UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. JH TRAFFIC CONTROL CO., LLC., Respondent.	DOCKET NO. 15-1987

Appearances:

Susan Brinkerhoff, Esq., Office of the Solicitor, U.S. Dept. of Labor, Seattle, Washington
For Complainant

Terry Pickens Manweiler, Esq., Pickens Cozakos P.A., Boise, Idaho
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On September 22, 2015, Respondent's employees were re-directing traffic on a busy public road in Boise, Idaho. During the course of their work, one of Respondent's employees was struck and seriously injured by a car. Two days later, on September 24, 2015, the Occupational Safety and Health Administration ("OSHA") began an investigation of the incident. As a result, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging three serious, and one other-than-serious, violations of the Act with total proposed penalties of $7,600.00. Respondent timely contested the *Citation*.

A trial was conducted in Boise, Idaho on January 31, 2017. At the beginning of the trial, the parties agreed that Citation 1, Items 2 and 3 would be withdrawn. (Tr. 8). Accordingly, only Citation 1, Item 1, and Citation 2, Item 1 remained in dispute, with a modified total proposed penalty of $4,800.00. The parties each submitted post-trial briefs for consideration.

Seven witnesses testified at trial: (1) Detective Josiah Ransom of the Boise Police Department; (2) Officer T.J. Harms of the Boise Police Department; (3) OSHA Compliance Safety and Health Officer ("CSHO") Catherine Korvig; (4) OSHA Area Director David Kearns; (5) Idaho Department of Transportation Technician Amy Bower; (6) Respondent's owner, Joie Henington; and (7) Respondent's employee, James Waters. (Tr. 30, 70, 101, 136, 154, 179, 230).

Jurisdiction

The Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. At all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Stip. 15). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Stipulations[1]

1. "JH Traffic Control" refers to Respondent JH Traffic Control Company, LLC, d/b/a Traffic Control Company.
2. JH Traffic Control works in conjunction with road construction crews by setting up traffic control devices, such as traffic barrels, traffic cones, arrow boards and warning signs before the road construction crew begins their work.
3. Joie Henington is the sole owner of JH Traffic Control.
4. Ms. Henington is solely responsible for hiring and firing of employees.

1. The stipulations were read into the record. (Tr. 65).

5. Ms. Henington requires all employees of JH Traffic Control to be trained as flaggers and/or maintenance workers.
6. JH Traffic Control employs a certain number of its workers as maintenance employees. Maintenance employees place traffic control devices on roads to create lane shifts and merged lanes in order to divert traffic away from locations where roadwork is being conducted.
7. JH Traffic Control employees [redacted] and James Waters were assigned to set up a lane merge at a road construction worksite on South Broadway Avenue, just north of the intersection with West University Drive on the evening of September 22, 2015.
8. Broadway Avenue has three southbound lanes and two northbound lanes of travel. The northbound and southbound lanes are separated by a painted island consisting of two double-yellowed lane-marking lines.
9. In particular, [redacted] and Mr. Waters were to place an arrow board and traffic barrels on the northbound left (inside) lane to create a taper and or merge pattern to divert the oncoming traffic into the right (outer) lane so that road construction could be performed in the inner lane.
10. On the evening of September 22, 2015, the barrels were staged on the sidewalk next to the right lane such that [redacted], who was placing the barrels in the left lane, had to cross a live lane of traffic (the right lane) with the barrels.
11. On the evening of September 22, 2015, around 8:15 p.m., while placing the barrels, [redacted] was struck by a northbound car and seriously injured.
12. It is a recognized safety practice in the traffic control industry to place the traffic control devices in the direction of the flow of traffic in order to protect the worker

placing the devices. By doing so, there are always one or more traffic control devices between the oncoming traffic and the worker.

13. JH Traffic Control did not notify OSHA of the accident within 24 hours.
14. JH Traffic Control was issued one citation for a violation of 29 U.S.C. Section 5(a)(1), the General Duty Clause under the Occupational Safety and Health Act, and one citation for a violation of 29 C.F.R. Section 1904.39(a)(2).
15. JH Traffic Control used tools, equipment and supplies at the worksite that were not manufactured in the state of Idaho.

Background

On September 22, 2015, Respondent's employees [redacted] and James Waters were engaged in traffic control on a busy public road in Boise, Idaho. (Stip. 7; Tr. 106). They were diverting (a/k/a "tapering") traffic for Track Utilities, Inc., who was performing road construction in the area. (Tr. 106-107). While [redacted] was setting up barrels to merge two lanes of traffic down to one lane of traffic, he was struck and seriously injured by an oncoming car (the gray Volkswagen Beetle in the photographs). (Stip. 11; Ex. C-2). [redacted] was immediately taken to the hospital, where he remained in a coma for a significant period of time,[2] sustaining potentially permanent brain injuries. (Tr. 210-211). He did not testify at the trial. The driver of the vehicle, who was apparently watching a passenger in the car glue on body jewelry at the time, was ultimately convicted of reckless driving. (Tr. 51, 55, 62; Ex. R-10).

One of the primary issues in dispute is the factual question of whether [redacted] was setting up orange traffic barrels correctly. The parties strongly disagree about whether he was placing barrels *with* the flow of traffic (starting at the inner-left part of the closed lane,

[2] The record does not indicate the length of [redacted]'s hospitalization. However, Respondent's owner testified that it was at least three days. (Tr. 210-211).

progressing to the outer-right part of the closed lane, in the same direction as traffic), or *against* the flow of traffic (starting at the end of the lane closure from the outer-right part of the closed lane, to the inner-left part of the close lane, progressing *against* the direction of traffic). (Tr. 23-24, 26). The parties do agree that the recognized industry practice is to place barrels from the inner-left part of the closed lane to the outer-right part of the closed lane, *with* the flow of traffic. (Stip. 12; Tr. 162, 184, 217; Exs. C-4.2, C-9, p.6).

Respondent never notified OSHA of the accident on September 22, 2015. (Stip. 13). OSHA learned about the accident two days later through a local newspaper article, and assigned CSHO Korvig to conduct an investigation. (Tr. 105, 140). During the course of her investigation, CSHO Korvig interviewed witnesses, consulted with the Idaho Department of Transportation, and visited the scene of the accident (although everything had been moved by that time). (Tr. 107-109, 124). CSHO Korvig recommended the issuance of the two citation items in dispute at trial: Citation 1, Item 1 which alleges that Respondent failed to protect employees from the hazards associated with crossing live lanes of traffic, and from the dangers of setting up barrels against the flow of traffic; and Citation 2, Item 1 which alleges that Respondent failed to report a work-related employee hospitalization within twenty-four hours. (Tr. 114, 118; Ex. C-3).

Applicable Law

Citation 1, Item 1 alleges a violation of Section 5(a)(1), also known as the "general duty clause." 29 U.S.C. § 654. To establish violation of the general duty clause, Complainant must prove, by a preponderance of the evidence, that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to

eliminate or materially reduce the hazard. *Waldon Healthcare Center*, 16 BNA OSHC 1052 (No. 89-2804, 1993). Complainant must also prove that Respondent knew, or with the exercise of reasonable diligence, could have known, of the violative condition. *Burford's Tree, Inc.,* 22 BNA OSHC 1948 (No. 07-1899, 2010); *Regina Construction Co.,* 15 BNA OSHC 1044 (No. 87-1309, 1991).

Citation 2, Item 1 alleges a violation of a specific regulatory standard. To prove a violation of a specific OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that *if* an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

Discussion

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

OSH ACT of 1970 Section 5(a)(1): 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, in that employees were exposed to struck by hazards from vehicles:

(a) Broadway Avenue: On September 22, 2015, and at times prior thereto, employees were exposed to the hazards of being struck by public traffic when crossing live traffic lanes while setting and/or retrieving traffic devices.

(b) Broadway Avenue: On September 22, 2015, and at times prior thereto, employees set up traffic control barriers (candles or barrels) working from the downstream end of the area to be closed.

Note: Abatement certification AND supporting documentation are required for this item.

Among other methods, feasible means of abatement includes use of trucks to place traffic control devices, shadow vehicles with a truck-mounted attenuator, and/or flaggers to stop traffic until installation is complete. Traffic control devices such as barrels placed starting at the upstream end of traffic in order to prevent vehicles from entering the lane to be closed.

A Condition in the Workplace Presented a Hazard

"[H]azards must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Pelron Corp.*, 12 BNA OSHC 1833 (No. 82-388, 1986) (citing *Davey Tree*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984)). "A safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur." *Baroid Div. of NL Indust., Inc.*, 660 F.2d 439, 444 (10th Cir. 1981). Complainant does not have to prove the cause of a particular accident in order to establish that a condition violated the Act. *See Williams Enters. Inc.*, 13 BNA OSHC 1249 (No. 85-355, 1987) ("We have many times held . . . that the cause of an accident is not necessarily relevant to whether a standard was violated."). Indeed, "it is the hazard, not the specific incident that resulted in injury . . . that is the relevant consideration in determining the existence of a recognized hazard." *Kelly Springfield Tire Co.*, 1982 WL 917447 (O.S.H.R.C., No. 78-4555,

1982), *aff'd* 729 F.2d 317 (5th Cir. 1984). It is also true, however, that an accident may demonstrate that a condition presented a hazard to employees. *Coleco Industries, Inc.*, 14 BNA OSHC 1961 (No. 84-546, 1991).

Complainant identified two hazardous conditions in Citation 1, Item 1. The first, instance (a), alleges that Respondent's employees were crossing live lanes of traffic. It is undisputed that Respondent's employees were crossing (on foot) a live lane of traffic to retrieve and place the traffic control barrels. (Stip. 10; Tr. 28). The barrels were staged along the sidewalk on the right side of the far right lane. (Tr. 44; Exs. C-2.4, C-2.7). In order to place those barrels in the far left lane (the lane being closed), employee James Waters had to retrieve each barrel from the sidewalk, cross the live traffic lane, and take each one over to [redacted] in the left lane for placement. (Stip. 10; Ex. C-2.4, C-2.7). This exposed Mr. Waters to the hazard of being struck by oncoming cars in a live traffic lane. Complainant established the existence of a hazardous condition in instance (a).

Complainant's second hazard allegation, in instance (b), was that Respondent's employee [redacted] was placing the barrels *against* the flow of traffic. Complainant alleges he started at the arrow board trailer, sett barrels at the end of the lane closure first, then progressed towards oncoming traffic with the intention (had the accident not occurred) of eventually placing the last barrel at the beginning of the lane closure. (Tr. 24). Only one witness who testified at trial had personal knowledge of the actions of [redacted] in the moments leading up to the accident: Respondent's employee James Waters. (Tr. 36). None of the other witnesses who testified about what happened were actually there at the time. None of the other witnesses who testified about what they *thought* happened were very convincing.

Detective Ransom was one of the Boise police officers called out to the accident. (Tr. 34). He interviewed James Waters at the scene. (Tr. 36-37). Complainant referred Detective Ransom to one sentence in his report, which Complainant submits proves that [redacted] was setting barrels out *against* the flow of traffic: "James indicated that [redacted] had just placed the third barrel and James was walking to the fourth to prepare it when he observed [redacted] get struck by the Volkswagen Beetle..." (Tr. 37-38; Ex. R-6, p. 897). Almost 1 ½ years after the incident, Detective Ransom interpreted the meaning of "first barrel" to be the one closest to the arrow board, and the "third barrel" to be the one furthest away from the arrow board. (Tr. 38). Detective Ransom testified that [redacted] was located near the "third barrel" when he was struck by the car, and that his body was thrown in the general direction of the "first barrel." (Tr. 41-43; Ex. C-6). He certainly had no personal knowledge of how, and in what order, the traffic control barrels were set out. Understandably, the larger focus of Detective Ransom's investigation was the car's driver, rather than the actions of the injured road worker. (Ex. R-6). It also appeared to the Court that there may have been miscommunication between James Waters and Officer Ransom concerning the meaning of "first barrel" and "third barrel", given Mr. Water's testimony (discussed below).

Officer Harms was another Boise police officer who was dispatched to the scene of the accident. (Tr. 72). He prepared an accident reconstruction report. (Ex. R-8). Officer Harms concluded that two barrels had been placed in front of the arrow board, with a third barrel being placed at the time [redacted] was struck. (Tr. 77). He also concluded, although he was not present at the time of the accident and did not interview any witnesses, that "[redacted] had started to place the barrels closest to the arrow board and was working south away from the arrow board." (Tr. 75, 86, 90; Ex. R-8, p. 3). When asked which barrel was the "third barrel,"

Officer Harms said, "I'm going with the third barrel would be the one farthest south of the arrow board." (Tr. 90). He later added, "I was going by [what] the people had said[,] he started at the arrow board, so I would say that-- for me – I would say that was barrel 1. Then the next one south would be barrel 2, and the next one south would be barrel 3." (Tr. 91-92). It was apparent to the Court that he did not know how, or in what order, the barrels were actually set out.

Although CSHO Korvig also concluded that [redacted] was placing traffic control barrels *against* traffic, her entire decision was based on the police reports and unspecified witness reports. (Tr. 127). She was not present at the accident, did not observe the location of the employees at the time, the layout of the traffic control barrels, the arrow board, or other equipment because they had been moved by the time OSHA was notified. (Tr. 124-125, 127, 129). One of the barrels had also been struck by the vehicle, causing it to be moved an unknown distance, and in an unknown direction, prior to the police photographs being taken. (Tr. 89; Ex. C-2.1).

Joie Henington, Respondent's owner, also speculated based upon those same police photographs, police reports, and discussions with James Waters, as to how [redacted] was setting out the traffic control barrels that evening. (Tr. 187-189). She believes that [redacted] was just starting to set out the barrels when the accident occurred, that he was setting them *with* the flow of traffic, and that his plan from the layout in the photos was to move the arrow board down the road, as he continued to set out more barrels. (Tr. 207-209. 212-216, 218).

In reviewing the entire record, including the speculative testimony and inconsistent theories about how [redacted] was setting out barrels, the Court is left with the testimony of the one witness who was actually at the jobsite when the accident occurred: James Waters. He personally observed how and in what direction the barrels were being placed that night. (Tr. 230-

231). James Waters testified that [redacted] was placing the barrels correctly, *with* the flow of traffic, and was in the process of going back to "barrel 1" to readjust it when he was struck by the car. (Tr. 233-234). In reference to the photograph labeled C-2.1, he testified that the closest barrel (lying down) is what he called "barrel 1." The next (middle) barrel in the photograph was "barrel 2" and the furthest barrel in the photograph was "barrel 3." (Tr. 233; Ex. C-2.1). James Waters further testified that there was no doubt in his mind as to the order [redacted] was setting out the barrels that night – and that he always did it the right way. (Tr. 244). "He was behind that barrel [the one laying down in the picture] coming up to readjust it, reposition it back over just a little bit, just scoot it over a little bit to get it where it could be seen better." (Tr. 245; Ex. C-2.1). The Court credits the testimony of James Waters - the only witness with actual, direct knowledge of [redacted]'s actions in the minutes before he was struck – that barrels were being placed *with* the flow of traffic, and that [redacted] was only located by the first placed barrel at the time of the accident because he was adjusting it from its initial location.

Accordingly, Complainant failed to prove, by a preponderance of the evidence, that Respondent's employees were exposed to the hazard of placing traffic control barrels starting at the downstream end of the lane to be closed (*against* oncoming traffic). Citation 1, Item 1, instance (b), will be vacated.

Respondent and the Industry Recognized the Hazard

According to the Commission, a hazard is recognized when either the cited employer or its industry recognizes the risk of harm from the cited conditions. *Arcadian Corp.*, 20 BNA OSHC 2001 (No. 93-0628, 2004). Amy Bower, a certified Traffic Control Supervisor with the Idaho Department of Transportation, who has been working in this industry for 36 years, testified that it is never acceptable for workers to cross live lanes of traffic. That is never a safe practice.

(Tr. 164, 174-175). Ms. Bower's testimony on this industry standard was not disputed. The Court finds that Complainant established that the traffic control industry recognizes the hazard of road workers crossing (on foot) live lanes of traffic, as alleged in instance (a) of Citation 1, Item 1.

The Hazard was Likely to Cause Death or Serious Physical Harm

Complainant need not prove that an accident itself was likely; rather, he only needs to prove "that *if* an accident were to occur, death or serious physical harm would be the likely result." *Beverly Enters., Inc.*, 19 BNA OSHC 1161 (No. 91-3144 *et al.*, 2000). Crossing live lanes of traffic to retrieve barrels for placement could easily result in an employee being struck and seriously injured or killed. Thus, the Court finds that the hazard identified in instance (a) was likely to cause death or serious physical harm, and, as such, the violation is properly characterized as serious.

A Feasible and Effective Means Existed to Abate the Hazard

In order to establish a violation of the general duty clause, Complainant must "'specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard.'" *Arcadian Corp.*, *supra*. "Feasible means of abatement are established if 'conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Id.* (quoting *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993).

The Court finds that there were multiple feasible means of abatement with respect to the hazard identified in instance (a). First, the traffic control barrels could have been staged on the left side of the left lane (the lane being closed). Therefore, none of Respondent's employees would have had to cross the right (active) lane of traffic. Second, the barrels could have been

stacked on the back of a truck, and set out from a rider within the truck. (Tr. 164; Ex. C-10). Therefore, none of Respondent's employees would have had to cross a live lane of traffic. Third, a flagger could have been used to stop all traffic temporarily while the barrels were retrieved and set out. (Tr. 133). The Court finds that Complainant established feasible means of abating the hazard in Citation 1, Item 1, instance (a).

Complainant Failed to Prove Knowledge of the Violative Condition

In addition to proving the existence of a recognized, abatable hazard under Section 5(a)(1), Complainant must also prove that Respondent knew or, with the exercise of reasonable diligence, could have known of the violative condition. *Burford's Tree* and *Regina Construction supra.* Complainant conceded that Respondent did not have actual knowledge of the conditions in Citation 1, Item 1. (*Sec'y Brief*, p. 19). Instead, Complainant argued that Respondent, with the exercise of reasonable diligence, could have known that Respondent's employees were crossing live lanes of traffic that night.

Reasonable diligence, according to the Commission, "involves several factors, including an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.'" *Frank Swidzinski Co.*, 9 BNA OSHC 1230 (No. 76-4627, 1981). "Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe." *Pride Oil Well Svc.*, 15 BNA OSHC 1809 (No. 87-692, 1992).

Ms. Henington, who is the sole owner of Respondent and has exclusive responsibility for all hiring and firing, was not present at the worksite that evening. (Stips. 3, 4; Tr. 185). Therefore, she did not have personal knowledge of her employees crossing live lanes of traffic to

retrieve barrels. There is no evidence in the record that either [redacted] or James Waters were supervisors or managers for Respondent. [redacted], a certified Traffic Flagger, was the designated setup/maintenance worker, and James Waters was the designated driver. (Tr. 183). Ms. Henington had personally trained [redacted] for two years to make sure that he understood traffic control procedures, and could manage traffic according to the rules, before he could work a job without her. (Tr. 184-185). Even after two years of training, she checked on her employees periodically, sometimes from a distance with binoculars, to make sure they were doing things correctly. (Tr. 185, 198). She testified that her employees never knew when she might show up at one of Respondent's traffic control jobsites. (Tr. 198). She also testified that she was actually driving to this jobsite at the time of the accident to check on the employees and the job. (Tr. 185). Despite two years of training, unannounced in-person visits to jobs, and occasional monitoring of jobs with binoculars from a distance, she never observed them set up traffic control barrels incorrectly. (Tr. 185). The Court finds that Respondent exercised reasonable diligence in monitoring its jobsites for the use of proper traffic control techniques by its employees.

Given that the condition in Citation 1, Item 1, instance (a), of crossing a live lane of traffic to retrieve three barrels, could only have taken a few minutes, Ms. Henington had no way of knowing that it had happened. Therefore, there will be no finding of constructive knowledge of the violative condition in instance (a). In addition, even if Complainant had proven the existence of the hazard alleged in instance (b) (discussed above), it failed to prove constructive knowledge of that condition as well.

Thus, as Respondent did not have actual or constructive knowledge of hazardous conditions alleged in Citation 1, Item 1, it will be vacated.

Citation 2, Item 1

Complainant alleged an other-than-serious violation of the Act in Citation 2, Item 1 as follows:

> *29 C.F.R. § 1904.39(a)(2): Within twenty-four (24) hours after the in-patient hospitalization of one or more employees[3] amputation or an employee's loss of an eye, as a result of a work-related incident, the employer did not report the in-patient hospitalization, amputation, or loss of an eye to OSHA.*
>
> *(a) The employer did not report to OSHA a work-related injury of a worker resulting in a hospitalization on September 22, 2015. The worker was performing maintenance activities for traffic control and was struck by a vehicle.*

Respondent stipulated to the occurrence of the violation alleged in Citation 2, Item 1, and argued only that the proposed penalty for the violation was excessive. (Stip. 13; Tr. 28-29; *Resp. Brief*, p. 10).

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its Judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

[3] The Court notes that, although the occurrence of this violation is stipulated, the language of Citation 2, Item 1 does not accurately reflect the language of the cited standard. 29 C.F.R. §1904.39(a)(2) reads: "Within twenty-four (24) hours after the in-patient hospitalization of one or more employees *or an employee's* amputation or an employee's loss of an eye…"

Complainant proposed a penalty of $2,000.00 for Citation 2, Item 1. The maximum statutory penalty for this type of violation at the time was $7,000.00. 29 U.S.C. § 666. OSHA originally calculated a $5,000.00 penalty for this violation, but applied a 60% penalty reduction due to the employer's small size. (Tr. 145). Because Respondent did not have an inspection history, Complainant determined that it was not eligible for an additional history-based penalty reduction. (Tr. 151). The Court agrees with Complainant's characterizations, and also notes that Respondent's failure to notify OSHA of this accident within the required time frame hindered its ability to conduct a thorough and complete investigation of this incident. Considering the totality of the circumstances in this record, the Court finds that the $2,000.00 penalty for Citation 2, Item 1 is appropriate.

Order

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

1. Citation 1, Item 1 is VACATED; and
2. Citation 2, Item 1 is AFFIRMED and a penalty of $2,000.00 is ASSESSED.

/s/ Brian A. Duncan

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

Date: June 7, 2017
Denver, Colorado