UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. DOYLE K. BECKHAM d/b/a DKB CONSTRUCTION, Respondent.	DOCKET NO. 12-2151

Appearances:

Luis A. Garcia, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, CA
For Complainant

Doyle K. Beckham, Owner of DKB Construction, Tucson, AZ
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the 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"). On April 30, 2012, the Occupational Safety and Health Administration ("OSHA") inspected a DKB Construction ("Respondent") jobsite located in Tuba City, Arizona, on the Hopi Indian Reservation ("jobsite"). As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging two serious violations of the Act with total proposed penalties of $3,200.00. Respondent timely contested the Citation. A trial was conducted in Tucson, Arizona on April 18–19, 2013. The parties submitted post-trial briefs for consideration.

Stipulations

1. The jobsite is a Tuba City assisted living facility, Tuba City, Arizona 86045. (Tr. 56).[1]
2. The Review Commission has jurisdiction over this action and the parties pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, as amended. (Tr. 56).
3. The general contractor on the jobsite was Brycon Construction. (Tr. 56).
4. DKB Construction (hereinafter referred to as "DKB") was a subcontractor on the jobsite. (Tr. 56).
5. DKB is a sole proprietorship owned by the Respondent, who is identified as Doyle Beckham. (Tr. 56).
6. DKB's business address is 301 East Fort Lowell Road in Tucson, Arizona 85705. (Tr. 56).
7. On April 30, 2012, Frank Ponce (carpenter); Anthony French (foreman in training); Shannon Lee Naha (carpenter); Gale Albert (carpenter); and Dominic Benton (carpenter) were employees of DKB working on the jobsite. (Tr. 56).
8. All DKB employees are provided a copy of a company policy statement and they are required to read and familiarize themselves with the terms of the company policy statement. (Tr. 57).
9. At the time of CSHO Moon's inspection at the jobsite, DKB's employees were working in and around a single story wood frame construction building. (Tr. 57).
10. At the jobsite, DKB's employees use various hand tools and power operated hand tools including nail guns, saws, and hammers. (Tr. 57).
11. At the jobsite was one of ten DKB-owned Gradall rough terrain forklifts identified as Unit Number 5, Model 534-D9-45, Serial Number 0644683 (hereinafter referred to as the

[1] The Court notes that the actual project name was the "Hopi Assisted Living Facility" according to Ex. C-4, p. 24.

"forklift"). (Tr. 57).

12. Upon CSHO David Moon's arrival at the jobsite, DKB's forklift was not being operated. (Tr. 58).
13. DKB is not asserting any affirmative defenses. (Tr. 58).
14. Anthony French is currently employed by DKB. (Tr. 327).
15. Anthony French's position as a foreman is his current position. (Tr. 327).
16. Anthony French's position and his job duties [at the time of trial] are similar to what he had on April 30, 2012. (Tr. 327).
17. Anthony French met CSHO Moon at the jobsite on April 30, 2012 and participated in the opening conference. (Tr. 327).
18. Anthony French accompanied CSHO Moon on the walkthrough throughout the jobsite for the entire time of the walk. (Tr. 327).
19. Frank Ponce purchased all of the PPE that is listed under the company policy statement he signed, under Section 19.4. (Tr. 411).
20. Frank Ponce purchased those items before he was hired by Mr. Beckham. (Tr. 411).

Jurisdiction

Jurisdiction is conferred upon the Commission pursuant to Section 10(c) of the Act. Based on the parties' stipulations and the record, 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). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). Although Arizona manages its own OSHA state plan, it is undisputed that Respondent was engaged in construction activities on the federally recognized Hopi Indian Reservation, which is subject to Federal OSHA jurisdiction. (Tr. 84, 133). *See* 29 C.F.R. § 1975.4(b)(3); *Mashantucket Sand &*

Gravel, 95 F.3d 174 (2nd Cir. 1996); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985); *U.S. DOL v. OSHRC*, 935 F.2d 182 (9th Cir. 1991).

Background

Five witnesses testified at trial: (1) David Moon, OSHA Compliance Safety and Health Officer ("CSHO"); (2) Anthony French, Respondent's jobsite Foreman; (3) William Keller, Respondent's Field Operations Manager; (4) Beatrice Grassman, Respondent's Business Manager; and (5) Doyle Beckham, Respondent. (Tr. 60, 326, 415, 474, 486).

In April of 2012, CSHO David Moon was assigned to inspect work activities on the Hopi Indian Reservation in Arizona for compliance with OSHA regulations. (Tr. 63–64, 130–132). One of the projects occurring at the time involved the construction of the Hopi Assisted Living Facility in Tuba City, Arizona (on the Hopi Reservation). (Tr. 64–65). Therefore, on April 30, 2012, CSHO Moon initiated an inspection of that jobsite. (Tr. 64–65). He learned that Respondent, a subcontractor on the project, employed a crew of five individuals who were performing framing, roofing, and related carpentry work. (Tr. 67–68, 153, 448; Ex. C-3, and C-4, pp. 24, 36, 39). Based upon CSHO Moon's interviews, observations, and measurements, OSHA issued the following two citation items that are in dispute in this case.

Discussion

To establish a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the standard applied to the cited condition; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the violative condition, 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; she 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).

Citation 1, Item 1

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

> 29 C.F.R. § 1926.95(d)(1): Except as provided by paragraphs (d)(2) through (d)(6) of this section, the protective equipment, including personal protective equipment (PPE), used to comply with this part, were not provided by the employer at no cost to employees:
>
> (a) On or about April 30, 2012, and at times prior thereto, the employer did not provide personal protective equipment at no cost to employees.

The cited standard provides:

> (d) Payment for protective equipment. (1) Except as provided by paragraphs (d)(2) through (d)(6) of this section, the protective equipment, including personal protective equipment (PPE), used to comply with this part, shall be provided by the employer at no cost to employees.

It is important to emphasize at the outset that Citation 1, Item 1 involves failure of an employer to ***pay*** for PPE, ***not*** the failure of the Respondent to require appropriate PPE, or the failure of employees to actually use appropriate PPE. (Tr. 100-101, 113-114). Anthony French was Respondent's foreman on this jobsite. He directed the other four employees' work, and was

responsible for jobsite safety. (Tr. 354, 458). CSHO Moon interviewed all five of Respondent's employees, including Foreman French, and was consistently told that PPE was the employees' responsibility, and that pre-purchasing basic PPE was a condition of employment for new employees. (Tr. 85-88, 95, 292). It was undisputed that carpenter Frank Ponce purchased all of the required PPE items listed in Respondent's employee manual before starting work. (Stip. No. 19). Foreman French told CSHO Moon during the inspection that even he purchased his own PPE, including hard hats and safety glasses – but could not remember whether his owning those items was a pre-requisite back when he was hired. (Tr. 102, 293, 365–366, 392–393).

Respondent's written policy on PPE in effect at the time of the inspection, which all five employees at the jobsite were required to sign, stated:

> **19.4 Supplied by Employee**
> Employees performing construction work tasks shall provide and maintain for their own use the basic tools of the trade and personal protective equipment (less personal fall arrest equipment) essential to perform work tasks while performing Company business. Any wear, damage, theft, or loss of any kind to employee-owned tools, equipment, or motor vehicles used on Company property or for performing Company business shall be at the employee's risk, and no compensation for wear and tear, damage, theft, or loss of any kind will be given by this Company.
> […]
> The following shall be the minimum requirement for personal protective equipment that is to be supplied and maintained by each employee performing construction duties:
> (a) Gloves.
> (b) Hard Hat.
> (c) Hearing Protection.
> (d) Long pants.
> (e) T-shirt (long sleeved shirt recommended).
> (f) Safety Spectacles, (2 pair, clear and tinted).
> (g) Steel-toed Footwear.
> (h) Sunscreen.

(Ex. C-8, pp. 65, 81, 98, 113, 129).

Foreman French testified that he understood this policy to mean that tools of the trade

(carpentry) and required PPE were his, and his crew's, own responsibility to provide. (Tr. 358–359, 367). He further testified that the basic PPE required for this particular job included a hard hat, safety glasses, safety vest, face mask, ear plugs, steel-toed footwear, and jeans. (Tr. 362). CSHO Moon observed work activities at the jobsite, such as the use of cutting tools, overhead objects and materials, and hazards posed by mobile equipment, which necessitated the use of many of the PPE items listed in Respondent's employee handbook and discussed by Foreman French. (Tr. 110–111, 293). Foreman French later clarified that Respondent's employees were responsible for purchasing their own hard hats, hearing protection, safety glasses, and steel-toed footwear; however, safety vests and fall protection equipment were provided by Respondent. (Tr. 300, 358, 395, 363–364, 367).

Three of Respondent's carpenters on this project were newly hired from the local Hopi Indian population, as it was apparently required under the tribal contract. (Tr. 86, 361, 434, 459). William Keller, Respondent's Field Operations Manager, actually interviewed and hired the three local Hopi carpenters, and acknowledged that he told CSHO Moon during the inspection that that it was the employees' responsibility to buy their own PPE. (Tr. 95, 467-468). He also acknowledged that during his interview of local applicants, he asked whether they already possessed basic required PPE, such as hard hats and safety glasses. (Tr. 435). While he testified that "most of them had it," the Court notes that he only hired three applicants who actually did possess the required basic PPE. (Tr. 436, 439, 450). Mr. Keller further conceded that if a carpenter showed up without a hard hat, he would require that employee to go purchase one. (Tr. 473).

Despite Foreman French's testimony, employee statements to CSHO Moon during the inspection, and Respondent's own written policy, Mr. Keller and Mr. Beckham both asserted that

basic PPE ownership was not a precondition of employment. (Tr. 439–440, 489). For example, Mr. Keller attempted to modify his statements to CSHO Moon during the inspection (and some of his previous trial testimony discussed above) by explaining that what he meant to say was that if individuals sought employment as a carpenter, but did not already have the typically required PPE, it would cause him to question their skills and experience. (Tr. 461-462). Mr. Keller also claimed at a different point during the trial that if an employee started work for Respondent but did not have some of the required PPE, Respondent would provide certain items. (Tr. 443). However, Beatrice Grassman, Respondent's Business Manager who typically processes new employees, conceded that it was "extremely rare" for Respondent to hire any employee who did not already have basic PPE. (Tr. 478). Ms. Grassman testified that if an employee provided her with a receipt for PPE, she would reimburse them. She acknowledged, however, that she never discussed this purported policy with the newly hired Hopi carpenters on this project when processing them in as new employees. (Tr. 478, 482–483).

The relevant promulgation history for the cited regulation discusses the concept of requiring PPE as a condition of employment:

> These provisions address the concern that employers not circumvent their obligations to pay for PPE by making employee ownership of the equipment a condition of employment or continuing employment or a condition for placement in a job. OSHA recognizes that in certain emergency situations, such as response to a natural disaster, where immediate action is required, it may be necessary for employers to hire or select employees already in possession of the appropriate PPE. As a general matter, however, employers must not engage in this practice. Taking PPE-ownership into consideration during hiring or selection circumvents the intent of the PPE standard and constitutes a violation of the standard.

72 Fed. Reg. 64342, 64358 (2007).

There are exceptions to the basic rule requiring employers to pay for PPE. For example,

an employer is not required to pay for: steel-toed footwear or prescription safety glasses, provided they can be used away from the jobsite; alternative employee-requested metatarsal guards; everyday clothing such as pants, shirts, work boots, and common weather protection items; lost or intentionally damaged PPE which the employer previously provided; and PPE already owned by an employee. See 29 C.F.R. §1926.95(d)(2)–(d)(6).

However, Respondent's arguments that it actually provided and/or reimbursed employees for basic PPE, and that the employee-owned PPE exception absolves them of a violation, are rejected for the following reasons: (1) Respondent's written policy, in effect at the time, very clearly stated that employees are responsible for supplying and maintaining their own PPE; (2) Foreman French interpreted Respondent's policy to require supervisors and employees to pay for most of their own PPE (with the exception of safety vests and fall protection); (3) Foreman French actually did purchase his own hard hats and safety glasses while working for Respondent; (4) Foreman French and other employees on this project understood basic PPE ownership to be a pre-requisite for employment with Respondent; (5) Carpenter Frank Ponce purchased the specific PPE items on Respondent's list before starting work for Respondent; (6) Mr. Keller's statements to CSHO Moon at the time of the inspection revealed a clear practice of requiring employees to pay for their own PPE; (7) Mr. Keller acknowledged during trial, at least with regard to hard hats, that if a new employee showed up without one, Mr. Keller would make him go buy one; and (8) Mr. Keller admitted at trial that Respondent's policy required employees to replace PPE at their own expense. (Tr. 465-466). He did not differentiate between lost, intentionally damaged, or simply worn out PPE, contrary to the language of 29 C.F.R. § 1926.96(d)(5).

The preponderance of the evidence presented in this case established that Respondent

required current employees, applicants for employment, and even Respondent's own supervisors, to purchase many of their own basic PPE items and pay for replacement of those PPE items. The evidence most clearly established that practice with regard to hard hats and safety glasses [which are not excepted items pursuant to 29 C.F.R. § 1926.95(d)(4)]. The Court finds that the cited regulation applied and was violated.

Complainant is not required to prove that an employer understood that a condition was non-compliant, only that it was aware of the condition itself. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076 (No. 90-2148, 1995). There can be no doubt that Respondent was aware of its own written policy that employees supply, maintain, and replace basic PPE at their own expense. Accordingly, knowledge of the violative condition was established. Further, all five of Respondent's employees at this jobsite were exposed to the violative condition and practice.

When asked about the classification of Citation 1, Item 1, CSHO Moon asserted that it was a "serious" violation because failure to use appropriate PPE could result in physical harm or death. (Tr. 113–114). While that may be true, there was no allegation in this case of any employee failing to use appropriate PPE. As stated earlier in this decision, and confirmed by CSHO Moon during the trial, this violation is based solely on Respondent's *failure to pay for* required PPE. The question of who paid for required PPE, as long as it was being used by employees, is not reasonably likely to result in serious physical harm or death. Accordingly, Citation 1, Item 1 will be MODIFIED to an other-than-serious violation and AFFIRMED.

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).

In calculating the proposed penalty for Citation 1, Item 1, CSHO Moon factored in the low probability of an accident actually occurring as a result of this violation, the low severity of any potential accident, and the small size of Respondent's company. (Tr. 114–116). It is also important to note that prior to this inspection, Respondent had never been inspected by OSHA, and had no violation history. (Tr. 68, 168, 178–180). Based on the totality of the circumstances discussed above, including the modification of this item to an other-than-serious violation, the Court finds that a penalty of $500.00 is appropriate.

Citation 1, Item 2

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

> 29 C.F.R. § 1926.602(c)(1)(vi): All vehicles in use were not checked at the beginning of each shift to assure that the following parts, equipment, and accessories were in safe operating condition and free of apparent damage which could cause failure while in use: service brakes, including trailer brake connections; parking system (hand brake); emergency stopping system (brakes); tires; horn; steering mechanism; coupling devices; seat belts; operating controls; and safety devices:
>
> (a) On or about April 30, 2012 and at times prior thereto, the JLG Gradall operating on loose sandy soil was not provided with tire treads that could provide gripping action and traction to prevent the equipment from slipping and sliding, exposing employees to struck-by and crushed-by hazards.

[2] As amended at the beginning of trial. (Tr. 32).

The cited standard provides:

> (vi) All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in American National Standards Institute B56.1-1969, Safety Standards for Powered Industrial Trucks.

This citation item is based on the condition of the two rear tires on the JLG Gradall Rough Terrain Forklift being used by Respondent at this jobsite. (Tr. 73–75, 230; Stip. No. 11). Both rear tires were essentially "bald" down the middle, with traction only on the outside edges/corners of the tires. (Tr. 76, 80, 316; Ex. C-4, pp. 27, 31, 32). One of those tires also had a three-inch partial hole/tear,[3] in that some of the outer layers of tire rubber were missing. (Tr. 380; Ex. C-4, pp. 31, 32). Although it was not being used at the time of the inspection, it was undisputed that the forklift had been operated in that condition daily throughout Respondent's two months at the site. (Tr. 82–83, 91, 93, 306–307, 317, 328, 335–336, 347, 386). The forklift was used to move various carpentry materials, such as stacks of 4x8 sheets of plywood and 2x4s, including lifting them approximately twelve feet up onto the structure for employee use. (Tr. 125, 348–349). Employees helped load and unload materials from the forklift, but only when the forklift was not in motion. (Tr. 350–352, 373, 379). It was also undisputed that the cited standard (as amended) applied to the JLG Gradall Rough Terrain Forklift being used at this jobsite. (Tr. 127, 355-356).

CSHO Moon believed that the lack of tread on the two rear tires, and the 3-inch partial tear on one of those tires, might cause the forklift to become unbalanced, slip, and lose its load. (Tr. 118–119, 236–237). He also believed that the sandy soil and approximate three degree slope of the jobsite increased this possibility. (Tr. 83, 320, 342, 380). However, this never occurred, neither on the day of the inspection nor during Respondent's use of the forklift in that condition

[3] "Partial" because it was not a complete hole through the tire to the core. (Tr. 430).

during the previous two months on this project. (Tr. 308, 386, 398, 429). Complainant did not introduce any scientific or other technical evidence to support CSHO Moon's belief. Rather, at one point during the trial, CSHO Moon relied on an analogy comparing the forklift to an ordinary automobile. (Tr. 226–231). However, Respondent argued, Complainant conceded, and this Court agrees, that the operation and design of a JLG Gradall Rough Terrain Forklift is very different from an ordinary automobile. (Tr. 230–231).

At trial, CSHO Moon did not know whether the forklift was front-wheel driven, rear-wheel driven, or four-wheel-driven. (Tr. 313). Respondent, however, explained without contradiction that the forklift was front-wheel-driven, with a four-wheel-drive option (although that option was never necessary on this particular project). (Tr. 382; Ex. C-4, p. 19). Therefore, the forklift and load weights were always centered on the front tires, while the rear tires (the ones at issue) rotated left or right for steering purposes only. (Tr. 383, 401, 405, 408, 430). The forklift also typically traveled only 3–5 miles per hour and could be mechanically leveled, to adjust for travel over any sloping on a jobsite. (Tr. 390, 402, 425).

The specific regulation cited requires industrial trucks such as this one to meet the "design, construction, stability, inspection, testing, maintenance, and operation" requirements of ANSI B56.1-1969. At trial, CSHO Moon conceded that there is no specific language in the cited regulation, or ANSI B56.1-1969, which specifies a minimally acceptable tread depth for forklift tires or a prohibition on wear such as the 3-inch partial hole on the forklift's right rear tire. (Tr. 242–243, 252, 309–310, 431; Ex. C-11). Despite a lack of any specific language prohibiting the condition of these rear tires in the cited regulation or the relevant ANSI standard, CSHO Moon still believed the tires should have been replaced. Complainant argues that the language of Section 606(A) of the referenced ANSI standard can be construed to prohibit the condition of the

tires:

> 606(A): Operator Care of the Truck. Give special consideration to the proper functioning of tires, horns, lights, battery, controller, lift system (including load engaging means, chains, cable, and limit switches", brakes and steering mechanism. If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the matter shall be reported immediately to the designated authority, and the truck shall be taken out of service until it has been restored to safe operating conditions.

(Ex. C-11, p. 209).

The record established that the tires at issue in this case were "foam-filled." (Tr. 217, 374). Instead of air, Respondent had the forklift tires filled with polyurethane and resin, which dries to "almost bowling ball" hardness, and "cannot go flat." (Tr. 218, 387, 421). The foam filling in these tires is so durable, that when it becomes necessary to replace one, the tire has to be cut off in sections and peeled away from the metal rim.[4] (Tr. 422). CSHO Moon testified that the tires being foam-filled made no difference to him in terms of the alleged hazard. (Tr. 319).

It was undisputed that Foreman French inspected this forklift every day, including the day of OSHA's inspection. (Tr. 122–124, 329–330; Ex. R-14). His checklist included a category for tire "damage and wear affecting the performance of the machine," which Foreman French testified he did, in fact, check. (Tr. 331; Ex. R-14). Foreman French did not report the rear tires on his inspection sheets because they did not affect the safe performance of the forklift, and he never considered their condition to be hazardous. (Tr. 344, 384). Mr. Keller and Mr. Beckham supported Foreman French's on-site conclusion that the condition of the rear tires presented no hazard—primarily due to the fact that they were foam-filled. (Tr. 430, 490).

Based on the record in this case, the Court finds that Complainant failed to establish, by a

[4] Respondent also argued in its *Post-Trial Brief* that a hole is intentionally drilled into every foam-filled tire to allow air pressure to escape as the foam enters the tire. However, this fact was not introduced into the record and will not be considered.

preponderance of the evidence, that the lack of tread down the middle of the rear tires, or the partial hole/tear on the right rear tire, constituted conditions "in need of repair, defective, or in any way unsafe." The following factors from this record are determinative: (1) No language in the regulation or referenced ANSI standard identifying a minimally acceptable tire tread depth; (2) No language in the regulation or referenced ANSI standard prohibiting a partial hole/tear in the outer rubber layer of a foam-filled tire; (3) No scientific or other technical information presented by Complainant (other than CSHO Moon's lay opinion) concerning how, or if, the lack of tread or partial tear on the right rear tire created an unsafe condition, especially considering the foam-filled nature of the tires; (4) the fact that the rear tires did not primarily support the weight of the forklift or its load, but rather were primarily used for steering; and (5) a lack of evidence in the record of any slipping, sliding, or other loss of traction or balance occurring as a result of the condition of the tires. Since Complainant failed to meet its burden of establishing a violation of the cited regulation, Citation 1, Item 2 will be VACATED.

ORDER

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

1. Citation 1, Item 1 is MODIFIED to an other-than-serious violation, AFFIRMED as modified, and a penalty of $500.00 is ASSESSED; and
2. Citation 1, Item 2 is VACATED.

SO ORDERED.

/s/ *Brian A. Duncan*

Date: August 12, 2013
Denver, Colorado

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