UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Sanchez Arango Construction, Respondent.	DOCKET NO. 10-0461

Appearances:

Matthew Sallusti, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Darren Harrington, Esq., Key, Harrington, Barnes, P.C., Dallas, Texas
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

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"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Sanchez Arango Construction ("Respondent") worksite in Houston, Texas, on January 12, 2010. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging three serious and three other-than-serious violations of the Act with total proposed penalties of $4,850.00. Respondent timely contested the Citation and a trial was conducted on October 14, 2010 in Houston, Texas.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section

3(5) of the Act, 29 U.S.C. §652(5). (Stipulations No. 1, 2). See also *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of the Act, the Complainant must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

A violation is "serious" if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. §666(k). Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm would result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶29,942 (No. 88-0523, 1993).

Stipulations

The parties offered, and the court accepted, the following stipulations (Tr. 10):

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Occupational Safety and Health Act ("Act").

2. Respondent is engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5).

3. Respondent admits Inspection No. 312920655 occurred at Respondent's workplace, located at I-610 Loop SS 400 w/o Main, Houston, Texas 77001.

4. With regard to Citation 1, Items 1 and 2, Respondent stipulates that it did not have

the synthetic web sling load tested on or before January 12, 2010.

5. With regard to Citation 1, Item 3, Respondent stipulates that one of Respondent's employees was not wearing fall protection at the time of Inspection No. 312920655.

6. Respondent asserts the unpreventable employee misconduct defense as to Citation 1, Item 3 only. (Tr. 76).

Additional Factual Findings

Five witnesses testified at the hearing: (1) Michael Grimes, OSHA Compliance Safety and Health Officer ("CSHO"); (2) Omar Muniz, a Foreman/Crane Operator employed by Respondent; (3) Leandro Batista, a Foreman/Crew Chief employed by Respondent; (4) Fred Ward, Respondent's Safety Director; and (5) Rouget Sanchez, President and part owner of Respondent. (Tr. 24, 53, 126, 152, 182-183, 297). Based on their testimony and discussion of evidentiary exhibits, the court makes the following additional factual findings.

On January 12, 2010, CSHO Grimes was driving by Respondent's worksite on I-610 in Houston, Texas when he observed an individual walking on a billboard catwalk approximately twenty-five feet above the ground while not using fall protection. (Tr. 25-26, 52, 56, 80, 98). CSHO Grimes stopped and initiated an OSHA inspection.

Respondent's crew was in the process of retrofitting a new apron on the billboard. (Tr. 300-301). Respondent had four employees working on site at the time: three up on the billboard catwalk and one in the cab of a truck crane on the ground. (Tr. 47, 131). Two of the four employees were supervisors: Omar Muniz, who was operating the truck crane, and Leandro Batista, who was working on the billboard catwalk. (Tr. 28-29, 33). Each supervisor had responsibility for enforcing Respondent's safety policies that day. (Tr. 157, 302-303).

It is undisputed that one of Respondent's employees was not using fall protection on the catwalk at the time of the inspection. (Stip. No. 5). The employee was wearing a harness and lanyard, but his lanyard was clipped back onto the harness itself, rather than the available

lifelines. (Tr. 44, 101, 124; Ex. C-11). CSHO Grimes observed him walking back and forth along the catwalk and between the two sides of the billboard without fall protection for about fifteen minutes. (Tr. 47-49, 159-160; Ex. C-11). There was some ambiguity in the record concerning the identity of the unprotected employee. However, the court concludes that the preponderance of the evidence establishes that the employee in the black t-shirt who was not using fall protection was Pablo Hernandez. (Tr. 140, 185, 188, 270, 303; Ex. C-11).

The court rejects Foreman Muniz's and Foreman Batista's assertions that they were unaware of Mr. Hernandez's failure to properly use his fall protection gear because: (1) the condition was obvious enough that CSHO Grimes first observed it while driving by on the nearby interstate highway, (2) CSHO Grimes was able to plainly see the unprotected employee for several more minutes after he entered the site, (3) photographs taken while on site clearly show Mr. Hernandez walking from one side of the billboard to the other, and along the catwalk, with his lanyard hooked only to his own harness, and (4) CSHO Grimes' testimony that he could see Mr. Hernandez without fall protection while standing next to Foreman Muniz. Mr. Hernandez's failure to properly secure his harness lanyard was plainly visible to anyone onsite, including Foreman Batista and Foreman Muniz. (Tr. 49-50, 55-56; Ex. C-11). CSHO Grimes characterized the fall protection violation as serious because Mr. Hernandez could have been killed if he fell from the catwalk. (Tr. 56-57).

During his inspection, CSHO Grimes also observed a synthetic sling, which was being used to lower debris from the billboard catwalk to the ground, with an illegible load limitation tag. (Tr. 29, 31, 40, 131; Ex. C-4, C-5). Even Foreman Muniz, when shown a picture of the sling tag taken during the inspection, acknowledged that it was illegible at the time.[1] (Tr. 153-154). CSHO Grimes explained, and Foreman Muniz agreed, that the information on sling labels is

[1] The court gives no weight to Ex. R-1, a portion of the actual sling presented nine months after the inspection. The photographs taken during the inspection constitute the best evidence on the condition of the sling at the time. The court also notes that, unfortunately, Ex. R-1 was lost in the court reporter's submission of the transcript and exhibits to the court. After an exhaustive search by both the court reporter and the court, it could not be located.

important to ensure that slings are not used in manners that exceed their limitations.[2] (Tr. 31, 164-165). CSHO Grimes considered the illegible tag to be a serious violation because overloading the sling could result in failure of the sling and serious injuries to Respondent's employees. (Tr. 34, 92).

In addition to its illegible label, the synthetic sling was significantly torn, cut, and frayed, to the point that red wear indicator fibers were showing. (Tr. 36-39, 155-157, 166, 196; Ex. C-8). Respondent's written policies were consistent with the cited regulation, in that damaged slings were required to be removed from service. (Tr. 285; Ex. R-6). Foreman Muniz inspected the sling prior to use that day and was therefore aware of its condition. (Tr. 155). CSHO Grimes considered all three of Respondent's employees on the billboard catwalk, including Foreman Batista, to be exposed to the conditions of the damaged sling and its illegible label, as they were using it to remove 200-pound loads of debris. (Tr. 43, 131-132, 193). If the sling were to break while being loaded, lifted, or lowered to the ground, it is difficult to predict which direction the unsecured material may have fallen. (Tr. 34).

While on site, CSHO Grimes also observed and photographed a flexible electric cord which was not provided with strain relief, and as a result, the cord's outer sheathing had been pulled away from the plug exposing the ground wire. (Tr. 72-73; Ex. C-23). The cord was plugged into a welding machine by Foreman Batista early in the day and was supplying electricity to the three employees working on the catwalk billboard. (Tr. 74, 118, 169, 189-190). Foreman Batista's undisputed testimony established that the cord's sheathing was not in that condition when he initially plugged it in. (Tr. 190-191). Foreman Batista testified that if he had known of the condition of the cord, he would have used one of the newer cords available on site. (Tr. 190-191). CSHO Grimes characterized this alleged violation as other-than-serious because the cord was plugged into a GFCI outlet, and therefore, unlikely to result in serious injury to an

[2] Respondent's post-inspection load tests are not persuasive, as the significantly damaged sling was being used prior to the testing. (Tr. 41-42).

employee. (Tr. 75).

On January 25, 2010, CSHO Grimes requested a copy of Respondent's injury and illness logs. (Tr. 247-248). Three days later, Safety Director Ward provided him with Respondent's OSHA 300 Log and 300A Annual Summaries for 2007 & 2008. (Tr. 59-61, 64-65, 249). CSHO Grimes considered them to be deficient because entire informational columns for employee job titles and locations of injuries had been left blank. (Tr. 59-60; Ex. C-15). He also considered the OSHA 300A Annual Summaries to be deficient because they were not signed by a company executive. (Tr. 64-65; Ex. C-18).

After the citations in this case were issued, OSHA received a second version of Respondent's OSHA 300 Logs and 300A Annual Summaries for 2007 and 2008 which had additional information in various columns, as well as handwritten dates and signatures. (Tr. 61, 262-267; Ex. C-16, C-19). Safety Director Ward testified that the discrepancies between the versions he sent to OSHA three days after they were requested, and the versions sent to OSHA after the citations were issued, were caused by transmission problems using e-fax on his computer. (Tr. 249-250). Although the post-citation versions of the OSHA 300A Annual Summaries were signed by Safety Director Ward, CSHO Grimes still considered the certification deficient because Safety Director Ward is not an employee of Respondent and the regulations require OSHA 300A Annual Summaries to be certified by a "company executive." (Tr. 68-69, 117, 208; Ex. C-19). It was undisputed that Safety Director Ward is not a company executive. (Tr. 260, 305). CSHO Grimes characterized the proposed violations related to the OSHA 300 Logs and 300A Annual Summaries as other-than-serious violations of the Act. (Tr. 63).

Discussion

Citation 1 Item 1

Complainant alleged in Citation 1 Item 1 that:

> *29 C.F.R. §1926.251(e)(1): The employer did not have each synthetic web sling marked or coded as required in paragraphs (e)(1)(i)-(iii) of this section: (a) directly to the south of the National Crane where the synthetic web sling had been used to remove the damaged catwalk material, the identification tag was not legible due to mold and dry-rot.*

The cited standard provides:

> *29 C.F.R. §1926.251(e)(1): Synthetic webbing (nylon, polyester, and polypropylene). (1) The employer shall have each synthetic web sling marked or coded to show: (i) name or trademark of manufacturer, (ii) rated capacities for the type of hitch, (iii) type of material.*

Citation items are duplicative if the same abatement action would correct the violative conditions alleged in both citation items. *E. Smalis Painting Co., Inc*., 22 BNA OSHC 1553, (No. 94-1979, 2009); *Capform, Inc*., 13 BNA OSHC 2219, 1989 CCH OSHD ¶28,503 (No. 84-556, 1989). The court finds below, in its discussion of Citation 1 Item 2, that the condition of the synthetic sling in question was deteriorated to the point that it should not have been used. Had Respondent complied with the terms of the regulation cited in Citation 1 Item 2, there would not have been any issue with regard to the sling's illegible label. In other words, abatement of the hazardous condition in Citation 1 Item 2 (removal of the sling from service) would also correct the violative condition in Citation 1 Item 1 (illegible manufacturer's tag on the sling). Therefore, the court finds Citation 1 Item 1 to be duplicative of Citation 1 Item 2. Accordingly, Citation 1 Item 1 will be VACATED.

Citation 1 Item 2

Complainant alleged in Citation 1 Item 2 that:

> *29 C.F.R. §1926.251(e)(8)(iii): The employer did not ensure that damaged synthetic web slings (i.e. snags, punctures, tears, cuts) were removed from service: (a) directly to the south of the National Crane where the synthetic web sling had been used to remove the damaged catwalk material, the sling had numerous cuts, abrasions, and fraying, exposing the colored wear indicator.*

The cited standard provides:

> *29 C.F.R. §1926.251(e)(8)(iii): Removal from service. Synthetic web slings shall be immediately removed from service if any of the following conditions are present...(iii) snags, punctures, tears or cuts...*

It is undisputed that Respondent's employees were using a synthetic web sling. The cited standard clearly applies. The photographs depicting the sling's condition at the time, as well as the testimony of CSHO Grimes, Foreman Muniz, and Foreman Batista establish that the sling was significantly torn, cut, and frayed to the point that it should not have been used. Respondent failed to comply with the requirements of the cited regulation.[3] Since the sling was manually loaded by Respondent's three employees on the catwalk and then lowered down by Foreman Muniz from within the crane, the court finds that all four of Respondent's employees were exposed to the violative condition. As CSHO Grimes correctly explained, had the sling failed, releasing its load, it is impossible to predict which direction the debris would have fallen. Any of Respondent's employees working with or near the damaged sling were in the "zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997). Foreman Muniz's knowledge of the sling's condition is imputed through him to

[3] The court affords no weight to post-inspection testing of the sling's load capacity. Respondent was unaware of the damaged sling's limitations at the time of use, and the cited regulation clearly requires that slings "be immediately removed from service" when they have "snags, punctures, tears or cuts."

the Respondent. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991). In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). If the sling had failed, and debris struck one or more of the employees, it could have resulted in serious physical injuries. The violation was properly characterized as a serious violation. Citation 1 Item 2 will be AFFIRMED.

Citation 1 Item 3

Complainant alleged in Citation 1 Item 3 that:

> *29 C.F.R. §1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems: (a) on the west facing catwalk of the outdoor billboard, where an employee was traversing from north to south. The condition exposed the employee to a fall hazard.*

The cited standard provides:

> *29 C.F.R. §1926.501(b)(1): Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.*

Mr. Hernandez was walking and working on a catwalk approximately twenty-five feet above the ground while not protected by a guardrail system, safety net system, or personal fall arrest system. The standard clearly applies. Mr. Hernandez's securing of his lanyard back onto

his own harness, rather than the available lifelines, combined with the unprotected edges along the length of the billboard catwalk, violated the requirements of the cited standard and exposed him to fall hazards. His unprotected condition was so obvious, as discussed above in the court's factual findings, that the court rejects Foreman Muniz's and Foreman Batista's assertions that they were unaware of the condition. The preponderance of the evidence establishes that both supervisors knew, or with the exercise of reasonable diligence could have known, that Mr. Hernandez's lanyard was connected back onto his own harness. Their knowledge is imputed to Respondent. *A.P. O'Horo Co.* supra.

Respondent asserted the affirmative defense of unpreventable employee misconduct to Citation 1 Item 3. (Tr. 76). To establish this defense, an employer must show 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. *L.E. Meyers Co.*, 16 BNA OSHC 1037 (No. 90-945, 1993).

Respondent had a written fall protection program at the time which required 100% fall protection compliance by its employees. (Ex. R-10). Respondent's supervisors were charged with enforcing the fall protection policy. (Tr. 287-288; Ex. R-10). Respondent also conducted weekly safety meetings and provided employee training on how to use fall protection equipment, which Mr. Hernandez attended. (Tr. 148-149, 220, 223-224; Ex. R-11). Respondent's jobsites are also inspected for safety compliance every 2-3 weeks and there was evidence that employees, including Pablo Hernandez, had been disciplined previously for not complying with safety requirements. (Tr. 147-148, 183-185, 224-233, 270-276; Ex. R-13). In fact, Mr. Hernandez was previously warned that if he was discovered not using fall protection again, he would be terminated. (Tr. 293-294; Ex. R-13). After observing the investigative photographs taken by CSHO Grimes from this inspection, Respondent did in fact terminate Mr. Hernandez. (Tr. 230).

These facts establish some of the elements for an unpreventable employee misconduct defense: that Respondent had work rules designed to prevent fall protection violations, that Respondent had communicated those rules to its employees, and that Respondent had taken *some* steps to discover violations.

The court is not persuaded, however, that Respondent effectively monitored for compliance or enforced its own fall protection rules and policies when violations were discovered. Since the Respondent's officers and Safety Director were located in Florida, and only made trips to oversee operations in Texas every 2-3 weeks, Respondent had to place great reliance in Supervisors Muniz and Batista to enforce the company's safety policy and enforce discipline. In this instance, both supervisors failed at this task. The fact that an employee can plainly and openly fail to connect his lanyard to anything, while working twenty-five feet above the ground, in the immediate presence of *two* supervisors, with a history of failure to comply with Respondent's rules in the past, while no action was taken by those supervisors to correct the problem until *after* OSHA arrived, belies the notion that fall protection rules were enforced, or that the violative conduct was either isolated or unforeseeable. *Burford's Tree Service*, 22 BNA OSHC 1948, 2010 CCH OSHD ¶33,046 (No. 07-1899, 2010); *Falcon Steel Co.*, 16 BNA OSHC 1179, 1193 (Nos. 89-2883 & 3444, 1993). On the contrary, the facts in this case convince the court that Respondent's safety program has deficiencies which need to be addressed. *Rawson Contractors*, Inc., 20 BNA OSHC 1078, 2002 CCH OSHD ¶32,657 (No. 99-0018, 2003). In addition, there was no evidence presented that established any disciplinary action taken against the two supervisors for failing to enforce the company's safety policies. Accordingly, Respondent failed to establish the affirmative defense of unpreventable employee misconduct with regard to Citation 1 Item 3.

Citation 2 Item 1

Complainant alleged in Citation 2 Item 1 that:

29 C.F.R. §1904.29(b)(1): A log of all recordable work-related injuries and illnesses (OSHA Form 300 or equivalent), was not completed in the detail as required by the regulation: (a) for the year 2007:

(1) Where a job title was not listed for case 1;

(2) Where a job title was not listed for case 2;

(3) Where a job title was not listed for case 3;

(4) Where a job title was not listed for case 4;

(5) Where a job title was not listed for case 5;

(6) Where a job title was not listed for case 6;

(7) Where a job title was not listed for case 7;

(8) Where a job title was not listed for case 8;

(9) Where a location of injury was not listed for case 1;

(10) Where a location of injury/illness was not listed for case 2;

(11) Where a location of injury/illness was not listed for case 3;

(12) Where a location of injury/illness was not listed for case 4;

(13) Where a location of injury/illness was not listed for case 5;

(14) Where a location of injury/illness was not listed for case 6;

(15) Where a location of injury/illness was not listed for case 7;

(16) Where a location of injury/illness was not listed for case 8;

(b) For year 2008:

(1) Where a job title was not listed for case 1;

(2) Where a location of the injury/illness was not listed for case 1.

The cited standard provides:

> *29 C.F.R. §1904.29(b)(1): Implementation – (1) What do I need to do to complete the OSHA 300 Log? You must enter information about your business at the top of the OSHA 300 Log, enter a one or two line description for each recordable injury or illness, and summarize this information on the OSHA 300-A at the end of the year.*

Citation 2 Item 1 alleges that Respondent failed to properly complete its OSHA 300 Logs for 2007 and 2008. The cited standard addresses the requirement to complete an OSHA 300 Log, or an equivalent form, to record occupational illnesses and injuries. The cited standard applies. The initial versions of Respondent's OSHA 300 Logs for 2007 and 2008, produced only two days after the on-site portion of the inspection, were wholly missing information concerning employee job titles and injury locations. It was not until *after* the *Citation* was issued to Respondent that a second version was submitted, with the missing information filled in. Based on the fact that the second versions of the OSHA 300 Log were not sent to OSHA until after the citations were issued, several weeks after the initial request for the records were made, the court finds Safety Director Ward's explanation for the differences between the two versions to not be credible. The logs produced at the time of inspection lacked required information and violated the terms of the standard. Furthermore, as the Commission recently reiterated, the violative condition of Respondent's 2007 and 2008 logs were continuous in nature and not barred by the Act's six-month statute of limitations. *AKM, LLC d/b/a Volks Constructors*, 2011 WL 896347 (No. 06-1990, March 11, 2011). Respondent is deemed to have knowledge of the condition of its own safety records since management knowledge is the purpose of the cited regulation. Citation 2 Item 1 will be AFFIRMED.

Citation 2 Item 2

Complainant alleged in Citation 2 Item 2 that:

> *29 C.F.R. §1904.32(b)(3): The Summary of Work-Related Injuries and Illnesses (OSHA Form 300A or equivalent) was not properly certified: (a) for year 2007 where the signature block was left blank; (b) for year 2008 where the signature block was left blank.*

The cited standard provides:

> *29 C.F.R. §1904.32(b)(3): How do I certify the annual summary? A company executive must certify that he or she has examined the OSHA 300 Log and that he or she reasonably believes, based on his or her knowledge of the process by which the information was recorded, that the annual summary is correct and complete.*

The OSHA 300A Annual Summaries for 2007 and 2008 were not certified.[4] The cited regulation requires that they be certified by a "company executive." The cited standard clearly applies and was violated. Respondent is deemed to have knowledge of its own safety records. In fact, management knowledge of annual occupational illness and injury statistics is the intended purpose of the cited regulation. Citation 2 Item 2 will be AFFIRMED.

Citation 2 Item 3

Complainant alleged in Citation 2 Item 3 that:

> *29 C.F.R. §1926.405(g)(2)(iv): Flexible cords were not connected to devices and fittings so that strain relief is provided to prevent pull from being directly transmitted to joints or terminal screws: (a) at the south facing side of the truck, where the flexible cord was attached to the*

[4] As discussed in the analysis of Citation 2 Item 1, the court rejects the second version of the OSHA 300A Annual Summaries which were produced after the citations were issued. Furthermore, in the alternative, if the court were to determine the second version valid, the second version was improperly signed by Safety Director Ward, who was not a "company executive" as required by the standard. (Tr. 305). This conclusion would also result in an affirmance of the citation item.

operational GFCI, the outer insulation had pulled away from the end of the cord exposing the insulation of the conductor.

The cited standard provides:

29 C.F.R. §1926.405(g)(2)(iv): Strain relief. Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

While Complainant established that the cited regulation applied and that the condition of the cord violated the terms of the regulation, it failed to establish that Respondent knew or should have known of the condition. The court credits the testimony of Foreman Batista, who testified without contradiction that the plug on the extension cord was not in the condition observed by CSHO Grimes when he plugged it in earlier in the day. There was also no evidence that any of the employees or foremen working at the site passed by the area during the day and, therefore, should have discovered the condition. Since Complainant failed to establish actual or constructive employer knowledge of the condition, Citation 2 Item 3 will be VACATED.

Penalties

In calculating the appropriate penalty for affirmed violations, Section 17(j) of the Act requires the Commission to 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. 29 U.S.C. §666(j). 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, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993).

CSHO Grimes never testified as to his precise methodology for calculating the proposed penalties for Citation 1 Items 1, 2, or 3. Rather, he said he afforded Respondent the "appropriate

deductions" for size, good faith, and history. (Tr. 35, 57). Upon review of Complainant's inspection documentation, it appears that he reduced the initial proposed gravity-based penalties by 60% based on Respondent's small size and 10% based on Respondent's lack of a violation history. (Ex. C-3, C-6, C-9). The proposed penalty for the OSHA 300 Logs and 300A Annual Summary violations were calculated pursuant to OSHA's enforcement policy on record-keeping violations, which dictated a $1,000.00 penalty for each year in which deficiencies were identified. (Tr. 63-64, 70; Ex. C-20). Regardless of CSHO Grimes' methodology, 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. *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975); *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995). Based on the totality of the factual circumstances discussed above for each affirmed violation, as well as Respondent's small size and lack of violation history, the court assesses penalties as set out below.

ORDER

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

1. Citation 1 Item 1 is VACATED;
2. Citation 1 Item 2 is AFFIRMED and a penalty of $175.00 is ASSESSED;
3. Citation 1 Item 3 is AFFIRMED and a penalty of $1,500.00 is ASSESSED;
4. Citation 2 Item 1 is AFFIRMED and a penalty of $300.00 is ASSESSED;
5. Citation 2 Item 2 is AFFIRMED and a penalty of $300.00 is ASSESSED;
6. Citation 2 Item 3 is VACATED.

Date: April 11, 2011
Denver, Colorado

/s/
PATRICK B. AUGUSTINE
Judge, OSHRC