 1968.³ For the first few years, BAS provided automotive body work. In 1977, Mr. Berkebile added towing to the services provided by BAS. (Tr. 161-63).

The accident

¹ The following witnesses testified at the hearing: OSHA Compliance Officer (CO) Kathy Clugston, OSHA CO Joshua Butchkoski, BAS owner Harold Berkebile, a former driver for BAS Richard Caron, and the daughter of the deceased driver. No testimony was presented from a current or recent BAS driver.

² Exhibits within this decision will be referenced as Ex. J-__ for Joint exhibits, Ex. R-__ for Respondent's exhibits and Ex. C-__ for Secretary's exhibits. The stipulated facts will be referenced as Ex. J-1, Fact __.

³ Early in 2017, the business structure of BAS changed from that of a sole proprietor to a limited liability corporation under the name Berkebile Auto and Towing Services dba Berkebile Auto Service and Towing and Recovery, LLC. (Tr. 8, 121, 126, 165, 209, 212, 228-29).

On December 13, 2016, BAS assigned Driver J.H.⁴ to tow a red 2007 Dodge dump truck with a failed transmission to Weinzierl's garage. (Ex. J-1, Fact ¶ 5). Driver J.H. used a BAS-owned truck to tow the Dodge dump truck. (Tr.30, 67; Ex. J-1, Fact ¶ 5; Ex. C-5, pp. 2, 12). Mr. Berkebile stated that Driver J.H. would have known the transmission was faulty when preparing the Dodge dump truck for towing. (Tr. 197-98).

Driver J.H. off-loaded the disabled Dodge truck onto a sloped area at Weinzierl's garage. (Tr. 39-40, 205). He did not chock its wheels to prevent movement. (Tr. 31-32, 78, 87; Ex. J-1, Facts ¶ 7). Driver J.H. then stood behind the tow truck, and in front of the disabled vehicle, perhaps to store the chains and winch cable on the tow truck's bed. (Tr. 33; Ex. C-5, p. 13). While standing there, the disabled truck drifted forward and pinned Driver J.H. between the two vehicles. (Ex. J-1, Facts ¶ 8; Ex. C-2, p. 3). Driver J.H. was found pinned and crushed between the back of the tow truck and the front of the off-loaded disabled truck.⁵ (Tr. 187; Ex. C-5; Ex. J-1, Facts ¶¶ 5, 6, 7).

EMS were called to the accident scene. (Ex. C-5, p. 2). Driver J.H. was transported to the hospital. He died later that day from the injuries sustained when he was crushed between the vehicles. (Ex. C-5, p. 2).

Weinzierl's garage called Mr. Berkebile, to tell him that a driver for BAS had been injured. (Tr. 187). Rather than personally going to the accident site to check on Driver J.H., Mr. Berkebile called Harold Cole, another BAS driver, and asked him to go over to Weinzierl's to see what had happened. (Tr. 187, 231).

Inspection and basis for the OSHA citation

Officer Michael Beblar of the West Hills Regional police department notified OSHA's Pittsburgh area office about the accident on December 13, 2016. (Ex. C-5). The case was assigned to Compliance Officer (CO) Kathy Clugston, who began an inspection of BAS on December 14, 2016. (Tr. 22; Ex. J-1, Fact ¶ 11).

CO Clugston obtained accident information and photographs from the EMS and the West Hills police department. (Tr. 23, 28-29, 35; Exs. C-5, C-6). CO Clugston also received

⁴ The deceased employee's name is not used due to privacy concerns.

⁵ To unpin Driver J.H. from between the vehicles, Mr. Tom Weinzierl applied the brakes on the towed vehicle while someone moved the tow truck forward. (Ex. C-5, p. 2).

information from WreckMaster's Administrative Director and lead instructor. WreckMaster is a third-party provider of education and safety practices to operators in the towing industry. (Tr. 78-80, 170-72, 186-87; Ex. C-10).

The day after the accident, CO Clugston, accompanied by CO Butchkoski,⁶ opened the inspection with owner, Harold Berkebile, at BAS's office and garage in Johnstown, Pennsylvania. CO Clugston interviewed Mr. Berkebile and others at the BAS garage. (Tr. 22-23; Ex. J-1, Fact ¶ 1). CO Clugston observed the tow truck involved in the accident, which had been moved from the accident site to the BAS garage. (Tr. 31). The tow truck appeared to be in the same condition as it had been when it was photographed at the accident site the day before. (Tr. 30-31; Ex. C-5, pp. 12-13). She then went to Weinzierl's garage to inspect the area where the accident occurred and to see the towed Dodge truck. (Tr. 23-24).

The tow truck was a Super Duty Ford 650 truck with a Jerr-Dan tow bed. (Tr. 42; Ex. C-5, p. 4). The Jerr-Dan Operations and Maintenance Manual (Manual) for this model stated that a vehicle should be on level ground during loading and unloading operations. (Tr. 42-44; Ex. C-11, pp. 6-8). The Manual also stated that the load (towed vehicle) should be aligned directly behind the tow truck when loading and unloading. (Tr. 41-44; Ex. C-11, pp. 6-7).

CO Clugston stated that after the Dodge truck was off-loaded directly behind the tow truck, the area between the trucks presented a struck-by and crushing hazard to the tow truck driver. (Tr. 39). This area between the back of the tow truck and the front of the off-loaded vehicle is the hazard zone that is the subject of the alleged violation.

According to CO Clugston, both the Jerr-Dan Manual and WreckMaster's training materials maintain that an off-loaded vehicle should be secured to prevent movement before working in the hazard zone. (Tr. 39-44; Ex. C-11). The Manual instructs the driver to "[s]ecure the load on the ground" before removing and storing the winch cable. (Tr. 43-45; Ex. C-11, p. 8). WreckMaster's training referred to the area between the back of the tow truck and the off-loaded vehicle as the "kill zone" because of the hazard to a driver working in this area. (Tr. 40-41).

Mr. Berkebile agreed there was a risk anytime the driver was between the back of the tow truck and the towed vehicle. (Tr. 151).

The tow truck drivers

⁶ Mr. Butchkoski observed CO Clugston and took photographs during the inspection. (Tr. 246, 250-51).

In December 2016, three or four tow truck drivers worked for BAS, including Harold Cole, Mr. Petak, and Driver J.H. Also, Vernon Fulton worked for BAS, on a weekly basis, as a mechanic, performing oil changes, tow truck maintenance, and computer data input. (Tr. 70-71, 114, 226-27, 320-21). Mr. Berkebile informed CO Clugston that he had no employees. He stated that he used independent contractors to drive the tow trucks. (Tr. 24-25, 165; Ex. J-1, Facts ¶ 4).

Since 2004, Mr. Berkebile had each driver sign a one-page “Independent Contractor Agreement” (Agreement). (Tr. 24, 166-67; Exs. C-9, R-6). The Agreement did not specify the rate of pay, the nature of services provided, or the duration of the agreement. (Tr. 166-68, 189-90; Exs. C-9, R-6). Mr. Berkebile stated that the pay and work assignments were the same for all drivers. (Tr. 189-90). Each Friday, Mr. Berkebile paid each driver for that week’s completed service calls. (Tr. 138, 140, 177; Ex. C-13). Drivers were paid at the rate of 40 percent of the BAS rate charged to the customer for towing calls and 50 percent of the BAS rate charged to the customer for non-tow service calls. (Tr. 134-38, 140, 190).

Agreements signed by Driver J.H. and former driver Richard Caron were entered into the record. (Exs. C-9, R-6). Driver J.H. signed an Agreement with BAS on May 31, 2004. (Ex. C-9). Driver J.H. had previously driven a tow truck for another company and was a certified tow truck driver before he drove for BAS. (Tr. 170). Driver J.H. drove for BAS from 2004 until his death in 2016. (Ex. J-1, Facts ¶ 9; Ex. C-9).

Richard Caron had been a driver for BAS from 2006 to 2012. (Tr. 301, 305-06; Ex. R-6). Prior to becoming a driver, Mr. Caron brought doughnuts to the BAS garage around 7:00 a.m. every morning to have coffee with Mr. Berkebile and others, for companionship. (Tr. 291). Eventually, Mr. Berkebile asked Mr. Caron if he would like to drive for BAS. (Tr. 292). Mr. Caron had done some towing work before he retired from the military in 1996, ten years before. (Tr. 289-90, 293). Mr. Caron signed an Agreement with BAS in 2006. (Ex. R-6). Mr. Caron knew the Agreement stated that he had to take care of his own taxes. (Tr. 292, 297). Mr. Caron believed that he worked for himself; however, he also knew that he represented BAS and only used BAS equipment for service calls. (Tr. 298-99, 304).

Mr. Berkebile stated that since 2006 he had accumulated a three to four-inch stack of the driver Agreements. (Tr. 166-67). Mr. Berkebile did not notify a driver when an Agreement was terminated. Instead, he simply stopped calling the driver. (Tr. 169).

BAS provided no formal work rules, training, or safety instruction to its drivers. Mr. Berkebile gave no specific instructions on how to strap a vehicle down or unload a vehicle from the tow truck. (Tr. 196). During a driver's first two weeks with BAS, Mr. Berkebile had a senior driver accompany a new driver. (Tr. 170, 174-75, 214-15, 292-93). When Driver J.H. started driving for BAS in 2004, he was trained by driver Ross Snyder.⁷ Mr. Berkebile testified that Mr. Snyder showed Driver J.H. how to drive the truck, hook up, and tie down the vehicle. (Tr. 174-75, 214-15). In 2006, Richard Caron was trained by Driver J.H. (Tr. 292). Mr. Caron commented that he had to "be checked out to make sure that I knew how Mr. Berkebile wanted it," in other words how Mr. Berkebile wanted the job performed. (Tr. 293). The record is otherwise silent on what information was conveyed to a new driver during this time. Mr. Berkebile personally did not accompany the drivers on a tow job or train them. (Tr. 176). Mr. Berkebile claimed that no one supervised the drivers and that "everybody does their thing."⁸ (Tr. 176, 195-96). He assumed Driver J.H. knew what he was doing. (Tr. 195-96).

Prior to working for BAS, Driver J.H. attended WreckMaster classes and received a towing and recovery operator certificate. (Tr. 170-72; Ex. C-10). Driver J.H. attended two WreckMaster classes while he worked for BAS; one class Mr. Berkebile also attended because Driver J.H. talked him into it. (Tr. 170-71). BAS did not pay for Driver J.H.'s training classes. (Tr. 170-72). Mr. Berkebile stated that the class he attended included a demonstration of how to hook-up an overturned bus. (Tr. 172). Mr. Berkebile could not recall whether the training included any discussion of the hazardous area between the towed vehicle and tow truck. (Tr. 186-87). The record is silent as to whether the class content included safety topics.

Assignments to drivers

For more than ten years, BAS had towing and recovery contracts with several companies, including, Allstate, GEICO, Agero, U-Haul and the United States Postal Service. (Tr. 130, 136-37, 225-26). Mr. Berkebile negotiated the contract with each company. (Tr. 136-37). Some

⁷ Ross Snyder was a BAS tow truck driver in 2004. (Tr. 175).

⁸ Mr. Berkebile testified,

Whenever [Driver J.H.] drove the truck, he knew what he was doing – supposedly knew what he was doing, and I didn't have no supervisor over him. Because everybody – everybody does their thing. You might do it this way. It might be easier for you, and it might be easier for me to do it this way. So, whatever is the easiest way for you to do, that's what you do. (Tr. 195-96).

contracts specified payment to BAS on an hourly or per mile basis, others paid BAS per tow. (Tr. 136-37).

BAS received towing and non-towing service requests at its office. (Tr. 131, 138). Mr. Berkebile assigned the tow request to an available driver. (Tr. 176). Sometimes the assigned driver was already at the BAS garage; at other times, the driver came to the garage to get the tow truck. (Tr. 188, 212-13). If the driver had taken the tow truck home, the driver began the assigned call from his home. (Tr. 188-89). Generally, Mr. Berkebile contacted available drivers based on seniority. (Tr. 176). A driver had the option to not accept the offered assignment. (Tr. 176). If the driver refused, Mr. Berkebile contacted the next available driver on the list. (Tr. 176). Driver J.H. had the most seniority and had been at the top of the contact list.⁹ (Tr. 179).

BAS had six or seven tow trucks that drivers were required to use for all towing service calls. (Tr. 152, 192, 228). BAS paid for the costs of the fuel, maintenance, and insurance for the tow trucks. (Tr. 134-35). If more than one person was needed to perform the towing assignment, the assigned driver would call the BAS shop and another BAS driver would be assigned to assist. (Tr. 195, 234-35, 237). In addition to towing, Mr. Berkebile assigned other service calls to drivers, such as jump-start, flat tire, gas and lock-out requests. (Tr. 134, 138). Generally, drivers used their personal vehicles for the non-tow service calls. (Tr. 134, 299-300).

Mr. Berkebile claimed that drivers “leased” the tow trucks from BAS.¹⁰ (Tr. 142, 190, 213-14). On each tow truck, there were pieces of paper (stickers) stating the truck was leased to its driver, attached with scotch tape to the outside doors and one on the inside dashboard. At first,

⁹ Mr. Berkebile testified that in the time period immediately before Driver J.H.’s accident, Driver J.H. was less interested in work with BAS and would turn down assignments offered by Mr. Berkebile. (Tr. 176-80). Record evidence does not support this testimony. Review of Driver J.H.’s paystubs for 2016 reveal steady earnings from BAS throughout the year, with no decrease in earnings predating the December 2016 accident. (Ex. C-13). Likewise, Driver J.H.’s federal tax forms 1099-MISC disclose that Driver J.H. had generally consistent earnings from BAS between 2012 and 2016 (Tr. 206; Ex. C-14) and that Driver J.H.’s yearly earnings from BAS comprised a generally consistent percentage of Respondent’s total “contract labor” expense for the years 2013 through 2016, 24.9 %, 29.2 %, 27.1 % and 33.4 %, respectively. (Tr. 217-20; Ex. R-3, pp. 1, 3, 5, 7).

¹⁰ Overall, Mr. Berkebile’s testimony was influenced by his strong belief and litigation position that Driver J.H. was not an employee. Mr. Berkebile mentioned there were other ongoing issues with the state regarding his business structure. (Tr. 142-50). I find that his answers were shaped through the lens of the desired outcome of establishing an independent contractor relationship.

Mr. Berkebile hand-wrote these stickers. Later, he prepared them by typing. (Tr. 190-92, 247). Mr. Berkebile claimed he had placed the “lease” stickers on his tow trucks for the past six years. (Tr. 190). He started using the lease stickers after he noticed them in a taxi and on another company’s trucks. (Tr. 206). On December 14, 2016, CO Clugston did not see stickers on the BAS truck involved in the accident, when she began the inspection. The COs did not open the truck and look inside to see if there was a sticker on the dashboard.¹¹ (Tr. 83, 103-06, 247). In December 2016, when CO Clugston first interviewed Mr. Berkebile there was no mention of a “vehicle lease.” (Tr. 106). When CO Clugston returned to the BAS garage in March 2017, she noticed on a truck a “vehicle leased to driver” sticker. (Tr. 67-68). Mr. Berkebile admitted that sometimes the stickers had to be replaced. The stickers came off when they became wet from weather and when the trucks were steam cleaned because they were only attached with scotch tape. (Tr. 192, 233-34, 236-37).

There was no document, contract, or other source that explained the terms of the purported lease. (Tr. 69, 142). The Agreement did not mention a vehicle lease. (Exs. C-9, R-6). Mr. Berkebile stated that the “lease agreement” was simply the percentage of the BAS customer fee the driver would earn based on whether the assignment was a tow or non-tow service assignment. (Tr. 206). Mr. Berkebile stated that he explained the “oral lease” of the tow trucks to the drivers when they started. (Tr. 142). Contrary to this claim, Mr. Caron testified that when he had noticed a lease sticker in the tow truck, he was surprised to find that Mr. Berkebile considered the tow truck to be leased to Mr. Caron. (Tr. 303-04). Mr. Caron could not recall where the lease sticker was on the truck, he only noticed the sticker one time. (Tr. 303-04).

Mr. Berkebile stated that a driver could only use the truck for BAS towing work. (Tr. 134, 142, 213-14). The driver could not sublease the truck, allow anyone else operate the truck, or use it for his own benefit. (Tr. 69). The record is silent on whether a particular truck was leased to each driver; however, it appears that the “lease” simply applied to whatever truck the driver happened to use. Mr. Caron stated that for most of his tow jobs he used the same tow truck that Driver J.H. used. (Tr. 300-01). Mr. Berkebile testified that Driver J.H. used the same Berkebile tow truck ninety-nine percent of the time. (Tr. 187-88, 212-13).

¹¹ CO Clugston looked at two tow trucks at the BAS garage on December 14, 2016. (Tr. 104). Mr. Berkebile claimed that the lease stickers were on each of the tow trucks in December 2016. (Tr. 192).

Mr. Berkebile advertised BAS as Berkebile Auto Service and as Berkebile Towing and Recovery. (Tr. 124-25, 127; Exs. C-3, 4). Only Mr. Berkebile could advertise or solicit business on behalf of BAS. (Tr. 142). The drivers were required to present themselves as representatives of BAS to clients and the public. The tow trucks were marked with BAS signage. (Tr. 35, 301; Ex. C-5, p. 13). The uniform shirt and jacket that Driver J.H. routinely wore had a “Berkebile Towing” patch on the left side and his name on the right side. (Tr. 269-71, 280, 313-15, 317; Exs. C-18, 19, 20). Driver J.H.’s daughter stated that Driver J.H. had several BAS t-shirts that he wore. (Tr. 280).

Analysis

BAS was an employer under the Act

BAS asserts that it was not an employer under the Act. (Resp’t. Br. 9). The Act defines an employer as a “person engaged in a business affecting commerce who has employees.” 29 U.S.C. § 652(5). Person means “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” 29 U.S.C. § 652(4). An employee is defined as “an employee of an employer who is employed in a business of his employer which affects commerce.” 29 U.S.C. § 652(3).

In similarly worded statutes, the Supreme Court has relied on the common law for guidance in determining whether an individual is an employee, or alternatively, the kind of person the common law would consider an employee. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (*Darden*). The Commission analyzes the *Darden* factors to determine if an individual is an employee of the cited employer. *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (*S&W*). For the following reasons, I find Driver J.H. was an employee of BAS and, thus, BAS was an employer under the Act.

Darden analysis

“[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site.” *All Star Realty Co., Inc.*, 24 BNA OSHC 1356, 1357 (No. 12-1597, 2014) (citation omitted). The common-law agency doctrine set forth in *Darden* focuses on the company’s “right to control the manner and means by which the product” is accomplished. *S & W*, 23 BNA OSHC at 1289 (citation omitted). The company’s control over the worker is a “principal guidepost” to determine the existence of an employment relationship. *Froedtert Mem’l*

Lutheran Hosp., Inc., 20 BNA OSHC 1500, 1506 (No. 97-1839, 2004) (citations omitted).

Additional factors relevant to analysis include:

the skill required [for the job]; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; [and] the provision of employee benefits and the tax treatment of the hired party.

S&W, 23 BNA OSHC at 1289 citing *Darden*, 503 U.S. at 323-24. An evaluation of the *Darden* factors shows an employer-employee relationship between BAS and Driver J.H. In particular, the control of the worksite, work assignments, payments, and the essential tools of the trade are indicative of an employer-employee relationship.

a. General control over the manner and means to accomplish the product

This factor is the most significant in determining whether Driver J.H. was an employee of BAS. “Control over the ‘manner and means of accomplishing the work’ must include control over the *workers* and not just the results of their work.” *Don Davis*, 19 BNA OSHC 1477, 1482 (No. 96-1378, 2001) (emphasis in original). I find that BAS had general control over the drivers’ means and manner to accomplish the work.

Respondent’s control was manifested through its towing contracts, the tools used for towing services, service call assignments, the non-negotiable rate of a driver’s pay, limits on the use of “leased” tow trucks, the prohibition of driver advertising or self-promotion, and the initial two-week ride-along training of drivers.

Mr. Berkebile negotiated the terms of the towing contracts between BAS and its client companies. Each driver’s payment from BAS was based upon the towing rates established in these contracts. (Tr. 134). The drivers had no input into the fee structure or other contract terms. (Tr. 136-37). Further, each driver was required to follow the terms specified in each contract. For example, one client’s contract specified that a driver could not allow the owner of the vehicle being towed to assist the driver in any way, such as by moving a vehicle. (Tr. 195, 234-36). Drivers were bound to contract terms over which they had no control.

BAS specified how a driver could represent himself when providing tow services. Drivers were not allowed to solicit or advertise for themselves. (Tr. 134, 142). The tow trucks were

marked with BAS signage. (Tr. 35, 66, 125-26, 301; Ex. C-5, p. 13). Drivers could not use the tow trucks for non-towing calls, such as jump-start or lock-out; instead generally BAS required them to use their personal vehicles.¹² (Tr. 134). Even though Mr. Berkebile claimed the tow truck was leased to the driver, the driver had no control over the use of the truck. The driver could not sublet the truck or use the truck in any other way. The truck was exclusively for towing calls assigned by BAS.

Some drivers wore BAS uniforms, even though it was not a requirement. (Tr. 73, 156-57, 207-08). Driver J.H. routinely wore a BAS uniform shirt and jacket.¹³ (Tr. 280, 306). Mr. Caron testified that a lot of the drivers wore a BAS shirt.¹⁴ (Tr. 306). Mr. Berkebile claimed that BAS initially purchased and then deducted the uniform cost from the drivers' weekly paychecks.¹⁵ (Tr. 156-57, 207, 315). Contrary to this claim, during the inspection, the employees told CO Clugston that Mr. Berkebile paid for the uniforms. (Tr. 26, 112-13). The uniforms show that the drivers knew they were representatives of BAS.

Mr. Berkebile controlled the driver assignments. Service requests were routed through BAS. (Tr. 131, 176). Mr. Berkebile decided which driver would be contacted for an assignment. (Tr. 176). Instead of terminating a driver's contract with BAS, Mr. Berkebile simply stopped offering assignments to that driver, apparently without notice.¹⁶ (Tr. 169). The driver only had control over whether to accept the assignment offered to him.

¹² Former driver, Mr. Caron recalled that he once used a BAS van for a jump-start call. (Tr. 299-300).

¹³ Mr. Caron testified that Driver J.H. wore a BAS shirt and jacket. (Tr. 306). Driver J.H.'s daughter testified that she saw him routinely wear his BAS uniform. (Tr. 280).

¹⁴ Mr. Caron stated that he went out on so few service calls that he did not get a BAS shirt. (Tr. 307).

¹⁵ Mr. Berkebile's claim that the uniform cost was deducted from the drivers' pay is uncorroborated and not supported by record evidence. This claim is not credited. There is no uniform cost deduction noted on the weekly pay slips Mr. Berkebile prepared for Driver J.H. (Tr. 112-13; Exs. C-13, R-5). Four years (2013-2016) of Mr. Berkebile's tax returns show that BAS had uniform-related expenses between \$1,798 and \$2,178 each year. (Ex. R-3, pp. 2, 4, 6, 8). No testimony was presented to explain the nature of this expense.

¹⁶ Mr. Berkebile simply stopped calling a driver if issues arose regarding drinking or drugs. (Tr. 169). He did not provide any other examples of when he chose to stop calling a driver.

Drivers had to be trained on BAS requirements. When a driver started working for BAS, Mr. Berkebile had an experienced, senior driver ride along for a couple of weeks to train the new driver, even when the driver had prior towing experience. (Tr. 174-75, 292). Driver J.H. was an experienced, certified tow truck driver when he started working for BAS. Nonetheless, experienced BAS driver Ross Snyder trained him for two weeks. (Tr. 175). Mr. Caron had done some towing work while in the military, but still had to “be checked out to make sure that I knew how Mr. Berkebile wanted it.” (Tr. 293). Driver J.H. was assigned to train Mr. Caron. Mr. Berkebile delegated the training duty to a senior driver. The two-week training period is more akin to an employer-employee relationship rather than relying on an independent contractor’s expertise. Delegation of training to a senior driver is indicative of an assignment that an employer would give to an employee.

Finally, the payment terms were the same for all drivers. (Tr. 134, 190). A driver either received 40 percent or 50 percent of the fee collected by BAS. (Tr. 134). Drivers could not negotiate their payment terms or the underlying tow fees charged. (Tr. 136-37). Drivers could not negotiate a minimum number of assignments per week. (Tr. 176). If a driver collected payment during the towing service call, the total amount was given to Mr. Berkebile. (Tr. 37-38).

BAS had extensive control over the drivers through its owner Harold Berkebile. He provided the primary tools, the towing contracts, and was the source of all tow assignments. He exclusively controlled the amount of pay each driver received. This one-sided control by BAS is indicative of an employer-employee relationship.

I find that BAS had significant control over the drivers and the manner and means to accomplish the work. This factor supports an employer-employee relationship.

b. Skills required

Mr. Berkebile did not indicate whether he had a minimum experience or certification requirement for drivers. Driver J.H. and Mr. Caron had significantly different prior towing experience when they began driving for BAS. Driver J.H. was a certified tow truck driver. (Tr. 170; Ex. C-10). Mr. Caron had “some” towing experience from when he was in the military many years before. (Tr. 289-90). Regardless of prior experience, Mr. Berkebile had a senior driver ride along with a new BAS driver for two weeks to show them the BAS way. (Tr. 175, 293).

Drivers were not required to have a certificate or special driver’s license, such as a CDL, to drive a BAS tow truck. (Tr. 66, 99-100, 151-52; Ex. J-1, Fact ¶ 10). The only requirement was

a “medical card” obtained with a doctor’s certification. (Tr. 229, 238, 240). The lack of required specialized training, certification, or licensing is akin to an employer-employee relationship. Further, the lack of significant, prior experience and the requirement for an initial two-week ride-along for new drivers is also akin to an employer-employee relationship. I find the skills required for a driver reflect an employer-employee relationship.

c. Source of the tools, work location, and hours worked

BAS provided the essential tools for the work. BAS provided the tow truck, the tools on the truck (such as blocks, chocks, ratchet straps, chains, come-along, hoist, fire extinguisher), and the tow assignments. The driver incurred no costs for towing services. (Tr. 134-35, 152, 228, 298). BAS paid the cost of insurance, equipment, maintenance, state vehicle inspections, and fuel for the tow trucks. (Tr. 70-71, 100, 134, 138; Ex. R-3, pp. 2, 4, 6, 8 (Berkebile Towing & Recovery. IRS Form 1040, Schedule C)). BAS paid for the vehicle insurance on the tow trucks and liability insurance for four of the tow truck drivers, including Driver J.H. (Tr. 67, 70-71, 110-11, 134).

Mr. Berkebile claimed the drivers leased the tow trucks. Despite this claim, the driver was only allowed to drive the tow truck for a BAS-assigned towing job. The driver could not sublet the truck or use it for his own benefit. Further, the driver did not pay for the lease and the driver had no costs related to the use of the tow truck. These terms show that control remained with BAS and the driver had no autonomy.

For non-towing assignments, such as jump-start or lock-out calls, generally the drivers used their personal vehicles. Mr. Caron recalled performing a jump start call for BAS. To perform this assignment, he used a BAS van and BAS equipment, jumper cables, and a charger unit. (Tr. 299-300). Mr. Berkebile claimed that he ordered the tools Driver J.H. needed to perform “lock-out service” assignments, and that Driver J.H. later reimbursed Mr. Berkebile for the cost.¹⁷ (Tr. 182-83).

The location of work was controlled by BAS through its assignment of tow jobs to a driver. A driver could refuse a job that he was offered, but otherwise could not set his own hours of work.

¹⁷ Mr. Berkebile’s claim that the lock-out service tool cost was deducted from the driver’s pay is uncorroborated and not supported by record evidence. This claim is not credited. There is no tool cost deduction noted on the weekly pay slips Mr. Berkebile prepared for Driver J.H. (Tr. 182-83; Exs. C-13, R-5). Four years (2013-2016) of Mr. Berkebile’s tax returns show that BAS incurred a small tools expense each year. (Ex. R-3, pp. 2, 4, 6, 8). No testimony was presented to explain the nature of this expense.

A driver could not demand a minimum number of assignments per week. A driver's opportunity to work was limited to when Mr. Berkebile called with an assignment.

BAS had control over the hours of work and the source of essential tools. I find this is indicative of a traditional employer-employee relationship.

d. Method of payment

Payment by the hour, day, week, and month is generally indicative of payment to an employee. Whereas, payment per job suggests an independent contractor relationship. Investment in the business or the ability to incur losses or gains is a feature of an independent contractor relationship. The lack of investment in a business and no risk of economic loss suggests an employer-employee relationship.

Here, even though the drivers were paid based on the actual service calls performed each week (rather than by the hour) the payment structure is more akin to that of an employer-employee relationship rather than that of an independent contractor. A driver could not negotiate his rate of pay. A driver was paid at 40 percent of a tow fee and 50 percent of a non-tow fee, fees that had been exclusively negotiated by Mr. Berkebile. All payments from tow clients and non-tow customers were remitted to BAS. BAS then paid each driver their portion of the fees each week. The weekly dispersal of payments to drivers is more like a traditional employment relationship.

Further, the drivers had no opportunity to impact gains or losses incurred by the business. Drivers could not increase their profit from tow assignments by finding a better price for fuel or insurance. Drivers were paid at the rate determined by Mr. Berkebile and all drivers were paid at the same rate. A driver's income was not affected by expenses incurred. A driver could not increase his income through his own initiative.

While the lack of an hourly wage points toward an independent contractor relationship, the lack of control over the payment structure and lack of investment in the business is more akin to an employer-employee relationship. This factor leans toward an employer-employee relationship.

e. Was towing a regular part of BAS's business

Towing was a regular part of the business. BAS added towing to its garage services in 1977. BAS relied on the tow truck drivers to perform this essential service for BAS's towing operation. This factor weighs in favor of a traditional employer-employee relationship.

f. Duration of the relationship and hiring or paying of assistants

The agreements between BAS and its drivers were not limited in time and were generally of long duration. (Tr. 168). Additionally, the relationship was not related to a particular project or contract. (Tr. 91). Driver J.H. was a driver for BAS from 2004 until 2016. (Exs. C-9, J-1, Fact ¶ 9). Mr. Caron was a driver from 2006 until 2012. (Tr. 301, 306). Mr. Petak also was a BAS driver for several years. (Tr. 65, 70-71, 157). The BAS logo worn by many drivers on their work shirts and jackets, is evidence that both the drivers and Mr. Berkebile regarded their working relationship as long-term and on-going. (Tr. 269-71, 280, 312-20, 323-24). The drivers did not hire assistants. If a driver needed assistance, BAS assigned another driver to the service call. (Tr. 195, 234-35, 237). The assignment of another BAS driver to assist on a service call is indicative of an employee-employer relationship.

The duration and open-ended nature of the employment is akin to that of a traditional employer-employee relationship. *See Absolute Roofing Constr., Inc.*, 580 F. App'x 357, 362 (6th Cir. 2014) citing *FM Home Improvement*, 22 BNA OSHC 1531, 1538 (No. 08-0452, 2009) (ALJ).
g. Tax treatment and employee benefits

BAS did not withhold taxes from a driver's weekly pay. (Tr. 206-07). BAS used the IRS 1099-MISC form to report its drivers' income.¹⁸ Prepared by an accountant in 2017 after his death, Driver J.H.'s 2016 federal tax return reported his income from BAS as self-employment income. (Ex. C-15).

Here, the taxes and benefits are like those of an independent contractor relationship. Even so, tax reporting status is not the controlling factor in a *Darden* analysis. *See S&W*, 23 BNA OSHC at 1290. (In this case, the Commission found the "failure to withhold federal income and social security taxes was . . . not a bona fide reflection of an authentic independent contractor relationship.") I find the tax treatment and lack of benefits are not dispositive in determining the nature of the employment relationship.

h. The independent contractor agreement (Agreement)

Respondent asserts the Agreement signed by its drivers proves they are not employees. The following is a representation of the Agreement.

¹⁸ IRS 1099-MISC is a federal tax form used for independent contractors. *See Absolute Roofing*, 580 F. App'x at 361.

Independent Contractor Agreement

*This agreement is between _____, Contractor, and
_____ Company.*

*Whereas, the aforementioned contractor understands and
agrees there is no employer-employee relationship existing
between the Company and the Contractor, as such all liability as
to local, county, state and federal taxes due them from the
Contractor is solely the full responsibility of the Contractor.*

*In Addition, the company assumes no liability in any form
from the Contractor as a consequence of this agreement.,*

*All services performed by Contractor shall be agreed upon
verbally by both parties prior to any services being performed.*

(Exs. C-9, R-6). I find the Agreement does not demonstrate the drivers were independent contractors under a *Darden* analysis. First, the terms of each Agreement were not individually negotiated with a driver. The Agreement was a generic, boilerplate, fill-in-the blank form that only varied with the name of the Contractor (driver). (Exs. R-6, C-9).

Second, the Agreement simply specifies there was no employer-employee relationship for the purpose of local, state, and federal tax liability. It does not specify the nature of work agreed to or each party's responsibility. BAS contends the tow trucks were leased to drivers, yet there is no mention of this in the agreement.

Considering all the facets of the relationship between BAS and its drivers, I find the relationship was more akin to that of an employer-employee rather than of a self-employed independent contractor. Considering all the *Darden* factors, especially the significant control the company had in obtaining and assigning work, setting the compensation rate of the drivers, and providing the tow trucks to complete the work, I find that Driver J.H. was an employee of BAS for purposes of the Act.

The Citation

Citation 1, Item 1, alleged a serious violation of section 5(a)(1) of the Act, also referred to as the general duty clause. The general duty clause requires an employer to “furnish 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). The citation alleged a violation as follows:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees from crushing and struck-by hazards:

(a) Facility, 337 Oakland Avenue, Johnstown, PA: On or about December 14, 2016 an employee was positioned between the rear of the roll off tow truck and the front of the vehicle that had been offloaded. The vehicle was offloaded on a sloped area and the wheels were not chocked or otherwise secured to prevent movement or travel. The employee was pinned when the vehicle drifted forward and caught him against the rear of the tow bed.

A feasible and acceptable method of abatement is to follow the manufacturer's (Jerr-Dan) operations and maintenance manual to ensure proper steps and methods are followed to prevent the operator from being in a danger zone until the vehicle has been secured. The manufacturer's operating instructions include, but are not limited to: the unit shall be loaded and unloaded on level and stable ground; the truck is to be parked with approximately 13 feet plus the length of the equipment to be unloaded; and the offloaded vehicle should be secured. In addition, the employer should develop and implement a written motor vehicle safety program that defines organizational requirements for driver and motor vehicle safety. The written program shall include the elements listed in ANSI/ASSE Z15.1-2012, Safe Practices for Motor Vehicle Operations, Section 3.2.1 Program Elements.

Complaint, at Ex. A.

“To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard.” *Peacock Eng'g, Inc.*, 26 BNA OSHC 1588, 1589 (No. 11-2780, 2017) citing *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). In addition to the four elements of the general duty clause, the Secretary must prove “the employer knew or, with the exercise of reasonable diligence could have known of the hazardous condition.” *Peacock*, 26 BNA OSHC at 1589 (citations omitted); *S. J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016) (citations omitted).

Respondent does not challenge the recognition or abatement of the hazard as alleged by the Secretary. Also, Respondent does not challenge that a hazard existed or that it was serious. Respondent simply asserts that it was not always possible to load and unload a vehicle on level

ground and that if there was a violation, it was the result of employee misconduct by Driver J.H. (Tr. 287-88).

The hazardous condition

The “hazard must be defined in a way that apprises the employer of its obligations, and identifies conditions and practices over which the employer can reasonably be expected to exercise control . . . and [be] defined in terms of the physical agents that could injure employees rather than the means of abatement” for a general duty clause violation. *Peacock*, 26 BNA OSHC at 1590 citing *Arcadian*, 20 BNA OSHC at 2007.

Here, the hazardous condition was working in the area between the back of the tow truck and the front of the towed vehicle. This hazard existed each time the driver worked between the back of the tow truck and the towed vehicle, either when loading or unloading the towed vehicle. (Tr. 45-46, 151). The disabled vehicle was aligned directly behind the tow truck when loading and unloading. (Tr. 41-44; Ex. C-11, pp. 3, 6). While working in this area the tow truck driver was exposed to a caught-between and crushing hazard. Driver J.H. was crushed when he was pinned between the tow truck and towed vehicle that he had just unloaded.

The Secretary proved a hazardous condition existed.

Hazard recognition

The Secretary must show that either the employer or industry recognizes the hazardous condition. *Peacock*, 26 BNA OSHC at 1590-91(citations omitted) (hazard recognition may be shown by proof of either the employer’s recognition or by the “general understanding in the [employer’s] industry”).

BAS does not dispute this is a recognized hazard. Mr. Berkebile recognized there was a risk anytime the driver was between the back of the tow truck and the towed vehicle. (Tr. 151). Industry recognition of the hazard is shown through the tow truck’s manual and an industry training provider. The Manual for the tow truck required the towed vehicle to be secured to prevent its movement. (Ex. C-11, p. 8). WreckMaster’s training referred to the area between the tow truck and towed vehicle as the “kill zone” due to its hazard to the driver. (Tr. 40-41).

I find both the towing industry and BAS recognized the crushing hazard between the back of the tow truck and the towed vehicle. Recognition of the hazard is established.

The hazard was likely to cause death or serious physical harm

Determination of whether a hazard can cause serious harm is not based on the likelihood that an injury will occur, instead it is whether there is a likelihood that death or serious physical harm could result if an accident occurs. *The Duriron Co., Inc.*, 11 BNA OSHC1405, 1407 (No. 77-2847, 1983). Here, being caught between the tow truck and a towed vehicle could result in serious injuries and, as in this case, death. I find the hazard was likely to cause death or serious physical harm.

Abatement of the hazard

The Secretary must show that the proposed abatement method is feasible and will materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC at 2011. “[T]he Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard.” *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993). And, that the “methods undertaken by the employer to address the alleged hazard were inadequate.” *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-316, 2006).

To abate this hazard, the Secretary asserts that Respondent must establish a safety policy¹⁹ that requires drivers to unload vehicles on level ground and secure the unloaded vehicle against movement using blocks, or other means, to chock the wheels before working in the hazard zone between the tow truck and towed vehicle. (S. Br. 18-19). The tow truck’s Manual sets forth these procedures. The Manual states that “[t]he unit should always be loaded and unloaded on level and stable ground” and when the vehicle is unloaded, the driver should, “[s]ecure the load on the ground. Remove the winch cable from the load and store the cable.” (Ex. C-11, pp. 6, 8). In contrast, Respondent had no work rules for loading and unloading vehicles, including a requirement for chocking the wheels or level ground.

Chocking the wheels of the towed vehicle to prevent its movement is feasible. Mr. Berkebile admitted that blocks were available on each tow truck for this use. (Tr. 196-97). After unloading a vehicle, the driver can chock the wheels of the towed vehicle before working between the tow truck and towed vehicle.

¹⁹ For example, ANSI/ASSE Z15.1 (2012), *Safe Practices for Motor Vehicle Operations, American National Standard*, section 3.2 states that “[o]rganizations shall have a written motor vehicle safety program that defines organizational requirements for driver and motor vehicle safety.” (Ex. C-12, p. 4; Tr. 48-50).

With respect to loading and unloading on level ground, Mr. Berkebile asserted this was not feasible because a tow truck driver had little control over the location of the disabled vehicle that will be towed; a vehicle must sometimes be moved and loaded from its disabled position. (Tr. 199-200, 204-05). Nonetheless, I find it would be feasible for Respondent to establish a policy that, whenever conditions allow, the loading and unloading process must be done on level ground. Plus, a requirement to always chock the wheels to prevent movement will mitigate the effect of the sloped ground.

I find it is feasible to block the wheels to prevent movement of the unloaded vehicle. This materially reduces the hazard of being pinned between the tow truck and towed vehicle.

Knowledge of the hazardous condition

The Secretary must prove “the employer knew or, with the exercise of reasonable diligence could have known of the hazardous condition.” *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1305 (No. 06-1201, 2008) (citations omitted). Reasonable diligence involves several factors related to an employer’s safety program, including adequate work rules, an adequate training program, an obligation to inspect the work area, supervision of employees, efforts to anticipate hazards, and measures to prevent the occurrence of a hazard. *North Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1472 (No. 96-721, 2001) (citations omitted). The Secretary can prove constructive knowledge by showing the Respondent had an inadequate safety program. *PSP*, 22 BNA OSHC at 1305 (Commission finding violation of general duty clause where constructive knowledge proved through employer’s inadequate safety program).

BAS had no general safety program, written or otherwise. (Tr. 50, 54-55, 89). BAS had no work rules for loading and unloading a vehicle. (Tr. 196). Mr. Berkebile had “no idea” whether Driver J.H. had ever read the operating manual²⁰ that was in the tow truck. (Tr. 186). Mr. Berkebile never rode with the drivers or supervised them. (Tr. 176, 195-96). He simply assumed Driver J.H.

²⁰ During the inspection, Mr. Berkebile told the CO there was no manual in the tow truck. However, the CO never inspected the truck’s interior to see if a manual was there. (Tr. 82-83). During his testimony, Mr. Berkebile stated there had been a manual in the glove box of the truck for the operation of the tow truck’s bed. He explained that when he talked to the CO during the inspection, he had thought the CO asked whether there was a manual on how to drive the truck. (Tr. 185-86; Ex. R-2). The Secretary did not provide evidence to refute Mr. Berkebile’s assertion at hearing that the operations manual was in the glove box of the tow truck.

knew what he was doing. (Tr. 195-96). Mr. Berkebile admitted that no one supervised the drivers and that “everybody does their thing.” (Tr. 195-96).

BAS did not provide adequate work rules, training, supervision of its employees, or take steps to prevent hazardous conditions. Overall, the absence of work rules, training, and attention to safety shows a lack of reasonable diligence. Therefore, I find BAS had constructive knowledge.

For the alleged general duty clause violation, I find there was a crushing hazard, employees were exposed to the hazard, the hazard was serious, the hazard was recognized by BAS and by the industry, and there was a feasible means to abate the hazard. Further, BAS had constructive knowledge of the hazard due to its lack of reasonable diligence and inattention to safety. The Secretary proved his prima facie case. Berkebile asserts the affirmative defense of unpreventable employee misconduct.

Unpreventable employee misconduct defense

During the hearing,²¹ Respondent asserted that Driver J.H. worked independently, with little supervision, so any violation must be employee misconduct. (Tr. 287-88). It was Driver J.H.’s fault that the wheels were not chocked to secure the vehicle against movement. (Tr. 287).

An employer may defend against a violation by asserting the affirmative defense of unpreventable employee misconduct. *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). To establish the defense, Respondent must prove “(1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered.” *Id.*

This asserted defense fails. As discussed above, Respondent had no established work safety rules, it did not communicate those rules, it took no steps to discover violations of work safety rules, and it made no attempt to enforce safety rules. Mr. Berkebile made no effort to determine if Driver J.H. followed safety guidelines or worked in a safe manner. The asserted affirmative defense of unpreventable employee misconduct is rejected.

I find the Secretary has proved a violation of the general duty clause and citation 1, item 1 is affirmed.

²¹ This defense was raised in Respondent’s Answer and in the parties’ prehearing statement of facts to be litigated (Ex. J-1, VI ¶ 3). It was not addressed in Respondent’s post-hearing brief.

Characterization

Under section 17(k) of the Act, a violation is serious “if there is a substantial probability that death or serious physical harm could result from” the violative condition. 29 U.S.C. § 666(k). As tragically demonstrated here, being pinned and crushed between the off-loaded towed vehicle and the tow truck can result in serious physical injury or death. The violation is serious in nature.

Penalty

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer’s business, the gravity of the violation, the employer’s good faith, and its prior history of violations. *Compass Env’tl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff’d*, 633 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally accorded greatest weight. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993).

The maximum statutory penalty for a serious violation is \$12,675.00.²² The violation’s gravity was assessed as high. (Tr. 53). The probability was assessed as greater. (Ex. C-2, p. 1). Because Respondent had no safety program OSHA applied no reduction for good faith. (Tr. 54-55). There was no adjustment for history because Respondent had no prior inspections. (Tr. 55). Because this citation resulted from a fatality, OSHA applied no discount for company size and proposed the maximum penalty. (Tr. 56-57, 114-15).

Typically, a high gravity penalty is adjusted for a small business such as BAS. In December 2016, at the time of the violation in this case, five individuals worked for BAS. (Tr. 70-71, 114, 226-27, 320-21). At that time, Respondent had between six and seven trucks.²³ (Tr. 152, 192, 228). I find that BAS was a small business at the time of the violation in this case and that a penalty

²² OSHA’s statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). The violation in the instant case was assessed on June 21, 2017, thus a statutory maximum of \$12,675.00 applies. Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 82 Fed. Reg. 5373, 5382 (Jan. 18, 2017) (to be codified at 29 C.F.R. Part 1903).

²³ Respondents’ federal tax documents, Form 1040, Schedule C, for years 2013, 2014, 2015, and 2016, received in evidence, are of limited assistance. Generally, they appear to confirm BAS as a small business. That said, the tax forms raise more questions than they answer. For example, the 2014 Schedule C tax form lists “donation” expenses of \$3,244.00 that exceed the reported net business *loss* of \$2,177.00 for that year. No testimony was presented to explain the expenses or reported yearly business net income or loss on the tax forms. (Tr. 217-20; Ex. R-3). *See* notes 15 and 17 above.

reduction based on size is appropriate. (*See generally*, Ex C-2, pp. 1-2.). A penalty of \$ 3,803.00 is assessed.

In summary

For purposes of the Act, BAS was the employer of Driver J.H. Further, BAS violated the general duty clause. Finally, the affirmative defense of preventable employee misconduct was unsupported and fails.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

Citation 1, Item 1, alleging a serious violation of § 5(a)(1) of the Act, is AFFIRMED as Serious and a total penalty of \$ 3,803.00 is ASSESSED.

/s/ _____
Carol A. Baumerich
Judge, OSHRC

Date: April 1, 2019

Washington, D.C.