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

SECRETARY OF LABOR, Complainant, v. ARMSTRONG UTILITIES, INC. d/b/a ARMSTRONG CABLE SERVICES, Respondent.	OSHRC Docket No. 18-0034

ON BRIEFS:

Jessica L. Cole, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Michael S. Glassman, Esq. and Hayley L. Geiler, Esq.; Dinsmore & Shohl LLP, Cincinnati, OH
For the Respondent

DECISION

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

Armstrong Utilities, Inc. d/b/a Armstrong Cable Services is a telecommunications company that provides broadband internet, television, and telephone services, mostly in rural areas. An Armstrong crew was installing a new fiber-optic cable on utility poles in Bellville, Ohio, when a lineman contacted a 7.8kV electrical line. Following the incident, the Occupational Safety and Health Administration inspected the worksite and issued Armstrong a one-item serious citation alleging a violation of 29 C.F.R. § 1926.416(a)(1), a general requirement of Subpart K (Electrical) of the Construction standards. The Secretary amended the citation to allege in the alternative a serious violation of 29 C.F.R. § 1910.268(b)(7), a provision of the Telecommunications standard. Administrative Law Judge John B. Gatto affirmed the Secretary's alternative allegation and assessed a $11,407 penalty.

For the following reasons, we conclude that the Secretary failed to establish the knowledge element of the alleged violation and therefore vacate the citation.

BACKGROUND

On July 12, 2017, a four-member crew employed by Armstrong was installing fiber-optic cable below an energized electrical line along a mile-long stretch of road in a rural area of Bellville, Ohio. The crew's work involved attaching the fiber-optic cable to steel wire that had been previously installed on the utility poles by another Armstrong crew. Each crew member, including foreman Brian Hilderbrand, was assigned a specific task. Hilderbrand flagged traffic in the road, while Bob Stroup drove a bucket truck with an aerial lift on the road along the path of the utility poles, and Travis Reed unspooled the cable from a cart onto the ground. The fourth crew member, R.M., rode in the truck's bucket and strung the cable along the steel wire between utility poles. This required R.M. to attach the cable to the bucket using a metal clamp with a hook at the end (known as a "becky"), which pulled the cable along while the truck traveled down the road.

Because of the wooded terrain around the utility poles, Stroup had to stop the truck approximately every 30 feet so that R.M. could boom the bucket up into the trees where he would throw a weighted ball attached to the unclamped becky with "mule tape" through the trees; this allowed R.M. to pull the fiber-optic cable along the path of the poles. After throwing the ball, R.M. would boom the bucket out of the trees and Stroup would drive the truck toward the next pole. Once the truck was repositioned, R.M. would boom back up into the trees, locate and grab the tape on the weighted ball, then pull both the becky and cable through the trees.

At the time of the incident, R.M. was working between utility poles 17 and 18, both of which had T-arms and were spaced about 300 feet apart.[1] Shortly before, Hilderbrand saw him throw the weighted ball and start to retrieve it. Hilderbrand then turned and walked to the top of the hill to observe traffic, roughly 30 yards from R.M. When Hilderbrand reached the top of the hill, he heard R.M. make contact with the 7.8kV energized line, which the parties stipulated was ten feet, five inches (125 inches) above the fiber-optic cable at pole 17; four feet, nine inches (57

[1] On a pole with T-arms, the two electrical lines (one is energized and the other is "neutral") hang on the outside of the arms, and the steel wire and fiber-optic cable hang below, from the middle of the pole.

inches) above at the mid-span; and five feet (60 inches) above at pole 18.[2] R.M. suffered electrical shocks and burns.[3]

DISCUSSION

To establish a violation, the Secretary must show by a preponderance of the evidence "that the cited standard applies, there was a failure to comply with the standard, employees were exposed to the violative condition, and the employer knew or could have known of the violative condition with the exercise of reasonable diligence."[4] *Aerospace Testing All.*, No. 16-1167, 2020 WL 5815499, at *2 (O.S.H.R.C., Sept. 21, 2020) (citing *Briones Util. Co.*, 26 BNA OSHC 1218, 1219 (No. 10-1372, 2016); *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982)). On review, Armstrong argues that the judge erred in affirming the § 1910.268(b)(7) violation and specifically challenges the judge's findings with respect to noncompliance, exposure, and knowledge.[5]

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[2] Despite the parties' stipulation to these measurements, the judge gave them "little weight," finding that "[t]he record does not indicate that the measurements taken three months later . . . were an accurate indication of the actual measurements on the day of the accident." This was plain error—the parties stipulated to these measurements and the Secretary never disputed their accuracy for purposes of the citation. *See Fed. Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, 942 F.2d 1032, 1038 (6th Cir. 1991) ("Stipulations voluntarily entered by the parties are binding, both [on the trial court and on the appeals court].").

[3] The record does not establish what caused R.M. to breach the minimum approach distance (MAD) and contact the energized line.

[4] In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission 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). The worksite here was in Ohio, which is within the Sixth Circuit, and Armstrong's headquarters are in Pennsylvania, which is within the Third Circuit. *See* 29 U.S.C. § 660(a) (employers may seek review in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or in the District of Columbia Circuit); 29 U.S.C. § 660(b) (Secretary may seek review in the circuit where the violation occurred or in the circuit in which the employer's principal office is located).

[5] Armstrong does not challenge the judge's determination that the provision cited by the Secretary in the alternative applied here. The company does argue that if the Commission affirms the alleged violation, it was the result of unpreventable employee misconduct. Given our conclusion that the knowledge element of the Secretary's case has not been established, we do not reach the company's affirmative defense. *See Mountain States Tel. & Tel. Co.*, 9 BNA OSHC 2151, 2152 (No. 13266, 1981) ("Unpreventable employee misconduct is an affirmative defense [to be considered after] . . . conclud[ing] that the Secretary has made out a prima facie case of a violation.").

I. Noncompliance and Exposure

For 2Kv to 15Kv power lines, § 1910.268(b)(7) requires that an employee maintain a 24-inch minimum approach distance (MAD) "unless" one of the provision's enumerated exceptions has been implemented: (1) the employee is wearing insulated gloves or otherwise guarded; (2) the lines are insulated or grounded; or (3) the lines are deenergized.[6] 29 C.F.R. § 1910.268(b)(7). Here, there is no dispute that none of these exceptions were implemented by Armstrong.

The judge concluded that the Secretary established noncompliance because R.M. breached the MAD when he contacted the energized line. On review, Armstrong claims that this finding amounts to strict liability because "there is absolutely no evidence that *any* action or inaction by Armstrong failed to ensure that workers did not violate the 24[-]inch safe approach distance."[7] We reject the company's argument. Armstrong failed to comply with the cited requirements

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[6] Section 1910.268(b)(7) states:

> *Approach distances to exposed energized overhead power lines and parts.* The employer shall ensure that no employee approaches or takes any conductive object closer to any electrically energized overhead power lines and parts than prescribed in Table R-2, unless:
>
> > (i) The employee is insulated or guarded from the energized parts (insulating gloves rated for the voltage involved shall be considered adequate insulation), or
> >
> > (ii) The energized parts are insulated or guarded from the employee and any other conductive object at a different potential, or
> >
> > (iii) The power conductors and equipment are deenergized and grounded.

[7] Relying on *Diebold v. Marshall*, 585 F.2d 1327, 1333 (6th Cir. 1978), Armstrong also argues that the Secretary failed to prove " 'the existence of a specific and technologically feasible means of compliance' " because the means of compliance the Secretary claims would have prevented R.M.'s breach of the MAD—inspecting the mile-long "run" (which encompasses the road and the surrounding conditions, including the utility poles, wires, and trees) and communicating changes in the distance between the energized line and steel wire to employees—are found nowhere in the statute or interpretive guidance and contradict industry practice. As explained below in our discussion of knowledge, we conclude that Armstrong acted reasonably in conducting a pre-work inspection and providing sufficient instructions to its employees. Nonetheless, the company failed to comply with § 1910.268(b)(7), which is a hybrid performance and specification standard in that it sets forth the MAD the employer "shall ensure" (the performance part of the standard) unless the employer provides protective equipment for its employees or takes certain protective measures (the specification part of the standard). Absent the use of any of the protective measures specified in the standard, the company had notice that it must otherwise "ensure" R.M. did not breach the 24-inch MAD, which it failed to do given that contact was made.

because none of the standard's protective measures were in place when R.M. breached the MAD and contacted the energized line, and the company did not otherwise "ensure" he did not breach the MAD.[8] This finding does not render Armstrong strictly liable for the alleged violation because noncompliance is but one element of the Secretary's prima facie case; here, the Secretary must also prove exposure, as well as knowledge. *See S. Pan Servs. Co.*, 25 BNA OSHC 1081, 1090 (No. 08-0866, 2014), *aff'd*, 685 F. App'x. 692 (11th Cir. 2017) (unpublished).

As to exposure, the Secretary must show either that employees were actually exposed to the violative condition (through injury or death) or that it is reasonably predictable they have been or will be in the zone of danger posed by the condition. *Dover High Performance Plastics, Inc.*, No. 14-1268, 2020 WL 5880242, at *2 (O.S.H.R.C., Sept. 25, 2020); *see also Aerospace Testing*, 2020 WL 5815499, at *3 n.3. Here, the judge found "[t]here can be no dispute that [R.M.] was exposed to the hazard" because he "made physical contact with the electrical [line]."

Armstrong argues that R.M.'s exposure to the energized line was not reasonably predictable because he was not required to breach the MAD to do his job. But the Secretary "need not show that an employee's exposure was 'reasonably predictable' where there is actual exposure." *George J. Igel & Co. v. OSHRC*, 50 F. App'x. 707, 713 (6th Cir. 2002) (unpublished); *see also Par Elec. Contractors, Inc.*, 20 BNA OSHC 1624, 1626 (No. 99-1520, 2004) ("[W]ounds described in his autopsy report indicate that . . . [the electrocuted employee] also was clearly

[8] While Commissioner Laihow agrees that Armstrong failed to comply with § 1910.268(b)(7), she cannot help but notice that the standard, as written, coupled with current industry standards and practices, leaves employers like Armstrong in a very difficult position. Without considering the MAD, the specific compliance measures set forth in subsections (i)-(iii) pose their own complex challenges. Although subsection (i) contemplates the use of personal protective equipment, Armstrong Safety Coordinator Joe Bellis testified that the bucket trucks Armstrong employees work from cannot be insulated because the insulation interferes with communications. Likewise, subsection (ii) theoretically allows employers to comply with the standard by providing employees with insulated blankets, but this seems impractical for the type of work being performed here—indeed, employees would have to insulate long distances of energized line or constantly place and remove insulating material as they progressed down the road. Doing that would no doubt impact efficiency and, more significantly, could be counterproductive to safety. Finally, Bellis' undisputed testimony made clear that power companies are unwilling to deenergize their lines while telecom work is being performed, rendering subsection (iii) moot. In sum, Commissioner Laihow recognizes that the standard's three specified alternatives may not always be feasible or practical. In this case, however, none of these alternatives were implemented and the MAD was breached.

exposed to the hazardous condition."). The parties stipulated that R.M. "sustained electrical shock injuries after contacting" the energized line. Accordingly, we find that the Secretary has established actual exposure.

II. Knowledge

To establish knowledge, the Secretary must show by a preponderance of the evidence "that the employer knew of the hazardous condition, or could have known through the exercise of reasonable diligence." *Mountain States Contractors, LLC v. Perez*, 825 F.3d 274, 283 (6th Cir. 2016) (citing *Carlisle Equip. Co. v. Sec'y of Labor*, 24 F.3d 790, 792-93 (6th Cir. 1994)). Here, the Secretary alleges that with the exercise of reasonable diligence, Armstrong could have known of the violative condition.

"When considering the question of reasonable diligence, the [Commission] looks to a number of factors including: 'an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.' " *Mountain States Contractors*, 825 F.3d at 285 (quoting *Kokosing Constr. Co. v. OSHRC*, 232 F. App'x. 510, 512 (6th Cir. 2007) (unpublished)); *see also Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015). The Commission also considers whether the employer has adequate work rules and training programs and has adequately supervised employees. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001) (citing *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-0692, 1992)).

In concluding that the Secretary established constructive knowledge here, the judge found that "reasonable diligence required Armstrong to inspect their run for significant changes in working conditions, such as the easily-observable 5-foot" decrease in distance between the steel wire and electrical line where R.M. was working when he contacted the energized line.[9] The judge also relied on testimony from Armstrong's expert witness to find that "it would be important for the worker in the bucket to know about such a decrease in the distance . . . ." On review,

[9] As the judge recognized, the knowledge of a supervisor or foreman can be imputed to the company. *See Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994) (unpublished) (imputing constructive knowledge of supervisor to the company); *see also Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-0360, 1992) (consolidated) (same). The judge, however, did not explicitly find that Hilderbrand, as the foreman on this worksite, failed to exercise reasonable diligence and that this failure could be imputed to Armstrong. As our analysis demonstrates, this is contrary to the record and how the parties argued this aspect of the case.

Armstrong maintains that Hilderbrand exercised reasonable diligence based upon his pre-work inspection and the related instructions he gave the crew. The company also disputes the Secretary's claim that it lacked an adequate work rule to address the violative condition. For the following reasons, we agree with Armstrong that it exercised reasonable diligence and could not have known of the violative condition.

Pre-Work Inspection and Instructions

The judge agreed with the Secretary that Armstrong's pre-work inspection should have included consideration of the "gap" between the electrical line and steel wire. Specifically, the judge faulted Hilderbrand's inspection given his testimony that linemen typically work with the steel wire at shoulder level, which the judge found places "an employee's head above the lower wire and within the 40-inch gap between [the wire and the] line[] and at least as close as 32 inches from the electrical [line], leaving little margin of error to maintain a minimum 24-inch clearance." On review, Armstrong disputes the judge's calculations as they relate to this project because, according to the company, the electrical line and steel wire were at least 57 inches apart at their nearest point and even if a lineman's head were 32 inches from an energized electrical line, it would still be outside the required 24-inch MAD.

Armstrong is correct that the purported 32-inch clearance between a lineman and an electrical line does not reflect the conditions present at the worksite. The minimum stipulated distance—57 inches at mid-span—exceeded the MAD, and at pole 17 near where the incident occurred, the stipulated difference was 125 inches. Hilderbrand testified that he was specifically able to estimate the clearance between the electrical line and steel wire at poles 17 and 18 because it was "visually apparent" and that the clearance was "at least eight feet" (96 inches) at the location of the incident, which was "a little more" than 50 feet from pole 17. Donald Tacik, former vice-president of operations for Armstrong and current president of a sister company within the Armstrong corporate group, also testified that when he visited the worksite after the incident, "it was measured that we were 92 inches away from the electrical line at 66 feet, from Pole 17, which is where the accident occurred." Thus, Hilderbrand reasonably assumed during his pre-work inspection that the clearance would not place R.M. within the MAD. *See Tex. A.C.A., Inc.*, 17 BNA OSHC 1048, 1051 (No. 91-3467, 1995) ("[T]he employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions . . . .") (emphasis in original).

We also reject the Secretary's claim on review that the foreman's pre-work inspection was inadequate because "when the employees drove the [run] before beginning their work, Mr. Hilde[r]brand was not even in the same truck as the rest of the crew[.]" Although Hilderbrand did drive the lead truck while Stroup and R.M. followed him in the bucket truck, the foreman made clear that after they drove the run, he and the crew took time to review the project's blueprints[10] and discuss the work to be done:

> I got the prints out and I showed [R.M.], and I even asked him, I said did you see the run on the way in, and [R.M.] and Stroup both clarified yes, they said look like a lot of trees. I said, yes, it [isn't] the most pleasant run but we've done this before plenty of times, and I even explained to him, I said at the top of the hill is where the T-poles start. I said to be extra careful up there.

Indeed, Hilderbrand further testified that "[R.M.] was in the bucket sitting there, [and he] got out. I laid the prints right on the bucket and showed him the run." And Hilderbrand emphasized to the crew: "[W]hen we get to this next pole is where the cross arms start and the pine trees. I said to be careful through there." Given these actions, it is insignificant that the crew rode in two vehicles rather than one during their pre-work inspection. As such, we find that Armstrong made "a reasonable effort to anticipate the particular hazards to which" R.M. was exposed at the worksite. *Automatic Sprinkler Corp. of Am.*, 8 BNA OSHC 1384, 1387 (No. 76–5089, 1980).

As for Hilderbrand's instructions to the crew, we disagree with the judge that reasonable diligence required the foreman to inform R.M. of the decrease in distance between the electrical line and steel wire at poles 17 and 18. As Armstrong points out on review, the judge himself found that the change in distance was "easily-observable." Moreover, the record supports Armstrong's claim that its employees were experienced and trained to avoid electrical lines, including R.M., who as Armstrong points out had "a history of safe practices and was following company procedures and industry standards immediately preceding the incident." *See S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1895 (No. 12-1045, 2016) (specificity of an employer's instructions to an employee must be commensurate with the employee's training and experience).

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[10] Armstrong's design and draft department creates these blueprints, which show where segments begin and end, the height of all attachments on the poles, as well as where Armstrong will attach its hardware. Tacik testified that the prints also "show the poles relative to streets, roads, [and] other major obstacles that have been identified in the fielding process, in the field engineer's work."

According to Hilderbrand's undisputed testimony, R.M. had performed fiber-optic cable installation work for 23 years and had experience working in trees and on hilly terrain, both at Armstrong and as a tree trimmer before he joined the company. While Hilderbrand acknowledged that the terrain for this particular project was "bad," he also testified that his crew, including R.M., worked among hills and trees most of the time. In addition to his extensive work experience, there is no dispute that R.M. had attended several Armstrong safety meetings and training sessions regarding electrical hazards that directly communicated the approach distance requirements set forth in § 1910.268(b)(7), Table R-2. Hilderbrand was not only aware of R.M.'s training and experience when he gave the crew instructions after they drove the run but had himself attended some of the same training sessions as R.M.

Moreover, Armstrong's expert witness, James Orosz, an electrical engineer with experience in the telecommunications industry, testified that "R.M. was provided adequate training, both classroom type training and on-the-job training, [and] his record [shows] . . . that he was an experienced and accomplished, qualified communications employee." According to Orosz, "the worker is trained to identify the hazard," such as lines of different voltages, and "the two-foot approach distance would be the common" MAD for work in telecommunications. He further opined that Armstrong did not require R.M. to do anything he was not trained to do. *Cf. N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1472 (No. 96-0721, 2001) (supervisor knew employee was not a trained electrician yet permitted him to work near energized line). Although, as noted, the judge relied on Orosz's testimony that the line clearance would have been "important" for R.M. to know, the expert qualified this statement, testifying that it is "not necessarily required, because regardless of the work, the worker has that two-foot approach distance, and must stay in the communications space." Orosz further testified that it was R.M. who had the better vantage point to assess the change in distance between the electrical line and the steel wire, as a lineman's knowledge of such a change comes from "observing the line itself, while the worker is an elevated position."

The record simply does not support the Secretary's claim that information about the decrease in distance was critical for Hilderbrand to identify for R.M. given these circumstances. The Secretary presented no evidence or expert testimony to rebut Orosz's opinion or otherwise show that R.M.'s training or work experience was insufficient to allow him to make this evaluation. *See LJC Dismantling Corp.*, 24 BNA OSHC 1478, 1481-82 (No. 08-1318, 2014) (in arguing

employer should have discounted employee's prior training and given more specific instructions, Secretary has the burden to show the employer should have been aware employee's training was deficient and what instructions would have been necessary under the circumstances). And there is no evidence R.M. had a poor safety history or previously failed to follow safety requirements such that Armstrong should have anticipated that R.M. would breach the MAD. *See id.* (absent evidence of employee failing to comply with safety requirements, Secretary has not demonstrated employer should have anticipated cited provision would be violated).

In sum, R.M. was an experienced lineman, and Armstrong had adequately trained him to recognize and avoid the electrical hazards associated with his work. *See MasTec N. Am., Inc.*, No. 15-1574, 2021 WL 2311875, at *3 (O.S.H.R.C., Mar. 2, 2021) (finding supervisor, who was aware of lineman's four years of experience, completed training, and history of no accidents, exercised reasonable diligence in relying on the lineman not to breach the MAD without properly insulating the energized line); *S.J. Louis Constr.*, 25 BNA OSHC at 1895.

Work Rule

The Secretary claims on review that although Armstrong had "an informal rule requiring employees to stay forty inches away from energized lines," the rule "does not account for accidental contact" and is merely a "general warning" insufficient for installing cable "in areas like [this one], where it is difficult to see the power lines." Armstrong responds that its training program provides "unmistakably clear guidance that [employees] must remain at least 24 inches from high-voltage electrical lines." We agree with Armstrong.

The evidence shows that Armstrong "model[ed]" its work rule "on the applicable requirements." *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1425 n.6 (No. 90-1106, 1993). Armstrong's safety manual states that employees must stay a minimum of 24 inches away from electrical lines with a voltage range between 2Kv and 15Kv. In short, Armstrong's work "rule reflects the requirements of the cited standard." *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003) (consolidated). Accordingly, we find that the rule is sufficient for purposes of reasonable diligence. *See MasTec*, 2021 WL 2311875, at *5. *Cf. Pride Oil Well Serv.*, 15 BNA OSHC at 1815 (finding safety program inadequate when employer "failed to formulate and implement adequate work rules and training programs" to ensure employee was informed of appropriate safety considerations).

CONCLUSION

For all of these reasons, we conclude that the Secretary failed to establish that Armstrong had knowledge of the violative condition. Accordingly, we reverse the judge and vacate the citation.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: September 24, 2021

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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ACTING SECRETARY OF LABOR,[1] Complainant, v. ARMSTRONG UTILITIES, INC. d/b/a ARMSTRONG CABLE SERVICES, Respondent.	OSHRC Docket No. **18-0034**

DECISION AND ORDER

Attorneys and Law firms

Adam Lubow, Attorney, Office of the Solicitor, U.S. Department of Labor, Cleveland, OH, for Complainant.

Michael S. Glassman, Attorney, Dinsmore & Shohl, LLP, Cincinnati, OH, for Respondent.

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

I. INTRODUCTION

This case arose from an accident that resulted in severe electrical shocks and burns to an employee of Armstrong Utilities, Inc., d/b/a Armstrong Cable Services ("Armstrong") when it was installing a new fiber optic cable on utility poles in Belleville, Ohio. Armstrong was subsequently cited[2] by the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") for an alleged "serious" violation of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 651–678, for violating 29 C.F.R. § 1926.416(a)(1),

[1] Pursuant to Federal Rule of Civil Procedure 25(d), the Acting Secretary of Labor, is automatically substituted as the party in interest for the former Secretary of Labor.

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

one of the general requirements contained in Subpart K (Electrical) of the Construction standards, with a proposed penalty of $12,675.00. After Armstrong timely contested the citation, the Secretary of Labor ("Secretary") filed a formal complaint with the Commission alleging both a violation of 29 C.F.R. §1926.416(a)(1) and, in the alternative, a violation of 29 C.F.R. §1910.268(b)(7).[3]

The parties stipulated Armstrong is an employer engaged in a business affecting commerce within the meaning of section (5) of the Act, 29 U.S.C. § 652(5). (Compl. ¶ 1, Answer ¶4). The Court also concludes it has jurisdiction of this action under section 10(c) of the Act, 29 U.S.C. § 659(c).[4] A bench trial was held in Cleveland, Ohio. Pursuant to Commission Rule 90, 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.[5] For the reasons indicated *infra*, the Court concludes all the elements necessary to prove a serious violation of § 1910.268(b)(7) have been established by the Secretary. Accordingly, the citation is **AFFIRMED** as a serious violation and Armstrong is **ASSESSED** a civil penalty of $11,407.00.

II. BACKGROUND

[3] At the informal conference held by OSHA on January 3, 2018, Armstrong argued its activities did not constitute Construction, but rather General Industry, and therefore 29 C.F.R. §1910.268 should be the governing standard. (Sec'y's Br. at 2-3.) The Secretary asserts the proper standard is §1926.416(a)(1) but that the record developed at trial establishes a violation under either standard. (*Id.* at 3.)

[4] Armstrong contested jurisdiction on the grounds the Secretary failed to file a complaint within twenty days of receipt of Armstrong's notice of contest and did not request an extension of time in advance of the date on which the complaint was due to be filed, "as required by 29 C.F.R §2200.5." (Pretrial Order at ¶4.) The Court finds no merit in this argument. The applicable version of Commission Rule 5 in effect at the time of the filing of the Complaint provided that "in exigent circumstances, an extension of time may be granted even though the request was filed after the designated time for filing has expired." 29 C.F.R §2200.5 (2018). However, "the party requesting the extension must show, in writing, the reasons for the party's failure to make the request before the time prescribed for the filing had expired." (*Id.*) The Secretary met this requirement when he asserted in his motion that "due to the lapse in government funding, the filing deadline was inadvertently missed." More importantly, the requirement to file a complaint arises under the Commission's procedural rules and is not jurisdictional. *Asarco, Inc. El Paso Division*, 8 BNA OSHC 2156 (No. 80-1028, 1980); *Howard Electric Co.*, 11 BNA OSHC 1091 (No. 80-2111, 1982). The Commission has long held a citation should not be dismissed for failure of a party to comply with procedural rules. *Asarco*, 9 BNA OSHC at 2163 (citations omitted). As the Commission held in *Asarco*, "the policy in law in favor of deciding cases on their merits generally prevails unless the party's noncompliance results from its own contumacious conduct or results in prejudice to the opposing party." *Id.*, *citing Duquesne Light Co.*, 8 BNA OSHC 1218 (Nos. 78-5034, et. al., 1980).

[5] 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.

Armstrong is a telecommunications provider, primarily in rural areas. (Tr. 275.) Armstrong regularly utilizes crews of four workers to install new fiber optic cable on overhead utility poles in rural areas. (Tr. 279.) One worker installs the cable, certain other wires, and hardware from an elevated bucket truck, while a second worker slowly drives the truck down the road. (Tr. 32-33.) A third worker flags traffic and watches for road obstructions. (*Id.*) The final member of the crew manages the spool of cable being installed. (*Id.*; *see also* Pretrial Order, Attach. C at ¶2.)

The work crews install the cable on the utility poles in a three-stage process. (Tr. 289.) First, the crew installs hardware known as "attachers" on the utility pole. (Tr. 289-92.) The crew pulls a steel strand through the space where the cable will later go and attaches the steel strand to the attachers. (*Id.*) Second, the crew pulls the cable alongside the steel strand and attaches two wires together with metal boxes known as "quad blocks." (Tr. 292-294, 333-34.) A quad block is a metal locking mechanism, which clamps to the steel strand and the fiber optic cable holding them in place. (Tr. 65.) Finally, the crew lashes the steel strand and the cable together. (Tr. 294-95.) Performing one phase of the three-stage installation process is referred to as a "run." (Tr. 321.) Runs last for part or all of a workday and can be up to 3 miles long. (Tr. 335.) To string the cable during the second stage of the process the cable is attached to the elevated bucket using an attachment called a "becky" (a metal clamp with a hook attached to the end). (Tr. 331-33, 65.) The truck and the elevated bucket slowly pass down the road, pulling the cable along. (Tr. 333-34.) The worker in the bucket then attaches the quad blocks at certain distances to hold the cable close to the steel strand. (*Id.*)

To pass through wooded areas during a run, workers throw a weighted ball through the trees. The weighted ball is attached to the becky by material known as "mule tape." After throwing the ball through the wooded area, the worker in the bucket booms backwards out of the trees, the truck then drives slightly forward, and then booms back into the trees. The worker then grabs the mule tape to retrieve the weighted ball and manually pulls the becky and the cable through the trees. This process is repeated until the worker passes through the trees and the becky can again be attached directly to the bucket for direct pulling. (Tr. 334-35.)

On July 12, 2017, a mobile crew of Armstrong employees was installing a new fiber optic cable on utility poles owned by Ohio Edison on Riggle Road in Belleville, Ohio. (Pretrial Order, Attach. C ¶1; *see also* Ex. C 11; Tr. 37, 152-153). Riggle Road is located in a rural area,

and surrounded by hilly, treed terrain. (Tr. 25). The crew was composed of four employees: Foreman Brian Hilderbrand, who, when the incident occurred, was standing in the roadway monitoring work and watching traffic; Bob Stroup, who was driving the boom truck; Travis Reed, who was manning the cable spool; and [redacted], who was stationed in the bucket of the aerial lift. (*Id.* at 32-33). In preparation for the July 12, work on Riggle Road, Hilderbrand surveyed Riggle Road, laid out the necessary road signs, and assessed the layout of the terrain. (*Id.* at 40). During the span of the run on Riggle Road, the poles transitioned from stacked I-Poles to T-Poles. (*Id.* at 39).

Around 2:30 P.M. on July 12, [redacted] sustained electrical shock injuries while in the aerial lift truck after contacting the 7800-volt primary line that was outside the telecommunications space. (Tr. 33; *see also* Pretrial Order, Attach. C at ¶3). At the time of his injury, [redacted] was working between Poles 17 and 18, which were both T-Poles. (*Id.* at ¶4; *see also* Tr. 35). Prior to the incident, [redacted] was in the process of retrieving the weighted ball to string fiber optic cable to the pre-existing metal strand. (Tr. 33.)

Two days later, Compliance Safety and Health Officer Corrine Majoros initiated an inspection. Significantly, Majoros did not take any measurements during the inspection of the approach distance between the primary electrical wire and the fiber optic cable for each of the relevant poles. According to measurements taken by Armstrong over three months later on October 30, 2017, at Pole 17 the primary electrical wire was located 33 feet, 4 inches, above the ground and the fiber optic cable was located 22 feet, 11 inches above ground, a difference of 10 feet, 5 inches between the two wires. Mid-span between Poles 17 and 18, the primary wire was located 22 feet, 1 inch, above the ground and the fiber optic cable was located 17 feet, 4 inches, above the ground, a difference of four feet, 9 inches between the two wires. At Pole 18, the primary electrical wire was located 22 feet, 6 inches, above the ground and the fiber optic cable was located 17 feet, 6 inches, above the ground, a difference of 5 feet between the two wires. (Pretrial Order, Attach. C at ¶5). The record does not indicate that the measurements taken three months later on October 30 were an accurate indication of the actual measurements on the day of the accident. Therefore, the Court gives little weight to this proffered evidence.

III. ANALYSIS

Under the law of the Sixth Circuit where the action arose,[6] "[t]o establish a *prima facie* violation of the Act, the Secretary of Labor must show by a preponderance of the evidence that '(1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence.'" *Mountain States Contractors, LLC v. Perez*, 825 F.3d 274, 279 (6th Cir. 2016) (*quoting Carlisle Equip. Co. v. Sec'y of Labor & Occupational Safety*, 24 F.3d 790, 792–93 (6th Cir. 1994) (internal citation omitted)).

A. Alleged Violation

The Secretary asserts in the amended complaint and citation that Armstrong violated one of the general requirements of the construction standards found at 29 C.F.R § 1926.416(a)(1) or, in the alternative, the telecommunications standard found at 29 C.F.R. §1910.268(b)(7), when its employees working in proximity to a 7800-volt electric power circuit were exposed to electrocution and electrical shock injuries. (*See* Compl. at Ex. A.) The cited construction standard mandates that "[n]o employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means." 29 C.F.R. § 1926.416(a)(1). The cited telecommunications standard mandates unless one of the enumerated exceptions applies (none of which Armstrong asserted), the "employer shall ensure that no employee approaches or takes any conductive object closer to any electrically energized overhead power lines and parts than prescribed in Table R-2[.]" 29 C.F.R § 1910.268(b)(7).

1. Whether Cited Standards Apply to the Facts

[6] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). The citation was issued in Ohio, which is in the Sixth Circuit. Armstrong's corporate office is in Pennsylvania, which is in the Third Circuit. In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission 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) (citation omitted). Since both parties cited to Sixth Circuit precedent in their briefs, it is highly probable that this decision would be appealed to that circuit. Therefore, the Court applies the precedent of the Sixth Circuit in deciding this case.

"The [Construction] standards . . . apply . . . to every employment and place of employment of every employee engaged in construction work." 29 C.F.R. § 1910.12(a). "Construction work" is defined in §1910.12 as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b). The telecommunications standards "apply to the work conditions, practices, means, methods, operations, installations and processes performed at . . . telecommunications field installations, which are located outdoors or in building spaces used for such field installations." 29 C.F.R. §1910.268(a)(1). The Secretary argues the work conducted by Armstrong's crew was construction work. (Sec'y's Br. at 8.) Armstrong argues that the construction standard "is wholly inapplicable to Armstrong's telecommunications workers engaged in 'field work' as specifically defined in the telecommunications standard[.]" (Resp't's Br. at 23.)

The Secretary argues "[t]here is scant precedent under Section 1910.268 whether work performed in the telecommunication industry constitutes construction work." (Sec'y's Br. at 10.) According to the Secretary, "[t]he only cases discussing this particular issue with any particularity, *Pac. Gas & Elec. Co.*, 2 O.S.H. Cas. (BNA) 1692 (O.S.H.R.C. 1975) and *Gulf States Utilities Co.*, 12 O.S.H. Cas. (BNA) 1544 (O.S.H.R.C. 1985) turned on whether replacement of wires and structures constituted 'improvement' or 'maintenance.' " (*Id.*) The Court finds no merit in the Secretary's argument since both cited cases involved performing work on electric power lines, not telecommunications lines.

However, in a Commission case actually on point, *United Telephone Company of the Carolinas*, which implicated both the construction and telecommunications standards, the Commission held that at the time the citation in that case was issued, "the erection and removal of telephone poles and the transfer of lines was considered 'construction work' and subject to all pertinent construction standards." *United Tel. Co. of the Carolinas*, 4 BNA OSHC 1644, 1646 (No. 4210, 1976). Subsequent to the issuance of the citation in that case the Secretary adopted the telecommunications standard, and therefore, the Commission held "erecting and removing telephone poles and transferring lines were reclassified at § 1910.268(a)(1) as 'field work'" and "the condition for which Respondent was cited is now regulated by § 1910.268(b)(7) and § 1910.268(j)(4)(i) and (ii)." *Id.*

In adopting the telecommunications standard, the Secretary explained in the preamble that "they will prevail over any general standards in Part 1910" if they "contain standards which

apply to unique employment conditions in telecommunications[.]" 40 Fed. Reg. 13,437 (1975). Thus, the Commission "interpret[ed] the Secretary's actions as preempting the applicability of certain general construction standards by adopting standards specifically drafted for the telecommunications industry." *United Telephone*, 4 BNA OSHC at 1647.

The telecommunications standard defines "field work" as "the installation, operation, maintenance, rearrangement, and removal of conductors and other equipment used for signal or communication service, and of their supporting or containing structures, overhead or underground, on public or private rights of way, including buildings or other structures." 29 C.F.R. §1910.268(a)(1). Armstrong engages in the telecommunication industry, providing digital cable services to residential and commercial customers, including television, telephone, and high-speed internet services. To provide these services, the company's operations included field work installing fiber optic cable on existing utility poles owned by other utility companies.

Therefore, the Court concludes the cited telecommunications standard prevails over the cited construction standard. Applying *United Telephone*, the condition for which Armstrong was cited was reclassified as field work in §1910.268(b)(7) and can no longer be considered construction work under § 1910.12(a). The Court concludes the cited telecommunications standard did apply, but the cited construction standard did not apply, and the portion of the amended citation asserting a violation of the construction standard must be vacated.

2. Whether Cited Telecommunication Standard Was Violated

This standard requires that "[t]he employer shall ensure that no employee approaches or takes any conductive object closer to any electrically energized overhead power lines and parts than prescribed in Table R-2[.]" 29 C.F.R. §1910.268(b)(7). The parties stipulated this case involved a 7800-volt primary line. As referenced in the standard, Table R-2 provides, for voltages between 2,000 and 15,000 volts, the minimum approach distance is 24 inches. 29 C.F.R. §1910 Subpart R, Table R-2. The Secretary argues, and the Court agrees, as "[redacted] actually came in to contact with the electrical wire," he was clearly less than 24 inches away from the wire. (Sec'y's Br. at 16.) Therefore, the Secretary has established Armstrong violated the telecommunications standard since the approach distance was closer than 24 inches.

3. Whether Employees Had Access to Hazardous Condition

The hazard was the 7800-volt electrical wire. Armstrong's employees were working in a vehicle-mounted bucket lift that had the ability to contact the overhead electrical wire and

[redacted] actually made physical contact with the electrical wire. There can be no dispute that [redacted] was exposed to the hazard. Therefore, the Secretary has established employee access to the hazardous condition.

4. Whether Armstrong Knew or Could have Known of Hazardous Condition With the Exercise of Reasonable Diligence

The fourth and final condition for a prima facie violation of the Act requires that the employer knew of the hazardous condition or could have known through the exercise of reasonable diligence. *Mountain States Contractors, LLC v. Perez*, 825 F.3d at 283–84 (*citing Carlisle Equip. Co.*, 24 F.3d at 792–93). The knowledge of a supervisor or foreman, depending on the structure of the company, can be imputed to the employer. *Id.* (citations omitted). The Secretary alleges Armstrong, "with the exercise of reasonable diligence, could have known the assigned work would bring [redacted] close to the live electrical wire and therefore it could have taken the necessary measures to ensure the hazard was eliminated." (Sec'y's Br. at 17-18.) The Court agrees.

There is no dispute the gap between the two wires decreased by more than 5 feet between the two poles and was several feet shorter at the location of the incident than it had been at the previous pole. (Pretrial Order, Attach. C at ¶5; *see also* Tr. 301, 308, 399-400.) Armstrong's expert opined it would be important for the worker in the bucket to know about such a decrease in the distance between the telecommunications wires and the electrical wires. (Tr. 430.)

Foreman Hildebrand admitted he and his crew typically worked with the wires at shoulder level. (Tr. 385.) Work in such proximity would place an employee's head above the lower wire and within the 40-inch gap between lines and at least as close as 32 inches from the electrical wire, leaving little margin of error to maintain a minimum 24-inch clearance." (*Id.*) The Court agrees with the Secretary that reasonable diligence required Armstrong to inspect their run for significant changes in working conditions, such as the easily-observable 5-foot change in wire distance between Poles 17 and 18. With the exercise of reasonable diligence on July 12, 2017, Armstrong could have known of this hazard. Therefore, the Court concludes the Secretary established that Armstrong possessed knowledge of the violative conditions. Thus, the Court concludes the Secretary has established a *prima facie* violation of the Act as it relates to the cited telecommunications standard.

B. Serious Violation

A serious violation exists "if there is a substantial probability that death or serious physical harm could result from a condition which exists[.]" 29 U.S.C. § 666(k). "To find a serious violation the Secretary need not show that an accident was probable, only that an accident was possible." *Mayflower Vehicle Sys., Inc. v. Chao*, 68 F. App'x 688, 693 (6th Cir. 2003) (citation omitted). Here, the telecommunications standard violation was a serious one since there was a substantial probability that death or serious physical harm could result from exposure to electrocution and electrical shock injuries.

C. Affirmative Defense[7]

"In the Sixth Circuit, in order to successfully assert [the unpreventable employee misconduct] defense, an employer must show that it has a thorough safety program, it has communicated and fully enforced the program, the conduct of the employee was unforeseeable, and the safety program was effective in theory and practice." *Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003). Further, "to be effective, the safety program must be designed such that, if followed, it would prevent the violations at issue." *Id.*

Whether Armstrong Had a Thorough Safety Program

Armstrong had a comprehensive 88-page safety manual that covered a variety of safety topics including, working aloft, aerial lift safety, personal protective equipment, electrical safety, concern for safety, hazards in the field, and vehicle safety. (Ex. R-1 at 5-6.) The electrical safety portion of the safety manual expressly stated that "no employee shall approach or take any conductive object closer to any electrically energized overhead power lines than" the distances established in Table R-2 of § 1910.268, which is listed within the policy. (*Id.* at 49; *see also*, Tr. 133, 173-174, 209, 218-220, 238). Armstrong had a thorough safety program.

Whether Armstrong Communicated the Safety Program

At the beginning of their employment, Armstrong employees attended a New Employee Safety Orientation, which covers a range of topics including a review of the Armstrong safety manual and electrical safety training. (Tr. 221.) Armstrong's safety program covered topics such as recognizing different types of power lines, recognizing voltages, conductivity and insulation, voltage testing, and respecting minimum distances from energized lines. (Tr. 89, 218-221, 238-

[7] Although Armstrong raised numerous affirmative defenses in its Answer, it only preserved in the Pretrial Order the "isolated employee misconduct defense" and lack of jurisdiction.

239; *see also* Ex. R2). Armstrong's employees also had access to safety policies and safety training on its intranet site. (Tr. 230). Armstrong also required employees to attend Climbing school, boot camp, annual bucket truck training,[8] monthly safety meetings[9] and job specific safety training, which all covered electrical safety training, including maintaining safe distances from energized power lines. (Ex. R-5). Additionally, Armstrong brought in outside training on electrical safety through presentations by power companies and industry produced-videos. (Tr. 236-237).

[redacted] and Hilderbrand were long-term employees, who attended numerous trainings on electrical safety and safety awareness, including annual bucket truck training. (Tr. 238-239; *see also* Ex. R-2; Ex. R-4; Ex. R-6 at 1-9, 20, 29).[10] [redacted] and the other aerial lineman received annual training on electrical safety, including review of the safe approach distances to electrical power. Several of the training sessions reviewed the safety manual or recited the Armstrong safety manual's rule on maintaining safe distances to overhead power lines. (Ex. R-2 at 11; Ex. R-4 at 26; Ex. R-6 at 2-3, 30; *see also* Tr. 85-86, 221.) Armstrong effectively communicated its safety program.

Whether Armstrong's Safety Program Was Effective in Theory and Practice

Armstrong had an effective safety policy in theory since its program expressly prohibited employees from approaching or taking any conductive object closer to any electrically energized overhead power lines than the distances established in Table R-2 of § 1910.268, which is listed within the policy. There is no evidence the electrical safety portion of its safety manual had ever been violated prior to the accident and Supervisor Hilderbrand testified he never observed employees within 24 inches of an overhead high-voltage line. (Tr. 356.) Armstrong had an effective safety policy in practice.

Whether Armstrong's Safety Program Was Designed Such That, if Followed, It Would Prevent Violation at Issue

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[8] Bucket truck training was required before an employee can operate a bucket truck (aerial lift) and was renewed on an annual basis. (*Id.* at 221). In bucket truck training, employees were required to review the safety manual and related policies. (*Id.*)

[9] Monthly safety meetings rotate through a variety of topics, including driving safety, sprain and strain prevention, hazcom, and electrical safety. (Tr. v. 1, 22 J-223). Electrical safety training is also covered in monthly meetings, sometimes as a specific topic and sometimes within other topics, such as awareness and hazard recognition. *(Id.)*

[10] Hilderbrand, [redacted], and Stroup all had over 20 years of experience working in the aerial cable installation group at Armstrong. Reed had 6 years of experience. *(Id.* at 49-55).

Armstrong maintained a well-established work rule regarding the minimum proximity to which an employee is permitted to work near different types of power lines, which, if followed, would have prevented the incident for which Armstrong was cited. Therefore, Armstrong's safety program was designed such that, if followed, it would prevent the violation at issue.

Whether Conduct of [redacted] Was Unforeseeable

[redacted] was an employee with a history of safe practices and therefore Armstrong argues, and the Court agrees, it had no reason to suspect [redacted] would not comply with its safety rules on the day of the accident. Therefore, the Court concludes [redacted]'s conduct was unforeseeable.

Whether Armstrong Fully Enforced Program

Site foremen were responsible for ensuring that safety policies were followed and conducted safety inspections on a regular basis. (Tr. at 214-215). In addition to the foreman working at a site as part of the crew, front-line managers, mid-level managers, and upper-management also went out into the field to look for compliance with safety requirements and to look for violations. (Tr. 214-215.) However, while Armstrong proffered testimony that management conducted unannounced site visits and disciplined employees for infractions (*id.*), the Secretary argues, and the Court agrees, Armstrong did not introduce any documentation showing it effectively enforced the rules when violations were discovered.

In *Precast Servs., Inc.*, 17 BNA OSHC 1454 (No. 93-2971, 1995), the Commission noted that adequate enforcement is a critical element of the defense. Therefore, "[t]o prove that its disciplinary system is more than a 'paper program,' an employer must present evidence of having actually administered the discipline outlined in its policy and procedures." *Id.* at 1455. Thus, in *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003), the Commission held an employer's unpreventable employee misconduct argument "fails without any specific evidence to corroborate its assertion that employees were disciplined." Here, as in *Rawson*, although Armstrong asserted that employees were disciplined, its employee misconduct defense fails since it proffered no specific evidence to corroborate this assertion.

IV. PENALTY DETERMINATION

When the citation was issued on December 6, 2017, the maximum statutory penalty for a serious citation was $12,675.00.[11] *See* Department of Labor Federal Civil Penalties Inflation

[11] As originally written, the Act mandated that "[a]ny employer who has received a citation for a serious

Adjustment Act Annual Adjustments for 2017, 82 Fed. Reg. 5373, 5382 (Jan. 18, 2017); 29 C.F.R. §1903.15(d)(3)(2017). The Secretary proposed the maximum penalty for the violation.

Under Section 17(j) of the Act, the Commission is empowered to "assess all civil penalties provided in this section, giving due consideration 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; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citing Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992)). The Court concludes the violation was properly classified at the highest gravity (high severity and greater probability) since the electrocution injury that resulted from [redacted]'s contact with a 7800-volt electrical wire could result in death or, as it did here, serious physical injury.

As to good faith, the Court finds a 10% reduction is appropriate, based upon Armstrong's extensive safety program, which included a comprehensive 88-page Safety Manual that covered a variety of safety topics including electrical safety. With respect to the size of the business, neither party provided evidence of the number of employees Armstrong had at the time of the accident and therefore, Armstrong is not entitled to a penalty reduction for size. Further, Armstrong was not entitled to a credit based upon its lack of history of previous violations since the company had not been inspected in the previous five years. Thus, giving due consideration to the size of the business, the gravity of the violation, good faith, and history, the Court finds the appropriate civil penalty to be imposed is $11,407.00. Accordingly,

V. ORDER

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violation . . . shall be assessed a civil penalty of up to $7,000 for each such violation." 29 U.S.C. §666(b). However, on November 2, 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74, sec. 701 (Inflation Adjustment Act), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 as previously amended by the 1996 Debt Collection Improvement Act (collectively, the "Prior Inflation Adjustment Act"), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The Inflation Adjustment Act required agencies to: (1) Adjust the level of civil monetary penalties with an initial "catch-up" adjustment through an interim final rule (IFR); and (2) make subsequent annual adjustments for inflation, no later than January 15 of each year.

IT IS HEREBY ORDERED THAT the citation is **VACATED** as to the alleged violation of 29 C.F.R. §1926.416(a)(1), is **AFFIRMED** as a serious violation of 29 C.F.R. §1910.268(b)(7), and Armstrong is **ASSESSED** and directed to pay to the Secretary a civil penalty of $11,407.00.[12]

SO ORDERED. **/s/**

JOHN B. GATTO, Judge

Dated: September 16, 2019
Atlanta, GA

[12] *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).