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

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).