Some personal identifies have been redacted for privacy purposes

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. DAVIS H. ELLIOT CONSTRUCTION COMPANY, INC. and its successors, Respondent.	DOCKET NO. 13-1184

Appearances:
Demian Camacho, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, Texas
For Complainant

Carl B. Carruth, Esq., McNair Law Firm, P.A., Columbia, South Carolina
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Between February 5 and June 7, 2013, the Occupational Safety and Health Administration ("OSHA") investigated a workplace accident which occurred at 52148 West 46th Street in Oilton, Oklahoma ("worksite"). (Tr. 137). As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent. The Citation alleged six serious violations of the Act, with total proposed penalties of $37,500.00. Respondent timely contested the Citation. A trial was conducted in Oklahoma City, Oklahoma on May 6–7, 2014. At the commencement of the hearing, Complainant

withdrew Items 2, 4, 5, and 6 of the Citation. (Tr. 9–10). Thus, the only remaining disputed issues for trial were Items 1 and 3, and their corresponding penalties totaling $12,500.00.[1] The parties each submitted post-trial briefs for consideration.

Ten witnesses testified at trial: (1) [redacted], a former employee of Respondent; (2) Tony Huff, residential property owner of 52148 West 46th Street, Oilton, Oklahoma; (3) Denny Downing, a former management employee of Respondent; (4) [redacted], father of [redacted]; (5) Marcus Rambo, OSHA Compliance Safety and Health Officer ("CSHO"); (6) Don Adkins, Respondent's Safety Manager; (7) Grant "Matt" Rosemond; employee of Respondent; (8) Brian Culley; employee of Respondent; (9) Rick Thomas, Respondent's Field Safety Director; and (10) Roger "Dean" Harris, mechanical and professional engineer.

Jurisdiction

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. (Tr. 22). The parties also stipulated 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. 21–22). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Background

On January 28, 2013, a crew of Respondent's employees were installing a new utility pole and transferring live electric power lines between the old pole and the new pole on private residential property located at 52148 West 46th Street, Oilton, Oklahoma. (Tr. 39–40, 137). The crew that day consisted of [redacted], Denny Downing, Matt Rosemond, and Josh Pruitt. (Tr. 47). In order to transfer the power lines, [redacted], Mr. Rosemond, and Mr. Pruitt were each

[1] . Citation 1, Item 1 was assessed at $5,500.00. Citation 1, Item 3 was assessed at $7,000.00.

working aloft in separate aerial lift buckets. (Tr. 65–66). Mr. Downing, [redacted]'s direct supervisor, was observing and supervising the crew's work from the ground. (Tr. 47-48, 66). At some point during the transfer, Mr. Pruitt began experiencing problems with his aerial lift controls and moved his bucket away from the utility pole. (Tr. 65). Mr. Rosemond, who identified himself as a supervisor, though not acting as the crew foreman that day, swung away from the utility pole to help Mr. Pruitt fix his controls. (Tr. 65). [redacted], while still under the supervision of Foreman Downing from the ground, continued to work on the power line transfer. (Tr. 47–48). A few minutes after Mr. Rosemond and Mr. Pruitt swung away from the pole, [redacted] contacted a live power line energized at 7,200 volts. (Tr. 44, 50–51, 65). As a result, [redacted] suffered electrical burns to his chest and right knee, which required hospitalization. (*Id.*).

On February 5, 2013, in response to a complaint, CSHO Marcus Rambo initiated an inspection of the worksite. (Tr. 137–38; Ex. C-3). Although it was approximately a week after the accident, the aerial lift truck used by [redacted] remained in the same location as it was at the time of the accident. (Tr. 80). Based on CSHO Rambo's observations, as well as his conversations with Respondent's employees and managers, OSHA issued the aforementioned *Citation and Notification of Penalty* on June 12, 2013.

Applicable Law

To prove 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).

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).

Discussion

Citation 1, Item 1

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

> 29 C.F.R. § 1910.67(c)(2)(vii): Outriggers were not positioned on pads or a solid surface:
>
> On or about January 28, 2013, at an electrical pole change-out location, the employer did not ensure outrigger pads were used when outriggers were extended and resting on a soft surface, exposing the employee to the hazard of truck tipping.
>
> The cited standard provides:
>
> The brakes shall be set and outriggers, when used, shall be positioned on pads or a solid surface. Wheel chocks shall be installed before using an aerial lift on an incline.

29 C.F.R. § 1910.67(c)(2)(vii).

During his inspection of the worksite, CSHO Rambo photographed [redacted]'s Altec AA755 bucket truck parked with its rear bumper facing the utility pole. (Tr. 80; Ex. C-18 at 13). The truck was parked with the front part of the truck in a grassy area and the rear portion of the

truck located in a dirt area. (Tr. 42–43, 59, 81; Ex. C-18). According to the property owner, Tony Huff, he had "disced" the area around the utility pole, which included the soil underneath the rear end of the truck in preparation for planting his garden. (Tr. 81–82). Thus, the surface soils in that area of the property could be characterized as "loose". (Tr. 446). All four of the outriggers on [redacted]'s bucket truck had been deployed; however, only the outriggers located on the front of the vehicle had pads placed beneath them. (Tr. 97–98, 151). By the time CSHO Rambo visited the worksite, the rear outriggers, which had no pads, were partially submerged in the dirt, and the soil in the area was wet and muddy. (Tr. 166; Ex. C-18 at 9, 13).[2]

The Cited Standard Applies

Complainant argues that the cited standard applies according to the terms of 29 C.F.R. § 1910.67, which includes "[v]ehicle-mounted elevating and rotating work platforms." There is no dispute that the Altec AA755 bucket truck is such a vehicle; however, Respondent argues that 1910.67(c)(2)(vii) is preempted by a more specific standard; namely, 29 C.F.R. § 1910.269(p)(2), which provides:

> (2) *Outriggers*
> (i) Vehicular equipment, if provided with outriggers, shall be operated with the outriggers extended and firmly set as necessary for the stability of the specific configuration of the equipment. Outriggers may not be extended or retracted outside of clear view of the operator unless all employees are outside the range of possible equipment motion.
> (ii) If the work area or the terrain precludes the use of outriggers, the equipment may be operated only within the maximum load ratings for the particular configuration of the equipment without outriggers.

29 C.F.R. § 1910.269(p)(2).

According to 29 C.F.R. § 1910.5(c)(1), "a specific standard preempts a general one only if 'a condition, practice, means, methods, operation, or process' is already dealt with by the

[2] The Court recognizes, however, that the condition observed by CSHO Rambo may not have reflected the condition at the time of the accident, because significant rain fell in the area the day after the accident. (Tr. 424).

specific standard." *The Cincinnati Gas & Electric Co.*, 21 BNA OSHC 1057 (No. 01-0711, 2005) (citing *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 669 (D.C. Cir. 1982)). However, a general standard is not preempted by a specific standard "when it provides meaningful protection to employees beyond that afforded by the more specific standard." *Id.* (citing *Bratton Corp.*, 14 BNA OSHC 1893, 1896 (No. 83-132, 1990)).

In one respect, Respondent is correct that the standards found in Section 1910.269 are specifically applicable to electrical line work, whereas the cited standard is applicable to vehicle-mounted elevating and rotating work platforms generally. However, this in and of itself does not establish preemption. As noted by Complainant, Section 1910.269(a)(1)(iii) states:

> This section applies in addition to all other applicable standards contained in this Part 1910. Employers covered under this section are not exempt from complying with other applicable provisions in Part 1910 by the operation of § 1910.5(c). Specific references in this section to other sections of Part 1910 are for emphasis only.

29 C.F.R. § 1910.269(a)(1)(iii).

Thus, it must be determined whether there is a conflict inherent in the language of these two standards. Section 1910.269(p)(2) sets forth two basic requirements: (1) If your vehicle has outriggers, they must be extended and set as necessary for stability; and (2) if, due to adverse conditions, you cannot set your outriggers, then you cannot exceed the maximum load ratings of the vehicle without the outriggers. Section 1910.67(c)(2)(vii), on the other hand, simply requires that *when* outriggers are used, they have to be placed on a solid surface or pads. The two standards in question do not appear to conflict with one another but are, instead, complementary. The conditional statement of 1910.67(c)(2)(vii), "when used", fits within the confines of the two subsections of 1910.269(p)(2), which entertain the possibility that conditions may prevent the use of outriggers. In that case, an operator is limited to the load ratings of the vehicle without

outriggers. 29 C.F.R. § 1910.269(p)(2)(ii). However, to the extent that outriggers are deployed pursuant to 1910.269(p)(2)(i)—"when used"—then 1910.67(c)(2)(vii) requires their placement on a solid surface or the use of outrigger pads. In other words, 1910.269(p)(2) says nothing about the surface upon which the outriggers are placed. It addresses stability based on the configuration and load ratings of the equipment/vehicle. In that regard, the Court finds that 1910.67(c)(2)(vii) "provides meaningful protection to employees beyond that afforded by the more specific standard" and is not preempted by 1910.269(p)(2). *The Cincinnati Gas & Electric Co.*, *supra*. Accordingly, the cited standard applied.

The Terms of the Standard Were Violated

Due to the conditions observed by CSHO Rambo on February 5th, the property owner's testimony, and the testimony of Respondent's employees that the outrigger feet on [redacted]'s truck and others sunk into the ground when deployed, Complainant argues that the outriggers on the rear of [redacted]'s truck were not positioned on a solid surface, and therefore required the use of outrigger pads. Respondent proffers two separate arguments in response. First, Respondent contends that the metal plates attached to the end of each outrigger, which were also referred to as "feet" or "shoes", constituted a "pad" within the meaning of the standard. (Tr. 324-325, 430). Second, through the testimony of its expert, Respondent argues that the disced soil of the property owner's garden constituted a solid surface. The Court disagrees on both counts.

The plain language of the standard states that outriggers "shall be *positioned on* pads or a solid surface." 29 C.F.R. § 1910.67(c)(2)(vii) (emphasis added). Contrary to Respondent's argument regarding the characterization of the shoes or feet at the end of the outriggers as "pads", the Court finds the plain language of the standard indicates that a pad, similar to a "solid surface", is separate from the outrigger. Thus, a pad, according to the standard, is something that

an outrigger is supposed to be "positioned on" rather than "equipped with". In addition, Respondent's own employees, including Safety Director Adkins, referred to the plates at the end of the outriggers as "feet." (Tr. 61, 97, 352, 389–90). Outrigger "pads" were clearly defined by Safety Director Adkins: "They're an additional separate piece…they are plates or cribbing or mats that you put underneath the outrigger foot to give you a larger surface area to put the foot on." (Tr. 298-299). Respondent's own employee and supervisor testimony undercuts Respondent's argument that it did not have proper notice of the meaning of the term "outrigger pad" as used in the standard.

Through the testimony of its engineering expert, Dean Harris, Respondent also attempted to show that the disced area of Mr. Huff's garden qualified as a solid surface within the meaning of the cited standard. (Tr. 446–457). In sum, Mr. Harris opined that the disced soil in the homeowner's garden area could be considered stable once the loose soil on the surface was compressed under the weight of the outrigger foot down to the soil substrate, which he estimated to be a few inches below the surface. (*Id.*).

While there was no evidence challenging the accuracy of Mr. Harris's calculations, the Court does not agree with his conclusion that the surface upon which the outriggers were placed was "solid" within the meaning of the standard. The standard appears to address situations where an equipment operator arrives at a worksite and makes an immediate assessment based on the visible conditions of the worksite at the time; namely, whether the surface the vehicle is parked on is solid. It does not require, nor reference, a post-work engineering analysis of soil or substrate as performed by Mr. Harris. The simplicity of the cited regulation was exemplified by the actions of the digger operator, Mr. Culley, who worked at the site the day before the accident. Mr. Culley testified that when he positioned his own truck next to the utility pole to

dig a new hole for the replacement pole, he extended his outriggers. When he saw them sink slightly into the loose soil on the ground, he immediately determined that he should (and did) place outrigger pads beneath the outrigger feet. (Tr. 390).

Respondent also introduced evidence indicating that the area near Oilton had been experiencing dry weather conditions for a significant period of time and that it had only started raining the day after the accident took place, which, it contends, explains the presence of mud and dirt around the rear outriggers. (Tr. 342, 398, 415; Ex. R-24 to R-32). However, Mr. Huff testified that he disced the soil in this area about 2-3 months earlier to use as a garden because "it holds moisture pretty good in the wintertime." (Tr. 85). Despite the dry weather conditions, Mr. Rosemond testified that the outriggers on his own bucket truck also "sank maybe an inch-and-a-half or two inches" but that he did not use outrigger pads on the day of the accident either. (Tr. 351-352).

The Court concludes, after considering all of the evidence presented with regard to the surface on which the outriggers were placed, that loose, disced soil in a residential garden area, specifically chosen by a homeowner for the area's ability to retain moisture is not a "solid surface." The conclusion is bolstered by Respondent's own employees' testimony indicating that the outriggers on multiple trucks consistently sank/shifted from one to three inches in that area when they were initially set. Accordingly, the Court finds that [redacted]'s rear outriggers were not placed on a solid surface, and therefore, outrigger pads should have been used. They were not. The cited standard was violated.

Respondent's Employees Were Exposed to the Hazard

As noted above, [redacted] was aloft in an aerial lift bucket working on overhead electrical lines, which did not have pads placed beneath the outriggers, while performing a

power line transfer to a new utility pole. According to CSHO Rambo, this exposed him to the potential for the truck to become unbalanced, shift, or tip, which could have resulted in [redacted] falling out of, or with, the bucket.[3] (Tr. 152–53). Thus, the Court finds that [redacted] was exposed to the violative condition.

Respondent Knew or Could Have Known of the Hazard

The Court finds that Respondent knew or could have known of the violative condition. As a general rule, the knowledge, action, or inaction of a supervisory employee is imputable to the employer. *See Revoli Constr. Co.*, 19 BNA OSHC 1682 (No. 00-0315, 2001). In this case, Mr. Downing, who was the foreman at the worksite on the day of the accident, testified that he was aware that outrigger pads were not used on all four outriggers of [redacted]'s bucket truck. (Tr. 97–98). Mr. Downing's knowledge is properly imputable to Respondent. The Court also notes that Mr. Rosemond, who was a supervisor though not designated to serve as the foreman of the crew that day, was also present and either knew, or could have easily discovered, that outrigger pads were not being used on the rear outriggers of [redacted]'s truck.

The Violation Was Serious

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). In this instance, if the bucket truck were to tip or unexpectedly shift, [redacted] could have been ejected from the bucket, or fallen with the bucket, which could have resulted in serious injuries like broken bones or contusions. (Tr. 154). CSHO Rambo did not determine that more serious injuries were possible because [redacted] was tied off inside of the bucket. (Tr. 154). However, the Court finds that if the placement of the truck on the loose soil caused the bucket to

[3] [redacted] was "tied-off" inside the bucket at the time. (Tr. 154).

completely tip over, [redacted] could have received more serious injuries despite being "tied-off" inside the bucket. The violation was properly characterized as serious.

Citation 1, Item 3

> Complainant alleged a serious violation of the Act in Citation 1, Item 3 as follows:
>
> 29 C.F.R. § 1910.269(l)(1): Unqualified employees were allowed to work on or with exposed energized lines or parts of equipment:
>
> On or about January 28, 2013, at an electrical pole change-out location, the employer allowed an unqualified employee to work on overhead power lines independently without direct supervision, exposing the employee to the hazard of electrical shock.
>
> The cited standard provides:
>
> Only qualified employees may work on or with exposed energized lines or parts of equipment. Only qualified employees may work in areas containing unguarded, uninsulated energized lines or parts of equipment operating at 50 volts or more. Electric lines and equipment shall be considered and treated as energized unless the provisions of paragraph (d) or paragraph (m) of this section have been followed.

29 C.F.R. § 1910.269(l)(1).

At the time of [redacted]'s accident, he was characterized by Respondent as a Step 4 Apprentice Lineman. (Tr. 56). Respondent's apprenticeship program has five steps. (Ex. C-16). In 2009, [redacted] was first employed by Respondent as a groundsman, installing underground transformers, pedestals, and power lines. (Tr. 30, 32, 35). After two years of employment with Respondent, he left to take a job with another company, Diversified Services, where he became a lineman apprentice. (Tr. 53, 56). During his time at Diversified, he worked with Mr. Downing. (Tr. 55–56). [redacted] and Mr. Downing then left Diversified in 2012, and applied for and received new positions with Respondent. Although he had worked for Respondent previously, [redacted] was required to complete new employee orientation and safety training, and was required to demonstrate his knowledge and skill level. (Tr. 243–45, 266; Ex. R-5, R-18, R-19).

Based on his training, experience, and demonstration of knowledge and skill, [redacted] was accepted into Respondent's apprenticeship program as a Step 4 lineman apprentice. (Tr. 55, 265–66).

According to Respondent's Safety Manager, Don Adkins, who designed the apprenticeship program, the program is front-loaded with all of the OSHA requirements for a "qualified person". (Ex. 251). *See* 29 C.F.R. §§ 1910.269(a)(2), 1910.269(x). In fact, Mr. Adkins testified without contradiction that once an employee has completed Steps 1 and 2 of Respondent's apprentice program, they would be considered a "qualified person" according to OSHA standards. (Tr. 251; Ex. C-16, R-18, R-19).

Notwithstanding the level of training provided in the in early stages of Respondent's apprenticeship program, Respondent implemented a cautionary safety policy which does not allow Step 4 Apprentices to work on live power lines unsupervised. (Tr. 283; Ex. C-16 at 10). Specifically, Respondent's program requires a supervisor to "be on pole with" or "in bucket with" a Step 4 Apprentice. (Tr. 281–82; Ex. C-16 at 10). According to Mr. Adkins, this means a supervisor must be aloft at the same height as the apprentice, but not necessarily in the same aerial bucket. (Tr. 282). This policy interpretation was echoed by Mr. Rosemond, who, until a few minutes before the accident, was working with and supervising [redacted] and Mr. Pruitt in an elevated bucket on the line. (Tr. 368–69).

The Standard Applies

According to 29 C.F.R. § 1910.269(a), "This section covers the operation and maintenance of electric power generation, control, transformation, transmission and distribution lines and equipment." Respondent's work crew was engaged in the transfer of live power lines—energized at 7,200 volts—from an old utility pole to a new utility pole. Neither party

disputes that this activity was covered by the cited standard. Accordingly, the Court finds that the standard applies.

The Terms of the Standard Were Not Violated

The cited standard requires that only "qualified employees" may work with exposed, energized lines operating at 50 volts or more. 29 C.F.R. § 1910.269(l)(1). The term "qualified employee" is defined as follows:

> One knowledgeable in the construction and operation of the electric power generation, transmission, and distribution equipment involved, along with the associated hazards.
> NOTE 1: An employee must have the training required by paragraph (a)(2)(ii) of this section in order to be considered a qualified employee.
> NOTE 2: Except under paragraph (g)(2)(v) of this section, an employee who is undergoing on-the-job training and who, in the course of such training, has demonstrated an ability perform duties safely at his or her level of training and who is under the direct supervision of a qualified person is considered to be a qualified person for the performance of those duties.

29 C.F.R. § 1910.269(x).

Section 1910.269(a)(2)(ii) lists the training and competencies required to be considered a qualified person.[4] In his brief, Complainant concedes that "[redacted] had the training required by (a)(2)(ii) of 29 C.F.R. 1910.269 and thus satisfied the requirements of Note 1 of the definition of a qualified employee." *Compl't Br.* at 8–9. Notwithstanding that concession, Complainant contends that because [redacted] was still—at least according to Respondent's program—an apprentice-in-training, he was not a qualified employee pursuant to Note 2, which requires direct supervision. *Id.* (citing 29 C.F.R. § 1910.269(x)).

The Court rejects Complainant's argument that [redacted] was not qualified pursuant to the cited OSHA standard on three grounds. First, the *Notes* appended to 1910.269(x) appear to be mutually exclusive means by which an employee can be considered "qualified" under the

[4]. The exception listed in Note 2 regarding paragraph (g)(2)(v) does not apply in this case.

standard. Complainant's argument seems to be that [redacted] was simultaneously both qualified (pursuant to Note 1) and yet unqualified (pursuant to Note 2) at the time of the accident. *See Manganas Painting Co., Inc.*, 21 BNA OSHC 1964 (No. 94-0588, 2007) (a standard must be construed to avoid an absurd result) (citing *Unarco*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993)). The purpose of Note 2 was not to provide Complainant with an alternative method of establishing a violation if the elements of Note 1 were met. Rather, according to the preamble of 29 C.F.R. § 1910.269(l)(1):

> In the final rule, the Agency has added a note to the definition of "qualified employee" to indicate that employees who are undergoing on-the-job training are considered to be qualified if they have demonstrated an ability to perform duties safely and if they are under the immediate supervision of qualified employees. Therefore, paragraph (l)(1) of final §1910.269 no longer refers to employees in training. (See the discussion of the definition of this term under the summary and explanation of §1910.269(x).) ***These changes will allay the concerns of those who argued that the language in the proposal would have required fully trained qualified employees to work under the direct supervision of another qualified employee . . . .***

Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment, 59 Fed. Reg. 4320-01 at 4379 (January 31, 1994) (emphasis added). Later in the same document, the preamble states:

> OSHA did not intend to require employees to be knowledgeable in all aspects of electric power generation, transmission, and distribution equipment in order to be considered as 'qualified'.
> ….
> It should be noted that the final rule uses the term "qualified employee" to refer only to employees who have the training to work on energized electric power generation, transmission, and distribution installations. Paragraph (a)(2)(ii) of final §1910.269 sets out the training an employee must have to be considered a qualified employee. A note to this effect has been included following the definition of this term.

Id. at 4425–26.

Therefore, OSHA's own published discussion of this regulation seems to indicate that the standard supplies two independent methods by which an employee can be considered qualified: (1) he has the training required by (a)(2)(ii), ***or*** (2) he is in the course of receiving the training required by (a)(2)(ii) and is supervised by a person who has already received that training. By the terms of the cited standard, [redacted] was either qualified or he was not. Complainant concedes, and the Court agrees based on the evidence presented, that [redacted] possessed the requisite training to be a qualified employee pursuant to (a)(2)(ii).

The second reason the Court rejects Complainant's argument is that there is a difference between saying that [redacted] was not *qualified* pursuant to the terms of (a)(2)(ii) and saying that he was not *authorized* by Respondent to perform live line transfers without direct supervision. Respondent apparently requires its employees to participate in supervised on-the-job training beyond the point at which they would be considered "qualified" under the cited standard. In this instance, Complainant is attempting to use Respondent's own apprentice program to enforce higher standards than what is required by the cited regulation. As noted above, Complainant conceded that [redacted] was qualified pursuant to the terms of the standard, having received the requisite fundamental training and testing. Put simply, Respondent's additional training and supervision above and beyond what is required by the cited standard does not place a higher burden on Respondent in complying with that standard.

Lastly, assuming *arguendo* that Note 2 applies even though Note 1 has already been satisfied, the Court is still not convinced that Respondent failed to comply. According to Note 2, an individual undergoing on-the-job training can be considered "qualified" if they are under the direct supervision of another qualified person. 29 C.F.R. § 1910.269(x). The term "direct supervision" is not defined anywhere in Section 1910.269. At the time of the accident, Mr.

Rosemond had swung away from the pole to assist Mr. Pruitt, leaving [redacted] as the sole employee aloft on the energized line. Even though [redacted] was the only employee on the line at the time, Mr. Downing, the actual crew foreman that day, was still actively observing [redacted] from the ground. In fact, Mr. Downing testified that he was specifically watching [redacted] work in the moments leading up to the accident, and was just about to tell [redacted] not to lean out of the basket when he was shocked. (Tr. 101).

Complainant argues that, because neither Mr. Rosemond nor Mr. Downing was in the bucket with, or on the pole with [redacted] at that moment, he was not under "direct supervision." (Ex. C-16 at 10). Although Respondent's own policies may prefer that a supervisor be aloft with an otherwise OSHA-qualified trainee during a live line transfer, the language in 1910.269(l)(1) does not impose any such requirement. There was no evidence that Mr. Downing was unable to provide supervision to [redacted] from his location on the ground. Complainant's argument is wholly contingent upon what level of supervision Respondent's policy requires, not what the cited standard requires. The preponderance of the evidence establishes that [redacted] was being directly supervised by Mr. Rosemond *and* Mr. Downing up until a few minutes before the accident. At the specific moment of the accident, [redacted] was still being directly supervised by Mr. Downing. Therefore, Complainant failed to prove that Respondent violated the terms of 29 C.F.R. § 1910.269(l)(1).

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).

Respondent is a large employer, with over 1,400 employees. (Tr. 168). There was one employee exposed to the hazard of an aerial lift basket shifting or tipping due to the failure to use outrigger pads when outriggers were not on a solid surface. The failure to do so exposed one employee to the potential for serious injuries. The likelihood of that type of accident actually occurring, however, was fairly low. As explained by Respondent's engineering expert, Mr. Harris, a post-accident analysis of the soil,[5] worksite conditions, and vehicle configuration illustrated that the vehicle was unlikely to actually tip over while [redacted] was working in the aerial bucket. (Tr. 444–459). Considering the totality of the circumstances discussed above, the Court finds that a penalty of $2,500.00 is appropriate for Citation 1, Item 1.

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 $2,500.00 is ASSESSED; and
2. Citation 1, Item 3 is VACATED.

[5] While giving weight to Mr. Harris's analysis for the purposes of penalty assessment (more specifically, the likelihood of an actual accident occurring), the Court notes that his opinion contained several factual assumptions concerning, among other things, soil type, soil conditions, and moisture levels at the time. (Tr. 404-465)

SO ORDERED.

Brian A. Duncan

Date: November 14, 2014
Denver, Colorado

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