UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. WESTERN WORLD, INC., *and its successor* CAYUSE, LLC, d/b/a WILD WEST CITY, Respondent.	OSHRC DOCKET NO. 07-0144

Appearances:

David M. Jaklevic, Esq. and Evan R. Barouh, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York
For Complainant

Michael Stabile, President and Mary Benson, Secretary, Western World, Inc., Netcong, New Jersey
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

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. § 651 *et seq.* ("the Act"). In response to a referral from local law enforcement, the Occupational Safety and Health Administration ("OSHA") began an inspection of a Western World, Inc. ("Respondent") worksite in Stanhope, New Jersey on July 10, 2006.[1] The referral was made because one of Respondent's employees had been shot during a reenactment of an Old West-style gunfight. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging a single violation of Section 5(a)(1) of the Act, and Respondent timely contested the Citation.

1. Western World was the party originally named by Complainant; however, in an amendment to the Complaint, Complainant also included Cayuse, LLC—Respondent's successor in interest—as a party to the proceeding.

On March 12, 2007, the Court[2] issued a stay in this case in response to Complainant's representation that criminal charges were pending against Respondent, its owner, as well as other individuals associated with Respondent. The criminal matter involving Respondent and associated parties was resolved on October 12, 2012. Subsequently, Complainant filed a *Motion to Remove the Case from Simplified Proceedings*, which was granted by the Court. The parties proceeded to trial for four days on August 21–26, 2013 in New York, New York.[3] Both parties filed post-trial briefs.

At trial, Complainant called the following witnesses: (1) Compliance Safety and Health Officer (CSHO) Robert Markow; (2) Scott Cunneely, employee of Respondent; (3) [redacted], former employee of Respondent;[4] (4) Michael Stabile, President of Respondent; (5) Kris Hoffman, Area Director of OSHA's Parsippany Office; and (6) Richard Ryder Washburn II.[5] Respondent called the following witnesses: (1) Robert Erven, former employee of Respondent and current member of the Arizona Territorial Rangers (hereinafter "AZTR") re-enactment group; (2) Kenneth Hill, member of AZTR; (3) Albert Schnellbacher, current employee of Respondent and member of AZTR; (4) Rigoberto Reyes, member of AZTR; (5) Michael Stabile; (6) Paul Van Eeckhoven, member of AZTR; and (7) Andrew Drysdale, former employee of Respondent and current member of AZTR.

Based upon the testimony, evidence, and after reviewing the parties' briefs, the Court finds that Respondent violated Section 5(a)(1) of the Act because it failed to take adequate steps to prevent the use of and detect the presence of live ammunition at the worksite. This failure, in turn, exposed Respondent's employees to the hazard of being struck by projectiles during the

2. This case was originally assigned to Judge John Schumacher, who dealt with the pre-trial phase of this case; however, due to unforeseen circumstances, the case was reassigned to Judge Patrick B. Augustine, who presided over the trial.
3. The trial began on Wednesday, August 21, 2013 and concluded on Monday, August 26, 2013.
4. [redacted] deposition testimony was replayed for the Court in lieu of live, in-person testimony.
5. Complainant called Mr. Washburn to provide expert testimony regarding the industry standard for weapons handling in the entertainment industry. The Court subsequently struck his testimony from the record.

course of their duties at their place of employment, which could result in serious bodily harm or death.

II. FINDINGS OF FACT

A. Background

Respondent runs a western theme park called Wild West City in Stanhope, New Jersey. (Tr. 68). The theme park is modeled after Dodge City, Kansas in the 1880's. It has been in operation since 1957 and run by the Stabile family since 1963. (Tr. 856). The theme park is typically open from Memorial Day to Columbus Day and houses exhibits, stores, and rides; however, the primary attractions are live action shows, which include reenactments of historical and quasi-historical events in the Wild West, such as the Gunfight at the OK Corral and the Sundance Kid. (Tr. 68, 219, 768; Ex. C-1 at 19). There are 22 reenactments or performances that are performed daily by approximately 25 of Respondent's employees, as well as by members of the AZTR, a non-profit reenactment group that works in conjunction with Respondent and is housed on Wild West City grounds. (Tr. 69, 78, 88). The performances primarily take place along what is known as Main Street and include, as is relevant to the present proceeding, staged shootouts between "good cowboys" and "bad cowboys". (Tr. 79, 219–20). According to Stabile, approximately ten of the performances include gunfight sequences, though most if not all performances include guns as part of the performers' costumes. (Tr. 878).

B. Handling and Use of Firearms and Ammunition

For the gunfight sequences, performers[6] use different types of guns, including prop guns, which are rubber, wooden, or otherwise non-functioning; blank-firing guns, which are capped and cannot fire projectiles; and operable firearms, which are capable of firing live ammunition.

6. The Court shall use the term "performer" when it is referring generally to participants in the reenactments/performances. As noted above, not all of the performers are employees of Respondent; some of the performers are members of the AZTR reenactment group. When necessary, the Court will refer to specifically to Respondent's employees or members of the AZTR; otherwise, it shall use the general term.

(Tr. 89, 863). Respondent provides some of these guns to the performers depending on their role in the performance; however, performers are allowed to bring their own blank-firing or operable firearms. (Tr. 363; Ex. C-1 at 34). In July 2006, at least ten performers brought their own firearms to the worksite for use in the performances. (Tr. 107, 363–366, 742, 837, 958, 997; Ex. C-1 at 34). Of the ten performers that brought their own firearms, at least six of them brought operable firearms capable of firing live ammunition. (*Id.*).

Prior to the first performance of the day, a senior cowboy would retrieve the firearms owned by Respondent from a safe located in the Town Hall building. (Tr. 644; Ex. C-1 at 43–45). The senior cowboy brought the guns to the Opera House, which Respondent's employees, including Stabile, used as a dressing room.[7] (Tr. 236, 239, 652; Ex. C-1 at 45). The dressing room also contained a gun rack that housed an operable shotgun. (Tr. 370; Ex. C-8, C-9, C-10). The guns were either distributed directly to the employees or were placed in an open shelving unit located in the dressing room. (Ex. C-1 at 38, 54). Once the guns were removed from Town Hall, they were not locked or secured; however, many of the performers testified that the guns were typically maintained on their persons for the entire day. (Ex. C-1 at 38). Although uncommon, some of the witnesses testified that guns were exchanged throughout the day if an employee needed a particular gun for a show. (Ex. C-1 at 43).

As noted above, not all employees used the guns provided by Western World; some of them used their own privately purchased guns. If an employee wished to use his own gun, that employee was required to submit his Firearms I.D. card and purchase permit to Stabile for approval. (Tr. 108, 823, 880). In addition to reviewing the Firearms I.D. card and purchase permit, Stabile inspected the firearm. (Tr. 366). Once approved, employees were allowed to bring their own firearms to the worksite and use those firearms in performances. (Tr. 107–109,

7. According to Scott Cunneely, Stabile was in the Opera House dressing room at least one time per day. (Tr. 236).

366, 667, 840). The initial approval was the only time that the firearm or certification was inspected by Respondent. (*Id.*). This is so even though Respondent did not prohibit employees from using their privately owned firearms outside of the worksite. (Tr. 368–69, 923–25).

Even though operable firearms were permitted, Respondent only allowed the use of blank ammunition for performances. (Tr. Ex. C-13). According to the written Gun Safety Review, no live ammunition was allowed on the worksite. (Ex. C-13; R-3). At the beginning of the day, in a manner similar to the distribution of firearms, Respondent supplied approximately 150 to 200 blank rounds, nearly all of which were used over the course of the entire day's performances. (Tr. 882; Ex. C-1 at 121). One person, typically Rick McPeek, would retrieve the blank ammunition from the safe in Town Hall and bring it to the Opera House dressing room. (Tr. 111, 178–79, 643–44, 882). McPeek would then give one box of blanks each (approximately 50 rounds) to two or three senior cowboys, who would then distribute the blanks to the remaining actors as needed throughout the day. (Tr. 239, 882). According to [redacted], a senior cowboy, the ammunition was distributed in a number of ways: boxes were left on an open shelf or dresser in the Opera House dressing room; blank rounds were kept in a glass bowl; blanks were distributed by senior cowboys who kept extras in their costume pockets; and some were kept in a vest that was hung in the dressing room. (Tr. 111, 644, 844; Ex. C-1 at 47–50). Employees were also allowed to exchange ammunition with one another—if an employee ran out or needed additional blanks, he could ask another performer for ammunition without going through a safety officer or centralized distribution scheme. (Tr. 110–12, 239, 372). A number of Respondent's witnesses disputed this version of the facts; however, the Court finds that those witnesses were not in a position to closely observe the distribution scheme in the Opera House dressing room. Many of Respondent's witnesses were members of the AZTR, which used the Surrey Shop as its dressing room and only came into the Opera House once a day in the morning in order to check

the daily performance schedule. (Tr. 111, 661, 760). Thus, the Court credits [redacted] testimony regarding how ammunition and guns were distributed by Respondent.

Respondent was not the only supplier of blank rounds. Employees were permitted to bring their own blank rounds, so long as they complied with the Gun Safety Review, which indicated what types of blank rounds were acceptable. (Tr. 371; C-1 at 50–52, C-13). This included nail gun blanks that could be purchased at a hardware store. (Tr. 113). Respondent did not have a designated employee or safety officer to inspect the personally supplied blank ammunition. (Tr. 113–114, 371). In that regard, Stabile testified that he could tell that it was blank ammunition "by the sound it made." (Tr. 371).

Even though the Gun Safety Review on its face called for a single safety officer, according to Stabile, "everyone [was] a safety officer" at Wild West City, which meant that, in practice, there was no designated safety officer. (Tr. 360; Ex. C-13). Respondent contends that the context of the document clearly indicates that safety officers were only required for off-site events; however, this explanation stands in contrast to how AZTR understood and implemented the policy that it drafted and that Respondent subsequently adopted. As described more fully below, AZTR utilized a safety officer for both off-site events and for events at Wild West City. (Tr. 980–83).

C. Training

In order to become a performer in Wild West City performances involving firearms, employees were required to take part in a training program that consisted of three parts. First, employees reviewed and discussed the Gun Safety Review and took a gun safety course. Second, employees were placed on a probationary period wherein they were only allowed to use prop guns, which allowed them to practice the basics involving where to aim and how far to stand away from other performers when firing. Finally, at the end of the probationary period,

employees were required to do a review of the policy with a senior performer to ensure they knew and understood the requirements. (Tr. 227–28, 673–77, 754; Ex. C-13, R-3).

During training, each employee signed a form, which provided the various rules and restrictions regarding the use of firearms at Wild West City. (Ex. C-13). Those rules were memorialized in a document entitled "Wild West City Gun Safety Review" and included the following:

> REAL guns of any type are NOT ALLOWED at WWC without EXPRESS permission from the owners of WWC . . . ALWAYS check with the Unit Safety Officer or the designated Event Safety Officer FIRST.
>
> Preferred Pistols are blank firing only style "non-guns" . . . Real .22 cal. single action six gun – firing .22 cal. #1, 2, 3, 4 blanks (ONLY WITH WWC PERMISSION).
>
> Real Guns REQUIRE: . . . Lock case for transport of any hand gun . . . 2nd lock case for ammo transport . . . All guns will be locked in trunk of car or in a locked case if no trunk.
>
> NEVER allow anyone access to your gun, keep it strapped in, do not hand it to customers for any reason EVEN NON-GUNS!
>
> NO ONE may load, let alone discharge a weapon at any event until briefed by the safety officer as to if, where and when.
>
> NO REAL AMMO EVER! NOT EVEN LOCKED IN YOUR CAR!!

(Ex. C-13). Other than the few remaining signed copies of the Safety Review, there is very little in the way of training documentation. According to Van Eeckhoven, many of the signed copies went missing during an office move. (Tr. 956).

Respondent hired a number of individuals with varying degrees of experience: Scott Cunneely was hired having never handled a gun before, whereas people like Hill and Schnellbacher had previously worked as police officers and had extensive experience in weapons handling. (Tr. 224–26, 670, 735). While it appears that a number of Respondent's employees participated in the aforementioned training, including former police officers, there were a few

individuals that did not go through the training course. These individuals included Chuck McCloud, who was a Hollywood stuntman with previous experience handling firearms, and Ron Benson, who grew up at Wild West City and maintained a hunting license. (Tr. 916–918). [redacted] testified that he did not receive training and did not sign the Safety Review sheet until after the incident that led to the present action; however, Van Eeckhoven testified that he provided [redacted] training and struggled to get [redacted] to sign the Safety Review sheet. (Tr. 952–53; Ex. C-1 at 32, 84).

D. Arizona Territorial Rangers

The AZTR is a non-profit, volunteer reenactment group that was formed in 1998 by Paul Van Eeckhoven and Andrew Drysdale.[8] (Tr. 938). According to Van Eeckhoven, prospective members had to have a "desire to relive the old west" and "show proficiency in the knowledge about firearms." (Tr. 938). Because not all individuals that wanted to join had such proficiency, AZTR drafted safety policies and provided safety courses. (Tr. 939). In developing the AZTR policy, the group reviewed standards from various reenactment groups, insurance company policies, as well as a target shooting group known as the Single Action Shooters Society, which is a group that seeks to portray living history through the use of old west style guns. (Tr. 941–43; Ex. R-14). Ultimately, the policy developed by AZTR was adopted by Respondent. (Tr. 945; Ex. R-3).

AZTR members participated in the reenactments at Wild West City alongside Respondent's employees, but they are not employees of Respondent.[9] (Tr. 938, 979). On occasion, however, AZTR members, such as Van Eeckhoven, would provide training to Respondent's employees when it was requested by Respondent. (Tr. 951). Otherwise, AZTR

8. Another founding member was Bob Copax; however, Mr. Copax did not testify at trial.
9. Some members of the AZTR, such as Paul Van Eeckhoven and Robert Erven, used to be employees of Respondent and then became members of AZTR. In other cases, such as Albert Schnellbacher, were originally members of the AZTR and then became Wild West City employees; however, Schnellbacher did not become an employee of Respondent until the summer of 2010.

members dressed and prepared in a different building (Surrey Shop) than Respondent's employees and, although based on the same document (Ex. C-13), implemented a more rigorous safety policy than Respondent with respect to the use, distribution, and handling of firearms and ammunition. (Tr. 980–82).

According to Van Eeckhoven, regardless of whether an event was off-site or on Wild West City grounds, AZTR had a designated safety officer or NCO (non-commissioned officer) to distribute ammunition and perform daily checks of the personally owned firearms that were brought to the worksite. (Tr. 980–982). Stabile, on the other hand, stated that the singular "safety officer" indicated in the Gun Safety Review was for off-site events only. (Tr. 908). As previously noted, Respondent considered every employee to be a safety officer while on Wild West City grounds.

E. The [redacted] Incident

On July 7, 2006, [redacted], a senior cowboy employed by Respondent, was seriously injured while performing in the Sundance Kid show at Wild West City. (Tr. 377). According to medical reports that were submitted into evidence, Dr. Devashish Anjara found a "bullet hole through [Mr. [redacted]] left frontal bone", a "bullet tract extending from the left frontal scalp in a parasagittal pan through the frontal, parietal, and occipital lobes", and a bullet fragment lodged "above [Mr. [redacted]] tentorium cerebelli in the midline against the calvaria." (Ex. C-18). Put simply, [redacted] had been shot in the head during a performance at Wild West City.

On the day of the incident, [redacted] brought two boxes of live ammunition to Wild West City. (Tr. 114–116, 245–46, 377–80; Ex. C-1). [redacted] left the live ammunition in his gun case, which was unlocked and left in the open on a dresser in the Opera House dressing room, alongside a box of blank ammunition. (Tr. 120–21, 240–41, 928–32; Ex. C-1 at 57, 69, C-12). Respondent did not check [redacted] case or the ammunition he brought to the worksite.

(Tr. 384). [redacted] testified that he brought live ammunition to work every day that season and that he told other employees about it, though he admitted that he did not tell Stabile or Mary Benson. (Ex. C-1 at 67–68). According to [redacted], other performers, including [redacted] and Ed Schanings, also brought live ammunition to Wild West City. (Ex. C-1 at 69, 85).

Before the Sundance Kid show began, the performers, including [redacted] and [redacted], were in the Opera House dressing room getting ready for the performance. (Tr. 233, 245, 647). In accordance with procedure, the performers obtained ammunition and loaded their firearms for the show. (Tr. 247; Ex. C-1 at 66–67). At the time, at least four of the performers used operable firearms for the Sundance Kid show. (Tr. 167–68; 384). Once the performers were dressed and their guns were loaded, they left the Opera House a few minutes prior to the start of the performance and got ready to start the show. (Tr. 261, 821–22).

The show began as scripted and culminated in a gun fight in which the good cowboys and bad cowboys stand across from each other and fire their weapons until only the good cowboys are left standing. (Tr. 79–80). As part of the training, performers are taught not to aim their guns directly at their targets; rather, they are instructed to aim to the side and towards the ground. (Tr. 127). On this day, however, [redacted], who was one of the good cowboys, fell to the ground at the conclusion of the gun fight, which was inconsistent with the script. (Tr. 114–15, 245–46; Ex. C-1 at 65–67). The other performers realized that something was amiss and went to check on [redacted]. (*Id.*). The performers noticed that [redacted] leg was twitching and that there was a pool of blood next to his head. (*Id.*). Someone called emergency services and [redacted] was taken to New Jersey University Hospital. (*Id.*).

After the incident, Stabile searched the Opera House Dressing Room and found the live ammunition in [redacted] gun case. (Tr. 379). Stabile removed the live ammunition and placed it in a safe in his office until the police asked him to turn it over approximately three days later.

(Tr. 379–82). Even though this was a clear violation of Respondent's firearms policy, Stabile did not fire [redacted] until three weeks after the ammunition was found in his gun case. (Tr. 384).

Local law enforcement referred the incident to the Parsippany Area Office, which sent CSHO Markow to Wild West City. CSHO Markow began his inspection the following day. (Tr. 79). As a result of the inspection, Respondent was cited for a violation of the general duty clause for failing to protect its employees from the hazards associated with the use of operable firearms.

F. Post-Incident Policy Changes

Since the incident involving [redacted], Respondent has implemented a number of changes to its firearms and ammunition procedures. First, only blank-firing guns are allowed for performances. (Tr. 388). Second, the guns are no longer brought to the Opera House. They are taken to the Marshal's Office at the beginning of the day, and a single designated safety officer (this person may change depending on the day) is responsible for the distribution of guns and keeping a log of gun assignments. (Tr. 388, 401–405, 656). Once a gun is issued, the performer is required to use the same gun throughout the course of the day. (*Id.*). Any guns that are not being used remain locked in the Marshal's Office. (*Id.*). At the end of the day, all performers are required to return their guns to the safety officer for inspection. Performers are allowed to use their personal, blank-firing guns; however, those guns must also be inspected by the safety officer both prior to use and at the end of the day. At the conclusion of the day's performances, the guns owned by Respondent are returned to the safe in the Town Hall. (*Id.*).

Similarly, Respondent now issues its blank ammunition from the Marshal's Office through a designated safety officer. (Tr. 401–403, 656–57). Each performer is allocated six blank rounds per individual performance. (Tr. 656). If a performer needs additional rounds for another performance, he must return to the Marshal's Office prior to the beginning of the next

show. (Tr. 657). Performers are no longer allowed to exchange ammunition or firearms. (Tr. 401). Kenneth Hill, a performer at Wild West City, testified that the new process of distribution is actually faster than it was under the system as it existed prior to July 6, 2006. (Tr. 714).

III. JURISDICTION

The Court finds that the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). The Act covers employers, which is defined as a "person engaged in business affecting commerce who has employees." 29 U.S.C. § 652(5). According to Section 3(4) of the Act, a "person" is defined as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." *Id.* § 652(4). Both Western World, Inc. and Cayuse, LLC are business entities located in and organized under the laws of the State of New Jersey. (Resp't *Answer* at ¶ 2; Tr. 359–361). Both Western World and Cayuse were (or are) in the business of operating Wild West City, a western theme park. (Resp't *Answer* at ¶ 2). Thus, Respondent is a "person" as defined by the Act.

Respondent's business also affects commerce, which is defined as "trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof . . . ." 29 U.S.C. § 652(3). This term has been broadly interpreted by the Commission to apply to employers who use products or tools that have moved in interstate commerce and those whose business attracts out of state customers. *See, e.g.*, *U.S. v. Dye Constr. Co.*, 510 F.2d 78, 83 (10th Cir. 1975) (holding that purchase and use of equipment from out-of-state sources is sufficient); *Avalotis Painting Co.*, 9 BNA OSHC 1226 (No. 76-4774, 1981) (finding jurisdiction where employer made use of products made out of state and that had moved in commerce); *Deauville Operating Corp.*, 5 BNA OSHC 1959 (No. 77-118, 1977) (ALJ) (finding jurisdiction where hotel attracted interstate and intrastate customers). Respondent

admitted that it uses materials and supplies shipped from outside of New Jersey, sells souvenirs that are shipped from both California and Tennessee, and attracts customers from outside New Jersey. (Resp't *Answer* at ¶ 3; Tr. 361–362). These activities illustrate that Respondent is engaged in a business affecting commerce pursuant to the Act.

Finally, the Court also finds that Respondent is an employer that has employees. *See* 29 U.S.C. § 652(6). Respondent admitted that it employed approximately 75 employees at the time of the OSHA inspection of Wild West City. (Tr. 77–78, 361; Ex. C-26).

Based on the foregoing, the Court finds that, at all times relevant to this matter, it was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

IV. Conclusions of Law

A. Citation 1, Item 1

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

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: 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 in that, employees were exposed to hazards from projectiles during performances involving shooting.
>
> The employer exposed employees to a hazard of being struck by bullets or projectiles when firearms were used by employees reenacting shootouts.
>
> Among other methods, one feasible and acceptable abatement method to correct this hazard is to appoint an armorer/safety officer who inspects and distributes all firearms and ammunition for everyone on site for every performance/show.

The cited standard provides:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

29 U.S.C. § 654(a)(1).

To establish a *prima facie* violation of Section 5(a)(1) of the Act, also known as the general duty clause, Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (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 and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co*., 17 BNA OSHC 1869 (No. 92-2596, 1996). The evidence must also show that the employer knew or with the exercise of reasonable diligence, should have known of the hazardous condition. *Otis Elevator Company*, 21 BNA OSHC 2204 (No. 03-1344, 2007).

i. *The Use of Operable Firearms and the Presence of Live Ammunition Presented a Hazard to Respondent's Employees*

"As part of [his] burden, the Secretary must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices over which the employer can reasonably be expected to exercise control." *Otis Elevator Co.*, 21 BNA OSHC 2204 at *3 (No. 03-1344, 2007) (citations omitted). Complainant does not need to show that an actual injury occurred to prove a violation of the general duty clause; rather, Complainant must show that it was "reasonably certain that some employee was or would be exposed to the danger" of the cited hazard. *See Mineral Indus. & Heavy Constr. Group*, 639 F.2d 1289, 1294 (5th Cir. 1981); see *also Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977); *Kansas City Power & Light Co.*, 10 BNA OSHC 1417, 1423 (No. 76-5255, 1982) (holding that it is the hazard, not the specific incident resulting in injury, that is relevant in determining existence of hazard).

As noted above, Respondent allowed its employees to use operable firearms during performances at Wild West City. Some of the firearms were owned by Respondent and others were brought to the worksite by Respondent's employees. CSHO Markow testified that the use

of operable firearms exposed Respondent's employees to the hazard of being struck by projectiles or bullets during the course of the choreographed gunfights, wherein performers would aim their weapons in the "general direction" of other performers. (Tr. 81, 135, 205). Throughout the course of the day, approximately 150 to 200 shots were fired during these performances.

Many of Respondent's witnesses, including Stabile himself, testified to the hazards associated with the use of firearms in reenactments. Paul Van Eeckhoven, one of the founding members of the AZTR who was instrumental in drafting the Gun Safety Review, testified that there are a number of inherent risks associated with the use of firearms, including the possibility of being shot. (Tr. 936–37). Kenneth Hill and Glenn Schnellbacher, who were both members of the AZTR at the time of the incident and were former police officers, testified that there are serious risks in using operable firearms, including serious injury and death. (Tr. 669–71).

Underscoring the concern about the possibility of being shot, Van Eeckhoven testified that members of AZTR were prohibited from ever using live ammunition in the operable firearms that they used in Wild West City performances. (Tr. 970–71). The purpose of this, of course, was to prevent the possibility that live ammunition could be inadvertently brought to the worksite, which, according to Van Eeckhoven, was "always on everyone's mind." (Tr. 964). In contrast, however, Respondent imposed no such restrictions, nor, as will be seen below, did Respondent conduct inspections of privately owned, operable firearms to prevent the presence or use of live ammunition.

Although Complainant is not required to show that the presence of a particular hazard resulted in an injury, the fact that an injury occurred is strong evidence that the hazard existed. [redacted] testified that, on July 7, 2006, he brought live ammunition to the worksite.[10] On that

10. In fact, according to [redacted], he had brought live ammunition to Wild West City every day that he worked

same day, during a simulated gunfight at Wild West City, [redacted] was shot in the head. The only reasonable inference from this state of affairs is that [redacted] was shot by a live bullet that was fired from an operable firearm. *Okland Construction Co.*, 3 BNA OSHC 2023, 2024, (No. 3395, 1976) (reasonable inferences can be drawn from circumstantial evidence). This, in and of itself, is sufficient to show that Respondent's employees were exposed to a hazard. *See Otis Elevator*, 21 BNA OSHC 2204 ("Indeed, the record establishes that McQuillen's death was the result of the hazard posed by a load free falling into an elevator pit while an employee is riding in the car sling.").

Nevertheless, Respondent contends that there was no hazard because it had a policy prohibiting the presence of live ammunition on Wild West City grounds and that, in 49 years of operation, [redacted] was the only person that was shot. The Court disagrees. The fact that no injuries have occurred over the course of 49 years does not disprove the existence of a hazard. *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 at * 7 (No. 90-2866, 1993) ("Although there was testimony that no injuries had occurred involving the grinder in its 32–year history, that in itself does not disprove the existence of a hazard."). As to Respondent's argument that its policy was sufficient to negate or materially reduce the hazard, the Court shall address that issue in Section IV.B, which addresses the defense of unpreventable employee misconduct. *See Connecticut Light & Power Co.*, 13 BNA OSHC 2214 (No. 85-1118, 1989) (holding that an employer is not in violation of section 5(a)(1) if it has established work rules designed to prevent the hazards from occurring, has adequately communicated the work rules, has taken steps to discover noncompliance, and has effectively enforced the rules).

Ultimately, the presence of operable firearms, the fact that [redacted] brought live ammunition to the worksite, and the fact that [redacted] was shot during a Wild West City

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during the summer of 2006. (Ex. C-1 at 67).

performance clearly establish that Respondent's employees were exposed to the hazard of being shot by live ammunition.

ii. *Respondent Recognized the Hazard*

Not only were Respondent's employees exposed to a hazard, Respondent recognized dangers associated with allowing the use of operable firearms during Wild West City performances. According to the Commission, "a hazard may be recognized by the individual employer itself or by its industry." *Wiley Organics, Inc.*, 17 BNA OSHC 1587, 1591 (No. 91-3275, 1996). Complainant's burden can be met by showing that Respondent had a work rule prohibiting a practice that presents a hazard. *See Otis Elevator Co.*, 21 BNA OSHC 2204 at *4 (holding that evidence of a work rule established that respondent recognized the hazard) (citing *Ted Wilkerson Inc.*, 9 BNA OSHC 2012, 2016 (No. 13390, 1981)). In this instance, Complainant's burden is easily met.

Respondent's recognition of the hazard in this instance is two-fold. First, Stabile testified that Respondent "always recognized that there are hazards associated with firearms" at Wild West City. (Tr. 871). Secondly, Respondent had a work rule that addressed the hazard. The Gun Safety Review document, which was adopted by Respondent, specifically states "NO REAL AMMO EVER! NOT EVEN LOCKED IN YOUR CAR!!" (Ex. C-13) (emphasis in original). The contents of the Gun Safety Review were discussed prior to an employee performing at Wild West City, reiterated during the employee's probationary period, and was reviewed again prior to any employee using an operable or blank-firing firearm. As noted above, Van Eeckhoven testified that the possibility of live ammunition being brought to the worksite was "always on everyone's mind." (Tr. 964). This clearly indicates that Respondent not only recognized the hazard, but it also ensured that each of its employees were aware of the hazard as well.

Although both parties presented evidence related to how Respondent's business should be characterized—thus calling into question the proper industry standard—the Court finds that such evidence is unnecessary to resolve the question of whether Respondent recognized the hazard.[11]

iii. ***The Hazard was Likely to Cause Death or Serious Physical Harm***

The Court also finds that the hazard was likely to cause death or serious physical harm. Such a finding is akin to the determination that a violation of a specific standard is "serious", which means that there is a substantial probability that death or serious physical harm could result from the violative condition. 29 C.F.R. § 666(k). In that regard, 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 case, almost every single witness testified that that the use of operable firearms poses the dangers of serious injury and potentially death. (Tr. 135, 671, 736, 937). Further, the fact that [redacted] was injured also demonstrates how dangerous the use of operable firearms can be. *See Marquette Cement Mfg. Co.*, 568 F.2d at 910 ("The fact that the activity in question actually caused death or serious injury constitutes at least *prima facie* evidence of likelihood."). [redacted] was shot in the head with a bullet from an operable firearm during a performance at Respondent's worksite, and his injury resulted in serious physical injury. (Ex. C-18). Complainant has met his burden by establishing the hazard that existed was likely to cause serious physical injury or death if left unabated.

iv. ***A Feasible and Effective Means Existed to Eliminate or Materially Reduce the Hazard***

11. In that regard, the Court finds that the testimony of Complainant's expert, Richard Ryder Washburn II, is unnecessary to reach the conclusion that Respondent recognized the hazard.

To prove a violation of the general duty clause, Complainant must "specify the particular steps a cited employer should have taken to avoid citation, and . . . demonstrate the feasibility and likely utility of those measures." *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973). As part of his burden, Complainant "must define the hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices which are within the employer's control." Mark A. Rothstein, *Occupational Safety and Health Law* 290 (2013) (citing *Beverly Enterprises, Inc. v. Herman*, 119 F. Supp. 2d 1 (D.D.C. 2000)). A feasible abatement measure is one that will eliminate or materially reduce the hazard. *See Arcadian Corp.*, 20 BNA OSHC 2001. Thus, it is incumbent upon Complainant to introduce evidence that the measures employed by Respondent were inadequate. *See United States Postal Svc.*, 21 BNA OSHC 1767 (No. 04-0316, 2005). The Court finds that Complainant has met his burden.

Although Respondent contends that the measures it employed prior to July 7, 2006 were effective, the evidence belies that contention. To be sure, there are facial similarities between the policy previously employed by Respondent and the measures proposed by Complainant; however, as a whole, the measures employed by Respondent were clearly inadequate to the task of materially reducing the hazards associated with operable firearms. In particular, the Court finds that Respondent's program as it existed prior to July 2006 exhibited two major problems.

First, and perhaps most important, was the fact that Respondent did not inspect personally owned weapons or personally purchased ammunition prior to their use in Wild West City performances. Stabile testified that personally owned firearms were inspected the first time they were brought to Wild West City; however, there is no indication that any subsequent inspections of those firearms ever occurred. Likewise, Respondent did not inspect personally purchased blank ammunition. In fact, Stabile underscored this failure when he testified that he

could tell whether someone was using blanks "by the sound it made." (Tr. 371). Such a process of inspection, if it may be so called, does nothing to prevent a live round from being fired in the first place. The Court recognizes that the new regime does not *guarantee* that a rogue performer will not slip a live round into the gun, but regular, daily inspections of a performer's personally owned firearm will materially reduce the hazards associated with allowing their use. *See Morrison-Knudsen Co., Inc.*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993) ("[T]he Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard.").

Along those same lines, the Court finds that, by allowing personally owned, operable firearms, Respondent had a heightened obligation to perform the type of inspection proposed by Complainant. According to the Commission, "Effective implementation of a safety program requires a diligent effort to discover and discourage violations of safety rules by employees." *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). The failure to conduct any inspection beyond the initial review of a performer's firearm or ammunition they bring to the worksite represents a critical failure to perform the type of inspections that would materially reduce the hazards associated with the use of firearms capable of firing live ammunition.

Second, Respondent effectively shifted its responsibility to ensure a safe workplace to each of its employees. In the words of Stabile, "We consider every actor that passes the Wild West City gun safety review to be a safety officer . . . ." (Tr. 928). While this sounds appealing, the practical effect is that each individual is only responsible to him/herself and that no one is taking responsibility for anyone else. *See, e.g.*, *Armstrong Cork Co.*, 8 BNA OSHC 1070, 1074 (No. 76-2777, 1980) ("An employer cannot shift responsibility to its employees by relying on them to, in effect, determine whether the conditions under which they are working are unsafe.").

While everyone was a designated "safety officer", Stabile testified that none of those "safety officers" had the authority to take action against a fellow employee for a breach of the rules, i.e., fire or take disciplinary action. (Tr. 385). The Court agrees with Complainant that "when everyone is responsible, no one is responsible." *Compl't Br.* at 34. Complainant has established Respondent's measures that were in place prior to the July 2006 incident were inadequate. The Court will now proceed to evaluate the feasibility of the proposed abatement method.

In the citation, Complainant proposed the following abatement method:

> Among other methods, one feasible and acceptable means of abatement to correct this hazard is to appoint an armorer/safety officer who inspects and distributes all firearms and ammunition for everyone on site for every performance/show.

Citation and Notification of Penalty at 6. CSHO Markow, as well as a number of Respondent's own witnesses testified that the abatement method proposed in the Citation has been used by other reenactment groups. (Tr. 134, 999–1004). Andrew Drysdale and Paul Van Eeckhoven both testified that reenactment groups typically employ a safety officer (sometimes referred to as an armorer or NCO) to inspect all weapons and ammunition prior to the beginning of a performance, as well as at the conclusion thereof. (Tr. 959–60, 999–1004). Van Eeckhoven, who drafted the Gun Safety Review that was subsequently adopted by Respondent, testified that he relied on Old West Living History Foundation's "Safety Guidelines" in formulating the Gun Safety Review. (Tr. 941; Ex. R-14). The Foundation's Guidelines require all individuals to check-in their firearms with a designated safety officer, who is also in charge of maintaining all ammunition under his control and supervision. (Ex. R-14). These safety measures are designed to prevent the possibility that an individual would improperly load his firearm with live ammunition and, thus, materially reduce the risks associated with the use of operable firearms. That other similarly situated performance groups utilize the proposed abatement measures is a testament to their feasibility.

Complainant, through its examination of Stabile and its cross-examination of Respondent's witnesses, was able to show that its proposed abatement methods were both technologically and economically feasible. As noted above, Respondent acknowledged that it has implemented the changes suggested by Complainant: personally owned firearms are inspected at the beginning of the day; company-owned firearms are distributed by a designated safety officer from the Marshal's Office; and blank ammunition is distributed on a performance-by-performance basis from a central source, with no more than six rounds being issued at one time to any individual performer. That these measures have been in place since the incident involving [redacted] in 2006 and Respondent continues to operate under these measures is further evidence that the proposed measures are feasible.[12] In fact, as previously noted, Kenneth Hill, a performer at Wild West City, testified that the new process of distribution and inspection is actually faster than it was under the regime that existed prior to July 6, 2006. (Tr. 714).

That Respondent has gone beyond the abatement measures suggested by Complainant and now, for example, only allows blank-firing guns does not in any way detract from the effectiveness of having a single point of distribution and inspection for both ammunition and company-owned firearms. In fact, Commission case law suggests it is acceptable to allow Respondent some measure of discretion in how it chooses to implement the specified abatement measures because the employer will be in a better position to evaluate workplace-specific conditions. *See, e.g.*, *Gen. Dynamics Land Syst. Div., Inc.*, 15 BNA OSHC 1275, 1287 (No. 83-1293, 1991). For example, in *Tampa Shipyards, Inc.*, the Commission found that it was acceptable to leave it to the company to develop the specifics of a written crane safety policy. 15 BNA OSHC 1533 (Nos. 86-360 & 86-469, 1992). In this case, Complainant stipulated that Respondent's current safety procedures have effectively abated the cited hazard.

12. The foregoing evidence indicates that the Court did not need the testimony of any expert witnesses on the issue of feasibility as there was sufficient evidence submitted on this topic through the testimony of lay witnesses.

Respondent failed to produce any evidence to suggest that the methods proposed by Complainant and enacted by Respondent were either technologically or economically infeasible. Additionally, it would be very difficult for Respondent to prevail in any such argument based on its adoption of the proposed abatement measures. (Tr. 401–403, 656–57). Many of the problems identified by Respondent with Complainant's proposed abatement methods are either highly speculative or are already dealt with through existing rules and procedures.[13] Further, Respondent appears to have misunderstood the recommended abatement. Nowhere did Complainant suggest that Respondent should be required to only use blank-firing weapons, nor did it suggest that someone should load the weapons for each of the actors. Rather, Complainant has proposed that weapons be inspected prior to use and that ammunition and company-owned firearms be distributed from a single source.

The foregoing illustrates Complainant has established that Respondent failed to properly address the hazards present at Wild West City. Although Respondent had some rules in place, those rules were insufficient in light of Respondent's policy, which allowed the use of personally owned, operable firearms. Complainant has also established a feasible and, in the opinion of one of Respondent's own witnesses, effective means to materially reduce the hazards associated with the use of operable firearms.

v. *Respondent Knew or Could Have Known of the Violative Condition*

Complainant also has the burden to establish that Respondent, with the exercise of reasonable diligence, knew or could have known of the conditions constituting the violation. *See Contour Erection & Siding Syst., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007). "In assessing reasonable diligence, the Commission has considered 'several factors, including the employer's obligation to have adequate work rules and training programs, to adequately

13. For example, though Respondent contends that the use of blank-firing only firearms present their own hazards, Respondent already had a training regime and policy in place to address those hazards.

supervise employees, to anticipate hazards to which employees may be exposed, and to take measure to prevent the occurrence of violations.'" *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1030 (No. 91-2834E, 2007) (consolidated) (citation omitted). The obligation to inspect the workplace for hazards "requires a careful and critical examination, and is not satisfied by a mere opportunity to view equipment." *Hamilton Fixture*, 16 BNA OSHC 1079, 1087 (No. 88-1720, 1993); *see also N & N Contractors, Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001) (employer has constructive knowledge of violation if employer fails to use reasonable diligence to discern the presence of a violative condition). *But see Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2196–97 (No. 90-2775, 2000) ("[I]n the absence of any evidence indicating how long the violative conditions had been in existence, we are unable to evaluate whether [the employer] could have known of them even it if had been reasonably diligent in inspecting its equipment."); *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999) (same).

While it is clear that Respondent was aware of the general hazard associated with the use of operable firearms during its reenactment performances, the Court also finds that Respondent knew or could have known of the specific hazard presented when [redacted] brought live ammunition to the worksite. According to [redacted], he had brought live ammunition to Wild West City every day that he worked during the 2006 summer season up to the incident on July 7, 2006.[14] (Ex. C-1 at 67–68). During that time, [redacted] testified that he had left the ammunition in his gun case, which was stored in the open on top of the dresser that he used in the Opera House. Thus, in terms of Respondent's opportunity to inspect, it is clear that the violative condition existed for a sufficient period of time for Respondent to have known of it through reasonable diligence.

14. Although there was some dispute as to the number of days that [redacted] actually worked, particularly as it pertains to the month of May, the Court finds that [redacted] was present at Wild West City for a sufficient amount of time to give Respondent the opportunity to discover the violation.

Given the length of time that the condition existed, Respondent had a number of opportunities to observe the presence of live ammunition. First, though Stabile testified that the individuals characterized as "senior cowboys" did not have the authority to hire and fire, he nonetheless characterized all of his employees as "safety officers." Therefore, it would appear as if any one of Respondent's employees had the authority and obligation to correct unsafe work practices, such as bringing live ammunition to work. *See Revoli Constr. Co.*, 19 BNA OSHC 1682 (No. 00-0315, 2001) (reiterating the well-settled rule that an employee who has been delegated authority, even temporarily, is considered to be a supervisor for the purposes of imputing knowledge); *Access Equip. Syst., Inc.*, 18 BNA OSHC 1718, 1726 (holding that employee "in charge of" or "the lead person for" one or two employees can be considered a supervisor). In [redacted] case, he testified that he told other employees that he brought live ammunition to work and yet none of the individuals he told took any action to correct the violation. Second, Stabile himself used the Opera House dressing room at least one time per day to prepare for his own reenactment. Stabile's dressing area was right next to [redacted] dressing area and, thus, he had a clear opportunity to observe [redacted] gun case and perform an inspection to ensure compliance with the rules. Further, the evidence indicates that [redacted] gun case was unlike those owned by Respondent in that Stabile testified that it was too large to fit in the safe with the other guns owned by Respondent. (Tr. 893). This fact should have placed Stabile on notice that an inspection should have been performed. This was his right and obligation as the employer in order to ensure a safe workplace for all of his employees.[15] Finally, to the extent that [redacted] was given the title "senior cowboy" and was charged with supervisor-like responsibilities, the Court finds that Respondent, through its supervisory staff, had direct knowledge of the presence of live ammunition. *Revoli Const. Co.*, 19 OSHC 1682

15. This was a right that Stabile eventually exercised after [redacted] had been shot—he conducted a search of [redacted] gun case almost immediately after the incident.

(No. 00-0315, 2001) (the actions and knowledge of supervisory personnel are generally imputed to their employers).

B. Unpreventable Employee Misconduct

In order to prove the affirmative defense of employee misconduct, it is the employer's burden 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. *GEM Industrial, Inc.*, 17 BNA OSHC 1861 (No. 93-1122, 1996). "[W]here a supervisory employee is involved in the violation the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Daniel Constr. Co.*, 10 BNA OSHC 1549 (No. 16265, 1982). "A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

i. *Respondent Had Established Work Rules Designed to Prevent the Violation and Communicated Those Rules to its Employees*

Although the Court questions the efficacy of Respondent's work rules, especially with regard to the method of distribution of firearms and ammunition, there is no question that Respondent had a very specific rule that disallowed the presence of live ammunition on Wild West City Grounds. (Ex. C-13). Further, the Court finds that those rules were communicated to Respondent's employees through its training program, which consisted of an initial review of the policy, a probationary period, and a final review of the rules and restrictions regarding the use of firearms at Wild West City. Respondent has met its burden with respect to this element.

ii. *Respondent Did Not Take Adequate Steps to Discover Violations*

The key to establishing this defense is that the misconduct is *unpreventable*. One of the main problems for Respondent, however, is its failure to conduct appropriate inspections to ensure that the policy contained within the Gun Safety Review was followed. As noted multiple times above, Respondent allowed its employees to not only bring their own operable firearms to Wild West City, it also allowed its employees to bring their own personally purchased ammunition. In light of that fact, Respondent had a heightened responsibility to audit those individuals to ensure compliance with the rules—the duty to inspect should be commensurate with the hazard presented by the conditions, which, in this case, was quite severe. Merely checking the firearm the first time it is brought to the workplace, without subsequent inspection, is not sufficient to meet this obligation. Nor, for that matter, is allowing employees to use their own ammunition without first verifying that it complies with the policy. This was further underscored by Stabile when he explained the reason for not conducting further inspections: "No, no one checked the firearm. There was an initial approval *and my presumption* was - - is that they would bring that firearm and use those blanks." (Tr. 925). A hazard of this nature is far too dangerous to protect against with presumptions.

As is the case with establishing employer knowledge, the key to this defense is a showing that Respondent exercised reasonable diligence in detecting workplace hazards. *See N & N Contractors, Inc.*, 18 BNA OSHC 2121 (defense rejected where employer took few steps to discover violations). In contrast to the employer in *N & N*, it does not appear that Respondent took any steps to discover violations of its policy beyond the initial inspection. Rather, Respondent shifted that responsibility to its own employees, who did not have the authority to properly address such violations and, in some cases, perhaps felt powerless to do so when the violator was one of Respondent's senior employees.

Respondent's failure to conduct inspections in the face of allowing employees to carry their own operable firearms and bring their own ammunition is clear evidence that it did not take adequate steps to prevent violations of its safety policy. Accordingly, Respondent has failed to prove the defense of unpreventable employee misconduct.

iii. ***Respondent Failed to Effectively Enforce Those Rules When Violations Were Discovered***

In addition to its failure to exercise reasonable diligence to discover violations, Respondent also failed to effectively enforce the rules it had. First, Respondent did not have a disciplinary policy to communicate or enforce in the event that a violation of the rules was discovered. Additionally, there was scant evidence in the record that, prior to July 7, 2006, disciplinary actions were ever taken against employees that violated the rules. This could be due to the fact that it does not appear as if there was anyone, other than Stabile, that was authorized to take such action. Second, the Court is not convinced that the actions taken against [redacted] constitute effective enforcement. Indeed, Respondent eventually terminated [redacted] for bringing live ammunition to the worksite; however, Respondent did not terminate [redacted] until three weeks after it discovered the live ammunition in his gun case. The Commission has held that a single instance of delayed discipline is not sufficient, in and of itself, to establish that an employer failed to effectively enforce its rules, especially when the employer presents evidence of a progressive disciplinary policy and an established record of employee discipline. *Amer. Eng. & Dev. Corp.*, 23 BNA OSHC 2093 (No. 10-0359, 2012). However, in this instance, Respondent did not present evidence of either, which is indicative, though not dispositive, of a deficient enforcement policy. Based on the foregoing, the Court finds that Respondent failed to prove the defense of unpreventable employee misconduct.

The Court finds that Respondent failed to provide employment and a place of employment that was free from the recognized hazards associated with the use of operable

handguns and the presence of live ammunition. Accordingly, Citation 1, Item 1, alleging a violation of Section 5(a)(1) shall be AFFIRMED.

V. 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).

Based on the Court's review of the record, the Court adopts the original penalty recommendations of Complainant. According to the Field Inspection Reference Manual, which was in effect in July 2006, Complainant initially recommended a gravity-based penalty of $2,500.00, which reflected a characterization of High Severity and Low Probability. (Tr. 411–420). The Court agrees with this characterization in light of the serious injuries suffered by [redacted] and taking into consideration the likelihood of such an event occurring. The original penalty was reduced by 40% due to Respondent's size and an additional 10% due to Respondent's lack of violation history. Respondent was not given credit for good faith in light of its failure to ensure compliance with its firearms policy, and the Court agrees with this assessment. This results in a total proposed penalty of $1,250.00. Contrary to the suggestion of

Complainant, the Court does not find that an increase in the proposed penalty will serve the twin purposes of deterrence and the promotion of compliance. Accordingly, the Court shall assess a penalty of $1,250.00.

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 shall be AFFIRMED and a penalty of $1,250 shall be ASSESSED.

/s/
Patrick B. Augustine
Judge, OSHRC

Date: December 27, 2013
Denver, Colorado