UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ACTING SECRETARY OF LABOR,[1] Complainant, v. ENTERGY NEW ORLEANS, LLC, Respondents.	OSHRC Docket No. **22-0063**

DECISION AND ORDER

Attorneys and Law Firms

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JUDGE: John B. Gatto, United States Administrative Law Judge

I. INTRODUCTION

Respondent Entergy New Orleans, LLC ("Entergy") produces and distributes electric power to customers in Arkansas, Louisiana, Mississippi, and Texas. Entergy's linemen often work in areas in which they are exposed to energized lines and conductors that can result in serious injuries or death if proper safety rules and procedures are not followed. C.S., an Entergy lineman, was electrocuted in June 2021 at a New Orleans worksite while he and two other crew members were changing out a utility pole's cross-arm from suspended buckets. He later died because of his injuries. The United States Department of Labor, through the Occupational Safety and Health

[1] On March 11, 2023, Julie A. Su became the Acting Secretary of Labor and was automatically substituted as a party pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. Rule 25(d) is made applicable to Commission proceedings through section 12(g) of the Act, which mandates that "[u]nless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure." 29 U.S.C. § 661(g). For ease of reference, the Acting Secretary will be referred to as the Secretary herein.

Administration ("OSHA"), investigated the accident and subsequently issued[2] a three-item serious Citation and Notice of Penalty of $13,653 ("citation") to Entergy on December 10, 2021, for violations of the Occupational Safety and Health Act of 1970 (the "Act"). 29 U.S.C. §§ 651–678. Entergy timely contested the citation, and the Secretary filed her complaint[3] with the Commission (the "Court") seeking an order affirming the citation. In its answer, Entergy raised the affirmative defense of the unpreventable employee misconduct. (Answer at 2.) The Secretary subsequently withdrew Items 1 and 2 of the citation. (*See* Sec'y's Stip. of W/D of Items 1 and 2 of Cit.) (Sept. 25, 2023).

Based upon the record, the Court concludes it has jurisdiction over the parties and subject matter in this case under section 10(c) of the Act. 29 U.S.C. § 659(c). (Pretrial Order ¶4; Compl. ¶¶1, 2; Answer ¶¶1, 2; Stip. Facts ¶¶1, 2 (July 18, 2023)). Pursuant to section 12(j) of the Act and Commission Rule 90(a)(1), after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings. 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90(a)(1).[4] For the reasons indicated *infra*, the Court **AFFIRMS** Item 3 and **ASSESSES** a penalty of $13,653.

II. BACKGROUND

On the morning of June 23, 2021, an Entergy crew arrived at a New Orleans worksite to remove rotten cross arms from utility poles, replace them with secondary cross arms, and move lateral switches. (Tr. 40, 142, 145.) Senior line mechanic Clyde Scales was the crew supervisor and designated observer of three lineman working in buckets, which were hoisted by material handler trucks. (Tr. 41-42, 142-43; Ex. R-21 at 377.) Senior bucket operator Christopher Bowden was the qualified employee overseeing work performed by C.S. and lineman [redacted] on the

[2] The Secretary has assigned responsibility for enforcement of the Act to OSHA and has delegated her authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 8-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020), *superseding* Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has authorized OSHA's Area Directors to issue the citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein. For simplicity, the Court also refers to actions taken by the Assistant Secretary and the Area Directors as actions taken by the Secretary.

[3] Attached to the complaint and adopted by reference is the citation at issue. (Compl., Ex. A.) Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[4] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

cross-arms.[5] (Tr. 40, 43-44, 344-45.) At the time of the accident, C.S. and [redacted] were rated at the Mechanic 2 level, meaning they were trainees. (Tr. 38, 40, 344-45.) When linemen at the Mechanic 2 level are working on energized lines or phases, Entergy requires a senior lineman to be up in a bucket observing them and ensuring they can perform their tasks. (Tr. 42-43, 344-45.)

At the site, two "live phased" [6] lines were stacked on top of each other at different heights. (Tr. 43, 55.) According to [redacted], "[i]t was a complicated job for almost anybody" due to nine energized phases (wires) and two laterals. (Tr. 65.) Before beginning work that day, the crew reviewed the Job Hazard Analysis ("JHA") prepared for the assignment.[7] (Tr. 65.) They discussed checking personal protective equipment ("PPE"), checking gloves, harnesses, cover-ups, and blankets. (Tr. 65.) The JHA also noted that proper insulating protective equipment ("IPE") should be used to protect against electrical hazards.[8] (Ex. R-21 at 378.)

Bowden, [redacted], and C.S., who were initially wearing rubber gloves and sleeves, went up in their buckets and covered the live phases with rubber blankets and snakes. (Tr. 65, 94, 102-03.) The crew changed out the cross arm on the pole, transferred it to the outside phases, and began working on the second phase by wrapping an insulated blanket around the pole. (Tr. 100, 147.) After they covered the other live phases, the crew members removed their sleeves. (Tr. 48, 65, 152.) [redacted] piloted his bucket to the ground to retrieve lateral switches and a "Klondike pin," which the crew was going to use to secure the insulated blanket to the pole. (Tr. 48, 104.)

Unfortunately, Bowden and C.S. did not wait for [redacted] to get the Klondike pin and instead, decided to use tape to secure the insulated blanket around the pole. (Tr. 103-04.) Bowden and C.S. removed the insulated blanket from the exposed phase (insulator) and put it on the pole. (Tr. 48-49.) Rather than redon their sleeves, they continued to work. (Tr. 152; Ex. R-26) (video of the accident). As C.S. was taping the insulated blanket to the pole, he came into contact with the exposed phase and collapsed into his bucket. (Tr. 50, 52; Ex. R-26.) Bowden attempted to get

[5] There were two other workers at the site tasked with gathering materials on the ground to be used in the completion of the assignment. (Tr. 67, 343.)
[6] Scales testified a "phase" is a wire, either primary or secondary. (Tr. 165.)
[7] A JHA is completed before each job. (Tr. 265-66; *see also* Ex. R-20, Ex. R-21.) The cited standard refers to it as a "job briefing" and does not require it be in writing but does require that it "cover at least the following subjects: hazards associated with the job, work procedures involved, special precautions, energy-source controls, and personal protective equipment requirements." 29 C.F.R. § 1910.269(c)(2).
[8] [redacted] testified to the difference between PPE and IPE. PPE is equipment worn on the body, such as a harness, hard hat, gloves, and clothing. (Tr. 92.) IPE is protective equipment not worn on the body, such as cover-ups and nonconductive fiberglass hot sticks. (Tr. 92.)

C.S.'s attention by calling him and knocking on his bucket, but he was unresponsive. (Tr. 51; Ex. R-26.) Bowden replaced the insulated blanket over the exposed phase and then called down for help. (Tr. 51, 233-34, 238.) On the ground, Scales unsuccessfully tried to lower C.S.'s bucket, which was between two stacked live wires, using the lower controls in C.S.'s truck, so [redacted] hopped in his bucket and piloted back up to C.S. (Tr. 55-56.) [redacted] climbed into C.S.'s bucket and lowered it to the ground. (Tr. 57-58, 149.) C.S. later died from his injuries. (Tr. 208.)

Both Entergy and OSHA investigated the accident. Entergy interviewed Bowden, who told company investigators and wrote in his statement that C.S. had passed out in his bucket. (Tr. 239; Ex. R-27.) Entergy eventually learned from a residential security video that before Bowden called for help, he re-covered the phase on the line. (Tr. 286-87; Ex. R-26.) Entergy fired Bowden for violating its safety rules and making untruthful statements during the investigation. (Tr. 77, Ex. R-35.) Entergy also determined that Scales, "as a crew leader and as an observer . . . failed to follow numerous safety guidelines and violated fatal rules, which contributed to a workplace fatality." (Ex. R-37 at 420.) Scales testified at trial that he resigned before Entergy could fire him. (Tr. 159, 281.)[9]

Following the accident, Compliance Safety and Health Officer[10] Jessica Bookman (now Assistant Area Director in OSHA's Savannah office) conducted an opening conference over the phone and then met management at the site. (Tr. 207-09.) By that time, Entergy had completed the job. (Tr. 209.) Based upon her investigation, worksheets, and recommendations, OSHA issued a three-item serious citation to Entergy. (Tr. 222.)

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.' " *Martin v. Occupational Safety & Health Rev. Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards

[9] Entergy did not fire [redacted] for getting out of his elevated bucket and going to C.S.'s bucket, which resulted in him violating a company fall protection rule, because he tried to save C.S.'s life. (Tr. 276.)
[10] "Compliance Safety and Health Officer" means "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d).

that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority, OSHA promulgated the standard at issue in this case.[11] Meanwhile, the Commission is assigned to carry out adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I Steel Corp.*, 499 U.S. at 151.

Under the law of the Fifth Circuit where this case arose,[12] to establish an employer violated the cited standard, the Secretary must establish "by a preponderance of the evidence: (1) that the cited standard applies; (2) noncompliance with the cited standard; (3) access or exposure to the violative conditions; and (4) that the employer had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016). Thus, "OSHA has the burden of proving sufficient facts to support the citation." *Calpine Corp. v. Occupational Safety & Health Rev. Comm'n*, 774 F. App'x 879, 883, 2019 WL 2387637 (5th Cir. 2019) (quotation omitted).

Section 1910.269 of the Occupational Safety and Health Standards governs electric power generation, transmission, and distribution. Section 1910.269(l) applies when working on or near exposed energized parts and section 1910.269(l)(4) regulates the type of insulation that is required. More specifically, section 1910.269(l)(4)(i) mandates that "[w]hen an employee uses rubber insulating gloves as insulation from energized parts . . . the employer shall ensure that the employee

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[11] As indicated *supra*, the Secretary delegated her authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health and the Assistant Secretary promulgated the Occupational Safety and Health Standards at issue.

[12] Under the Act, the employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (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, both the worksite and Entergy's principal office are in New Orleans, which is in the Fifth Circuit. (*See* Cit. at 9; Joint Preliminary Report and Discovery Plan ¶8.) Therefore, it is highly probable this case will be appealed to the Fifth Circuit, and the Court applies that circuit's precedent, in addition to Commission precedent, in deciding this case.

also uses rubber insulating sleeves." 29 C.F.R. § 1910.269(l)(4)(i). However, an employee is not required to use rubber insulating sleeves if "[e]xposed energized parts on which the employee is not working are insulated from the employee[.]" 29 C.F.R. § 1910.269(l)(4)(i)(A).

Item 3 of the citation asserts Entergy violated § 1910.269(l)(4)(i)(A) when "employees installed insulation near 23 kV phase lines without the use of rubber insulating sleeves." (Compl. Ex. A at 9.) At trial, and in its post-trial brief Entergy stipulated the Secretary could meet her burden of proof as to all the elements of her case in chief and would not need to put on any evidence regarding her burden.[13] (Tr. 34-35; Resp't's Br. at 2.) "Therefore, this case now turns on whether Entergy has proven its affirmative defense of unpreventable or unforeseeable employee misconduct" with respect to Item 3. (*Ibid.*)

Unpreventable Employee Misconduct Defense

In the Fifth Circuit, to establish a violation was the result of unpreventable employee misconduct, Entergy "must show it has (1) established work rules[14] designed to prevent the violation,[15] (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered." *Calpine Corp.*, 774 F. App'x at 885 (*citing W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety & Health Rev. Comm'n*, 459 F.3d 604, 609 n.7 (5th Cir. 2006)). The Secretary asserts Entergy's unpreventable employee misconduct defense "fails both prong (2) and (4) of this test."[16] (Sec'y's Br. at 16.) For the reasons *infra*, the Court agrees with the Secretary.

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[13] Entergy also stipulated the cited standard applied (Stip. Facts ¶ 3) and that at the time of the accident the energized phases were not covered with insulating blankets, despite the employees having removed their rubber insulating sleeves (i.e., that the cited standard was violated) (Sec'y's Br. at 10; Resp't's Br. at 1, 3).

[14] The Fifth Circuit has defined a work rule as " 'an employer directive that requires or prescribes certain conduct' and, to be adequate, must 'specifically match the violation at issue.' " *TNT Crane & Rigging, Inc. v. Occupational Safety & Health Rev. Comm'n*, 74 F.4th 347, 359 (5th Cir. 2023) (quoting *S. Hens, Inc. v. Occupational Safety & Health Rev. Comm'n*, 930 F.3d 667, 678 (5th Cir. 2019)).

[15] The Secretary asserts the first prong required a showing that "(1) the employee violated a work rule." (Sec'y's Br. at 16.) That is not the first prong of the Fifth Circuit's test.

[16] The Secretary does not allege Entergy did not meet the first and third prongs and the Court concludes it met both. Entergy's work rules Rule 5A.6, Rule 5C.1, and Rule 5C.1 were designed to prevent the violation at issue by eliminating exposure to energized potentials. Entergy also took steps to discover and document violations of its safety rules. Entergy sent supervisors, leads, foremen, and managers into the field to conduct "random safety audits," record the employee being observed, the task being performed, and whether the employee was complying with company safety rules. (Resp't's Br. at 10.) This "observation data" was placed into spreadsheets for individual employees, including for [redacted], Bowden, and Scales. (Resp't's Br. at 11) (*citing* Ex. R-16, Ex. R-17, Ex. R-18). [redacted] testified that he was aware supervisors were observing him for compliance with safety rules and would counsel him if he did not comply with a particular rule. (Resp't's Br. at 11.)

Entergy Did Not Adequately Communicate Work Rules to Employees

"When evaluating whether an employer has adequately communicated its rules, 'the Commission considers evidence of whether and how work rules are conveyed.' " *Angel Bros. Enters., Ltd.*, No. 16-0940, 2020 WL 4514841, at *4 (OSHRC, July 28, 2020) (citation omitted), *aff'd*, 18 F.4th 827 (5th Cir. 2021)). Therefore, the Court focuses on whether Entergy adequately communicated its Safety Rules to C.S. As Entergy notes, "[t]he safety rules at issue in the present case govern when employees are required to wear rubber protective equipment, including sleeves, and the proper cover-up of energized parts and conductors (sometimes referred to as 'potentials')[17] in the immediate work area." (Resp't's Br. at 5-6) (*citing* Tr. 246-50; Ex. R-1). Entergy's Safety Rules on PPE and cover-up are found in Sections 5A.6, 5C.1 and 5C.2 of Entergy's Transmission and Utility Operations Safe Work Rules Manual ("Safe Work Rules Manual"). Applying these Safety Rules, Entergy asserts "workers are permitted and able to work safely without sleeves if there is only one exposed energized potential in the work area, but they must wear gloves and sleeves if there is more than one exposed potential in the work area." (Resp't's Br. at 6) (*citing* Tr. 93, 99, 246-50).

Section 5A.6 mandates that "[p]roperly rated rubber gloves and sleeves shall be worn when installing/removing proper cover-up while employee is positioned between multi-phases or if any phase is within the immediate work area." (Ex. R-1 at 15.) "If work is confined to the single-phase side only of the cross arm and body position is on the outside of the cross arm of that side, employees may wear only properly rated gloves to cover and uncover." (*Ibid.*)

Section 5C.1 mandates that "[w]hile working on or near Distribution systems 300 volts and above, all energized parts and conductors in the immediate work area, except that part of the conductor being worked, shall be covered with insulating protective equipment rated for the voltage being worked." (*Id.* at 16.) "The work area is considered as the area wherein contact can be made with any conductor by the operator or any conductive object or tool the operator is handling including the boom and basket." (*Ibid.*)

Section 5C.2 mandates that "[b]efore working on energized conductors, all objects of different potential in the immediate work area shall be covered." (*Ibid.*) "Where conditions exist

[17] Scales testified a "potential" is anything on the pole, such as a cross-arm and the pole itself. (Tr. 165.)

which makes hands-on work impractical for the application and removal of protective rubber goods, the work shall be done with hot sticks or de-energized." (*Id.* at 16-17.)

Entergy's introduction to cover-up training begins in the entry-level 300 level Boot Camp curriculum, which C.S. was exempted from taking, and the physical portion of the cover-up training is part of its 500-level curriculum, which C.S. had not yet taken before the accident occurred. (Tr. 186, 307-08; Ex. R-14.) Nonetheless, according to Steve Benyard, Entergy's Vice President of Reliability for Louisiana, C.S. "understood those rules . . . based on his evaluation" and did not need the basic cover-up training. (Tr. 308.) However, Benyard's testimony was directly contradicted by James Plaisance, Entergy's Utility Learning and Development Supervisor, who personally assessed C.S. and testified C.S. "had minimal exposure to [Entergy's] cover-up practices" and "Entergy's standard of cover-up, he was—had minimal association with." (Tr. 187, 88.) Since Plaisance personally assessed C.S., the Court credits Plaisance's testimony over Benyard's testimony.

Benyard testified that new employees are required to attend a New Employee Orientation PowerPoint presentation where a company safety specialist reviews the Safety Rules.[18] (Tr. 250.) That presentation includes an intranet link to Entergy's Transmission & Utility Operations Safety Manual, which includes Entergy's Current Safety Manual, Introduction Documents to Safe Work Rules Manual, Fatal Rules,[19] Safe Work Rules, Methods, Procedures, and Guidelines, and Troubleshooting Distribution Equipment. (Ex. R-9 at 036.) The Safety Manual includes a "Report of Receiving Safe Work Rules Manual," which the new employee signs and verifies the employee received the Safe Work Rules Manual. (Ex. R-9 at 038.) This signed Report is required to be forwarded to and retained by Entergy's Safety Department. (*Ibid.*) Although Entergy's training records state C.S. attended the New Employee Orientation presentation on May 13, 2021 (Resp't's Br. at 8; Tr. 259-260; Ex. R-10), Entergy did not proffer any evidence showing C.S. signed and verified the Report indicating he had been issued a copy of the Safe Work Rules Manual or that

[18] According to Plaisance, "there is a cover-up module that we did cover that has Entergy standards," which the Court infers was the New Employee Orientation PowerPoint presentation. (Tr. 186-87.) However, Plaisance previously admitted to OSHA that cover-up was not covered in that presentation and "we didn't evaluate." (Tr. 185.) Since cover-up is presented in the 300 level Boot Camp curriculum, the Court does not find credible Plaisance's testimony that he went over a cover-up module with C.S. in the New Employee Orientation PowerPoint presentation.

[19] Benyard testified that "[f]atal rules are any rules that if broken can cause serious injury up until death." (Tr. 251; Ex. R-9 at 042.) Employees may be terminated for violating these rules. (Tr. 251.)

the Report had ever been forwarded to and retained by Entergy's Safety Department.

When Benyard was asked if C.S. went through the New Employee Orientation, Benyard simply said, "It's listed in his training record." (Tr. 259.) Thus, there is no evidence in the record that C.S. reviewed the specific PPE, IPE, and cover-up rules in the Safety Work Rules Manual or that he ever signed and certified that he had. As the Commission has held, "although the record shows that the employees received training on general safety matters and the demilling procedure, there is insufficient evidence to establish that this specific rule prohibiting fire and flames near explosives was communicated to employees." *Propellex Corp.*, 18 BNA OSHC 1677, at *6 (No. 96-0265, 1999). Further, Entergy's New Employee Orientation presentation's reference to its Fatal Rules fell short of communicating Entergy's specific safety rules regarding PPE and cover-up. Rather, the "Fatal Rules" section simply tells new employees to "wear rubber protective equipment, as required" and to "use proper cover-up." (*Id.* at 042.)

Even if Entergy provided C.S. with online access to a copy of its rules,[20] the Secretary asserts the company did not designate someone to "specifically, clearly, and adequately explain[]" to C.S. the "cover-up rule," and further, that no one from Entergy evaluated C.S.'s proficiency in cover-up procedures. (Sec'y's Br. at 16.) This, according to the Secretary, amounts to a failure to verify C.S.'s familiarity with Entergy's cover-up procedures. (Sec'y's Br. at 16.) The Court partially agrees with the Secretary.

Entergy did not call any company safety specialists to testify that the Safe Work Rules Manual had been reviewed with C.S. *C.f. TNT Crane & Rigging, Inc.*, No. 16-1587, 2022 WL 2102910, at *6 (OSHRC June 2, 2022) (work rules adequately communicated to new employees where employer "uses a safety orientation script that covers power line safety, including maintaining an appropriate distance between a crane and power lines," as well as providing safety manual and specific training), *aff'd on other grounds*, 74 F.4th 347 (5th Cir. 2023); *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, at *3 (Nos. 00-1268 and 00-1637, 2003) (consolidated) (safety rules adequately communicated where safety manager testified that, among other things, he "gives the applicant a copy of [employer]'s safety policy and goes over every safety rule").

However, as to the Secretary's assertion that Entergy did not evaluate C.S.'s proficiency

[20] Entergy asserts C.S. also received a USB containing Entergy's Transmission and Utility Operations Safety Work Rules Manual ("Safety Work Rules Manual"). (Ex. R-9 at 036.)

in cover-up procedures, as indicated *supra*, Plaisance personally assessed C.S. and concluded he "had minimal exposure to [Entergy's] cover-up practices" and "Entergy's standard of cover-up, he was—had minimal association with." (Tr. 187, 88.) C.S.'s unfamiliarity with Entergy's cover-up procedures was evidenced by Entergy's own rating of C.S. at the 300 Level of competency.

Entergy also asserts it requires its contractors to be aware of safety rules governing PPE, IPE, and cover-up through safety orientations and trainings developed by Alliance Safety Council ("ASC"). (Resp't's Br. at 10.) Specifically, Entergy contends it requires contractors to attend ASC's annual PowerSafe training program, which covers safety rules regarding cover-up and wearing rubber sleeves. (Resp't's Br. at 10) (*citing* Tr. 322-29; Ex. R-40 at 499-504). C.S. took that class in 2018, 2019, and 2020, while employed by contractors. (Resp't's Br. at 10) (*citing* Tr. 318-21; Ex. R-40).

Lalania Joelle McGehee, Vice President of Client Development at ASC, testified that the ASC PowerSafe Lineman Training was a "baseline course," otherwise described as generalized training. (Tr. 335.) Regarding "proper cover-up procedures," McGehee testified ASC's Training's course material references and teaches their "Cradle-to-Cradle" policy for the wearing of rubber gloves and sleeves, which refers to the wearing of rubber protection from the "instant the bucket truck's boom leaves its cradle until it is reset back in the cradle." (Tr. 334; Ex. R-40 at 6.)

Prior to working for Entergy, C.S. also worked for MDR Construction and received MDR's safety manual and safety rules. (Tr. 251-53; Ex. R-2 through Ex. R-7). Although MDR's safety manual provides similar rules concerning insulating sleeves and proper cover-up, MDR's 2018 Safety Rules mandate that rubber gloves "shall be worn cradle to cradle unless [there] are no energized lines on that pole and [there] are no energized wire crossings on the [pole]." (Ex. R-6, p. 022.) Thus, "*if any energized lines are exposed, sleeves shall remain on*[.]" (*Ibid.*) (emphasis added).

The Secretary argues Entergy cannot rely on C.S.'s previous training with ASC and MDR's cover-up procedures since MDR's "Cradle-to-Cradle" rules unless there are "no energized lines" and ASC's "Cradle-to-Cradle" policy for rubber insulating sleeves are more restrictive than Entergy's rules (Sec'y's Br. at 16-17), which permit workers to work "without sleeves if there is only one exposed energized potential in the work area[.]" (Resp't's Br. at 6.) The Court agrees with the Secretary. Further, as the Commission has held, "employers cannot count on employees' common sense, experience, and training by former employers or a union to preclude the need for

specific instructions." *PAR Elec. Contractors, Inc.*, 20 BNA OSHC 1624, at *4 (No. 99-1520, 2004); *see, e.g., CMC Elec., Inc. v. OSHA*, 221 F.3d 861, 865-66 (6th Cir. 2000); *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2009 (No. 90-1505, 1992), *aff'd without published opinion*, 16 F.3d 1219 (6th Cir. 1994).

According to Entergy's training records, it also conducted an Experienced Employee Skills Evaluation of C.S. on May 18, 2021, which involved paper tests followed by physical labor exercises to determine C.S.'s ability to do line work. (Ex. R-8.; Tr. 183.) Based upon the entirety of the assessment, C.S. passed the 400-level course, but failed the 500, 600, and 700 level courses. (Tr. 303-305.) Plaisance exempted C.S. from taking the 300 level Boot Camp curriculum but classified C.S. as a 300-level lineman because he did not have experience working underground, which the job requires. (Tr. 184, 189.) Although C.S. met expectations in "[c]hanging out a DE arm (PPE, cover-up, hoist proficiency)," which were his tasks the day of the accident (Ex. R-8 at 029; Tr. 260-61), it is unclear from the evaluation whether C.S. relied on his previous training with ASC and MDR's cover-up procedures, which were more restrictive than Entergy's rule, or whether he was aware of Entergy's less restrictive rule. Further while the evaluation may have shown C.S.'s skill level met or exceeds expectations; it does not establish Entergy adequately communicated its less restrictive rule to C.S.

Entergy also asserts it periodically distributes Safety Action Plans to its employees that identifies recent safety issues and reminds employees to document hazardous conditions, and discuss measures, including PPE, to safely conduct tasks. (Resp't's Br. at 9) (*citing* Tr. 264-65; Ex. R-19 at 351). Each of the three plans proffered by Entergy stated that team members had "experienced multiple severe accidents including," among other things, "contact with energized electrical components."[21] (Ex. R 19 at 348, 353, 355.) Each plan directed crews to "document how the hazard will be eliminated (preferred) or mitigated" and "what PPE is required to safely conduct the task . . . ." (Ex. R-19 at 351, 354, 356.) These plans, however, did not state the Safety Rules relevant to this case, cite the relevant Safety Rules, or otherwise point employees in their direction. Therefore, the Court concludes the vague language in these plans did not communicate Entergy's safety rules to employees. Entergy also failed to proffer evidence showing C.S. received any of

[21] For example, the June 1, 2019, safety action plan stated that "[i]n these events, common themes have emerged" such as "[i]nexperienced workers" and "[l]ack of field oversight by experienced personnel." (Ex. R-19 at 353.)

the Safety Action Plans.

In addition to its orientation and evaluations, Entergy also asserts it provides on-the-job training to ensure employees are aware of rules regarding PPE, IPE, and cover-up. (Resp't's Br. at 9) (*citing* Tr. 261-263; Ex. R-15). However, Entergy did not proffer any evidence showing C.S. received on-the-job training that adequately communicated its less restrictive rule to C.S. (and the documents contained in exhibit E-15 are all blank). Benyard also testified that Entergy paired the rules discussed in the cover-up class with on-the-job training and supervisors in the field reiterating the rules (Tr. 249-50, 262.) These supervisors, according to Benyard, used field notes to evaluate employees and communicate rules to them. (Ex. R-15; Tr. 263-64.) However, Entergy's position is unpersuasive. Even though [redacted] and [redacted] were receiving on-the-job training from Bowden at the time of the accident, Bowden failed to correct C.S.'s rules violations while they were working from their buckets. (Tr. 106.) *See Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, at *5 (No. 16-1087, 1991) (foreman failed to provide employee "with specific instructions on how to safely perform the task").

Bowden was also violating the rules and therefore was essentially providing on-the-job training on how to violate the safety rules. This is strong evidence Entergy did not effectively communicate its work rules through on-the-job training. *See Floyd S. Pike v. Occupational Safety & Health Rev. Comm'n*, 576 F.2d 72, 77 (5th Cir. 1978) ("Because the behavior of supervisory personnel sets an example at the workplace, an employer has if anything a heightened duty to ensure the proper conduct of such personnel.") (quoting *Nat'l Realty & Constr. Co. v. Occupational Safety & Health Rev. Comm'n*, 489 F.2d 1257, 1267 n.38 (D.C. Cir. 1973)); *see also Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, at *5 (No. 87-1067, 1991) ("[I]t is the supervisor's duty to protect the safety of employees under his supervision."), *aff'd*, 978 F.2d 744 (D.C. Cir. 1992) (unpublished); *J.K. Butler*, 5 BNA OSHC 1075, at *2 (rejecting affirmative defense where "employees involved were not engaged in a frolic of their own but rather were literally complying with the foreman's instruction"); *c.f.*, *United Contractors Midwest, Inc.*, 26 BNA OSHC 1049, at *2 (No. 10-2096, 2016) (excavation work rules adequately communicated where, among other things, safety construction manager observing the worksite on the day of the inspection told the site supervisor to ensure the excavation was properly sloped to account for its depth).

In addition to Bowden's lack of safety instructions to C.S., the Court also concludes that Scales, despite being the crew's leader, did not ensure from the ground that C.S. and Bowden followed Entergy's safety rules. *See N&N Contractors, Inc.*, 18 BNA OSHC 2121, at *6 (No. 96-0606, 2000) (evidence of lax safety program where foreman "permitted his crew to be exposed to fall hazard without proper fall protection" and foremen "were involved in . . . violative conduct"), *aff'*d, 255 F.3d 122 (4th Cir. 2001). For all of these reasons, the Court concludes Entergy's on-the-job training did not effectively communicate the company's safety rules.

Lastly, Entergy contends it communicated safety rules through JHAs. (Ex. R-20, Ex. R-21 (JHA for job at issue); Tr. 265-66.) However, Entergy points to no specific document referring to or communicating Entergy's specific safety rules regarding PPE, IPE, and cover-up. Instead, Entergy relies upon cursory language in the JHA for the job giving rise to the accident—"use PPE and all proper cover-up and IPE"—rather than communicating the company's specific safety rules. (Ex. R-21 at 378.) As noted above, the action plans directed crews to specifically document hazard mitigation and PPE to be used in the JHAs. However, these documents contain generic instructions, and none for donning and redonning PPE or directing employees to use IPE or cover-up in certain situations.[22] Therefore, the JHAs fell short of communicating Entergy's PPE, IPE, and cover-up rules to C.S. or otherwise informing him of their requirements. *See Propellex Corp.*, 18 BNA OSHC 1677, at *6; *Hamilton Fixture*, 16 BNA OSHC 1073, at *20 (No. 88–1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) ("While the existence of an adequate written work rule on glove use is not disputed, the evidence is insufficient to establish that Hamilton effectively communicated and enforced this specific rule."). The generic instructions or warnings may have been sufficient had Entergy previously and clearly communicated its Safety Rules to C.S., but the company failed to do so during his orientation and evaluation, despite C.S. having had minimal exposure to Entergy's practices and standards. Put another way: reminders to follow safety rules are of little value when an employer has not previously and clearly communicated those rules.

The Commission has long recognized that a work rule must be "communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, at *2 (No. 12354, 1977). The record

[22] *See, e.g.* Ex. R-20 at 358 ("wear all PPE,"), 359 ("cover-up[,] wear all PPE [and] IPE[,] cover all potentials"), 360 ("wear required PPE and use proper IPE"), 363 ("PPE/ IPE"), 365 ("don PPE"), 367 ("wear gloves[,] sleeves"), 371 ("proper cover [and] PPE").

does not establish Entergy did so. Although C.S. had minimal exposure to Entergy's practices and standards, Entergy did not place him in the 300-level boot camp cover-up class before it allowed him to work on energized phases or confirm he clearly understood the scope of Entergy's rules, which were less restrictive than ASC rule and MDR's cover-up procedures. Similar to the orientation provided to C.S., the record does not establish Entergy communicated its specific rules governing PPE, IPE, and cover-up to him in his evaluation. Taken together, the Court concludes Entergy failed to communicate the specific work rules at issue to C.S.

Entergy Did Not Effectively Enforce Work Rules When Violations Were Discovered

Entergy argues it enforces its rules through disciplinary action, up to and including termination, and that evidence in the record, including the introductory pages of the safety manual, supports its position. (Resp't's Br. at 11) (*citing* Ex. R-1; Tr. 271-76). Entergy asserts Benyard recommended terminating Bowden for violating a fatal safety rule, attempting to hide the violation, and being untruthful to investigators. (Resp't's Br. at 12) (*citing* Tr. 285-87; Ex. R-35). Benyard also recommended firing Scales for failing to follow safety rules as a crew leader. (Resp't's Br. at 12) (*citing* Tr. 283-84; Ex. R-37.) In addition to Bowden and Scales, Entergy contends it has "consistently enforced its safety rules by imposing discipline both before and after the incident" for violations of IPE and PPE rules. (Resp't's Br. at 12-13) (*citing* Tr. 277-80; Ex. R-39 at 430, 434, 458, 462). Therefore, according to Entergy, it has established it enforced its safety rules through disciplinary action it took both before and after the accident at issue. (Resp't's Br. at 13.)

The Secretary argues Entergy cannot establish Bowden effectively enforced the company's work rule because Bowden not only authorized but also participated in the violation of the work rule requiring rubber sleeves and failed to correct C.S.'s violation despite being within arm's reach. (Sec'y's Br. at 17-19.) Anticipating the Secretary's argument, Entergy asserts this one factor—a supervisor's participation in a safety violation—is not determinative and does not preclude the company from proving its unpreventable employee misconduct affirmative defense. (Resp't's Br. at 14.) While the Court agrees that it is not determinative, the Fifth Circuit has held, "a supervisor's direct authorization and participation in the violation of a work rule is strong evidence of lax enforcement." *H.B. Zachry Co. v. Occupational Safety & Health Rev. Comm'n*, 638 F.2d 812, 819 (5th Cir. 1981) (employer has "heightened duty" to ensure proper conduct of supervisors); *Floyd S. Pike*, 576 F.2d at 77 (rejecting unpreventable employee misconduct defense where supervisor

was among employees violating work rule and company did not look into the incident or take corrective action). The same is true under Commission precedent. *See TNT Crane*, 2022 WL 2102910, at *8 (rejecting unpreventable employee misconduct defense where, among other things, employer had not shown it disciplined employees for violating safety rule prior to accident at issue and supervisor, as well as entire crew, were involved in violative conduct.)

Here, the supervisors' misconduct, especially Bowden's failure to follow safety rules and correct C.S.'s violation, is evidence of Entergy's lax enforcement of its safety program. Entergy can overcome the inference of lax enforcement and meet its heightened burden by showing it consistently enforced the safety rules at issue. *See TNT Crane*, 2022 WL 2102910, at *8 (requiring employer to establish it enforced its safety program by disciplining supervisor engaged in violative conduct, as well as showing it previously disciplined employees for violating relevant rules).

Entergy terminated Bowden after its investigation revealed he provided misleading and false statements to investigators regarding safety rules he violated, which contributed to C.S.'s fatality. (Ex. R-35 at 415.) Entergy was also prepared to terminate Scales, but he resigned or retired before the company could do so. (Ex. R-37 at 420; Tr. 159. 281-82.) Therefore, the Court concludes Entergy enforced its safety program after the accident by terminating the supervisors who violated its safety rules. *C.f.*, *Angel Bros.*, 18 F.4th at 832-33 (finding employer failed to effectively enforce safety program where, among other things, it failed to discipline supervisor for entering an unsafe trench after it received a citation); *Cooper/T. Smith Corp.*, 2020 WL 1692541, at *4 (finding employer failed to effectively enforce safety program where, among other things, it had not disciplined the supervisor as of the hearing date and did not formally discipline other employee who violated safety rule).

Entergy claims it regularly disciplined employees prior to the accident for violating its safety rules. It points to approximately 20 incidents prior to this accident in which employees were either suspended or terminated due to safety violations. (Resp't's Br. at 12-13) (*citing* (*citing* Tr. 277-80; Ex. R-39.) Most of those incidents, however, did not involve the safety rules governing PPE and IPE. Entergy also cites four instances where it disciplined employees for violations of its PPE and IPE rules. (Resp't's Br. at 13) (*citing* Tr. 278-79; Ex. R-39 at 430, 434, 458, 462). However, none of that evidence shows Entergy was disciplining employees for violations of Rules 5A.6, 5C.1, and 5C.2, the rules specific to the violative conduct cited.[23] The employer claiming

[23] In the first instance, Entergy suspended an employee in September 2021 for untangling a primary wire

the defense must show "that it monitored its site supervisors' actual worksite compliance with the specific safety requirements at issue here." *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097 at *3 (No. 98-1748, 2000); *see also Hamilton Fixture*, 16 BNA OSHC 1073, at *20 ("the evidence is insufficient to establish that Hamilton effectively communicated and *enforced this specific rule*.") (emphasis added). Thus, based upon the record before it, the Court concludes Entergy has failed to prove it effectively enforced Rules 5A.6, 5C.1, and 5C.2, the specific rules relevant to the cited conduct.

For all the foregoing reasons, the Court concludes Entergy has not met its burden of establishing it effectively communicated and enforced the safety rules at issue, and therefore, the Court rejects Entergy unpreventable employee misconduct defense. *See Sw. Bell Tel. Co.*, 277 F.3d 1374, at *5 ("This court has declined . . . in the context of a claimed affirmative employee misconduct defense, to relieve an employer of liability where a general safety program exhibited deficiencies in communication regarding specific violations at issue, or as to the employee who committed the violation."); *Cooper/T. Smith Corp.*, 2020 WL 1692541, at *1 (citing *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1308 (11th Cir. 2013); *Precast Servs., Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995)) ("Adequate enforcement is a critical element of the [unpreventable employee misconduct] defense."), *aff'd*, 106 F.3d 401 (6th Cir. 1997) (unpublished).

IV. CLASSIFICATION

A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *ConAgra Flour*, 15 BNA OSHC 1817, at *7 (No. 88–2572, 1992). The Secretary contends Item 3 is a serious because the violation—C.S.'s failure to wear rubber

that had become stuck on a company truck without wearing proper PPE in violation of Part 4A of company rules. (Ex. R-39 at 430.) In the second instance, Entergy suspended an employee in December 2019 for failing to use an insulating mat as a second layer of protection in addition to rubber gloves while he performed an underground service job in violation of Rule 5A.1 of the Entergy Safety Manual, which requires employees to wear appropriately rated rubber gloves. (*Id.* at 434.) In the third instance, Entergy suspended an employee in March 2019 for checking voltage in a meter base without wearing rubber gloves or safety glasses in violation of Rules 3A.5 and 4A.a.1 (*Id.* at 458.) Lastly, Entergy terminated an employee in January 2018 attempting to install a single conductor grounding jumper violating Rule 5A.1, among others, which falls under Part 5A discussing rubber gloves and sleeves use. (*Id.* at 462, 463.)

sleeves—resulted in his death. (Sec'y's Br at. 19.) Entergy does not challenge the classification of Item 3. The fatality in this case demonstrates "a substantial probability of death or serious physical hard could result" from a violation of the standard. *See Trumid Constr. Co.*, 14 BNA OSHC 1784, at *5 (No. 86-1139, 1990) ("fatality demonstrates the seriousness of the trench support violation"). Therefore, the Court concludes Item 3 was properly classified as serious.

V. PENALTY DETERMINATION

Under the Act, the Secretary has the authority to propose a penalty. *See* 29 U.S.C. §§ 659(a). In Item 3, the Secretary proposed the maximum penalty of $13,653 for the serious violation.[24] However, in section 17(j) of the Act, Congress vested the Commission with the final "authority to assess all civil penalties provided in [the Act]," which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995).

Section 17(j) of the Act requires that when assessing penalties, "due consideration" must be given "to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (citation omitted). "Gravity is typically the most important factor in determining an appropriate penalty and depends upon the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). For the reasons indicated *infra*, considering Entergy's size, the gravity of the violations, the lack of good faith, and its history, the Court concludes the appropriate penalty for Item 3 is $13,653.

[24] Section 17(b) of the Act mandates that any employer who has received a citation for a serious violation "shall be assessed a civil penalty of up to $7,000 for each such violation." 29 U.S.C. § 666(b). However, in 2015 Congress passed the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act), which requires federal agencies to adjust civil penalties for inflation each year. *See* Bipartisan Budget Act of 2015, Pub. L. 114-74, § 701, 129 Stat. 584, 599 (2015) (codified at 28 U.S.C. § 2461 note). The Inflation Adjustment Act provides that the increased penalty levels apply only to civil monetary penalties "which are assessed after the date the increase takes effect." *See* Section 6 of the Inflation Adjustment Act, 28 U.S.C. 2461 note (Nov. 2, 2015). At the time of the citation, the maximum penalty for a serious violation was $13,653. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments for 2021, 86 FR 2964 (Jan. 14, 2021); *see also* 29 C.F.R. § 1903.15(d)(3).

The Secretary determined the gravity of the violation was "high." In making this assessment, the Secretary concluded the severity was "high" because injuries resulting from violations and contacting the energized phases could result in serious injuries, up to and including death, and the probability was "greater" because Entergy linemen, including C.S., Bowden, and [redacted], were exposed to the hazards of energized phases in their day-to-day work. (Tr. 218-19; Ex. C-7 at 097.) The accident demonstrates contact with an energized potential would result in a high likelihood of serious injury or death. Following proper PPE, IPE, and cover-up procedures required by Entergy's safety rules and the standard would have provided C.S. and Bowden with "immediate, direct relief from the hazardous" conditions presented by the energized potentials. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, at *10 (No. 87–692, 1992). As a large employer with multiple crews, many employees could be exposed to this hazard, and the record establishes both C.S. and Bowden employees were exposed here for about three minutes. (Tr. 298.) Therefore, the Court agrees with the Secretary that Item 3 merits a high-greater gravity finding.

The Secretary did not propose a reduction of the penalty for size because Entergy has about 14,000 employees. The Court agrees with that determination. The Secretary also did not propose an increase or reduction in the penalty related to Entergy's history because OSHA had not issued a citation to Entergy within the past five years. The Court also agrees with that determination.

The Secretary did not propose a reduction in the penalty for good faith, due to the nature of the fatality and some deficiencies in Entergy's safety program. The Court agrees with the Secretary's determination. "With regard to good faith, the Commission has given consideration to various factors including the employer's safety and health program and its commitment to assuring safe and healthful working conditions." *Capform, Inc.*, 19 BNA OSHC at 1379 (citation omitted). Here, although the record shows that at the time of the accident, Entergy had a comprehensive written safety program, as well as a written enforcement program, it failed to effectively communicate or enforce the relevant safety rules, which resulted in a violation the Court has characterized as high gravity. Under these circumstances, the Court concludes a reduction for good faith would be inappropriate. Accordingly,

VI. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Item 3, is **AFFIRMED** and a penalty of $13,653 is **ASSESSED**.

SO ORDERED.

/s/

JOHN B. GATTO, Judge

Dated: December 26, 2023
Atlanta, GA