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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant, v. BYRD TELCOM, INC., Respondent.	OSHRC DOCKET No. **13-1759**

DECISION AND ORDER

COUNSEL: M. Patricia Smith, Solicitor of Labor, Stanley E. Keen, Regional Solicitor, Angela A. Donaldson, Counsel, Lydia J. Chastain Attorney, Melanie L. Paul, Trial Attorney. for Complainant.

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JUDGE: John B. Gatto.

I. INTRODUCTION

Byrd Telcom, Inc. (Byrd Telcom) is a business that provides in-house tower climbing services.[1] On May 28, 2013, two of Byrd Telcom's workers were killed at its worksite, a 300-foot Verizon Wireless cellular tower, in Georgetown, Mississippi. As a result of the two deaths, a fatality investigation was conducted at the worksite by John Sauls, Jr., a Compliance Safety and Health Officer with the United States Department of Labor's Occupational Safety and

[1] The in-house tower climbing services include the installation and maintenance of equipment such as antennas and booms, lines, sweep testing, and gin poles. (Tr. 18, 19, 24, 67, 68, 377, 440; *see also Ex.* J-6, Ex. J-9, p. 1.)

Health Administration (OSHA), which led to the issuance on October 21, 2013, of a citation and proposed penalty to Byrd Telcom by OSHA's Jackson, Mississippi, Area Director.[2]

The citation was issued under the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §§ 651–678 and alleged in two Items serious[3] violations of section 5(a)(1) of the Act, commonly known as "the "general duty" clause," 29 U.S.C. § 654(a)(1), and proposed penalties totaling $14,000.00. (Compl., Ex. A, pp. 1-2.) After Byrd Telcom timely appealed the citation, Thomas E. Perez, the Secretary of Labor, filed a complaint in the Commission, which amended Instances (b) and (c) of Item 2 and added Instance (d) to Item 2. Prior to trial, the Court granted the Secretary's unopposed motions to withdraw Item 1 and Instances (b) and (d) of Item 2. Still pending before the Court are Instances (a) and (c) of Item 2 with a proposed penalty of $7,000.00.

As amended, the Secretary asserts Byrd Telcom violated the general duty clause in Instance (a) when employees "were exposed to struck-by hazards while raising a gin pole[4] and were not protected by a properly secured top (hook) block used in raising a gin pole," and in Instance (c) when "the gin pole was not permanently marked with an identification number that references a specific load chart and gin pole weight, thereby exposing employees on and near the tower to struck-by hazards while raising the gin pole." (Compl. ¶ III.) Byrd Telcom denies the

[2] The Secretary of Labor has assigned responsibility to OSHA for enforcement and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA, and has authorized the Assistant Secretary to redelegate his authority. *See* 65 FR 50017, 50018 (2000). The Assistant Secretary has promulgated regulations authorizing OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

[3] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§666(a), (b), (c). A serious violation is defined in the statute; the other two degrees are not. *Id.* §666(k) (*see* Part III of this decision for the definition of a serious violation classification).

[4] A gin pole is a lifting device used in tower construction and service to raise tower sections, antennas and other items from the ground. (Ex. J-3, p. 1.)

Secretary's allegations and argues the Secretary "failed to establish the creation and/or existence of an employer/employee relationship" and further, that "it had no control over the work-site and no control over the mechanism of injury sufficient to make [it] and employer under the Act." (Answer ¶ XIII.)

The Commission has jurisdiction of this action under section 10(c) of the Act, 29 U.S.C. § 659(c). (Compl. ¶ I; Answer ¶ I.) Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. If any finding is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so. For the reasons indicated *infra*, the Court **AFFIRMS** amended Instances (a) and (c) of Item 2 and **ASSESSES** a civil penalty of $7,000.00.

II. BACKGROUND

Andrew Systems, Inc. (Andrew) was the prime contractor at the Georgetown, Mississippi worksite and Byrd Telcom was subcontracted by Andrew to do an upgrade. (Tr. 408; Ex. C-7, p. 7.) Sonny Byrd, the company's current President, was previously a partner in Byrd Telcom's predecessor, Circle B Electric & Tower (Circle B), and at the time of the accident, Byrd Telcom was using Circle B's safety manual. (Tr., 19, 24, 42, 377, 440; Ex. C-20, p. 2; *see also* Ex. J-6, Ex. J-9.) At the time of the accident, Sonny Byrd was the company's Vice-President and his wife, Ravan Byrd, was the company's President. (Ex. C-19, p. 2.)

The industry practice for safe and proper rigging of gin poles is wrapping two slings or chokers, one around each leg of the tower, and connecting them in the center with a shackle to create a "V" formation. (Tr. 205, 240, 309-10, 312, 653, 762-63.) However, the week prior to

the accident, rather than using chokers and a shackle, John Davidson, assisted by [redacted], attached the rigging of the "jump line"[5] on the tower by placing a carabiner[6] into a hole in one of the top plates.[7] (Tr. 544-45.) Unfortunately, they were supervised that day by Claudia Trammell, Byrd Telcom's foreman, who had no experience rigging gin poles, or climbing towers, and this was the first time John Davidson personally set up rigging for a gin pole at the top of a tower. (Tr. 533-34, 543, 546-447; Ex. C-8C, pp. 10, 13.)

Although John Davidson had been on jobs before where gin poles were rigged with shackles and chokers, he did not use a shackle and choker for this job because he "couldn't find one" and they "had none on the truck." (Tr. 547.) There were all different types and sizes of carabiners and he picked the biggest carabiner and "figured it would be the strongest." (Tr. 545.) John Davidson's use of the carabiner was inconsistent with the industry practice and its design and safety rating. (Tr. 616-17.) The carabiner used in the top plate was PenSafe Model # C775. (Tr. 637-38; Ex. J-3, p. 2; J-10, p. 6.) Although PenSafe certifies its carabiners for compliance with ANSI, International, and Canadian standards for fall protection, they are not certified for hoisting materials. (Tr. 471; Ex. J-10.)On May 28, 2013, the day of the accident, John Davidson, [redacted] and [redacted], Wilton Grimes, Allen "BJ" Martin, and Michael Shane Callender were

[5] There are two types of "lines" used in gin pole related activities. A "jump line" is used to raise and lower the gin pole to the top plate at the top of the cell tower. A "load line" is used after the gin pole is secured at the top of the tower to raise and lower the equipment being used, installed, or removed. (Tr. 414, 664; Byrd Telcom's Post-Trial Br., p. 7.)

[6] A carabiner is typically used in fall protection equipment. (Tr. 143.) PenSafe, Inc., the manufacturer of the carabiner involved in the accident describes a carabiner as a "connector with a trapezoidal or oval body with a self-closing self-locking gate." (Ex. J-10, p. 4.)

[7] The top plates or "top splices" are the metal squares or "leg flanges" at the top of the tower that "are used to splice two sections of the tower together when they're constructed. A tower section is placed on top and then bolts are used to secure the plates together." (Tr. 427-28; *see also* Ex. J-1B.) John Davidson referred to the inserting of the carabiner through a hole in a top plate as having "hung the block and the carabiner." (Tr. 546; *see also* Ex. J-1A.)

on the tower during the hoisting or raising of the gin pole up the face of the tower, commonly known as "jumping the gin pole." (Tr. 53-54, 222-23, 232-33, 549, 554; *see also* C-8b, p. 36; Ex. J-14, p. 8.) [redacted] and [redacted] were struck and killed by the 40-foot, 1800-pound steel gin pole and/or its rigging when the carabiner broke.[8] (Tr. 405, 644-45; *see also* Ex. J-3, p. 1.). (Tr. 405.) The impact of the falling equipment was so great that it ripped the D rings out of the fall protection harnesses worn by [redacted] and [redacted] and [redacted] was decapitated. (Tr. 418, 583; Ex. J-11F.)

Trammell had been the worksite foreman and since she had quit the weekend prior to the accident, John Davidson told OSHA investigator Sauls they really didn't know who was in charge the day of the accident but that he was not in charge, and credibly testified he thought the foreman that day was either his brother Randy or Callender since they had the most experience. (Tr. 456, 558-59.) Randy Davidson echoed John Davidson's sentiments and told Sauls "basically, everybody knew what to do and they went about their job and did it." (Tr. 457.)

Randy Davidson, testified he was Byrd Telcom's Construction Manager and admitted he was acting in a supervisory role the day of the accident, and Sonny Byrd sent him out to the worksite that morning to "check on them and see if they're working," and in that role, he "walked around and talked to the guys, found out what their game plan was, whether they had all their JSAs filled out and all that, which they did." (Tr. 312-13, 314, 315.) The Construction Manager, according to Randy Davidson, "goes around, looks at all the jobs, makes sure the job progress is going on schedule, and if there's any safety issues, the foreman will tell the CM and get it taken care of." (Tr. 289.)

[8] The applied and dynamic force exceeded the material strength of the steel which is estimated to be between 9846 and 13,192 pounds. (Ex. J-3, p. 6.)

With respect to hoisting gin poles, Sauls testified Randy Davidson had the most experience on the worksite on May 28, 2013, which was undisputed. (Tr. 458.) On May 20, 2013, Randy Davidson also signed the "Equipment Basics Checklist" as the Project Manager, which indicated the equipment inspected that day. (Ex. J-18.) Since Randy Davidson was the worksite Construction Manager/Project Manager and the worker with the most experience hoisting gin poles, and Callender had been the foreman before and after the accident, and since Trammell, the worksite foreman, had quite the weekend prior to the accident, the Court finds the preponderance of evidence shows either Randy Davison or Callender was in charge of the worksite the day of the accident, not John Davidson.

III. ANALYSIS

In the Fifth Circuit, the jurisdiction in which this case arises,[9] the circuit court noted, "[a]s has often been said, OSHA does not impose strict liability on an employer but rather focuses liability where the harm can in fact be prevented." *Central of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620, 623 (5th Cir.1978). "It is well-settled that the Secretary has essentially two weapons in [his] arsenal of enforcement. First, the Secretary may issue a citation for violations of specific standards promulgated (through rulemaking) by the Secretary. Alternatively, where the Secretary has not promulgated standards, he may rely on the General Duty Clause as a 'catchall provision.'" *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1196 (5th Cir. 1997) (citation omitted).

[9] The worksite is in Georgetown, Mississippi, and Byrd Telcom's principle place of business is in Baton Rouge, Louisiana, both of which are in the Fifth Circuit. Therefore, either party may appeal to the Fifth Circuit Court of Appeals, and in addition, Byrd Telcom may also appeal to the District of Columbia Circuit. *See* 29 U.S.C. § 660(a) & (b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, since it is highly probable that any appeal will be to the Fifth Circuit, the Court applies the precedent of that circuit.

The "general duty" clause provides that each employer "shall furnish to each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious injury to the employees." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980) (*citing* 29 U.S.C. § 654(a)(1)). To establish a violation of the general duty clause in the Fifth Circuit, "the Secretary must prove that (1) the employer failed to render its work place free of a hazard; (2) the hazard was "recognized"; and (3) the hazard caused or was likely to cause death or serious physical harm." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 320-21 (5th Cir. 1979. In addition, "the hazard must be preventable." *Arcadian*, 110 F.3d at 1197 n. 2 (citation omitted). A "serious violation" is one that carries "a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "The gravamen of a serious violation is the presence of a 'substantial probability' that a particular violation could result in death or serious physical harm." *Chao v. OSHRC*, 401 F.3d 355, 367 (5th Cir. 2005) (*citing Georgia Electric*, 595 F.2d at 318). Here, the alleged violations were serious since they resulted in the death of two workers.

A. Covered Employer

As a condition precedent to citing Byrd Telcom, the Secretary must show the company was an employer within the meaning of the Act. *See All Star Realty Co., Inc.*, 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014) ("[T]he Secretary has the burden of proving that a cited company is the employer of the affected workers at the site") (*citing Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated)). As the Supreme Court noted in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (U.S. 1992), courts have "often been asked to construe the meaning of "employee" where the statute

containing the term does not helpfully define it." Here, the Act defines employer as "a person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). "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(6). As the Commission noted in *Don Davis*, 19 BNA OSHC 1477, 1480 (No. 96-1378, 2001), this definition is "unhelpfully circular."

Byrd Telcom argues the Secretary "failed to establish the creation and/or existence of an employer/employee relationship" and that it "had no control over the work-site and no control over the mechanism of injury sufficient to make [it an] employer under the Act." In determining whether the Secretary has satisfied his burden of showing Byrd Telcom was an employer within the meaning of the Act, the Commission applies the common law agency doctrine enunciated in *Darden*. *See All Star Realty*, 24 BNA OSHC at 1358; *Allstate Painting*, 21 BNA OSHC at 1035 (citation omitted). *See* also *Timothy Victory*, 18 BNA OSHC 1023, 1027 (No. 93-3359, 1997) (the term "employee" under the Act should be interpreted consistent with common law principles).

As the Fifth Circuit noted, the hiring party's "right to control the manner and means" of the work performed is important to determining whether there is employee status. *United States v. Robinson*, 505 F. App'x 385, 387 (5th Cir. 2013) (*citing Darden*, 503 U.S. at 323). Many factors are relevant to this inquiry, including the work location, who set the work hours, who provided the tools being used, the duration of the relationship between the parties, and the method of payment. *Darden*, 503 U.S. at 323-24. For the reasons *infra*, the Court finds Byrd Telcom was a covered employer under the Act at the time of the accident.

Darden Factors

Byrd Telcom argues "that under the Darden factors respondent is not an "employer" subject to this standard." (Pretrial Order, Attach. D, ¶ 4.) The Secretary argues, "[e]mployee witnesses' sworn testimony to OSHA and at trial demonstrates [Byrd Telcom's] control over them and supports a finding of an employer relationship under the Darden factors." (Sec'y's Post-Trial, Br. p. 18.) The Court agrees with the Secretary. As the Commission has noted, under the *Darden* analysis, "the primary focus is whether the putative employer controls the workers." *Allstate Painting*, 21 BNA OSHC at 1035; *All Star Realty*, 24 BNA OSHC at 1358.

Work Skills

With regard to the skill required for tower work, the only special training required was fall protection and tower rescue. (Tr. 24-25). The work itself was essentially manual labor and the workers were not required to have a high school diploma or its equivalent. (Tr. 285, 459, 522). As indicated *supra*, Sonny Byrd admitted to OSHA during the fatality investigation that the company had 6 employees working at the worksite on the day of the accident and had a total of 12 employees, which was corroborated by Byrd Telcom's disclosure in the contract with Andrew on April 3, 2013, that it had no subcontractors. Therefore, Byrd Telcom has admitted through these documents that its workers were employees rather than subcontractors.

Not dissuaded, Byrd Telcom asserts at the time of hire each worker was provided a safety and health manual and "the language of the manual indicates that if an individual does not follow the safety policies and procedures, that it can result in the termination *of the relationship* between Byrd Telcom and the individual." (Byrd Telcom's Post-Trial Br., p. 8) (emphasis added). (*Id.*) Byrd Telcom misrepresents the language in the safety manual, which actually states if a worker

does not follow the safety policies and procedures, the worker acknowledges "it can result in *my employment* termination." (Ex. J- 4, p. 164.)

Equipment

Although Sonny Byrd testified the carabiners on the truck were not owned and supplied by Byrd Telcom and belonged to the workers ("they got their carabiners and put them on with them" (Tr. 135)), this assertion is contrary to Sonny Byrd's own admission that the company provided the fall protection equipment and his admission that workers would come to the warehouse to pick up the equipment that they need for a particular job, that "we furnish all materials to do the job with."[10] (Tr. 46, 74-75.) It is also contrary to Callender's testimony that some of the company trucks had carabiners, which belonged to Byrd Telcom. (Tr. 230.) Although some workers brought their own carabiners to worksites, they had them on their own personal belts. (Tr. 231.)

At trial Sonny Byrd testified two months before the accident, "we had a directive from Andrew to quit using carabiners. And when we got that directive to quit using carabiners, I went out there and pulled them all off the trucks. And from that day on, we never used them again." (Tr. 134-135.) Similarly, Randy Davidson testified about the directive from Andrew. As indicated *supra*, the Court does not find Sonny Byrd to be a credible witness. Further, Randy Davidson was representing Byrd Telcom at the worksite on May 31, 2013, while evidence was being retrieved from the tower. (Tr. 466.) As the company's owner and its worksite supervisor, Sonny Byrd and Randy Davidson, both had self-serving interests to lay blame for the accident elsewhere, mainly on John Davidson. Nonetheless, assuming arguendo their testimony was

[10] Randy Davidson, John Davidson and Callender all testified that Byrd Telcom provided the gin pole, rooster head, bolts, chokers, shackles, trailers, wire rope, carabiners, fall protection equipment, JSA forms, and a winch truck. (Tr. 214-15, 302-03, 537-38; Ex. C-8A, p. 16; Ex. C-8B, pp. 7, 8, 25; Ex. C-8C, p. 12; *see also* Ex. J-30.)

credible, John Davidson testified that no one gave him that advice about the Andrew directive. (Tr. 551.) The Court closely observed John Davidson during his testimony and he was candid and responsive to the questions posed to him. Unlike Sonny Byrd and Randy Davidson, John Davidson displayed no evasiveness or deflective tactics. He also gave no indication he harbored any animus towards the company. The Court finds him to be a credible witness and gives considerable weight to his testimony. Therefore, the Court finds even if Byrd Telcom's assertion is plausible, the company nonetheless did not instruct John Davidson to stop using carabineers on Andrew jobsites.

Work Location

The Darden factor regarding work location also favors an employer-employee relationship. Sonny Byrd arranged for Callender to be picked up and taken to the work site and the workers rode in the company's trucks to get to jobs. (Tr. 148, 215, 221, 304; *see also* Ex. C-8A, p. 17; Ex. C-8B, p. 12.) Byrd Telcom also paid for the workers' expenses associated with an out-of-town job, such as gas and lodging. (Tr. 117, 216, 304, 539; *see also* Ex. C-8A, pp. 33-34; Ex. C-8B, pp. 13-14; Ex. C-8C, p. 29.) Further, Sonny Byrd assigned the individual workers to particular crews to work on particular jobs. (Tr. 459, 533; *see also* Ex. C-8B, p. 11.)

Duration of Relationship

In addition, the duration of the relationship between the parties favors an employer-employee relationship. Both Davidsons and Callender testified that they worked for Byrd Telcom for several years, albeit off and on, including when the company was called Circle B. (Tr. 144, 150, 204, 286-87, 528; *see also* Ex. C-8A, p. 16; Ex. C-8B, p. 18; Ex. C-8C, pp. 6-7.) Although workers jumped around from company to company, that is a common practice in the

telecommunications industry. (Tr. 528.) Employees did not, however, work for any other employers at the same time that they were working for Byrd Telcom since it was a full-time job and employees received continuous job assignments. (Tr. 257, 293, 535, 351-52, 454-55, 533; *see also* Ex. C-8C, pp. 7, 40.)

Method of Pay and Work Hours

Byrd Telcom also paid employees a day rate and paid them weekly. (Tr. 34-35, 72, 211, 213, 295, 453, 532; *see also* Ex. C-8A, p. 32; Ex. C-8B, p. 9.) Employees had no ability to negotiate their pay rates and Sonny Byrd set the pay rates based on a scale relative to experience. (Tr. 34, 212, 532.) Although individual workers called in or texted the employees' daily start and stop times to Sonny Byrd or Ravan Byrd, Byrd Telcom also required the foreman to call in or texted the employees' daily start and stop times to Sonny Byrd or Ravan Byrd, or to the company's personnel office. (Tr. 68, 210, 296, 551; Ex. C-8A, p. 33.) The employees could not hire or fire other workers; Sonny Byrd was the sole decision-maker on those issues. (Tr. 212, 298, 534.) Thus, the workers did not have discretion over when they could start and finish jobs. The only other variations to the workers' work schedules were actually due to changing weather conditions. (Tr. 68, 211, 295-96, 535). It is undisputed that the company paid the employees a day rate; employees were not paid by the job. (Tr. 34-35, 211, 295, 532; Ex. C-8A, p. 32; Ex. C-8B, p. 9.) In addition, the company paid the workers on a weekly basis. (Tr. at 34, 72, 213, 453.)

In *Allstate Painting*, the Commission did not find that an employer-employee relationship existed since "Allstate did not control the hiring, firing or disciplining of the workers at the site; did not supervise their work; and did not supply them with equipment or safety gear." *Allstate*

Painting, 21 BNA OSHC at 1036. Likewise, in *All Star Realty*, the Commission concluded that an employer-employee relationship did not exist since the record contained "no evidence that the company prescribed work hours, work methods, or any other aspect of the activities the [OSHA compliance officer] observed." *All Star Realty*, 24 BNA OSHC at 1358. "Regarding the provision of tools, there [was] no evidence that the ladder or hand tool the brothers used on the day of the inspection belonged to All Star—in fact, the [compliance officer] testified that she saw no demolition equipment at the site, which is consistent with the company's contention that it had not yet begun its work." *All Star Realty*, 24 BNA OSHC at 1359.

Here, unlike in *Allstate Painting*, Byrd Telcom did control the hiring, firing and disciplining of the workers at the site; did supervise their work; and did supply them with equipment or safety gear. And unlike *All Star Realty*, Byrd Telcom did prescribe work hours; work methods; and the provision of tools. Further, as indicated *supra*, there was a long-term employment relationship between Byrd Telcom and these workers and Byrd Telcom retained control over the manner and means by which they performed their assignments. *Vergona Crane Co.*, 15 BNA OSHC 1782, 1790 (No. 88–1745, 1992).

Other Evidence Supporting Employer-Employee Relationship

Sonny Byrd admitted to OSHA in connection with the fatality investigation on May 30, 2013, that the company had 6 employees working at the worksite and had a total of 12 employees. (Ex. C-5.) Byrd Telcom is incorporated in the State of Nevada and has its principle place of business in Baton Rouge, Louisiana. (Tr. 30-32, 74; Ex. C-19, C-20.) On May 30, 2013, the company filed an *Amended List of Officers and Directors* with the Nevada Secretary of State, which changed the name of the company's President, Secretary, Treasurer and Director to "L.

Sonny Byrd." (Ex. C-20, p. 2.) Sonny Byrd's statements made to OSHA during the investigation after the accident were made in his capacity as the company's President, Secretary, Treasurer and Director and therefore were party admissions under Rule 801(d)(2). Significantly, at trial, when asked if the employee information he provided to OSHA on May 30, 2013 was accurate, Sonny Byrd testified, "It was probably accurate at the time." (Tr. 150.) The company's Job Safety Analysis form completed the morning of the accident also indicated all crew workers listed worked for Byrd Telcom and importantly, no subcontractors or independent contractors were listed. (Tr. 136-37; Ex. J-13.) Sonny Byrd's admissions are consistent with similar admissions made by Ravan Byrd on April 3, 2013, in her capacity as Byrd Telcom's President in the company's "Contractor Profile," that the company had 15 employees and did not have any subcontractors. (Ex. J-9, pp. 1, 2.) Ravan Byrd's statements, made in in her capacity as Byrd Telcom's President, that the company had 15 employees and no subcontractors, were also party admission under Rule 801(d)(2).

The Court observed the demeanor of both Sonny Byrd and Ravan Byrd and assessed their credibility, considering their motivation, and whether their testimony was plausible, consistent and corroborated. At trial, neither reflected a forthright and truthful demeanor. Rather than having been motivated by a desire to be truthful, their testimony appeared motivated by their deliberate and calculated attempt to support Byrd Telcom's defensive posture— that their workers were not employees but were independent contractors. Much of their testimony was self-serving and clearly contradicted by both the documentary evidence of record and by the credible testimony of other witnesses. The Court finds much of their testimony was untruthful and an intentional attempt to mislead the Court.

Both Sonny Byrd and Ravan Byrd asserted at trial that she had never been an officer of the company and that he was the company's President at the time of the accident. (Tr. 20, 21-22, 370-73.) However, Byrd Telcom's "Initial List of Officers and Directors" filed with the Nevada Secretary of State at the time of incorporation on November 14, 2012, was signed by Ravan Byrd under penalty of perjury, where she certified that she was the company's President, Secretary, Treasurer and Director. (Ex. C-19, p. 2.) Ravan Byrd also listed Sonny Byrd as the company's "Vice-President" on the April 3, 2013, "Contractor Profile" and "Certificate of Corporate Incumbency and Authority." (Ex. J-9, pp. 1, 2, 5.) As indicated *supra*, it was not until May 30, 2013, *two days after the accident*, that Byrd Telcom filed an "Amended List of Officers and Directors" with the Nevada Secretary of State, which changed the name of the company's President, Secretary, Treasurer and Director to "L. Sonny Byrd." (Ex. C-20, p. 2.) Significantly, as indicated *supra*, less than two months prior to the accident, Ravan Byrd also signed a contract with Andrew on April 3, 2013, as the company's President. (Ex. J-8, p. 5; Ex. J-9, pp. 1-5.) She also signed a "Request for Taxpayer Identification Number and Certification" (Substitute Form W-9), in her capacity as Byrd Telcom's President, which certified under penalty of perjury the company was more than 50% owned, controlled and actively managed by a woman, which she admitted at trial referred to her. (Tr. 376; Ex. J-9, p. 4.)

Further, although Ravan Byrd asserted at trial she had never worked for the company, she admitted she kept the books for Byrd Telcom, and Sonny Byrd referred to her as the company's "bookkeeper." (Tr. 22, 371.) Ravan Byrd signed many of the employment records on behalf of the company and Byrd Telcom required the foreman to text the employees' daily start and stop times to either Sonny Byrd or Ravan Byrd. (Tr. 68, 210, 296, 551; Ex. C-8A, p. 33; *see also* Ex.

J-19 through Ex. J-26.) Clearly, at the time of the accident, Ravan Byrd was the company's President, Secretary, Treasurer and Director, and contrary to her testimony, she was actively involved in the daily operations and management of Byrd Telcom.

At trial Sonny Byrd attempted to retreat from those party admissions by asserting the workers were independent contractors, not subcontractors, which is why, according to him, the company did not list any subcontractors in its "Contractor Profile." (Tr. 52.) The Court does not find his testimony credible since he also testified "to me, a subcontractor and an independent contractor would be used [] the same," (Tr. 50), which is corroborated by the company's own use of both a "Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers" form and a "Subcontractor Original Application" form. (*See e.g.* Ex. J-19, pp. 2, 5.) More importantly, Byrd Telcom admitted in its post-trial brief it "hires subcontractors to perform the work on the jobs for which it is awarded contracts." (Byrd Telcom's Post-Trial Br., p. 3.)

Further, these party admissions were not consistent with a lawsuit Byrd Telcom subsequently filed after the accident against its insurance carriers for cancelling its policies, including its worker's compensation coverage, where the company is seeking a judgment that the insurance companies owe a duty to indemnify Byrd Telcom up to the limits of the applicable policies in any subsequent lawsuits that may be filed as a result of the deaths of [redacted] and [redacted].[11] (Tr. 57-58.) Under the Texas Workers' Compensation Act, Tex. Labor Code Ann. §§ 401.001, 401.012(b)(2) (West), the term "employee" expressly excludes "independent contractor or the employee of an independent contractor."

[11] In that lawsuit, the insurance carriers have raised a material misrepresentation defense. (Tr. 60.)

Further, while it is true under Texas law a general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and is treated as the employer of the subcontractor for the purposes of the Texas Workers' Compensation Act, *see* Tex. Labor Code Ann. § 406.123(a) & (b), Byrd Telcom offered no evidence that it had entered into such written agreements with its workers. To the contrary, Byrd Telcom's "Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers" with [redacted] and [redacted] expressly stated neither were entitled to worker's compensation coverage by Byrd Telcom. (Ex. Ex. J-22, p. 9; J-23, p. 1.)

Since Byrd Telcom is now seeking workers' compensation insurance indemnification coverage, and since the company offered no evidence that it had entered into written agreements to provide workers' compensation insurance coverage to either [redacted] and [redacted], the Court finds the preponderance of evidence shows it is seeking indemnification coverage because at the time of the accident [redacted] and [redacted] were employees.

Callender's Purported Subcontractor and Independent Contractor Documents

The day after the crew that had been on the worksite watched their two co-workers die, Sonny Byrd required the whole crew to come to the office and sign subcontractor and independent contractor documents. (Tr. 247, 253.) Not surprisingly, Callender credibly testified, "that day was so messed up, I wasn't in the right frame of mind because of the accident the day before, and I didn't even read or remember that stuff that I signed." (Tr. 252-53.) "I normally don't even read those. When somebody gives me something and I'm working for somebody, I don't go into the details of looking at it, I just sign it, you know." (Tr. 253.)

Although the Circle B Electric and Tower Safety and Health Manual was used at the time of the accident, Sonny Byrd admitted the receipt Callender purportedly signed indicating he had received it, read it and understood it was different than the actual form contained on the last page of its manual. (Tr. 41-42; *cf.* Ex. J-19, p. 4 with Ex. J-4, p. 50.) Callender credibly testified he never received a copy of the manual and never saw it until it was shown to him at trial while he was on the witness stand. (Tr. 252.) He also testified the handwriting did not look like his and the "3" in the date filled in on that receipt form was not how he writes his "3's." (Tr. 255; *see also* Ex. J-19, p. 7.)

As to the subcontractor and independent contractor documents purportedly signed by Callender on May 29, 2013, there were two different W-9 forms. (Ex. J-19, pp. 1, 8.) Callender credibly testified the signature on the first W-9 was not his. (Tr. 246; *see also* Ex. J-19, p. 1.) He also credibly testified the handwriting on the second W-9 was not his, that the "3" in the date was different than his, and that where there the "X" appeared next to "Sole Proprietorship," he did not even know what that meant. (Tr. 255-56; *see also* Ex. J-19, p. 8.)

Further, Callender credibly testified he did not remember checking the box next to "Sole Proprietorship" on the "Subcontractor Original Application" form, and that he again did not even know what "Sole Proprietorship" meant. (Tr. 250-51; *see also* Ex. J-19, p. 2.) He also did not mark an "X" next to the box that stated "I am not an employer required to provide coverage under the Workers' Compensation Law," and he credibly testified, "I don't put "Xs" and "when I do something like that, I usually do a check." (Tr. 251.)

On the "Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers" form, Callender admitted the May 29, 2013, signature was his but that

somebody else filled out the section above his signature. (Tr. 253; *see also* Ex. J-19, p. 5.) As to the "Agreement Not to Compete," Callender again testified he did not know what that was. (Tr. 254-55; *see also* Ex. J-19, p. 6.) Therefore, the Court finds the documents signed by Callender May 29, 2013, which were also signed by Sonny Byrd and/or Raven Byrd, were fraudulently altered after he signed them and are given no weight.

Other Purported Subcontractor and Independent Contractor Documents

Randy Davidson also purportedly signed subcontractor and independent contractor documents on March 18, 2012, March 15, 2013, and on May 29, 2013. (J-20.) Although Randy Davidson testified all of the handwriting and signatures on each of these documents were his, the Court does not find him a credible witness, in particular since he also testified he was not given a choice about whether or not he could sign these documents and still work for the company. (Tr. 350-51.) Clearly, the March 18, 2012, and March 15, 2013, signatures do not match his May 29, 2013, signature. (*Cf.* Ex. J-20, p. 1 with pp. 2, 3, 4, 5, 6, and 8.) Further, the March 18, 2012, documents would have necessarily involved Byrd Telcom's predecessor, Circle B, and are not relevant to establish the type of employment relationship he had with Byrd Telcom on the day of the accident. Likewise the May 29, 2013, documents signed after the accident are not relevant to establish the type of employment relationship he had with Byrd Telcom on the day of the accident.

The documents purportedly signed by Allen Martin on May 2, 2013, contain a W-9 form that was not signed or dated. The remaining documents contained signatures that appear not to match. (Ex. J-24, *cf.* p. 2 with pp. 3 and 6.) Likewise, [redacted] purportedly signed Byrd Telcom's employment application on March 5, 2013, (Ex. J-22, pp. 1-2, 4-6), and that same day

purportedly signed independent contractor and subcontractor documents. (*Id.*, pp. 3, 7-10.) However, the Court finds the signature on the W-9 form included as part of the independent contractor and subcontractor documents did not match any other signatures purportedly signed by [redacted]. (*Id.*, p. 10.) The agreement not to compete was also not a Byrd Telcom form but rather was a Circle B form and was not signed by anyone from Byrd Telcom. (Ex. J-22, p. 7.)

John Davidson purportedly signed employment documents on January 18, 2012, which again, would have necessarily involved Byrd Telcom's predecessor, Circle B, and are not relevant to establish any employment relationship with Byrd Telcom on the day of the accident. (Ex. J-21, pp. 9-10.) Likewise, records purportedly signed by Claudia Trammell on May 30, 2012, involving Byrd Telcom's predecessor, Circle B, are not relevant to establish any employment relationship with Byrd Telcom on the day since there is no dispute she was no longer employed by Byrd Telcom on the day of the accident. (Ex. J-25.) Finally, the purported signatures of the deceased, [redacted], on March 19, 2013, did not match his signature on his social security card. (Ex. J-23.)

Given the Court's finding *supra* that Callender's May 29, 2013, documents, which were signed by Sonny Byrd and/or Raven Byrd, were fraudulently altered, the Court accords little weight to any of these other purported subcontractor and independent contractor documents, which were also signed by Sonny Byrd and/or Raven Byrd.

Byrd Telcom argues in its proposed Findings of Fact and Conclusions of Law it "did not have sufficient control of its subcontractors' daily activities under the Circuit's economic realities test to justify employer status under the Act." (Byrd Telcom's Proposed Findings and Conclusions, p. 1 ¶¶ 1, 2.) Byrd Telcom also argues in its post-trial brief that in *Hopkins v.*

Cornerstone America, 545 F.3d 338, 343 (5 Cir. 2008), the Fifth Circuit "has interpreted the Darden factors to evaluate employee status based on an 'economic-realities' test." (Byrd Telcom's Post-Trial Br., p. 29.) Thus, Byrd Telcom asserts "the focus is on whether the worker is economically dependent upon the alleged employer or is instead in business for himself." *Id.* The Court finds no merit in these arguments.

Prior to *Darden*, the Commission applied the "economic realities test," which was premised on the legal proposition that the term "employer" under the Act was not limited to employment relationships as defined under common law principles but rather was to be broadly construed in light of the statutory purpose and the economic realities of the relationship at issue. *S & S Diving Co.*, 8 BNA OSHC 2041, 2042 (No. 77–4234, 1980). However, "the Commission modified that proposition" in *Vergona* "in order to conform Commission precedent to [the] intervening [*Darden*] Supreme Court decision[.]" *Timothy Victory*, 18 BNA OSHC at 1027.

Further, *Hopkins* was decided applying the definitions contained in the Fair Labor Standards Act, not the Occupational Safety and Health Act, and is therefore distinguishable from the present case. However, in *Equip. Holdings v. O.S.H.C.*, 203 F.3d 828, (5th Cir. 1999), a case that *is* on point and was decided *after* the Commission abandoned the "economic-realities" test in *Vergona* and *Timothy Victory* in lieu of the *Darden* factors, the Fifth Circuit affirmed the Commission's final order, expressly noting in that case the Commission utilized the *Darden* factors to determine employer-employee relationships.

Thus, examining the circumstances of this case in light of the *Darden* factors, and in conjunction with employment records, *supra*, which are either questionable, were related to employment with Circle B, or were dated after the accident, coupled with the use of Circle B's

safety manual, which references the possibility of termination from employment for safety violations, and significantly, the party admissions made by both Sonny and Ravan Byrd, the Court concludes the preponderance of evidence shows Byrd Telcom's workers were employees.

B. Instance (a) of Item 2

Existence of a Hazard

The Secretary asserts in Instance (a) of Item 2 Byrd Telcom committed a serious violation of the general duty clause when employees "were exposed to struck-by hazards while raising a gin pole and were not protected by a properly secured top (hook) block used in raising a gin pole." (Compl. ¶ III, a.)

Ayub, the Secretary's expert in engineering and structural design, opined "[c]arabiners are manufactured to be used in certain manner. The load is in the major axis of the carabiner, along the spine of the carabiner." (Tr. 615-16; *see* Ex. J-32.) Ayub further explained that "the support needs to be right above the load so that the carabiner is subjected to tension, no bending and no flexion, always with tension. This is how it is designed to be used." (Tr. 616-17.) This is called "concentric loading," which is "the only way the carabiner can be used. There is no other way it can be used other than you can also pull it in the minor axis but the load and the support have to be in the same line." (Tr. 644; *see also* Ex. J-14, p.21 Fig. 27, Ex. J-32.) In his expert opinion, the manner in which Byrd Telcom's workers used the carabiner subjected it to flexural moment—bending—and resulted in the carabiner breaking, releasing the gin pole and its rigging. (Tr. 644-45.) Specifically, the load was pulling downward on the major axis but the support for the load was on the side of the carabiner at the gate, which was in the hole of the top plate; there was no support concentric with the load, just air. (Tr. 644-45; *see also* Ex. J-14, p. 22 Figs 28-

33.) The non-concentric loading of the carabiner is what caused it to bend and then break. (Tr. 644-45; *see also* Ex. C-12A-D.)

Further, Ayub and OSHA's laboratory in Salt Lake City, Utah, calculated that the total weight of the load placed on the carabiner, the gin pole and its rigging components, including the rooster head and wire rope, was approximately 3600 pounds. (Tr. 650-51; *see also* Ex. J-3, pp. 4-5.) The tensile strength is the breaking point—the maximum load should only be about 3300-3500 pounds, because there needs to be a factor of safety. (Tr. 646-47.) Likewise, although the carabiner's minor axis tensile strength is 3,600 pounds (which might have sustained the load being lifted even if the support for the load was directly on the carabiner gate), the tension of the load was not directly opposite the carabiner's gate along the minor axis. (*See* Ex. J-14, pp. 16-17, 20; Ex. J-32.) According to Ayub, 3600 pounds is the carabiner's breaking point—the load should not be more than 1000 pounds in order to ensure a factor of safety. (Tr. 647.)

Further, the intended use of the holes in the top plates of the tower was to bolt the next section of the tower when building it upward; a tower section is placed on top and then bolts are used to secure the plates together by placing bolts through the holes. (Tr. 428.) Those holes in the top plate were neither designed nor intended to hold rigging to hoist heavy steel equipment up the tower. Indeed, Ayub testified that when the carabiner was failing, it created indentations in the top plate. (Tr. 649-50; *see also* Ex. J-14, p. 24, Figures 36 and 37.)

The Court concludes the combination of using the carabiner for hoisting and threading it through the hole in the top plate created unsafe nonconcentric loading, which created a struck-by hazard from the failure of the carabiner causing the gin pole to release and fall, which occurred in this case. Since two employees were killed, the Secretary has shown the cited condition

actually posed a hazard to employees.

Recognized Hazard

Under the second element, a recognized hazard is "a condition 'that is known to be hazardous' " and "can be established by proving that the employer had actual knowledge that a condition is hazardous" or "by proving that the condition is generally known to be hazardous in the industry." *Acme Energy Servs. v. OSHRC*, 542 F. App'x 356, 363 (5th Cir. 2013). Actual knowledge on the part of the employer is not required; rather, "the question is whether the hazard is recognized by the industry of which [the employer] is a part." *Arcadian*, 110 F.3d at 1197 n. 5 (citation omitted). As indicated *infra*, the Secretary has established both employer recognition and industry recognition of this hazard.

Employer Recognition

The Secretary asserts, and the Court agrees, evidence establishes that Byrd Telcom recognized the hazard. Randy Davidson, the company's Construction Manager, admitted the use of the carabiner to hoist the gin pole was "unsafe." (Tr. 358.) He also testified that it was important for the rigging to be done properly for safety and that he had never hoisted a gin pole up a cell tower using a carabiner in lieu of the slings (or choker) and shackle method. (Tr. 312, 326.) He had 12 years of experience in the industry and had done about 40 gin pole jobs before the accident on May 28, 2013, and had been taught to rig the gin pole to the top of the tower by wrapping two slings or chokers around two of the tower legs and securing them in the center with a shackle, to make a "V" formation. (Tr. 290; *see also* Ex. J-31.) The top block (hook) is then placed into the shackle in the center of the face of the tower. Randy Davidson learned this

technique while employed with two previous tower/telecommunications companies, RP Communications, and Baggett Construction. (Tr. 307.)

Callender, who had 20 years of experience in the tower/telecommunications industry, also testified that the use of a carabiner to hoist the gin pole in the manner used was improper and unsafe based on his training within this industry. He testified that he was taught how to rig a gin pole to hoist up a tower about 17 years ago and "was taught to take two metal slings for one on each pole or tower. Put a block in the center [where there is shackle] and raise it like that." (Tr. 205, 240.) Callender performed the work of attaching the rigging to the top of the tower numerous times and had always done it that same way—never with a carabiner. (Tr. 219-20.) Callender testified that if you rigged the gin pole to the top of the tower by placing a carabiner in one leg of the tower, the gin pole would veer off to the side of the tower where the carabiner was attached, instead of going up the center of the face of the tower. (Tr. 220.) Moreover, Callender said he would never use a carabiner to hoist a gin pole because there would be too much weight on the carabiner. (Tr. 240-41; *see also* Ex. C-8A, pp. 51-52.) Therefore, the Secretary established Byrd Telcom recognized the hazard associated with improperly secured rigging.

Industry Recognition

The Commission has held that expert testimony and other sources such as industry publications and standards can demonstrate that the hazard is recognized in the employer's industry. *See American Phoenix, Inc.*, 24 BNA OSHC 2228, 2014 (No. 11-2969, 2014) (*citing* decisions that recognize ANSI standards reflect industry consensus). "Where a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question." *Arcadian*, 20 BNA OSHC at 2997. Byrd Telcom's industry recognizes the

hazard of using a carabiner in the improper manner in which it was used by Byrd Telcom on its worksite on May 28, 2013.

The relevant national consensus standard, ANSI/TIA-1019-A-2012, the American National Standards Institute's (ANSI) Telecommunications Industry Association (TIA) Standard for Installation, Alteration and Maintenance of Antenna Supporting Structures and Antennas, establishes industry recognition of the hazard. As this ANSI/TIA standard indicates, the "[i]nformation contained in this Standard was obtained from available sources and represents, in the judgment of the subcommittee, the accepted Industry minimum standard for the installation, alteration and maintenance of antenna supporting structures and antennas." (Ex. R-10, p. 13.) Although it defines rigging as "cables, shackles, slings, blocks, gin pole, load line, jump line, tag line, etc…used in construction," carabiners are not included in that definition. (Ex. R-10, p. 16.)

A relevant expert's testimony is also sufficient evidence in and of itself to establish that a particular industry recognizes a hazard. *See Kelly Springfield Tire Co., Inc. v. Donovan*, 729 F.2d 317, 322 (5th Cir. 1984) (holding that expert testimony established recognition of hazard); *see also* N*ational Realty and Constr. Co. v. OSHRC & Secretary*, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973) (noting that recognition standards center on "the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question.").

At trial, Vermillion, Byrd Telcom's own expert, testified that he was a certified rigger and "would never use a carabiner to jump a gin pole." (Tr. 762.) Ayub also testified that the use of a carabiner in place of the shackle in the "V" formation would be an unsafe use of the carabiner and contrary to its intended use by the manufacturer because it is triaxial loading (the load is pulling downward and the support for the load is on two sides of the carabiner and not

concentric with the load), for which the carabiner was not designed. (Tr. 801.) Importantly, according to PenSafe, the manufacturer of the carabiner involved in the accident, carabiners are certified safety rated for fall protection only and are not intended for hoisting heavy steel equipment. (Tr. 471; *see also* Ex. J-10.) Further, in Ayub's expert opinion, "there is not one manufacturer of the carabiner which will let you use the carabiner in the manner that [Byrd Telcom] did." (Tr. 672.) Thus, it is clear that the telecommunication industry recognizes the hazard of using a carabiner for hoisting heavy equipment and that the carabiner manufacturers recognize the hazard of non-concentric application of loads with their support. Therefore, the Secretary established industry recognition of this hazard.

Employee Exposure

"The goal of the Act is to prevent the first accident," *Owens-Corning Fiberglass, Corp. v. Donovan*, 659 F.2d 1285, 1290 (5th Cir. 1981), "not to serve as a source of consolation for the first victim or his survivors." *Mineral Indus. & Heavy Constr. Group v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981). The Secretary "need not prove that a given employee was actually endangered by the unsafe condition, but only that it was reasonably certain that some employee was or would be exposed to that danger." *Mineral Industries*, 639 F.2d at 1294 (*citing Gilles v. Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976)). "Thus, the 'likely to cause death or serious physical harm' aspect of the General Duty Clause violation does not require the Secretary to prove that particular, identifiable employees in fact were exposed to a hazardous condition. It is the dangerous condition itself that gives rise to a violation of the Clause." *Arcadian*, 110 F.3d at 1197 n. 5.

Here, however, it is undisputed that two workers died as a result of struck-by hazards while raising the gin pole and were not protected by a properly secured top (hook) block used in raising a gin pole. Additionally, John Davidson was also on the tower at the time of the accident and Grimes, Allen and Callender were working on the ground. Therefore, it was reasonably certain all of these employees were exposed to death or serious physical harm from the falling equipment. Accordingly, the Secretary has proven employee exposure.

Preventable Hazard

The struck-by hazard Byrd Telcom's employees were exposed to while raising the gin pole could easily have been prevented had the company simply followed the industry practice for safe and proper rigging of gin poles by wrapping two slings or chokers, one around each leg of the tower, and connecting them in the center with a shackle to create a "V" formation. (Tr. 205, 240, 309-10, 312, 653, 762-63.) Accordingly, the Secretary has proven the cited hazard was preventable.

B. Instance (c) of Item 2

Existence of a Hazard

The Secretary asserts in Instance (c) of Item 2 Byrd Telcom committed a serious violation of the "general duty" clause when "the gin pole was not permanently marked with an identification number that references a specific load chart and gin pole weight, thereby exposing employees on and near the tower to struck-by hazards while raising the gin pole." (Compl. ¶ III, c.) Sauls and Ayub testified that the inability to associate a gin pole with its load chart could result in struck-by hazards from equipment or the tower failing. As Sauls credibly testified, if employees cannot identify the correct load chart for the gin pole they are using, they will not

know how much load it can carry. (Tr. 475, 515, 652). Sauls also testified that in addition, the gin pole provides the weight of the rigging as well as the load for raising the load up to the top of the tower. Part of the rigging weight is also the gin pole weight, which can be used to determine what type of equipment to use to secure the top block at the top of the tower. Therefore, the marking of the gin pole to associate it to a specific load chart is important to the jump line and raising the gin pole up the tower. (Tr. 515-16). Further, the only reason the workers did not get to actually place a load on the load line to hoist up the tower after the gin pole was in place was because the initial rigging to jump the gin pole failed. But for the accident, the employees would have been exposed to a secondary struck-by hazard from the load line's potential failure. Therefore, the Secretary has shown the cited condition actually posed a hazard to employees.

Recognized Hazard

Industry recognition of the hazard of not properly marking the gin pole is again evidenced by ANSI/TIA-1019-A-2012, which mandates in section 6.2.6, that identification for a gin pole shall be as follows:

a) Each gin pole assembly and associated rooster head shall be permanently marked or otherwise clearly referenced for identification to its load chart.
b) The gin pole installation documents shall identify sections requiring a specific installation sequence and the sections shall be appropriately marked.
c) If a track is used to lift, or jump a gin pole, it shall be identified and acceptable rigging arrangements shall be included in the installation documents.

(Ex. J- 28, p. 3-4; Ex. R-10, pp. 67-8.)

Byrd Telcom "claims there were adequate markings related to the Gin Pole and load chart of said Gin Pole in question." (Joint Pretrial Order, Attach. D ¶ 5.) The Court does not agree. The gin pole consisted of four sections, one red, one blue, and two white. (Tr. 652, 662.) Byrd Telcom argues "[t]he stamp on the gin pole section shown in Exhibits R-7(a) and 7(b) offers a

clear picture of the corresponding serial number[.]" (Byrd Telcom Br., p. 23.) However, both exhibits relied on by Byrd Telcom depict a white gin pole section and Sonny Byrd admitted the white section was not at the worksite at the time of the accident, which was confirmed by Callender. (Tr. 193, 237.) More importantly, Sonny Byrd admitted the red and blue gin pole sections that were onsite were not marked at the time of the accident. (Tr. 193-94.)

Byrd Telcom also argues the load chart does not have to be at the worksite because, "the regulation just simply says, 'it's stamped.' So that anybody who wants to know, including contractors and employees, could identify this gin pole with this load chart." (Tr. 191.) Byrd Telcom's argument is not germane to Instance (c) of Item 2, which asserted "the gin pole was not permanently marked with an identification number that references a specific load chart and gin pole weight." Further, even if germane, the Court does not agree with Byrd Telcom. The ANSI/TIA-1019-A-2012 standard mandates "lifted loads shall be field verified prior to the lift unless the weight is confirmed by the Competent Rigger or Qualified Person." (Ex. R-10, p. 30.) Clearly, the lifted loads could not be field verified prior to the lift if the load chart was not onsite.

Accordingly, the Secretary has established industry recognition of the hazard, and further, with Sonny Byrd's admission that the red and blue gin pole sections onsite at the time of the accident were not marked, the Secretary has established Byrd Telcom failed to comply with that national standard.

Employee Exposure

It is undisputed that two workers died as a result of the company's failure to permanently mark the gin pole with an identification number that references a specific load chart and gin pole weight. Additionally, John Davidson was also on the tower at the time of the accident and

Grimes, Allen and Callender were working on the ground. Therefore, it was reasonably certain all of these employees were exposed to death or serious physical harm from the falling equipment. Accordingly, the Secretary has proven employee exposure. Byrd Telcom did not refute this evidence. The Secretary has shown the cited condition actually posed a hazard to employees.

Preventable Hazard

The cited hazard could easily have been prevented had the company simply followed the industry practice of properly marking the red and blue gin pole sections that were onsite the day of the accident with references to a specific load chart and gin pole weight and following the industry standard of field verifying the lifted loads prior to the lift "unless the weight is confirmed by the Competent Rigger or Qualified Person." Accordingly, the Secretary has proven the cited hazard was preventable.

C. Unpreventable Employee Misconduct Defense

Byrd Telcom asserts the procedures and training in place were within the reasonable standards used in the industry, and further, the workers' own failure to follow the procedures and polices put into place by Byrd Telcom was the sole and proximate cause of the accident. (Byrd Telcom's Post-Trial Br. p. 7.) In the Fifth Circuit, the affirmative defense of unpreventable employee misconduct "requires the employer to show (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Sanderson Farms, Inc. v. OSHRC,*

348 F. App'x 53, 57 (5th Cir. 2009) (*citing W.G. Yates & Sons Const. Co. v. OSHRC,* 459 F.3d 604, 609 (5th Cir.2006).

Further, "a supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *W.G. Yates & Sons Const.*, 459 F.3d at 608-09. Byrd Telcom asserts in its proposed Findings of Fact and Conclusions of Law that "the law of the 5th Circuit as held in the *Horne and WG Yates* opinions apply and are controlling in this case" and under the controlling case law, the Secretary "has the burden of proving constructive notice [through] substantial evidence when [he is] unable to impute the knowledge of a supervisory employee on to the employer because the supervisory employee was responsible for violative act." (Byrd Telcom's Proposed Findings and Conclusions, p. 2 ¶2.)

In *Horne*, the Fifth Circuit held an employer who had done everything possible to insure compliance with the Act short of personally directing the trenching operation himself could not be held liable on imputation theory for violation of Act because of conscious violations of Act by his experienced foremen who were thoroughly familiar with employer's safety program and requirements of Act. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976). Here, however, unlike in *Horne*, Byrd Telcom did *not* do everything possible to insure compliance with the Act and John Davidson was *not* an experienced foreman who was thoroughly familiar with Byrd Telcom' safety program and requirements of Act.

Likewise, in *WG Yates*, the Fifth Circuit held a supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline were sufficient to make the supervisor's conduct in violation of the policy

unforeseeable. Here, unlike in *W.G. Yates*, since John Davidson was not a supervisor, the Secretary is not imputing a supervisor's knowledge of his own malfeasance. Therefore, neither *Horne* nor *W.G. Yates* are controlling.

Further, the Secretary argues, and the Court agrees, there is sufficient evidence of constructive knowledge in this case based on Byrd Telcom's inadequate safety program. Byrd Telcom had no work rules regarding the use of gin poles and the proper manner to rig a gin pole to a tower. (Ex. C-7, p. 48; *see generally* Ex. J-4.) The safety manual was similarly silent as to carabiners and their appropriate uses. Randy Davidson testified that although he received the safety manual he did not read it. (Tr. 352-53). Callender also testified he never received the safety manual, but if he did, he did not read it. (Tr. 252). To the extent Byrd Telcom asserts someone from Andrew told Byrd Telcom's workers not to use carabiners, the Court finds it is not relevant since, as indicated *supra*, John Davidson credibly testified that no one gave him this directive. Therefore, the Court finds Byrd Telcom did not have work rules designed to avoid the cited violations. Thus, the Secretary has also established Byrd Telcom did not effectively communicate work rules regarding gin poles and rigging gin poles because it had none.

Moreover, the Court concludes Byrd Telcom did not adequately train its employees or provide them with safe equipment. John Davidson testified had 7½ years of experience in the tower industry (as of the date of trial) and 3½ of those with Circle B Towers or Byrd Telcom. (Tr. 523, 528). All of his training however, came from other employers. (Tr. 528, 539-40). He received gin pole training from a previous employer who taught him to use anything to rig a gin pole, including carabiners. (Tr. 541). He did not know the full weight of the gin pole and its

rigging and assumed that a carabiner—that he believed was rated for 3600 pound—rigged to a hole in a top plate of one leg of the cell tower was adequate to jump the gin pole.

Significantly, prior to the Georgetown worksite, John Davidson had worked on "very few," a "handful at the most," of gin pole jobs and had never personally done the rigging to jump the gin pole because someone with more experience rigged the gin poles. (Tr. 524, 540.) Although he had done one gin pole job with Byrd Telcom prior to the Georgetown worksite, even on that job someone with more experience rigged the gin pole to the tower. (Tr. 541-42.) The Georgetown worksite was the first time John Davidson had set up the rigging to jump the gin pole up the tower. (Tr. 546-47.) He credibly testified he wanted to wait for someone more experienced to be able to do the rigging but Sonny Byrd wanted to have the job completed before the Memorial Day holiday. (Tr. 559-60.)

Clearly, John Davidson was not adequately trained and did not appreciate that the use of the carabiner was unsafe since he believed all carabiners had a breaking strength of 5500 pounds (Tr. 542). He also selected the biggest carabiner because he thought it would be the strongest. (Tr. 545). He was unaware of the lifting limitations of a carabiner. The week prior to the accident when he placed the carabiner in the top plate of one tower leg, Trammell was the foreman in charge of the worksite, even though she had no experience in climbing towers and no experience in rigging gin poles. (Tr. 533-34, 543, 547). Byrd Telcom put forth no evidence to contradict this testimony.

Byrd Telcom argues "every witness with direct knowledge of the accident testified that John Davidson was the foreman of the job with direct supervisory authority over the work being performed with the exception of John Davidson himself." (Byrd Telcom's Post-Trial Br., p. 16.)

The Court does not agree. Although Callender denied that he was the foreman the day of the accident, John Davidson credibly testified he thought the foreman the day of the accident was either Callender or his brother Randy since they had the most experience. (Tr. 208, 558-59.)

Callender admitted the day of the accident was his first day back to work at Byrd Telcom, and that prior to the accident and after the accident, his job title with Byrd Telcom was "foreman." (Tr. 208-09.) He also admitted part of the duties of the foreman at the worksite was to conduct the Job Safety Analyses. (Tr. 208.) Importantly, John Davidson's undisputed testimony was that although he signed the "Job Safety Analysis" (JSA) form, he did not do the safety meeting the morning of the accident—Callender "did the talking part." (Tr. 208, 553-54.) The Court finds the preponderance of evidence established Callender, not John Davidson, was the foreman at the worksite the day of the accident.

Randy Davidson also admitted he was acting in a supervisory role that day, and the Court concludes he should have known how the rigging had been done, in particular since he signed the "Equipment Basics Checklist" as the Project Manager on May 20, 2013, which indicated the specific equipment that had been inspected. (Ex. J-18.) He admitted while on site, he did not do anything to ensure that the rigging had been done properly and safely and that he left the site while the hazardous work was in progress. (Tr. 272). Randy Davidson's admissions corroborate John Davidson's testimony that during the time that he worked for Byrd Telcom, no one ever came to worksites to monitor safety or check for safety issues. (Tr. 569). Ironically, Byrd Telcom's own expert, Vermillion, testified that in a speech he gave at a meeting of the National Association of Tower Erectors, he emphasized that contractors need more oversight and

supervision of their workers given that the tower industry had 13 deaths in 2013, and at least 9 in 2014. (Tr. 761-62).

Randy Davison testified emphatically that the use of the carabiner was wrong and unsafe. (Tr. 318, 358.) His testimony on this point was corroborated by the Secretary's expert, as well as by Callender, who had 20 years of experience in the industry. (Tr. 240-41; Ex. C-8A, pp. 45, 51-52.) Although Byrd Telcom argued John Davidson went rogue and committed misconduct, he nonetheless was not disciplined by Byrd Telcom for his use of the carabiner in hoisting the gin pole. (Tr. 570). Therefore, the Court finds Byrd Telcom did not correct hazards or enforce safety rules through a progressive disciplinary program.

Moreover, the conflicting testimony about who was in charge at the worksite on the day of the accident is further evidence of the company's inadequate supervision. Further, assuming arguendo John Davidson was the foreman at the worksite the day of the accident, Byrd Telcom's placement of an inexperienced supervisor in charge of a worksite is indicative of its lax attitude toward safety. Because the Secretary established that Byrd Telcom did not have work rules designed to avoid the cited violations, the Secretary also established Byrd Telcom necessarily failed to adequately communicate the required rules. Accordingly, constructive knowledge is also imputed to Byrd Telcom based on its inadequate safety program.[12]

[12] Byrd Telcom pleaded in its Answer that compliance was "infeasible, impractical and contrary to industry custom," the inspection "did not comply with §8(a) of the Act and violated the Fourth Amendment to the United States Constitution," and the "cited regulations and/or Complainant's interpretation of the cited regulations are overly ambiguous and insufficient to apprise the Respondent of its legal obligations regarding compliance with the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, et seq." As to Byrd Telcom's argument that compliance was "infeasible, impractical and contrary to industry custom," the Court disagrees. As indicated *supra*, compliance was clearly feasible, practical and could have been completed according to industry custom. As to the remaining defenses, Byrd Telcom waived them since it failed to present any evidence on those defenses. *Dole Packaged Food Co.*, 14 BNA OSHC 1368, 1372 (Nos. 88-0665 and 88-2672, 1989).

IV. PENALTY DETERMINATION

"The Commission has the exclusive authority to assess penalties once a proposed penalty is contested." *Chao v. OSHRC*, 401 F.3d 355, 376 (5th Cir. 2005) (*citing Arcadian*, 110 F.3d at 1199). *See also Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994). "Section 17(j) of the [ ] Act, 29 U.S.C. § 666(j), guides the Commission's assessment of a penalty." *Id.* (*citing J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2216 (No. 87-2059). The Commission is to "giv[e] due consideration to the appropriateness of the penalty with respect to [1] the size of the business of the employer being charged, [2] the gravity of the violation, [3] the good faith of the employer, and [4] the history of previous violations." *Id.* "These factors are not necessarily accorded equal weight...." *Id.* (*citing J.A. Jones*, 15 BNA OSHC at 2216).

"Gravity of violation is the key factor," *see id.*, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). The Court has considered Byrd Telcom's size, history of violations, and good faith, but finds the gravity of the serious violation warrant the assessment of the maximum penalty, even if Byrd Telcom rated "perfect marks on the other three criteria." *Nacirema Operating Co., Inc.*, 1 BNA OSHC 1001, 1003 (No. 4, 1972).

As to the gravity of the violation, two employees were tragically killed. Given the fatalities that did occur, and the high probable extent of physical injuries should future accidents occur, the Court finds the gravity of the hazard is high. For the serious violation, Byrd Telcom is subject to a civil penalty of up to $7,000.00. 29 U.S.C. §666(b). The Secretary proposed the maximum statutory civil penalty of $7,000.00, which the Court finds appropriate. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT amended Instances (a) and (c) of Item 2 are **AFFIRMED** and Byrd Telcom is assessed and directed to pay to the Secretary a civil penalty of $7,000.00.[13]

SO ORDERED THIS 28th day of **September, 2015**.

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

[13] *See* section 17(l) of the Act, which mandates that civil penalties owed under this Act "shall be paid to the Secretary for deposit into the Treasury of the United States[.]" 29 U.S.C. §666(l).