Some personal identifiers have been redacted for privacy purposes.

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

SECRETARY OF LABOR, Complainant, v. COASTAL DRILLING EAST, LLC, Respondent.	OSHRC Docket No. 17-1179

Appearances: Bertha M. Astorga, Esquire
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For the Secretary

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For the Respondent

Before: Keith E. Bell
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act or the Act). Following an inspection of Respondent's worksite in Dayton, PA, the Occupational Safety and Health Administration (OSHA) issued one citation to Coastal Drilling

East, LLC (Coastal or Respondent), alleging a "serious" violation of section 5(a)(1) (general duty clause) of the OSH Act. Coastal filed a timely notice of contest, bringing this matter before the Commission. A hearing was held in Pittsburgh, Pennsylvania on May 1, 2018. The parties each filed a post-hearing brief. For the reasons set forth below, Citation 1, Item 1 is AFFIRMED.

JURISDICTION

Based upon the record, the undersigned finds that, at all relevant times, Coastal was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. Answer at ¶ III & IV; JX-1, Stip. Legal Issues ¶ 2. The parties have stipulated, and evidence supports a finding, that the Commission has jurisdiction over the parties and subject matter in this case. JX-1, Stip. Legal Issues ¶ 1.

STIPULATED FACTS

Prior to the hearing, the parties stipulated the following facts (JX-1):

1. On April 26, 2017, an accident occurred on a Walker Neer C25 rig, also identified as Rig #243, which resulted in the amputation of [redacted]'s finger. [redacted] was an employee of Respondent at the time of the accident.
2. Respondent owned the Walker Neer C25 rig, Rig #243, where the April 26, 2017 accident occurred.
3. On April 26, 2017, [redacted], an employee of Respondent, was a service rig hand working on Rig #243.
4. On April 26, 2017, Dave Vickers, an employee of Respondent, was a rig operator and supervisor working on Rig #243.

5. On April 26, 2017, [redacted] was in the process of changing out the slip bodies on the slips, which were installed under the rig's elevators.
6. On April 26, 2017, [redacted] sustained a crushing injury to his left ring finger when a pipe and plate suspended from the rig's elevators drifted downward, struck the top of the slip bodies that [redacted] was changing and caused the slip bodies to crush [redacted]'s finger.
7. As a result of the April 26, 2017, accident, [redacted]'s left ring finger was amputated.
8. On April 26, 2017 immediately before the accident, Dave Vickers was operating the rig controls and left the rig controls to assist [redacted] but did not secure the drawworks brake before leaving the controls.
9. Respondent did not formally discipline any employees as a result of this accident on April 26, 2017.
10. Respondent provided no training related to the operation of the drawworks to the rig operator prior to the accident on April 26, 2017.
11. The operator of the Walker Neer C25A rig involved in the subject Citation, David Vickers, was hired by Respondent in March 2016.
12. Respondent did not have any operating procedures, guidelines, work rules or policies that specifically addressed the operation of the drawworks.

STIPULATED LEGAL ISSUES

Prior to the hearing, the parties stipulated the following legal issues (JX-1):

1. The Review Commission has jurisdiction in this proceeding pursuant to § 10(c) of the OSH Act, 29 U.S.C. § 659 (c).

2. Respondent is an employer engaged in business affecting commerce within the meaning of sections 3(3) and 3(5) of the OSH Act, 29 U.S.C. §§ 652(3), (5).
3. Leaving the rig controls without securing the brake handle can create a hazardous condition that is likely to cause serious physical harm or death.
4. Respondent recognized the crushing hazard created by leaving the rig controls without securing the brake handle prior to the April 26, 2017 accident.

BACKGROUND

The Accident

On April 26, 2017, an accident occurred on a Walker Neer C26 rig (also identified at rig #243) owned by Respondent, Coastal Drilling East. [redacted], an employee of Coastal, was attempting to change out the slip bodies which were installed under the rig's elevators. [redacted] was struggling with a bolt when his Supervisor, Dave Vickers, came to assist him. GX-4, at 1. Dave Vickers had been operating the rig controls and forgot to secure the drawworks brake before leaving the controls to assist [redacted]. GX-4 at 3. Shortly after Mr. Vickers arrived to help Mr. [redacted] with the bolt, a pipe and plate that were suspended from the rig's elevators drifted downward, struck the top of the slip bodies that [redacted] was changing and caused the slip to crush his finger. GX-4 at 2. As a result, [redacted]'s left ring finger was crushed and, subsequently, had to be amputated.

The injured employee, [redacted], worked in the Wells Service Division of Coastal. The main business of the Wells Service Division is plugging abandoned and active oil wells. Tr. 161.

The Inspection

OSHA was notified of an injury at Respondent's worksite that resulted in an amputation. Tr. 31. Compliance Officer (CO) Kathleen Clugston was assigned to conduct an inspection of this worksite and did so on May 2, 2017 Tr. 31. Upon her arrival, CO Clugston met with Dave Vickers, conducted an opening conference, took photos (GX-3 & 4), and interviewed other Coastal employees. Tr. 31. From her inspection, CO Clugston learned that the injured employee was attempting to remove a slip guide from a slip body underneath a suspended load and was having difficulty. Tr. 32. CO Clugston also learned that a slip is a device that holds a pipe in place, so another piece can be screwed onto it and prevent it from falling into the well. Tr. 32; CX-4 at 1.

Expert Witness

At the hearing, the Secretary tendered Mr. Gregory Milford, without objection, as an expert witness to provide an opinion on the hazards and the means of abating hazards related to the operation of the service rig workover unit at issue in this case. Tr. 128-29. Counsel for Respondent stipulated to Mr. Milford's qualifications as an expert. Tr. 119. Based on his qualifications and experience, the undersigned allowed him to testify as an expert witness.[1] JX-2; Tr. 121-23.

Mr. Milford based his testimony, conclusions, and opinions on his review of the following: (1) company safety program; (2) the investigative report; (3) depositions; and (4)

[1] Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case.

photographs. Tr. 132. Mr. Milford opined that employees working under a suspended load are exposed to crushing and/or caught between hazards. Tr. 132. Regarding abatement, Mr. Milford opined that Respondent needs to develop standard operating procedures (SOPs) for leaving the panel/controls without securing the brake. These SOPs could involve training employees to secure the brake, observing employees while they perform the task in order to evaluate their knowledge and understanding of the procedure. Tr. 133. According to Mr. Milford, these SOPs should be consistent with the API Section 9.4.4. although they might differ from rig to rig.[2] Tr. 134. As an example of why the SOP might differ depending on the rig, Mr. Milford pointed out that some rigs might be equipped with a brake handle while others might have a switch. Tr. 135. Mr. Milford found that Respondent did not have such an SOP neither did it have adequate training.[3] Tr. 136. Mr. Milford testified that Respondent's analysis of the root cause of the accident was inadequate because it did not identify a policy or procedure that was violated. Tr. 141. Moreover, Mr. Milford concluded that Respondent had policies, such as drug and alcohol testing, that were not always enforced. Tr. 137.

On cross-examination, Mr. Milford conceded that he never operated a well-service rig. Tr. 144. He also conceded that he wasn't aware of any studies supporting the position that having an SOP is better than on the job experience for ensuring safe operations. Tr. 147-48. Mr. Milford was aware of Mr. Vickers' testimony that he simply forgot to chain the brake down. Tr. 149. Also, Mr. Milford testified that he believed that Mr. Vickers knew how to secure the brake but that it is not good practice to solely rely on an employee's prior experience to determine his/her competency given the differences between workplaces. Tr. 150, 156. Finally, Mr.

[2] API Section 9.4.4 refers to the American Petroleum Institute, Recommended Practice for Occupational Safety for Oil and Gas Well Drilling and Servicing Operations that requires the brake of a drawworks to be secured before an operator leaves it unattended.
[3] Respondent was not cited for a training violation.

Milford testified that it is not possible to eliminate working under a suspended load when working on a rig. Tr. 151. However, Mr. Milford opined that the development and implementation of an SOP could eliminate or substantially reduce the risk of injury to employees. Tr. 136.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the Court held that a judge serves as a "gatekeeper" to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable". The "gatekeeper" function identified in the *Daubert* decision was subsequently extended to apply to all expert testimony included non-scientific. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). The undersigned finds Mr. Milford's testimony useful in that it identifies a means of implementing and reinforcing the industry standard (API 9.4.4) cited by the Secretary. The undersigned also finds that Mr. Milford's testimony is based on sufficient facts surrounding this case. Further, the undersigned finds that Mr. Milford's testimony is reliable in that it was drawn from his reservoir of work experience in the development and implementation of safety and health programs for the oil and gas industry, his familiarity with rigs, and has been reliably applied to the facts of this case. Based on the foregoing, the undersigned gives considerable weight to the testimony of Mr. Gregory Milford.

Lay Witnesses

At the hearing, four (4) lay witnesses testified: (1) Kathleen Clugston; (2) [redacted]; (3) Dave Vickers; and (4) Kevin Wright.[4]

Kathleen Clugston has worked for OSHA for over 30 years and has been a safety specialist for 18 of those years. In that role, Ms. Clugston conducts safety inspections. Tr. 29.

[4] All four lay witnesses testified during the Secretary's case-in-chief. Messrs. Dave Vickers and Kevin Wright also testified during Respondent's case-in-chief.

[redacted] is employed by Coastal Drilling East since December 2016, as a rig hand/laborer. Tr. 57. He services the rig, changes oil, fills the rig, works on the gas well running tongs/elevators etc. On April 26, 2017, [redacted] was a service rig hand working on Rig #243. JX-1, Stip. Fact #3.

Dave Vickers is employed by Coastal Drilling East. Tr. 82. He has been working for Coastal for over two (2) years starting in March 2016. Mr. Vickers works as rig operator/supervisor. His duties are to oversee men, equipment, rigs, make sure guys work in a safe manner, and ensure that the rig is maintained properly. Tr. 83. On April 26, 2017, Dave Vickers was a rig operator and supervisor working on Rig #243. JX-1, Stip. Fact #4.

Kevin Wright has been employed by Coastal Drilling East as a Division Manager for over 11 years. He manages the Well Service Division which is primarily responsible for plugging abandoned oil and gas wells for coal companies and oil & gas companies. Tr. 104. Mr. Wright's responsibilities include acquiring work, hiring employees, and workplace safety. Tr. 105.

DISCUSSION

> The Secretary alleges that Respondent violated section 5(a)(1) of the Act. In the serious citation at issue, Item 1 specifically, the Secretary alleges that Walker Neer C25 rig, 785 State Route 1018, Dayton, PA: On or about April 26, 2017, the drawworks brake, while holding a suspended pipe section and not under the control of the equipment operator, was not secured, drifted downward crushing an employee's finger resulting in an amputation.
>
> The Secretary further alleges that:
>
> A feasible and acceptable method of abatement is to follow the American Petroleum Institute [API], Recommended Practice for Occupational Safety for Oil and Gas Well Drilling and Servicing Operations, 54, Third Edition, Reaffirmed, March 2007 Section 9.4.4 that reads: The equipment operator shall not leave the drawworks brake without tying down the brake or securing it with a catch lock, unless the drawworks is equipped with an automatic driller.

The OSH Act's General Duty Clause requires an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical injury to his employees". 29 U.S.C. § 654(a)(1).

To prove a violation of the general duty clause, the Secretary has the burden to establish that "a condition or activity in the workplace presented a hazard, that the employer or its industry recognized this hazard, that the hazard was likely to cause death or serious physical harm, and that a feasible and effective means existed to eliminate or materially reduce the hazard." *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) citing *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986).

Respondent admits many of the elements of the Secretary's general duty clause violation claim. The crux of Respondent's defense is that abatement of the cited condition is infeasible, and the violation was the result of unpreventable employee misconduct that it characterizes as "idiosyncratic". Resp't Br. 5-12.

Nature of the Hazard

"A hazard must be defined in a way that apprises the employer of its obligations and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Arcadian*, 20 BNA OSHC at 2007. The Commission may define the hazard itself when the Secretary's definition is so broad or generic that it fails to meet the requirements of this definition. *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984). The hazard must be defined "in terms of the physical agents that could injure employees rather than the means of abatement." *Chevron Oil Co.*, 11 BNA OSHC 1329, 1331 n.6 (No. 10799, 1983); see *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1121 (No. 88-572,

1993) (hazard is not absence of abatement method). Here, the Citation and testimony of CO Clugston identify the hazard as a crushing hazard created by putting an employee between a pinch point with a suspended load in position and an operator who left the brake unsecured thereby allowing the pipe to come down on exposed employee. GX-1; Tr. 42. The Secretary's characterization of the hazard is supported by the evidence of record. The injured employee, [redacted], testified that he was working on changing out the slips when the accident occurred. Tr. 59-60. He was struggling with a bolt when his supervisor, Dave Vickers, came to help him and before he knew it, the slips were down over his finger. *Id*. Mr. Vickers gave the same account. Tr. 88-89.

Recognition of the Hazard

"The question of whether a hazard is recognized goes to the knowledge of the employer, or if he lacks actual knowledge, to the standard of knowledge in the industry - an objective test." *Cont'l Oil Co. v. OSHRC*, 630 F.2d 446, 448 (6th Cir. 1980). Whether a work condition is recognized as a hazard is a question of fact. *See Mo. Basin Well Serv., Inc.*, 26 BNA OSHC 2314, 2317 (No. 13-1817, 2018). Here, Respondent admits that it recognized the crushing hazard created by leaving the rig controls without securing the brake handle prior to the April 26, 2017, accident. JX-1, Stip. Legal Issue #4. On April 26, 2017, Dave Vickers was operating the rig controls and left the rig controls without securing the drawworks brake. JX-1, Stip. Fact #8. At that time, Dave Vickers was the rig operator and supervisor on Rig #243 where the accident occurred. JX-1, Stip. Fact #4. It is settled law that "knowledge can be imputed to the cited employer through its supervisory employee." *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). Coastal Division Manager, Kevin Wright testified that API Section 9.4.4 which requires that the drawworks brake be tied down or otherwise secured is industry

standard. He further testified that it is a practice that is followed by Coastal Drilling and he would expect rig operators to follow it. Tr. 114. On the day of the accident, Supervisor, Dave Vickers participated in a "pre-job safety brief" that recognized, among other things, "pinch/crush points" as a hazard that can injure workers. RX-2. The evidence establishes that Respondent recognized the hazard and knowledge of the cited hazard is imputed to Respondent vis-a-vie Rig Supervisor, Dave Vickers.

Likelihood of Harm

Under the general duty clause, the Secretary must prove that the cited hazard is likely to cause death or serious physical injury to exposed employees. 29 U.S.C. § 654(a)(1). Respondent concedes that leaving the rig controls without securing the brake handle can create a hazardous condition that is likely to cause serious physical harm or death. JX-1, Stip Legal Issue #3. Here, the exposed employee, [redacted], sustained a crushing injury to his left ring finger when a pipe and plate suspended from the rig's elevators drifted downward, struck the top of the slip bodies that he was changing. JX-1, Stip. Fact #6. As a result of this accident, Mr. [redacted]'s left ring finger had to be amputated. JX-1, Stip. Fact #7. The evidence establishes that the cited hazardous condition is likely to cause death or, in this case, serious injury.

Feasibility of Abatement

To establish the feasibility of a proposed abatement measure, the Secretary must "demonstrate both that the measure[] [is] capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard." *Arcadian*, 20 BNA OSHC at 2011 (citing *Beverly Enters. Inc*., 19 BNA OSHC 1161, 1190 (No. 91-3344, 2000) (consolidated)). The Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard. *Id*. (citing *Morrison-Knudsen*, 16 BNA OSHC at 1122).

Where an employer has undertaken measures to address the hazard, the Secretary must show that such measures were inadequate. *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006).

In his Citation, the Secretary states that:

> A feasible and acceptable method of abatement is to follow the American Petroleum Institute Recommended Practice for Occupational Safety for Oil and Gas Well Drilling and Servicing Operations, 54, Third Edition, March 2007 Section 9.4.4 that reads: "The Equipment operator shall not leave the drawworks brake without trying down the brake or securing it with a catch lock, unless the drawworks is equipped with an automatic driller."

CX-1; CX-6 at 27-28.

As an initial matter, the Secretary's Citation does not state that his proposed method of abatement is the only acceptable one, but rather that it is "a" method which implies that there may be others. The evidence of record makes clear that API Section 9.4.4 is well-recognized as an industry standard that Coastal was already following. However, on the day of the accident, Dave Vickers forgot to secure the brake as required by API Section 9.4.4. Tr. 89.

The Secretary's expert witness, Gregory Milford, opined that Respondent needs to develop standard operating procedures for securing the brake before leaving the rig panel/controls. He testified that this could involve employee training that would allow for observation of the employee while he/she is performing the task for the purpose of evaluating knowledge and understanding of the procedure. Tr. 133. According to Mr. Milford, the development of a standard operating procedure in this case is consistent with API Section 9.4.4 which is the industry standard cited by the Secretary. Tr. 134. Finally, Mr. Milford contends that such a standard operating procedure would eliminate or substantially reduce the risk of employee injury. Tr. 136. Mr. Milford's assertion that the development of SOPs consistent with API Section 9.4.4 is reasonable in that it acknowledges the constant need for reinforcement of good

safety practices, such as securing the drawworks brake, to overcome human error as much as possible. In this case, Respondent did not discipline Mr. Vickers following the accident. Tr. 98. Coastal management employee, Kevin Wright testified that, following an internal investigation into the April 26, 2017 accident, Mr. Vickers was reminded of his duty to chain the brake down. Tr. 118. The SOPs Gregory Milford suggested are in keeping with Respondent's approach, post-accident, of reminding Mr. Vickers to secure the brake because they simply reinforce that which he already knows.

Respondent argues that the abatement method proposed by the Secretary would not significantly reduce the hazard. Resp't Br. 6. So, in the aftermath of the accident, Dave Vickers and his crew developed an alternative means of abatement.

Although evidence of a "subsequent remedial measure" is generally not admissible, testimony of such a measure was admitted in this case without objection.[5] Evidence of "subsequent remedial measures" may be admitted for the purpose showing the feasibility of precautionary measures". Fed. R. Evid. 407; *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1215 (D.C. Cir. 2014). Also, The Commission has held that evidence of subsequent actions taken by an employer may establish the feasibility of precautionary measures, but not necessarily their utility in that the accident would have been prevented by prior action. *FMC Corp.*, 12 BNA OSHC 2008 (No. 83-488, 1986) (consolidated). [redacted] testified that, after the accident, they changed the procedure for changing slips. He also testified that, in his opinion, he would not

[5] Federal Rule of Evidence 407 states:

> [w]hen measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence;
> - culpable conduct;
> - a defect in a product or its design; or
> - a need for a warning or instruction.
>
> But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

have been injured on the day of the accident if they had been using this new procedure because he would have been further way from the well and suspended pipe. Tr. 80-81. According to Mr. Vickers, since the accident, rig hands are required to change the slips beside the well. Tr. 93. In his deposition, Mr. Vickers testified that he came up with the idea to change the location for changing the slips to the well as a matter of "common sense". Tr. 96-97. That Respondent chose an abatement method other than the one prescribed by the Secretary does not negate the feasibility of the Secretary's abatement method. The Commission has held that an "employer may use any method that renders its worksite free of the hazard and is not limited to those methods suggested by the Secretary". *Pepperidge Farm*, 17 BNA OSHC 1993, 2032 (No. 89-265, 1997) quoting *Brown & Root, Inc., Power Plant Div.*, 8 BNA OSHC 2140, 2144 (No. 76-1296, 1980). The Secretary need not prove that Respondent's alternative method of abatement is inadequate because it was implemented after the accident. Moreover, the record reflects that no precautionary measures were in place prior to the accident.

"The Secretary must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard. The Secretary must also show that [his] proposed abatement measures are economically feasible." *Beverly*, 19 BNA OSHC at 1190. " 'Feasible' means economically and technologically capable of being done." *Id.* at 1191. It is on the Secretary to prove that this means of abatement would not "threaten the economic viability" of Respondent. *Nat'l Realty & Constr. Co.,* 489 F.2d 1257, 1266 n.37 (D.C. Cir. 1973). The Secretary's expert, Gregory Milford, did not testify about costs associated with developing SOPs to ensure compliance with API Section 9.4.4. However, it is reasonable to infer the cost of developing SOPs that include training and observation would be minimal, capable of being done,

and not at all threatening to the economic viability of Coastal. *See generally* 1 Jones on Evidence § 1.3 at 4 (6th ed. 1972) (drawing reasonable inferences from circumstantial evidence). The evidence establishes the feasibility of abatement in this case using either the method proposed by the Secretary, or the method put in place by Respondent after the accident.

Unpreventable Employee Misconduct Defense

An employer may defend itself against the Secretary's allegation that it committed a violation by establishing the affirmative defense of unpreventable employee misconduct. To establish this defense, the employer is required to prove that "[1] it has established work rules designed to prevent the violation, [2] it has adequately communicated those rules to its employees, [3] it has taken steps to discover violations and [4] it has effectively enforced the rules when violations have been discovered." *Pa. Power & Light Co. v. Occupational Safety & Health Review Comm'n,* 737 F.2d 350, 358 (3d Cir. 1984) (emphasis omitted) (quoting *Marson Corp.*, 10 BNA OSHC 1660, 1662 (No. 78–3491, 1982).

In its Answer, Coastal asserted the affirmative defense of "unforeseeable employee misconduct" which the undersigned treats as "unpreventable" employee misconduct. Answer at ¶ 12. In its post-hearing brief, Coastal specifically alleges that the April 26, 2017, accident was caused by the idiosyncratic behavior of Mr. Vickers. Respt. Br. 9-10. When an employer's defense is that the hazard occurred as a result of unauthorized and idiosyncratic behavior by its employee, the issue of an employer's training and supervision of its employees automatically arises as part of the employer's showing that it took all feasible steps to avoid the occurrence of the hazard. *Gen. Dynamics Corp. v. O.S.H.R.C.*, 599 F.2d 453, 459 (1st Cir. 1979).

Respondent admitted that it did not have any operating procedures, guidelines, work rules or policies that specifically addressed the operation of the drawworks. JX-1, Stip. Fact #12.

Also, Respondent provided no training related to the operation of the drawworks to the rig operator prior to the accident on April 26, 2017. JX-1, Stip. Fact #10. The injured employee, [redacted], testified that he did not receive rig operations training. Tr. 61. Mr. [redacted] testified that he wasn't given any materials on how to operate a rig or change slips. Tr. 62. Dave Vickers testified that he didn't receive any supervision after being hired by Coastal. Tr. 85. Mr. Vickers also testified that he did not receive supervisor training although he had 3-4 crew members that reported to him. Tr. 86. Kevin Wright testified that Coastal does not have company rules (written or otherwise) to chain down the brake handle --- it's just commonly known. Tr. 105-06. Mr. Wright testified that Dave Vickers did not receive any training after he was hired by Coastal. Tr. 116-17. Further, Mr. Wright testified that he never observed Mr. Vickers perform his duties even though Dave Vickers reported to him. Tr. 117. In the absence of any evidence of work rules, procedures, policies, or guidance related to the operation of the drawworks, the undersigned need not address the effectiveness of their communication to Coastal's employees. Additionally, the fact that Kevin Wright was responsible for workplace safety but failed to supervise and, at a minimum, observe Dave Vickers in the performance of his duties reflects a lack of diligence to discover violations such as the one cited here.

According to Mr. Vickers, he simply forgot to secure the brake of the drawworks. Tr. 89. During his interview with CO Clugston, Mr. Vickers admitted that he made a mistake in not chaining the brake and he knew he was supposed to do it. Tr. 47-48. He further stated that he had been operating drawworks for over 30 years and should have chained the brake in place. Tr. 49. *See* GX-3 at 15 (depicting the drawworks brake held down by a chain). Kevin Wright testified that Dave Vickers had over 30 years of experience plugging and servicing wells when he was hired by Coastal. Tr. 172. Mr. Wright also testified that Dave Vickers did not receive

any training upon hire. Tr. 116-17. According to Mr. Wright, any employee hired above a "derrick hand" is not going to receive training on API Section 9.4.4 because it is assumed that anyone with that level of experience already knows how to do it. Tr. 115. In this case, Respondent's total reliance on Mr. Vickers' prior experience and common sense translated to an absence of training, instruction, and supervision. This approach is flawed in that it fails to take into account human error, as happened here when Mr. Vickers forgot to secure the brake, or the fact that every worksite is different. Expert witness Gregory Milford opined that it is not acceptable to rely on solely on an employee's prior experience to determine competency given the differences in workplaces. Tr. 157. The Sixth Circuit has held that employers cannot count on employees' common sense and experience to preclude the need for instructions. *Danis-Shook Jt. Venture XXV v. Sec'y of Labor,* 319 F.3d 805, 811 (6th Cir. 2003). Additionally, it has been held that "[i]n cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy." *Id.* The record reflects that Respondent did not formally discipline any employee as a result of the April 26, 2017, accident. JX-1, Stip. Fact #9. According to Kevin Wright, Dave Vickers was simply reminded to chain down the drawworks brake during a post-investigation meeting to discuss the accident. Tr. 118.[6] Finally, the Secretary's Expert, Gregory Milford opined that Coastal had polices, such as its drug and alcohol policies, that were not always enforced. In sum, the evidence does not support Respondent's claim of unpreventable employee misconduct.

[6] At the hearing, Respondent introduced several Employee Discipline Reports for incidents unrelated to the April 26, 2017, accident. RX-11(a), 11(b), 12(a), 12(b), 12(c), 12(d), 12(e), 12(f), 12(g), and 12(h).

PENALTY

"Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give due consideration to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations." *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994) (internal citations omitted). When determining gravity, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 85(5th Cir. 2000 (unpublished). Gravity is typically the most important factor in determining penalty. *Id.* The Commission is the "final arbiter" of penalties. *Hern Iron Works,* 16 BNA OSHC at 1622 (citation omitted).

The proposed penalty for the violation at issue is $11,408.[7] CO Clugston testified that the severity of the violation is rated "high" due to the nature of the injury --- amputation. CO Clugston further testified that the gravity is rated "greater" based on the probability/likelihood of an incident happening. Respondent was given a 10% reduction for size. The Compliance Officer's testimony regarding the penalty factors is uncontroverted, and, based on the evidence adduced at the hearing, the undersigned finds that the proposed penalty is appropriate.

[7] On November 2, 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74, sec. 701, 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. The maximum penalty for a violation cited in 2017 and characterized as "serious" was $12,675.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based on these findings of fact and conclusions of law, it is ordered that:

1) Citation 1, Item 1 alleging a violation of §5(a)(1) of the Act is AFFIRMED, and a penalty in the amount of $11,408.00 is imposed.

/s/_____
Keith E. Bell
Judge, OSHRC

Date: December 13, 2018
Washington, D.C.