Some personal identifiers have been redacted for privacy purposes.

**United States of America**
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CAPITOL CONCRETE CONTRACTORS, INC.,<br><br>Respondent. | OSHRC Docket No. 15-1823 |

Appearances:

Richard M. Moyed, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Kevin S. Mullen, Esq., Littler Mendelson, PC, Austin, Texas
For Respondent

Before: Administrative Law Judge Peggy S. Ball

# DECISION AND ORDER

## I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). In response to a report that one of Respondent's employees was admitted to a hospital due to a work-related injury, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite on August 31, 2015. (Tr. 16). Based on the observations and investigation of Compliance Safety and Health Officer (CSHO) Mark Moravits, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent, alleging one serious violation and one other-than-serious violation of the Act, with a

total proposed penalty of $10,800.00. Specifically, Complainant alleges Respondent's on-the-job training procedures for skid-steer operators placed trainers in harm's way, in violation of section 5(a)(1) of the Act. Complainant also alleges Respondent failed to contact OSHA within 24 hours of the hospitalization of one of its employees. Respondent timely contested the Citation.

The trial took place on July 13, 2016, in Austin, Texas. The only witness to testify was CSHO Moravits. At the close of Respondent's cross-examination of CSHO Moravits, Complainant rested its case. (Tr. 65). Respondent moved for a directed verdict, which was denied by the Court, and ultimately rested without presenting additional evidence or testimony. (Tr. 65–66). Both parties timely submitted post-trial briefs. After reviewing the sparse record produced in this case, the Court finds Complainant failed to establish either of the violations alleged in the Citation and Notification of Penalty.

## II. Jurisdiction

The parties submitted a Joint Stipulation Statement. The Stipulation states that Respondent is "an employer engaged in business affecting commerce within the meaning of section 3(5) of the Act" and that the "Occupational Safety and Health Review Commission has jurisdiction of this proceeding under Section 10(c) of the Act." (Ex. J-1).

## III. Factual Background

The facts of this case come entirely from the testimony of CSHO Moravits. Respondent did not present evidence but instead chose to rest its case on Complainant's failure to meet his burden of proof. Thus, the Court's findings of fact and conclusions of law hinge entirely on its assessment of the sufficiency of Complainant's evidence. As noted above, the Court finds Complainant failed to meet its burden of proof.

According to CSHO Moravits, Respondent notified OSHA of the hospitalization of one of its employees on August 28, 2015. (Tr. 15). When he reached out to Respondent, CSHO Moravits was told they were no longer working in Bastrop, so the parties arranged to meet on August 31, 2015, at Respondent's Liberty Hill Office. (Tr. 16). Respondent agreed to have the skid-steer, the operator, the injured trainer, and the superintendent available. On Sunday, Jordan Moore, Respondent's vice-president, informed CSHO Moravits that the skid-steer had been moved to a worksite in Georgetown, so the parties agreed to change the location and time of the meeting. (Tr. 16).

CSHO Moravits relayed the following facts about the incident, which occurred on August 26, 2015. During skid-steer operator training, the trainer, [Redacted], noticed the trainee lifted the bucket of the skid-steer into an elevated position, which was unusual because there was nothing in the bucket at the time. (Tr. 17–18). [Redacted] walked over to the skid-steer, reached into the cab while the loader bucket was still in a raised position and tried to point out the controls. (Tr. 18). As he was doing so, the bucket arms came down and fractured his wrist. (Tr. 18). According to CSHO Moravits' testimony, Carlos Sanchez, the worksite superintendent, took [Redacted] to a Concentra clinic and eventually to St. David's hospital.

With respect to the trainer's hospitalization, CSHO Moravits testified regarding what Sanchez told him. Sanchez purportedly told Moravits he had taken [Redacted] first to a Concentra clinic, which, in turn, referred Sanchez and [Redacted] to St. David's hospital. (Tr. 32). According to Moravits, Sanchez stated he helped [Redacted] get admitted to St. David's and waited around until [Redacted] was given a prognosis and started receiving treatment. (Tr. 33). Moravits could not say, however, when [Redacted] was admitted to the hospital, but, based on his conversations with Sanchez, he believed it occurred around noon on August 26, 2015. (Tr. 53). Although CSHO

Moravits testified about paperwork that would reflect the exact time of [Redacted]'s admission to the hospital, as well as the time of the report to OSHA, no such documents were introduced into evidence.

In response to the foregoing facts, Complainant issued a two-item Citation and Notification of Penalty.

## IV. Discussion

As noted above, Complainant's presentation of this case could most generously be characterized as perfunctory. In support of a $10,800 fine and two violations, Complainant's case-in-chief comprised 25 pages of direct testimony from CSHO Moravits.[1] Respondent only introduced one exhibit during its cross-examination of CSHO Moravits, but otherwise called no witnesses. Thus, the Court is presented with a fairly simple question: Is Complainant's evidence, standing alone, sufficient to meet his burden of proof with respect to two separate violations of the Act? The Court finds that it is not.

### A. Applicable Law

To prove a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005).

To establish a violation of an OSHA standard pursuant to 5(a)(2), Complainant must establish: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the

1. This page count reflects only the periods of time during which CSHO Moravits was under direct or redirect examination and does not include interludes for objections and rulings. As such, the total page count is likely lower.

employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

In both cases, Complainant's burden is the same: he has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

### B. Citation 1, Item 1

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

> OSH ACT of 1970 Section (5)(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees where employees were exposed to a struck by hazard from heavy equipment.
>
> On or about 26 August 2015, and at times prior thereto, an employee engaged in training operations for a new Skid-steer Loader operator would routinely approach the operational Loader at the construction jobsite and was exposed to a struck by hazard from the equipment.
>
> Feasible means of abatement for this hazard, among others, includes the following measure(s): 1) Follow the Manufacturer's Operation & Maintenance Manual for the Caterpillar Ski Steer Loader that explicitly warns in the safety section to keep bystanders away when operating. 2) Ensure clearance from the machine is maintained during operation. 3) Lower all mechanisms before approaching. 4) Power down the equipment before approaching. 5) Utilize brace for the Loader's lift arms when approaching while the bucket and arm are raised. 6) Conduct more yard training of new operators that covers the various controls, and provide a practical evaluation prior to allowing the operation of the Loader at any jobsite.

Citation and Notification of Penalty at 6.

### i. Complainant Failed to Prove the Existence of a Hazard

In order to determine whether Complainant established the existence of a hazard, it is important to clarify what conduct, exactly, Complainant contends is hazardous. *See Otis Elevator Co.*, 21 BNA OSHC 2204, 2206 (No. 03-1344, 2007) ("As part of her burden, the Secretary must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act . . . ."). Although [Redacted] was injured while reaching inside of the skid-steer cab, Complainant did not cite Respondent for that act; rather, Complainant expanded the scope of the citation to allege a more general hazard—approaching an operational skid-steer during the training process. (Tr. 42). So far as the Court can tell, this activity was characterized as hazardous because the trainer could presumably be struck by the skid-steer loader or its implements. Indeed, CSHO Moravits stated, "It's the fact that the trainer is next to a running fully functional skid-steer loader when the manual clearly states that there is no clearance for a person to be there and NIOSH also says bystanders are to be kept away from the machine." (Tr. 29).

Presumably, [Redacted] would have avoided breaking his wrist had he not approached the running skid-steer; however, extrapolating outward from avoiding his particular injury to a general prohibition against "approaching" a running skid-steer at all requires more than evidence that [Redacted] was injured when he reached into the cab. *See Arcadian Corp.*, 20 BNA OSHC 2001 (No. 93-0628, 2004) ("[T]he Commission has held that it is the hazard, not the specific incident that resulted in injury or might have resulted in injury, that is the relevant consideration in determining the existence of a recognized hazard."). The problem, though, is Complainant provided very little persuasive evidence with respect to the purported hazard.

In support of his argument that approaching an operational skid-steer was hazardous, Complainant relies upon three sources: (1) a NIOSH Alert entitled, "Preventing Injuries and Deaths from Skid-Steer Loaders"; (2) selected portions of the skid-steer operation manual; and (3)

the warning labels affixed to the skid-steer.[2] As discussed below, however, none of these documents either clarifies Complainant's allegation or substantiates the existence of the hazard as alleged.

With respect to the NIOSH Alert, Complainant places significant emphasis on the following warning at the beginning of the Alert: "WARNING! Workers who operate or work near skid-steer loaders may be crushed or caught by the machine or its parts." (Ex. C-2). Put simply (and unsurprisingly), there are hazards associated with working in or near skid-steer loaders. However, the Alert also recognizes that employees *must* work in or near skid-steers, and therefore states, "*If you operate or work near* skid-steer loaders, take these steps to protect yourself." (Ex. C-2) (emphasis added). For the most part, the Alert addresses the specific hazards of operating, entering, and exiting a skid-steer, which are not germane to the present analysis; however, the Alert also states that operators should "[k]eep bystanders away from the work area." (Ex. C-2).

Notwithstanding the cited passage, there is no general prohibition against approaching an operational skid-steer. Right before the list of safe operating procedures, the Alert recognizes that employees work near skid-steer loaders. (Ex. C-2). Although the Alert's procedures state that "bystanders" must be kept away from the "work area", those terms are left undefined, and Complainant provided no clarity as to how those terms should be interpreted other than to say that approaching a running skid-steer during training, as a general rule, is hazardous. Under this set of facts, it is not clear to the Court that [Redacted] (or any trainer) was a bystander, nor is it clear as to what constitutes the "work area". To clarify this problem, the Court highlights one of Complainant's proposed abatement methods: "Ensure clearance from the machine is maintained during operation." Citation and Notification of Penalty at 6. As with the term "work area",

2. Complainant also relies upon these sources to establish that the hazard was recognized.

Complainant failed to clarify what constitutes adequate "clearance",[3] and he failed to provide evidence indicating the specific manner in which Respondent's training procedures "routinely" failed to account for it. Indeed, CSHO Moravits admitted he did not ask [Redacted] whether he was following company policy or his training when he approached the skid-steer. (Tr. 45).

While the NIOSH Alert is explicit in its description of safe operating procedures and the proper methods for exiting and entering the cab of a skid-steer, it does not clarify Complainant's allegation that approaching a running skid-steer during training is hazardous. In fact, the Alert even accounts for a similar situation:

> Never work on the machine with the engine running unless directed to do so by the operator's manual. Follow the manufacturer's safety recommendations to complete the task. *If the adjustments require that the engine be in operation, use an additional person and work as a 2-person team with a trained operator positioned in the operator's station who can effectively communicate with the worker making the adjustment.*

(Ex. C-2 at 9) (emphasis added). Further, as regards training, which is the subject of this citation item, the Alert directs users to the manufacturer's operator and service manuals, as well as the equipment dealer's or manufacturer's "manuals, instructional videos, and operator or service training courses". (Ex. C-2 at 10). No additional evidence regarding these sources was introduced at trial.

The skid-steer operation manual and warning labels provide no additional clarity. The warnings identified by Complainant are described in the manual and specifically deal with the hazards presented by the loader arms of the skid-steer. Specifically, the 'Crush Hazard' states, "This warning is located on both of the loader arms of the machines that are equipped with extended reach. . . . No clearance for person in this area during operation. Severe injury or death

3. The terms "clearance", as stated by Complainant in the Citation, and "work area", as indicated in the NIOSH Alert, appear to be interchangeable, but neither provides additional clarity to Complainant's allegation.

from crushing could occur. Stay away from the work tool while it is in operation." (Ex. C-3). These warnings are specifically tailored to the crushing hazards associated with the loader arms. CSHO Moravits confirmed this when he testified that "no clearance for person in this area" means "keeping clear of the loader arms." (Tr. 22). As stated previously, Complainant improperly attempts to expand these specific hazards into a more general prohibition against "approaching" an operational skid-steer.[4] This expansion is unwarranted by any of the foregoing warnings, which are specific to a particular hazard.

Complainant contends the manner in which Respondent trains its employees is hazardous notwithstanding the fact that the Court has been presented with precious little evidence of how training is, in fact, carried out. Complainant asserts, without proof, Respondent's trainers *routinely* approach operational skid-steers during on-the-job training and that this activity is hazardous.[5] In this case, however, [Redacted] was not injured because he approached an operational skid-steer; he was injured when he stuck his hand into the cabin beneath the raised loader arms, a hazard which is repeatedly identified in the literature submitted by Complainant. (Ex. C-2, C-3). Complainant's attempt to expand upon these specific hazards to identify a more general hazard must fail. There is simply no proof that standing next to an operational and, by all accounts, idle skid-steer in order to give training instructions exposed Respondent's employees to a hazard.

**ii. The Hazard was not Recognized**

"A hazard is 'recognized' within the meaning of the general duty clause if the hazard is known either by the employer or its industry." *Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321 (No.

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4. This point is illustrated by Complainant's counsel, who, in response to CSHO Moravits' statement that "no clearance" means "keeping clear of the loader arms", asked, "So, essentially it's saying, 'Stay clear of the skid steer when it's fully functional?'" (Tr. 22).
5. The only evidence that this behavior was "routine" are the conclusory statements by CSHO Moravits that his investigation "revealed" the nature of Respondent's training procedures. None of these revelations are supported by statements from Respondent's employees or documented training procedures. (Tr. 17–18).

97-0469 *et al.*, 2003). In that regard, "[m]anufacturers' instructions and voluntary industry standards that contain explicit safety warnings regarding compliance may be probative evidence in establishing a general duty clause violation." *K.E.R. Enters., Inc.*, 23 BNA OSHC 2241 (No. 08-1225, 2013). As discussed above, the documents introduced by Complainant do not contain explicit safety warnings about approaching the cab of a skid-steer; instead, the Alert, safety manual, and warnings all target hazards specifically associated with the loader arms during entry, exit, while performing maintenance, or during regular work. Nor, for that matter, was there any evidence, such as previous injuries or citations, to suggest Respondent was specifically aware of a hazard. Furthermore, CSHO Moravits testified he was unaware of any industry standard that says how close to an operational skid-steer an employee may stand. (Tr. 46).

Ultimately, Complainant's failure is one of specificity and context. Surely, there are instances when approaching an operational skid-steer may be hazardous, such as when the bucket is raised or when it is "in operation", but those hazards are already addressed by the industry documents introduced by Complainant. (Ex. C-2, C-3). Those are not situations addressed by Complainant's citation item. Instead, Complainant specifically identified approaching an operational skid-steer in the context of training as being hazardous.[6] The distinction between "in operation" and "operational" may be slight, but it is important to the context of this alleged violation. "In operation" implies that the skid-steer is in the process of doing something; whereas "operational" implies that it is capable of carrying out that process, i.e., running, but not necessarily working. Those two contexts present entirely different hazards, which Complainant attempts to conflate without illustrating their similarity. Accordingly, the Court finds that Complainant failed to prove the existence of a recognized hazard.

6. CSHO Moravits stated that he did not inquire into whether employees approached skid-steers during regular work activities, outside of the training context. (Tr. 42).

### iii. Complainant Failed to Establish a Feasible Means to Abate the Hazard

Even if the Court were to conclude that Complainant established the existence of a recognized hazard (it does not), the Court finds Complainant failed to establish a feasible means to abate the hazard. *See Phillips Petroleum Co.*, 11 BNA OSHC 1776 (No. 78-1816, 1984) ("A violation of the general duty clause cannot be sustained unless the Secretary is able (1) to establish the type of employer conduct necessary to avoid citation under similar circumstances and (2) to demonstrate the feasibility and likely utility of such conduct." (quoting *Cargill, Inc., Nutrena Feed Division*, 10 BNA OSHC 1398 (No. 78–5707, 1982))).

There was virtually no testimony regarding what constituted a feasible means of abatement; indeed, the words "abatement" and "feasible" do not appear in the transcript. The only discussion of preventative conduct occurred when the CSHO testified that a brace bar would have prevented the injury suffered by the trainer *in this instance*. (Tr. 26). The problem, however, is the hazard alleged in the citation item specifically targeted the positioning of the trainer relative to the cab during training. While the brace bar prevents the loader arms from descending unexpectedly, that does not address—at least not completely—the more general hazard alleged in the Citation. Otherwise, there was no discussion whatsoever of what would constitute a safe distance from the skid-steer or of any other proposed abatement measures identified in the Citation and Complainant's post-trial brief. Aside from the brief mention of the brace bar, there was simply no evidence as to how this purported hazard should be abated, nor was there evidence to suggest that any of the proposed methods would be feasible or effective in addressing the hazard identified in the Citation.

The D.C. Circuit addressed the Secretary's burden in the context of abatement in a case similar to the one at bar (insofar as Complainant did not meet its evidentiary burden). It stated:

> Only by requiring the Secretary, at the hearing, to formulate and defend his own theory of what a cited defendant should have done can the Commission and the courts assure evenhanded enforcement of the general duty clause. Because employers have a general duty to do virtually everything possible to prevent and repress hazardous conduct by employees, violations exist almost everywhere, and the Secretary has an awesomely broad discretion in selecting defendants and in proposing penalties. To assure that citations issue only upon careful deliberation, the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.

*National Realty & Constr. Co., Inc.*, 489 F.2d 1257, 1268 (D.C. Cir. 1973). It is not enough for Complainant to merely list the things that Respondent should have done to prevent this vague and undefined hazard. To meet his burden, Complainant must provide evidence of how those steps will abate the identified hazard and whether implementing them will be feasible. Complainant failed on both counts.

**iv. Respondent did not Have Knowledge of the Hazard**

In addition to proving the four primary elements of a general duty clause violation, it is also incumbent upon Complainant to prove Respondent "knew or, with the exercise of reasonable diligence, could have known of the violative condition." *Regina Constr. Co*, 15 BNA OSHC 1044 (No. 87-1309, 1991); *see also S.J. Louis Constr. of Texas*, 25 BNA OSHC 1892 (No. 12-1045, 2016). "In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *Id.* (citations omitted). This case occurred in the jurisdiction of the Fifth Circuit, to which this case could be appealed. In both the Fifth Circuit and before the Commission, the actual or constructive knowledge of a supervisor can be imputed to the employer. *See, e.g.*, *Rawson Contractors Inc.*, 20 BNA OSHC 1078, 1080–81 (No. 99-0018, 2003); *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604, 608 n.6 (5th Cir. 2006). If, however, Complainant seeks to impute the supervisor's

knowledge of his own misconduct, the Fifth Circuit requires that such misconduct was foreseeable by "showing that the employer's safety, training, and discipline are inadequate." *W.G. Yates*, 456 F.3d at 608–609.

Complainant did not address the issue of knowledge either in its presentation of the evidence or in his post-trial brief.[7] It is not clear whether Complainant claims knowledge should be imputed through [Redacted], Sanchez, or Moore. This "who" is important because it determines what standard should be applied to establish actual or constructive knowledge. In either case, however, Complainant did not meet its burden of proof.

If Complainant sought to prove knowledge though [Redacted], the trainer whose misconduct led to the citation, it would need to establish that his misconduct was foreseeable. *Id.* In order to prove foreseeability, Complainant must show that Respondent's training, safety, and discipline are inadequate. *Id.* Complainant did not introduce any evidence regarding Respondent's training, safety, or disciplinary regimes, and therefore cannot prove that [Redacted]'s actions were foreseeable. Thus, based on these facts, [Redacted]'s knowledge cannot be imputed to Respondent.

While there is "more" evidence with respect to knowledge on behalf of Sanchez and Moore, the Court still finds it is insufficient to meet Complainant's burden. In response to leading questions from Complainant's counsel, CSHO Moravits testified that it was "normal policy" for Respondent's trainers to walk up to an operational skid-steer during on-the-job training. (Tr. 18). The problem, however, is there is no indication in the record as to how he learned this was part of the training routine. CSHO Moravits testified that he spoke to Moore, Sanchez, and [Redacted], but there is no indication as to who told him about this routine, instead stating that his inspection

7. Though the Court does not rely on it, the Notice of the Filing of Trial Transcript clearly states, "Issues not briefed will be deemed abandoned." *See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1136 (No. 89-2713, 1991).

"revealed" that it was a "normal process". Indeed, in response to cross-examination, CSHO Moravits admitted: (1) other than [Redacted], he did not speak to other employees engaged in skid-steer training operations; (2) neither Moore nor Sanchez told him about any other employees that conduct training, other than [Redacted]; and (3) he did not ask [Redacted] whether he was following company policy, rules, or training when he approached the skid-steer and reached inside the cab. (Tr. 40–45). What is missing is competent, credible evidence illustrating that either Moore or Sanchez was aware of how [Redacted] was carrying out training or that Respondent's training procedures specifically call for [Redacted] to act in the manner that he did.

Based on the evidence, and Complainant's failure to even address the issue, the Court finds that Complainant failed to prove Respondent had constructive or actual knowledge of the purported violation. Accordingly, based on the foregoing discussion, Citation 1, Item 1 is VACATED.

**C. Citation 2, Item 1**

Complainant alleged a serious violation of the Act in Citation 2, Item 1 as follows:

> 29 CFR 1904.39(a)(2): The employer did not report an in-patient hospitalization, amputation, or loss of an eye as a result of a work-related incident to OSHA within twenty-four hours.
>
> On or about 26 August 2015, the employer failed to report to OSHA a work-related in-patient hospitalization of one or more employees within 24 hours.

Citation and Notification of Penalty at 9.

The cited standard provides:

> Within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.

29 C.F.R. § 1904.39(a)(2).

As noted above in Section III, *supra*, Complainant failed to introduce documentary evidence indicating when [Redacted] was admitted to the hospital and when the call was received by OSHA. Even if the Court were to accept CSHO Moravits' testimony that Sanchez told him [Redacted] was admitted to St. David's hospital "around noon" on August 26, 2015, that only helps the Court determine when the 24-hour clock began. (Tr. 15, 53–54).

At trial, CSHO Moravits said he learned about the hospital admission from the company's report to OSHA; however, no documents were introduced to confirm that fact. (Tr. 54). Instead, CSHO Moravits testified that Sherry Lascowski called the office and reported the hospitalization. (Tr. 55). The Court overruled an objection from Respondent's counsel regarding this testimony to allow some latitude to establish foundation. However, evaluating the complete submission, the Court agrees that this testimony is double hearsay. *See* F.R.E. 805. While Ms. Lascowski's statements could be excepted from the hearsay rule as an admission of a party opponent under F.R.E. 801(d)(2), there are two major problems with accepting this testimony. First, there was no foundation laid to establish that Ms. Lascowski was, in fact, an employee of Respondent. CSHO Moravits did not speak with Ms. Lascowski and, thus, he did not have direct knowledge of who she was or whether she was authorized to speak on behalf of Respondent. (Tr. 55). Second, even if the Court were to accept that Ms. Lascowski was an employee of Respondent, Complainant cannot overcome the hearsay problem of how CSHO Moravits learned about the call from Ms. Lascowski. Presumably, this call was logged and documented by one of Complainant's employees, and the information was eventually provided to CSHO Moravits. What is unknown is how CSHO Moravits received that information. Had Complainant introduced the records upon which CSHO Moravits' knowledge was based, such records would have cured the second part of the double

hearsay problem because they likely would have qualified under the business records exception.[8] *See* F.R.E. 803(6).

Without competent evidence to ascertain the time at which Respondent made the call to Complainant, the Court cannot find that Respondent violated the standard. Accordingly, Citation 2, Item 1 is VACATED.

**ORDER**

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED.
2. Citation 2, Item 1 is VACATED.

SO ORDERED

/s/

Peggy S. Ball
Judge, OSHRC

Date: February 27, 2017
Denver, Colorado

8. The fact that the Court relied upon this testimony to establish what precipitated the inspection, however, does not implicate hearsay. The statement was not used for the truth of the matter asserted; rather, the phone call was used to ascertain its effect on the mind of the listener. *United States v. DeVincent,* 632 F.2d 147, 151 (1st Cir. 1980) (holding certain out-of-court statements were not hearsay because they were admissible "for their effect on the hearer"), *cert. denied,* 449 U.S. 986 (1980).