UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BERWICK ELECTRIC COMPANY, Respondent.	DOCKET NO. 17-0099

Appearances:

Matthew Finnigan, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado
For Complainant

Chris Matthewson, Chris Matthewson Safety Consulting, Denver, Colorado
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

While installing a cable to energize a sulfur dioxide scrubber at the Ray Nixon power plant just outside of Colorado Springs, Colorado, one of Respondent's employees broke his arm while attempting to lift a cable. (Tr. 52). After learning about the injury, OSHA sent Compliance Safety and Health Officer (CSHO) Lisa Bennett to inspect the worksite on December 6, 2016. (Tr. 180). As a result of her inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging three violations of the Occupational Safety and Health Act of 1970 (the Act). OSHA alleged a single, serious violation of 29 C.F.R. §1926.21(b)(2) for failing to properly train its employees in the recognition and avoidance of unsafe conditions presented by the cable; and two other-than-serious violations of 29 C.F.R. §1904.7(b)(3) and 29 C.F.R. §1904.29(b)(1) for failing

to properly document workplace injuries in the OSHA 300 log, including the injury at issue in this case. For the training violation, Complainant proposed a total penalty of $4,310.00. No penalties were assessed for the record-keeping violations. Respondent timely contested the *Citation*, which brought the matter before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act.

The Chief Judge designated this matter for Simplified Proceedings pursuant to Commission Rule 203(a). *See* 29 C.F.R. § 2200.203(a). A simplified trial was conducted in Denver, Colorado on December 5, 2017. Five witnesses testified at trial: (1) [redacted], the injured electrician employed by Respondent; (2) CSHO Lisa Bennett; (3) Bill Tuten, Respondent's safety manager; (4) Eric Norman, Respondent's general foreman for the Ray Nixon project; and (5) John DeLuke, electrician and journeyman trainer for the International Brotherhood of Electrical Workers (IBEW). Both parties timely submitted post-trial briefs for the Court's consideration.

Jurisdiction & Stipulations

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 50). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties also stipulated to several facts, which were read into the record.[1] (Tr. 50–56).

1. The parties amended Stipulation Number 17 to remove all but the first two sentences as it was being read into the record. (Tr. 53–55).

Factual Background

Respondent was contracted by The Perry Group (PG) to install electric cable that would power a sulfur dioxide scrubber at the Ray Nixon Power Plant (RNPP), located just south of Colorado Springs, Colorado. (Tr. 74–75). The cable installation process is known as a "wire pull." (Tr. 75). The particular electric cable being pulled at RNPP was a three-part cable, roughly 3–4 inches wide, weighing approximately 11 pounds per linear foot. (Tr. 52, 82; Exs. C-9, R-4). About 1,000 feet of cable had to be run between the scrubber and the switchgear building. Therefore, the entire length of electric cable weighed close to 11,000 pounds. (Tr. 81; Ex. C-1).

A wire pull for this size cable could not be accomplished by merely dragging the cable across the ground; rather, it required a series of rollers, sheaves, and a tugger, which are all designed to pull the heavy cable while preventing the outer insulation of the cable from becoming damaged. (Tr. 79, 86, 162; Exs. C-8, C-10, C-11, C-12). In order to run 1,000 feet of heavy duty cable, Respondent and PG developed a plan for the wire pull. (Ex. C-1). On November 22, 2016, employees from PG and Respondent gathered to discuss how the wire pull would be accomplished. (Tr. 93). The meeting was run by PG, with input from Eric Norman, Respondent's on-site foreman. (Tr. 93–94). In addition to discussing the logistics of the pull, [redacted] testified that they also discussed the hazards involved in the wire pull, including pinch points, the impact of the cable's size, and that the job would be executed using the buddy system. (Tr. 91–92). According to [redacted], the buddy system was an unwritten policy required on this job by PG, and implemented by Respondent. (Tr. 94, 97). [redacted] also testified that the buddy system was a normal part of being an electrician, because many jobs require two people to accomplish. (Tr. 94–95). He admitted, however, that it is not something that is strictly defined or enforced. (Tr. 95–96). Indeed, other than being required to "always be working with our buddy at all times",

[redacted] testified not much else was said about its implementation, including how the buddy system related to handling this particular cable. (Tr. 89, 94, 170). This testimony was echoed by CSHO Bennett, who testified she did not learn much about the buddy system during her interviews, other than that two people needed to be working together at all times. (Tr. 191).

On November 23, 2016, [redacted] started his day welding a strut to support a cable tray, which is an elevated surface equipped with rollers designed to move the cable without friction. (Tr. 75–76, 103–104). At some point that morning, Nate Cinocco, another journeyman electrician, re-assigned [redacted] to the wire pull.[2] (Tr. 104). [redacted] had not participated in the Job Hazard Analysis for the wire pull earlier that morning, and did not sign the JHA for the purposes of being informed about the hazards of the job. (Tr. 105). Nevertheless, [redacted] relocated to a waterfall on the cable line, which is a point where the cable drops downward from a cable tray onto another set of rollers. (Tr. 84–85, 105; Ex. C-8). At this particular waterfall, the sheave had started tilting to the north side of the tray, which was causing a hitch in the movement of the cable. (Tr. 106–107).

In order to straighten the sheave, [redacted] decided that he needed a new piece of strut measuring approximately 6 inches. (Tr. 105). He directed his apprentice, Robert Luerssen, to cut a piece of strut that size, and then meet him back at the waterfall. (Tr. 105). While Mr. Luerssen was retrieving the strut, [redacted] determined that he should remove the section of cable from the sheave, and place it to the side on the cable tray, so they could install the new strut to adjust the sheave. (Tr. 105). To do this, [redacted] got into a man lift and positioned himself underneath the cable at the point where it came out of the sheave, about 15 feet above the ground. (Tr. 110, 120; Exs. C-6, C-12). Once he got into position, [redacted] crouched underneath the cable, and lifted

2. According to [redacted], Cinocco was not his supervisor but was just relaying instructions from Eric Norman, the on-site foreman for Respondent. (Tr. 105).

that section of the cable onto his shoulder. (Tr. 111–112). As soon as he lifted the cable out of the sheave wheel, the cable jerked down suddenly and crushed his arm against the railing on the basket of the man lift. (Tr. 112–113, 184).

Brian Riggs, Respondent's other site foreman, saw [redacted] working by himself in the lift just before the accident, and directed Brad Gann, another journeyman electrician, to go assist [redacted]. (Tr. 120–21). As Mr. Gann was approaching the lift, the cable shifted and fell onto [redacted]'s arm. (*Id.*). [redacted] was taken to the local hospital, diagnosed with a broken arm, and screws and plates were permanently inserted into his forearm to repair the injury. (Tr. 125–26, 156–57). According to [redacted], he was off work for approximately four or five days after the accident. (Tr. 127). After that, Bill Tuten brought him back to the office to perform light-duty paperwork for Respondent. (Tr. 127). It was another two months before [redacted] was able to perform regular electrician's work. (Tr. 127).

Two weeks later, on December 6, 2016, CSHO Bennett came to the worksite to perform an inspection. (Tr. 180). She conducted an opening conference with representatives of Respondent, Perry Group, and Colorado Springs Utility. (Tr. 181–82). She also interviewed individuals with knowledge of the incident. (Tr. 181). In addition to learning about the layout of the cable pull and the details of the accident, CSHO Bennett concluded that [redacted] had not been properly trained to recognize the hazards imposed by the suspended heavy duty cable (Tr. 186–87). Instead, based on her interviews and inspection, CSHO Bennett summarized Respondent's training and instructions to employees for this job as: (1) we are pulling heavy cable, (2) which will create pinch points, (3) so be sure to work with your buddy. (Tr. 188–91).

CSHO Bennett also reviewed Respondent's injury logs during her investigation. (Tr. 207; Ex. C-15). CSHO Bennett testified that she received information from Bill Tuten indicating that

[redacted] was off work for thirteen days as a result of the accident. (Tr. 213). The 300 log, however, indicated that [redacted] had been placed on restricted duty, a less severe classification. (Tr. 212; Ex. C-15). In addition, CSHO Bennett noted individual log entries were missing certain pieces of required factual information. (Tr. 213). Based on these findings, CSHO Bennett ultimately recommended, and Complainant issued, the violations alleged in this case.

Discussion

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

The facts of this case are largely undisputed. The parties agree that a planning/training session took place the day before the accident, and agree to the circumstances under which [redacted] was injured. In fact, the parties stipulated, among other things, that the cited standards applied to Respondent's work activities at all relevant times; that [redacted] was Respondent's employee at all relevant times; that [redacted] broke his right forearm while adjusting the cable at issue. (Tr. 50-52). The Court finds that Respondent is also deemed to have knowledge of the training it provided, and did not provide, to [redacted] and other employees related to this job. The only remaining questions are whether [redacted], was sufficiently trained to perform his work pursuant 29 C.F.R. §1926.21(b)(2), and whether Respondent's work-related injury documentation complied with 29 C.F.R. §§1904.7(b)(3) and 1904.29(b)(1).

Citation 1, Item 1

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

> 29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to the work environment to control or eliminate any hazard(s) or other exposure to illness or injury:
>
> a) On or about November 23, 2016, and at times prior, employees were exposed to struck-by, caught-in, and crushing hazards when manually lifting an electrical cable weighing 10.9 pounds per linear foot. The cable was being installed in a raceway on the outside of a building, 15 feet above grade. To install the cable a spool of the cable was set on an electric powered tugger next to a below-grade trough 40 feet from the elevated portion. The cable was run on rollers through the trough, and then up into the elevated raceway. To facilitate the cable pull, the cable was placed over a sheave with a free spinning wheel, at the end of the elevated raceway. Adjustments to the sheave required the cable to be removed from the wheel. Employees lifted the cable in and out of the wheel manually. During a manual move employees were exposed to the weight of more than 15 feet of cable and the dynamic forces on the cable along its entire span. One employee suffered a broken arm when he was supporting the cable on his hand and shoulder and the cable jerked. Workers were trained in the weight of the cable, but not in material handling methods to safely move the cable to complete required tasks.

Citation and Notification of Penalty at 6.

According to 29 C.F.R. § 1926.21(b)(2), "an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Capform, Inc.*, 19 BNA OSHC 1374 (No. 99-0322, 2001) (citing *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992)). The standard also requires employees be instructed on the content of regulations applicable to those hazards. *Id.* (citing *Superior Custom Cabinet Co.*, 18 BNA OSCH 1019, 1020 (No. 94-200, 1997)). Thus, in order to establish a violation of an OSHA training standard, Complainant must prove, by a preponderance of the evidence, that Respondent failed to provide the instructions a reasonably prudent employer would have given in the same circumstances. *See Compass Environmental, Inc.*, 663 F.3d 1164, 1169 (10th Cir. 2011) (citing *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993)). Such circumstances include "the specific conditions [at the worksite], whether those

conditions create a hazard, and whether the employer or its industry has recognized the hazard." *Id.* (citing *W.G. Fairfield Co.*, 19 BNA OSHC 1233 (No. 99-0344, 2000)).

According to [redacted] and Eric Norman, the pre-pull meeting on November 22, 2016 (the day before the accident) covered multiple safety topics, including the buddy system, the so-called "line of fire",[3] and pinch points. (Tr. 92, 266). As it was relayed to the Court, however, each hazard was addressed in the same way—use the buddy system. (Tr. 268). The following colloquy is instructive. In response to the Court's inquiries regarding how to adjust or move the cable, Norman responded:

> Yes. We talked about the pinch points, using your tool buddy to help you if it's too heavy. One thing that I like to stress is stop when unsure, you know, stop and ask your foreman or—your foreman, another tool buddy, you know, anybody that you're working with—stop when—you know, stop if you're unsure, and we'll get it figured out, you know, whatever the question may be, we'll get it figured out, get the answer, the solution.
>
> ….
>
> Referring to using your tool buddy, we had, you know, a lot of different sets of experience in that room on that crew. So when we're handling the cable, use a tool buddy to help lift because of the weight, and making sure that you're keeping body parts out from under the cable and out of the line of fire. As far as handling the cable, for adjusting, it's by hand.

(Tr. 268–69). Other than being admonished to rely on his buddy, [redacted] testified he did not recall receiving any instruction on the proper way to handle the cable, or specific instructions not to lift or adjust the cable by hand. (Tr. 89, 94).

Even though the wire pull had been mapped through the facility, including all cable trays, waterfalls, and sheaves, there was apparently no further discussion about how to handle the cable

3. According to Norman, the "line of fire" is "any kind of mechanical failure of any kind of equipment, rope, structure. If the cable did anything that was not what we expected it to do, we wanted to make sure that you were—you know, that each person did not put themselves in the way—in harm's way for any mechanical failure, anything—anything breaking or anything like that." (Tr. 267).

when it got stuck or needed to be moved. This is particularly problematic when one considers that Respondent's workforce consisted of electricians who had extensive wire pulling experience, as well as those who did not. (Tr. 269). Given its employees' wide range of experience, Respondent had an obligation to ensure that its training was both clear, and effectively communicated. *Capform, Inc.*, *supra*, 19 BNA OSHC 1374 (holding rules and training need not be written down so long as it is specific enough to advise employees of the hazards associated with their work and the ways to avoid those hazards). The Court finds Respondent failed in that obligation.

There is no question that the cable was extremely heavy, requiring an extensive system of pulleys and rollers to facilitate its movement. [redacted] and Mr. Tuten both testified the cable was also unwieldy due to the cold temperatures, which caused the cable to stiffen up. (Tr. 112–113, 255). Compounding these problems, Mr. Tuten admitted that Respondent had never performed a wire pull with a cable of this size before. (Tr. 290). Nor had he, as Respondent's safety manager, ever provided training related to wire pulls to Berwick employees. (Tr. 250–51). In fact, the training provided at the worksite was provided by Perry Group and was premised on its own policies and rules, not Respondent's. (Tr. 93, 251). The extent of the material handling training provided to Respondent's employees prior to the wire pull was "to do the buddy system." (Tr. 257). There was no discussion as to how this training applied in specific instances, nor any clarification as to when the use of a buddy was required or appropriate.

Mr. DeLuke and Mr. Tuten testified that cable adjustments are typically done by hand on most jobs; however, they also noted those pulls involved smaller cables. (Tr. 269, 318). It was not reasonable to assume that a general instruction to "use your buddy" would be sufficient to address the particular hazards imposed by the heavy cable at issue in this case, which all agree was larger and heavier than on Respondent's previous wire pulls. *See Deep South Crane and Rigging Co.*, 23

BNA OSHC 2099 (No. 09-0240, 2012) (holding that reliance on prior training on one type of crane was improper for the purposes of establishing the sufficiency of training on another, bigger crane).

The Court also notes that [redacted] was not originally assigned to participate in the actual pulling of the wire on the day of the accident; instead he was assigned to weld struts to support a cable tray. Although a JSA was available for this job activity, [redacted] did not participate in its development, did not review it, nor did he sign onto it. (Tr. 103; Ex. C-4 at 7). Although Mr. Tuten and [redacted] testified the content of the JSA was similar in kind to the group presentation from the day before, both admitted that the process of filling out a JSA is important because it "really gets your mind set on what you're about to do, on all the hazards involved." (Tr. 155, 255). Whether due to the incomplete nature of the original training meeting, the unusually large and heavy nature of this particular cable, or by virtue of [redacted]'s lack of familiarity with the wire pull JSA, it is clear his training did not prepare him to recognize or avoid the hazard of lifting the heavy cable onto his shoulder and moving it by hand.

This case is similar to the situation presented in *Capform, supra*. In that case, the employer provided oral instruction to two new employees on how to remove jacks that were used to support recently poured concrete slabs. The two employees received instructions on how to remove the jacks under normal circumstances, but their trainer apparently did not provide instructions on how to proceed when immovable obstructions were present. *Id.* The Commission found Respondent failed to provide adequate instruction because, if the trainer had inspected the work area ahead of time, he would have noticed "it might not be possible for the employees to remove all of the posts . . . in the manner in which he had instructed." *Id.* (citing *Automatic Sprinkler Corp.*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980) (an employer "must make a reasonable effort to anticipate the

particular hazards to which its employees may be exposed in the course of their scheduled work.")).

In similar fashion, Respondent essentially relied upon the work methods it had employed in previous wire pulls. The only significant difference in the training was the implementation of the buddy system, whose application was entirely subject to the interpretation of the individual employee(s). (Tr. 315–16). The problem, however, was this particular wire pull was not amenable to the standard practices Respondent typically employed. Mr. Tuten confirmed this point in response to questions from the Court:

> JUDGE DUNCAN: I think I heard [redacted] talk about Berwick's policy on this job and other jobs, to say clear of, you know, pinch points. And [redacted] explained to me that that was your body, your body parts, in relationship to a wire cable like this one. And I heard Mr. Norman talking about staying clear of the line and making sure that everyone is not in the line of sight or line of tension –
>
> TUTEN: Line of fire.
>
> JUDGE DUNCAN: -- line of fire.
>
> How do you reconcile that policy, which I've heard from several people today, with what I've heard from other witnesses today that says it is perfectly okay and acceptable to physically put your hands on a cable under tension and suspended in the air to shift it a few inches? Those two seem inconsistent to me, and I want to give you an opportunity to explain that.
>
> TUTEN: I would—I don't know if I have a good answer for that.
>
> JUDGE DUNCAN: Okay. Well, I'd like to know what your best answer is to that. You are the safety director for the company so you seem to be the appropriate person to ask.
>
> TUTEN: I think to address it from this situation with this size cable with the type of problem that they had with the sheave, okay, I think that work should have stopped, and it should have been reevaluated instead of moving forward. And I think the wrong decision was made to proceed with work.

(Tr. 294–95). Respondent's own safety manager determined they failed to adequately anticipate and address the hazards present during the wire pull; in particular, the need to move the cable to make adjustments at the sheave. Accordingly, in conjunction with the stipulations above, the Court

finds Complainant established the *prima facie* elements required to prove the violation of 29 C.F.R. § 1926.21(b)(2).

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

Respondent failed to provide adequate instruction on handling and moving a heavy duty cable, under tension, in an elevated position. Considering the weight of the cable and the locations where it was most likely to be handled, the Court finds that if an accident occurred, a serious injury would be the likely result. In this case, unfortunately, that possibility became a reality when [redacted]'s arm was crushed between the cable and a metal railing. Accordingly, the Court finds Citation 1, Item 1 was properly characterized as a serious violation of the Act.

Respondent Failed to Prove the Affirmative Defense of Unpreventable Employee Misconduct

In order to prevail on a claim of unpreventable employee misconduct, Respondent must show: (1) it had established work rules designed to prevent the violation; (2) it adequately communicated those rules to its employees; (3) it took steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096–97 (No. 10-0359, 2012). In other words, it is incumbent upon Respondent to "demonstrate that the actions of the employee were a departure from a uniformly

and effectively communicated and enforced workrule." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

The work rule Respondent bases its unpreventable employee misconduct assertion upon is the requirement of the "buddy system." Perry Group required the use of the buddy system policy at the power plant, not Respondent, although [redacted] acknowledged it is common in the industry. According to Mr. Tuten, Respondent does not have a hard and fast policy on this; rather, an electrician only knows to use the buddy system "[w]hen they're told to." (Tr. 251). The examples he gave, however, were not related to cable handling, but instead involved confined space entry and specific types of energized work per the National Fire Protection Association (NFPA). (Tr. 251). Further, in response to a question about whether Respondent provides guidance to foremen about when to require the use of the buddy system, Tuten responded, "I would say yes, but I don't know how often that happens. I know they do it." (Tr. 252). These are not the hallmarks of a uniformly and effectively communicated work rule.

During her investigation, CSHO Bennett also learned about a similar incident with this cable and a sheave that occurred the day before [redacted]'s accident. (Tr. 189). Apparently a sheave wheel was off-center and required an adjustment. (Tr. 189). According to Foreman Riggs, two employees were working in a man lift, one of the employees manually lifted the cable from the sheave, much like [redacted] did on the day of the accident. (Tr. 190). Thus, [redacted]'s actions appear to have been consistent with Respondent's normal practices. Therefore, the buddy system appeared to be little more than an admonition to have another employee present while performing work. Mr. Tuten and Mr. Norman also testified that they were unaware of any Berwick employee ever being disciplined for failing to comply with the buddy system rule. (Tr. 276, 293).

In addition to the foregoing, Respondent cannot prevail on the defense of unpreventable employee misconduct "where the employer's instructions were insufficient to eliminate the hazard even if the employee had complied with the instructions." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013 (citing *Brown & Root, Inc.*, 8 BNA OSHC 1055, 1060 (No. 76-3492, 1980)). It was unclear how the presence of a "buddy" would have enabled [redacted] to handle the cable in a safer, more appropriate manner. Accordingly, Respondent failed to establish the affirmative defense of unpreventable employee misconduct. Citation 1, Item 1 will be AFFIRMED.

Citation 2, Item 1a

> Complainant alleged a serious violation of the Act in Citation 2, Item 1a as follows:
>
> 29 CFR 1904.7(b)(3): The employer did not correctly classify work-related injuries or illnesses on the OSHA Form 300 or equivalent:
>
> a) On or about December 6, 2016, and at times prior, the employer did not correctly enter the following work-related injury on the 2016 OSHA Form 300 Log of Work-Related Injuries and Illnesses:
>
> Case 5 should have been marked in Column H, "Days Away from Work," but was marked in Column I, "Job Transfer or Restrictions."

Citation and Notification of Penalty at 7.

The cited standard states, "When an injury or illness involves one or more days away from work, you must record the injury or illness on the OSHA 300 Log with a check mark in the space for cases involving days away and an entry of the number of calendar days away from work in the number of days column." 29 C.F.R. 1904.7(b)(3). Consistent with the requirements of the recording criteria of 1904.7, the log indicates that only the most severe injury column should be marked. (Ex. C-15). So, if an employee, like [redacted], suffered an injury resulting in both days away from work and a subsequent restriction, the log should be marked to reflect only the days away from work, which is the more severe of the two.

[redacted] testified he was away from work for approximately four or five days following the injury. (Tr. 127). Following that period of time, [redacted] came back to the office, where he performed light-duty functions involving paperwork. (Tr. 127; Ex. R-12). In the OSHA 300 log, however, Mr. Tuten characterized [redacted]'s injury as "job transfer/restriction." (Ex. C-15). Mr. Tuten failed to correctly mark the appropriate injury classification. Thus, the Court finds Complainant proved an other than serious violation of 29 C.F.R. § 1904.7(b)(3).[4] Citation 2, Item 1(a) will be AFFIRMED.

Citation 2, Item 1b

> Complainant alleged a serious violation of the Act in Citation 2, Item 1b as follows:
>
> > 29 CFR 1904.29(b)(1): A log of all recordable work-related injuries and illnesses (OSHA form 300 or equivalent) was not completed in the detail as required by the regulation:
> >
> > a) On or about December 6, 2016, and at times prior, the OSHA 300 Log for 2016 was not completed in the detail required by the regulation, in that each entered case did not include all three of the required elements in Colum [sic] (F), "Describe injury or illness, parts of body affected, and object/substance that directly injured or made the person ill."

Citation and Notification of Penalty at 8.

The requirements of the cited standard are fairly simple: "You must enter information about your business at the top of the OSHA 300 Log, enter a one or two line description for each recordable injury or illness and summarize the information on the OSHA 300A at the end of the year." 29 C.F.R. § 1904.29(b)(1). In this item, Complainant contends Respondent is in violation because it did not include the full description for each injury as instructed at the top of the OSHA

4. While the Court finds a violation of the standard, it does not accept CSHO Bennett's testimony regarding the number of days away from work. The only evidence she provided regarding the number of days was that she "got a doctor's note or I heard from Mr. Tuten from a doctor's note" that [redacted] was unable to work for 13 days. (Tr. 213). Given the equivocal nature of her testimony, and her lack of memory regarding where the information came from, the Court instead credits [redacted]'s assessment of his time away, which amounted to approximately four or five days.

300 form, which identifies three separate pieces of required information: (1) injury or illness, (2) parts of body affected, and (3) the object or substance causing the injury or illness. (Ex. C-15). Respondent entries simply stated things like: "laceration rt. middle finger" and "fracture to right forearm." (Ex. C-15). For example, [redacted]'s injury entry did not identify the cable (or anything else) as the "object or substance causing" his broken arm. (Ex. C-15). Respondent failed to describe workplace injuries and illnesses on its OSHA 300 form in sufficient detail. Thus, the Court finds Complainant proved an other than serious violation of 29 C.F.R. § 1904.29(b)(1). Citation 2, Item 1(b) will be AFFIRMED.

Penalty

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

Complainant assessed a gravity-based penalty of $4,310.00 for Citation 1, Item 1. This penalty was calculated through the application of a 30% reduction based on Respondent's small size and an additional 15% reduction for quick-fix abatement, which was accomplished by the

time CSHO Bennett arrived at the worksite for the inspection.[5] CSHO Bennett determined the training violation was of medium severity because a broken arm is a condition that will likely result in missed workdays, but is also temporary in duration. (Ex. 201–202). Complainant did not provide Respondent any penalty reductions for history, even though they had been inspected in 2011 with a finding of no violations. (Tr. 203). Considering the totality of the circumstances discussed herein, the Court finds that a slightly reduced penalty of $3,000.00 is appropriate.

Order

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

1. Citation 1, Item 1 is AFFIRMED as a serious violation, and a penalty of $3,000.00 is ASSESSED;
2. Citation 2, Item 1(a) is AFFIRMED as other-than-serious violation with no penalty; and
3. Citation 2, Item 1(b) is AFFIRMED as other-than-serious violation with no penalty.

/s/

Date: July 13, 2018
Denver, Colorado

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

[5] After the accident, Respondent began using a forklift to move and reposition the cable, when necessary. (Tr. 135, 166-167).