

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS  
PENDING COMMISSION REVIEW



Some personal identifiers have been redacted for privacy purposes.

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
721 19<sup>th</sup> Street, Room 407  
Denver, Colorado 80202-2517

SECRETARY OF LABOR,  
Complainant,

v.

HARVEY BUILDERS d/b/a HARVEY-  
CLEARY BUILDERS, and its successors,

Respondent.

OSHRC DOCKET NO. 20-0541

**Attorneys and Parties:**

For Complainant

Michael D. Schoen, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, TX

For Respondent

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Little Mendelson, P.C., Austin Texas

JUDGE: Administrative Law Judge Peggy S. Ball

**DECISION AND ORDER**

After being notified of an injury to a worker that required hospitalization, the Occupational Safety and Health Administration (OSHA) commenced an investigation of Harvey Builders' (Harvey) construction worksite located at 8701 FM 2244, Austin, Texas. (Ex. C-3.) Harvey was hired as the general contractor for the project and oversaw the work of several sub-contractors, including Eco-Crete, LLC (Eco). On September 30, 2019, one of Eco's employees fell approximately fifteen feet and suffered head injuries. (Tr. 143; Ex. C-3.) He was admitted to the hospital but could not recover from the injuries and died. (Tr. 317; Ex. C-3.)

The following day, on October 1, 2019, Compliance Officer Mark Moravits (CO) arrived at the worksite and conducted an opening conference with representatives of both Harvey and Eco. (Tr. 317, Exs. C-2, C-3; Resp't Br. 4.) The on-site portion of the inspection continued on October 2nd and 3rd. *Id.* The Secretary later issued a Citation and Notification of Penalty (Citation) to Harvey on March 9, 2020. (Ex. C-1.) The Citation alleges Harvey committed: (1) a serious violation of 29 C.F.R. § 1926.501(b)(4)(ii) by failing to properly cover a hole, (2) a serious violation of 29 C.F.R. § 1926.602(c)(1) because an industrial truck in use did not meet applicable requirements; (3) an other-than-serious violation of 29 C.F.R. § 1926.251(a)(2)(i) for failing to ensure rigging equipment had legible identification markings; and (4) an other-than-serious violation of 29 C.F.R. § 1926.403(b)(2) for permitting two power taps to be connected to each other and then an extension cord. *Id.*

Harvey timely filed a Notice of Contest, bringing the matter before the Commission. A two-day hearing was held on July 27 and 28, 2021, in San Antonio, Texas. Both parties filed post-hearing briefs. Based on what follows, Citation 1, Items 1 and 2, and Citation 2, Item 1 are affirmed. Citation 2, Item 2 is vacated.

## **I. Jurisdiction**

As indicated in their joint stipulation statement, the parties agree the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c), and Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(5).<sup>1</sup> (Sec'y Br.

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<sup>1</sup> The parties stipulated:

1. The Commission has jurisdiction over this proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("Act").

1; Resp't Br. 4-5.) The record supports finding the Commission has jurisdiction over this matter. *Slingluf v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). (Ex. C-2.)

## II. Factual Background

Harvey was retained as the general contractor to construct a large commercial office project called Seven Oaks. (Tr. 34; Exs. C-34, C-25, R-18.) Harvey oversaw its own employees at the site as well as the work of many subcontractors. (Tr. 34; Ex. C-34.) Around the time the inspection commenced, Harvey typically had twelve to fifteen employees at the worksite. (Tr. 35.) These employees included superintendents, engineers, and field workers. (Tr. 35, 39-41.) Daniel Kieschnick was the lead superintendent. He had a long experience in the construction industry, including working for Harvey as a superintendent for about ten years. (Tr. 33.) His responsibilities included ensuring all workers followed Harvey's safety program.<sup>2</sup> (Tr. 113.)

Eco was one of the subcontractors for the project. (Tr. 151.) Its role was to place and finish concrete at the worksite, including in the planned parking structure. *Id.* By the time the inspection commenced, Eco had been on the site repeatedly over the course of four months. (Tr. 271; Exs. C-17, C-19.)

Harvey oversaw Eco's work. (Tr. 48-49, 68, 82, 391-92.) Mr. Arce, the assistant superintendent, supervised the concrete pours. (Tr. 44, 135; Ex. C-33.) He had the ability to control Eco and tell them how to perform their nighttime pours. (Tr. 135-36.) He could stop or change their work if it was being done in an unsafe manner or was of poor quality. *Id.* He could

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2. Harvey Cleary is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 659(5).

<sup>2</sup> Mr. Kieschnick had worked for Harvey for about twelve years when the OSHA inspection commenced. (Tr. 32-33.) He stopped working for Harvey approximately four months before the hearing began. (Tr. 31.)

tell Eco what type of materials to use, the tools to use, and how to lay the concrete. (Tr. 136, 158-59, 163-64.)

On September 30, 2019, Eco employees arrived at the site around 1:00 a.m. (Tr. 272.) They had tasks to complete on the second level of the parking structure. (Tr. 51-52, 155, 170, 272.) This work required certain tools and equipment. (Tr. 123; Exs. C-17, C-37 at 15-16.) Harvey employees routinely transported tools and equipment for Eco. (Tr. 65, 86, 88-90, 118, 152-53, 182-83, 188-89, 360-61; Exs. C-18, C-20.) The Eco employees did not have the training or appropriate certifications to operate forklifts.<sup>3</sup> (Tr. 123, 138, 152, 157-58, 193-94, 312; Ex. C-37 at 9, 11.) Instead, Harvey's employees typically performed this task for subcontractors like Eco. (Tr. 63-65, 88-90, 152-53, 193-94; Ex. C-20.)

Mr. Arce selected a wooden box for Eco to put the tools they needed for the planned work. (Tr. 349; Ex. C-17.) He then directed another Harvey employee, [redacted], to assist Eco. (Tr. 169-70, 182; Exs. C-17, C-18, C-20.) [redacted] was a foreman and certified equipment operator. (Tr. 39, 102-3, 123; Exs. R-18 at 2; C-20, C-33.) The Eco employees were told to put the tools and equipment they needed into the box. (Tr. 182-83; 303.) After they did so, the Eco workers headed to the second level of the parking structure. (Tr. 295, 305-6; Ex. R-11.)

As the workers went to the second level, [redacted] picked up the load with a forklift and moved it from the staging area to a location outside the parking structure.<sup>4</sup> (Tr. 225-26, 354, 356-

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<sup>3</sup> The witnesses referred to the industrial truck differently at different points. Some called it a forklift, others a telehandler, some used both terms. (Exs. C-21, R-13.) When asked directly how he referred to the equipment [redacted] operated on the night of the incident, Mr. Kieschnick, the site superintendent said: "I always called them a forklift." (Tr. 51.) Various training materials use the term "forklift," as opposed to telehandler. (Exs. C-10, C-15 at 2, C-22.) The terms forklift and industrial truck will be used herein.

<sup>4</sup> The box belonged to a different Harvey subcontractor, Skyline Forming (Skyline). (Tr. 118.) Skyline had boxes built by a third party according to specifications. (Tr. 119.) The box used by [redacted] was three feet deep and three feet wide. (Tr. 192-93, 195, 234-35, 266; Ex. C-7.)

57, 361; Exs. C-33 at 12, R-18 at 9.) The operator could not drive the forklift onto the second level, which was still under construction. (Tr. 306; Ex. C-18.) However, there was a dirt mound workers could walk up to reach the second level. (Tr. 305-6.) Running from the edge of this mound alongside the structure was a depressed area referred to as a “moat.”<sup>5</sup> (Tr. 140, 358, 374; Ex. R-18 at 13.) The plan was for [redacted] to drive the forklift to the edge of the moat. (Tr. 51, 171, 268, 304.) He would then maneuver the load over a barricade before extending the forks above the moat and towards the structure’s second level. (Tr. 381-82; Ex. R-18.) At this location, the load was about fifteen to sixteen feet above the ground. (Tr. 86; Exs. C-3; R-18 at 9.) The Eco workers were to remove the contents of the box. (Tr. 87, 295.) After delivering the tools and equipment, [redacted] was to retract the forks and return the forklift to a resting position nearby.<sup>6</sup> (Tr. 144.)

The parking structure was not fully enclosed. (Ex. R-18 at 9.) A partial wall ran along the structure’s edge on each level. *Id.* at 9, 12. Above this partial wall, an approximately 46-inch opening extended from the top of the wall to the ceiling. (Tr. 266; Ex. R-18.) The wall was approximately eight inches deep. (Ex. R-18 at 13.)

[redacted] manipulated the forks to move the box toward the second level. (Tr. 234, 276.) The forklift was capable of moving loads in multiple directions. (Tr. 171, 228; Ex. C-8.) If a load did not exceed the size of the opening, it would be possible to move it into the opening and then

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<sup>5</sup> Mr. Kieschnick described this depression in more detail, referring to it as an “area way around the building.” (Tr. 116.)

<sup>6</sup> Respondent claims [redacted]’s task was complete once he extended the forks across the moat. (Resp’t Br. 3.) The site superintendent rejected this argument. (Tr. 144.) [redacted] could not have left his vehicle with the load extended. *Id.* The assigned task included retracting the forks and returning the forklift to a resting position. *Id.*

set it down on the floor on the other side of the opening.<sup>7</sup> (Tr. 171; Ex. C-8.) However, in this instance, [redacted] was unable to move the box into the opening above the partial wall. (Tr. 346.) Instead, the workers had to reach through the opening and over the wall to remove the contents of the box. (Tr. 171, 173, 234, 269, 298; Ex. R-18 at 9, 12.) They could not reach all items they needed because of the box's position and how things had moved during transport.<sup>8</sup> (Tr. 173, 196, 203.)

At that point, an Eco employee went over the wall and onto the forklift. (Tr. 262-63, 283, 293.) He then climbed into the box. (Tr. 230, 262, 281.) Shortly thereafter, he fell to the ground, as did the box. (Tr. 85-87, 114-15, 263.) Emergency personnel took the worker to the hospital, where he later died of his injuries. (Tr. 87, 140, 317; Exs. C-3, C-16, R-10, R-36.)

All work ceased at the site after the worker fell. (Tr. 319-20.) A representative of Eco notified OSHA of the incident. (Tr. 317; Ex. C-3.) The CO arrived at the worksite the following day (October 1, 2019) and spent three days at the site.<sup>9</sup> (Exs. C-3, C-35.) His review included conducting interviews and obtaining information from Harvey. (Tr. 318-20, 323-24; Exs. C-3, C-10, C-17 thru C-20, C-35, C-36.) At the conclusion of OSHA's investigation, the Secretary issued Harvey two citations, each containing two separate items. (Ex. C-1.)

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<sup>7</sup> While cranes were on site and operated by Harvey employees to move equipment for Eco, a crane could not be used to deliver a load to the parking structure because of its configuration. (Tr. 40, 62-63, 89.)

<sup>8</sup> The items in the box may have shifted to the bottom while being transported and/or during the unloading. (Tr. 341, 346-47, 383-84.)

<sup>9</sup> At the time of the inspection, the CO had worked for OSHA for approximately ten years. (Tr. 317.) By the time of the hearing, he was the Assistant Director for OSHA's Austin Area Office. (Tr. 316.)

### III. Discussion

For most standards, including the ones at issue here, the Secretary is not required to prove the existence of a hazard each time a standard is enforced. *Bunge Corp. v. Sec’y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981); *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978) (Secretary not required to prove violation related to walking and working surfaces constituted a hazard). Instead, the hazard is presumed, and the Secretary’s burden is limited to showing: (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009); *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016); *Atl. Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

#### A. Citation 1, Item 1 – Hole Covers

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.501(b)(4)(ii). This standard requires working and walking surfaces to have protection to prevent workers from tripping in or stepping through holes.<sup>10</sup> The standard defines a “hole” as any “gap or void 2 inches (5.1 cm) or more in its least dimension” in any “walking/working surface.” 29 C.F.R § 1926.500.

The Secretary alleges there was a 3.5-inch gap in the middle of each row of stairs.<sup>11</sup> (Sec’y Br. 16-17.) These stairs lead from the ground to the entrances of two jobsite trailers. (Exs. C-4, C-5.) Respondent acknowledges there were gaps but argues the cited standard does not apply to the condition. (Resp’t Br. 6-8.)

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<sup>10</sup> “Each employee on walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.” 29 C.F.R. § 1926.501(b)(4)(ii).

<sup>11</sup> The Citation alleged: “On or about 1 October 2019, and at times prior thereto, the worksite trailer had two sets of stairs paired together that left a hole in the middle. The hole was approximately 3.5 inches wide and the depth of all four stair treads, creating a hazard of tripping or stepping into the hole.” (Ex. C-1.)

## 1. Applicability and Violation

The worksite had two trailers near each other which served as on-site offices for Harvey employees. (Tr. 37; Exs. C-4, C-5, R-18 at 3.) Harvey built a small platform to connect the two trailers. (Tr. 65-67; Ex. R-18 at 24.) A single set of stairs led to this platform. (Tr. 37; Exs. C-4, C-5; R-18.) The stairs were the only way to enter or exit the trailers. (Tr. 42.) In the middle of each stair, a 3.5-inch gap separated the right side from the left side. (Tr. 42, 66, 130, 377; Exs. C-4, C-5; R-18.) The gap was present on each stair, from the bottom of the flight up to the platform. (Exs. C-4, C-5.)

Mr. Kieschnick agreed the stairs were a “walking and working surface” within the meaning of the cited standard, and the gap constituted a “hole” under the cited standard. (Tr. 67-69.) He knew the construction standard defines a “floor hole” as anything larger than two inches. (Tr. 67-69.) Harvey’s policies similarly define a “floor hole” and specify that “any hole larger than two inches must be covered.” (Tr. 67-69, 71; Ex. C-27 at 28.)

The Court agrees. The gap was in an area employees had to traverse daily. (Tr. 66-67, 69-71.) The photographic evidence confirms the other record evidence of the gap’s size and the need for Harvey to cover or eliminate it. (Tr. 66, 70, 377; Exs. C-5; R-18.) Contrary to Respondent’s assertion, the gap had unprotected edges and was not analogous to a depression in the earth. (Resp’t Br. 7; Ex. C-5.)

Respondent notes that the cited standard is part of a section of regulations concerning fall protection. (Resp’t Br. 6-7.) 29 C.F.R. § 1926.501 applies to both horizontal and vertical surfaces. 29 C.F.R. § 1926.500 (defining walking/working surfaces to include “any surface, whether horizontal or vertical”); *Major Constr.*, 20 BNA OSHC 2109, 2111 (No. 99-0943, 2019) (upholding ALJ’s finding employer violated 29 C.F.R. § 1926.501(b)(4)). Further, while the cited



standard has subsections focused on hoist areas and excavations, it is not limited to such areas. *Id.* Subsection (4) is titled “holes” and requires protection from any “gap or void” which exceeds 2 inches “in its least dimension.” 29 C.F.R. §§ 1926.501(b)(4), 1926.500 (defining hole). The cited standard’s requirements are not dependent upon the depth of the hole. *Id.* There is no exception for situations where walking around the floor hole is possible.<sup>12</sup> *Id.* As the CO explained, although each stair was several inches long, someone could be close to the opening if multiple people were using the stairs.<sup>13</sup> (Tr. 377.)

The Secretary established the cited standard applied, and Respondent violated it.

## 2. Exposure

Tim Sullivan, Harvey’s engineer, and another employee worked in one trailer while Mr. Kieschnick and the other superintendents worked in the adjacent trailer. (Tr. 43.) Mr. Kieschnick and other employees stepped near the holes identified in the Citation whenever they entered the trailer. (Tr. 37-38, 69.) Twelve to fifteen field employees went up and down the stairs to sign in and out of the worksite at least twice a shift. (Tr. 37-38, 43; Ex. C-19.) These employees also visited the trailers for meetings and other purposes. (Tr. 37-38, 111.) The Secretary established exposure of Respondent’s own employees to the cited condition.

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<sup>12</sup> Similarly, and contrary to Respondent’s argument, the presence of handrails does not allow there to be holes in the walking surface. (Resp’t Br. 8-9.) As Respondent itself notes, 29 C.F.R. § 1926.501, also has requirements regarding protection at the edges of elevated walking or working surfaces. The presence of protection at one edge in compliance 29 C.F.R. § 1926.501(b)(1), does not eliminate the separate requirement to cover holes set forth in subpart (b)(4). The standard requires protection from unprotected sides, edges, *and* holes. 29 C.F.R. §§ 1926.501(b)(1) (“Unprotected sides and edges”), 1926.501(b)(2) (“Leading edges”), 1926.501(b)(4) (“Holes”).

<sup>13</sup> Respondent’s arguments about the likelihood of injury from the gap are not relevant to assessing whether the standard applies and was violated. *See Bunge*, 638 F.2d at 834 (finding the type of “hazard” to be “irrelevant to whether some condition or practice constitutes a violation”). The probability of injury and the severity of any injury that could result from exposure to the hazardous conditions goes to the appropriate classification and penalty, not whether the standard was violated. *Id.*

### 3. Knowledge

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The employer's knowledge is directed to the physical condition constituting a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). It is not necessary to show the employer knew or understood the condition was hazardous or violated an OSHA standard. *Id.* Although it challenges the applicability of the cited standard and contends it complied with it, Respondent does not raise any specific challenges regarding its knowledge of the condition. (Resp't Br. 5-9.)

Harvey employees assembled the stairs leading up the decking connecting the two trailers. (Tr. 65-66, 71.) Mr. Kieschnick was aware of how the stairs were constructed. (Tr. 71; Ex. C-19.) Initially, there was a railing in the middle of the stairs. (Ex. C-19.) This railing was removed in mid-April 2019, not long after the stairs were placed. (Tr. 69-71; Exs. C-5, C-19, R-10.) Mr. Kieschnick was aware that removing the railing left gaps in the middle of the steps.<sup>14</sup> (Tr. 71.) He walked by it daily. (Tr. 69, 325.) The gap in the middle of the stairway remained uncovered for months. (Tr. 65-7, 325; Exs. C-4, C-19.)

Mr. Kieschnick was the site superintendent, and his actual knowledge of the violative condition is attributable to Respondent. *See e.g., Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (“when a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his

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<sup>14</sup> The holes were in plain view of Respondent's employees. (Exs. C-4, C-5.) Multiple supervisors passed by the identified floor holes whenever they went into either jobsite trailer. (Tr. 69.) The condition was open, obvious, and readily observable. *See Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1710 (No. 96-1330, 2001) (finding knowledge, and imputing it to employer, where supervisor worked in the area of the violative condition), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003).

burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program"); *Revoli*, 19 BNA OSHC at 1864 (actual or constructive knowledge of a supervisor can be imputed to the employer). The Secretary established knowledge of the violative condition.

#### 4. Classification & Penalty

The Secretary classified the violation as serious because stepping into or over the holes could lead to broken bones, fractures, sprains, lacerations, contusions, and possibly concussions. (Exs. C-1, C-4, C-19; Sec'y Br. 25.) Someone's foot could go into the gap and cause them to fall. (Tr. 69-71; Exs. C-4, C-19.)

While Respondent argues this item should be vacated, it does not raise any specific challenges to characterizing such a violation as serious. The record supports the characterization as serious. *See Chapman Constr. Co., Inc.*, 9 BNA OSHC 1175, 1178 (No. 76-2677, 1980) (affirming a violation of 29 C.F.R. § 1926.501(b) for issues related to stairs as serious).

Turning to the appropriate penalty, 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 violation's gravity, (3) the employer's good faith, 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 Constr. Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). 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, 1137-38 (No. 93-0239, 1995).

Looking first at the violation's gravity, the stairs were in good condition overall. (Tr. 326; Ex. C-5.) Many workers used them without any reported incidents with the gap. (Tr. 326, 377.)

The CO assessed the severity of the violation the probability of an injury as low. (Tr. 325-26.) The stairs were not particularly high: the first step with a hole was about 7 inches above the ground, and the top stair with a hole was approximately 30 inches above the ground. (Tr. 129, 405.)

As for good faith, although the cited hazard had not resulted in injury and Respondent promptly abated it, the Secretary argues a reduction for good faith is not appropriate when there had been a fatality at the worksite. (Tr. 67, 130; 327-28; Ex. C-15 at 6.) Turning to size, Respondent had approximately 120 employees. (Tr. 327; Ex. R-7.) In terms of history, OSHA previously inspected Respondent, but those inspections did not result in any citations for serious violations. (Tr. 328; Ex. R-7.) Respondent's size and history of compliance warranted a decrease in the penalty amount in the Secretary's view. (Ex. R-7.) Based on these factors, the Secretary believes a penalty of \$4,684 is appropriate for the violation. (Tr. 328; Ex. C-1.)

The proposed penalty does not completely reflect the low probability of injury from the condition. The stairs were made of steel and were in good condition. (Tr. 326.) They were sufficiently wide, with handrails on both sides and netting covering the area between the handrail and stairs. (Tr. 405; Ex. C-5.) Respondent had a rule regarding footwear that limited the tripping risk from the holes. (Tr. 406.) Accordingly, the Court finds \$2,432 is an appropriate penalty that properly accounts for the section 17(j) factors. *See* 29 U.S.C. § 666(j).

#### **B. Citation 1, Item 2 – Compliant Industrial Trucks**

Citation 1, Item 2 alleges a serious violation 29 C.F.R. § 1926.602(c)(1)(vi), which addresses material handling equipment, including lifting and hauling equipment. The cited provision is part of Subpart O-Motor Vehicles, Mechanized Equipment, and Marine Operations. It requires industrial trucks in use to meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined by the American National

Standards Institute's (ANSI) B56.1 Safety Standards for Powered Industrial Trucks (B56.1).<sup>15</sup> 29 C.F.R. § 1926.602(c). B56.1 details how operators are to use powered industrial trucks. (Ex. C-9.) Among other things, B56.1 addresses loading the truck and maintaining stability when transporting loads. *See A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 2000-01 (No. 92-1022, 1994) (finding a violation of 29 C.F.R. § 1926.602(c) when the operator of equipment failed to comply with B56.1); *Lee Way Motor Freight, Inc.*, 2 BNA OSHC 1735, 1737 (No. 1932, 1975) (employer violated standard that incorporated B56.1 by reference).

### 1. Applicability

Respondent first challenges the assertion that the equipment its employee used was an industrial truck. Respondent used the equipment to handle materials. (Tr. 64-65, 140, 148, 336.) For example, an employee lifted and hauled the wooden box of tools and equipment from one location to another. (Ex. C-8.) Respondent attempts to obfuscate the cited standard's applicability by referring to the equipment as a "telehandler" rather than a forklift. (Resp't Br. 15.) However, its own employees often referred to the equipment as a forklift, and it functioned similarly.<sup>16</sup> (Tr. 51, 84, 117, 138, 142, 191, 225, 241, 394; Ex. C-8.) The title used to refer to the equipment is not determinative of whether it qualifies as an industrial truck subject to the application of the standard.

More importantly, the cited standard is not limited to forklifts. 29 C.F.R. § 1926.602(c). The standard, including the incorporated information from B56.1, does not distinguish between elevating materials or extending them down, in, or out. (Tr. 382-83.) [redacted] picked the load

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<sup>15</sup> "Industrial trucks shall meet the requirements of § 1926.600 and the following ... All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in [ANSI] B56.1 ...." 29 C.F.R. § 1926.602(c)(1)(vi).

<sup>16</sup> Respondent also cites to materials that use the term forklift but not telehandler to show [redacted] was trained and certified to operate the machinery at issue. (Exs. C-10; R-22.) Mateo Reyes of Eco also referred to the equipment as a forklift. (Tr. 296-97.)

up and transported it from the staging area to another location. (Ex. C-20.) He then lifted it over the safety barricade and across the moat, suspending it about fifteen feet in the air. (Tr. 86, 381-82; Ex. R-18.)

As the CO explained, the equipment used was a “forklift or lift truck” that primarily moves materials. (Tr. 336.) Such equipment constitutes a powered industrial truck. (Tr. 336, 340.) The express terms and intent of the cited standard show it applies to the equipment [redacted] was operating. This remains true regardless of whether one calls the industrial truck a forklift or a telehandler.<sup>17</sup> See e.g., *Meadows Constr. Co. LLC*, 25 BNA OSHC 1797, 1800, 1804-10 (No. 14-1636, 2015) (ALJ) (finding 29 C.F.R. § 1926.602(c)(1) applicable to a “telehandler” and affirming a violation thereof when it was not operated in accordance with B56.1); *Durco Contractors*, 26 BNA OSHC 1090 (No. 15-0693, 2016) (ALJ) (concluding 29 C.F.R. § 1926.602(c) applies to “lifting and hauling equipment” like “forklifts”).

## 2. Violation

Respondent first argues B56.1’s requirements as incorporated “are just recommendations for best practices.” (Resp’t Br. 9-11, 16.) Respondent cites no authority for this view. Its disingenuous attempt to equate the cited standard with a “best practice” is rejected.<sup>18</sup> The cited

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<sup>17</sup> See also *Ne. Precast, LLC & Masonry Servs., Inc.*, No. 13-1169, 2018 WL 1309480, (O.S.H.R.C.A.L.J., Sept. 28, 2015) (consolidated) (applying 29 C.F.R. § 1926.602(c)(1)(vi) to “telehandler forklifts” and concluding the employer violated the requirements of B56.1 as incorporated by reference), *aff’d in part*, 26 BNA OSHC 2275, 2276 (No. 13-1169, 2018) (judge’s finding of a violation of 29 C.F.R. § 1926.602(c)(1)(vi) not reviewed), *aff’d*, 773 F. App’x 70 (2d Cir. 2019) (unpublished); *Meadows Constr. Co., LLC*, No. 12-2142, 2018 WL 1309749 (O.S.H.R.C.A.L.J., Feb. 26, 2018) (equating a “telehandler” to a “rough terrain forklift” and finding 29 C.F.R. § 1926.602(c)(1)(vi) applicable), *aff’d*, 26 BNA OSHC 2265 (No. 12-2142, 2018).

<sup>18</sup> Respondent does not allege 29 C.F.R. § 1926.602 was improperly promulgated. It only attempts to distract from the cited standard’s use of the mandatory word “shall” and the language of what has been incorporated by reference. See e.g., *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1595-97 (No. 95-0489, 2001) (upholding the incorporation by reference of an ANSI standard).

standard repeatedly uses the mandatory word “shall” to indicate what actions operators need to take when using industrial trucks:

Industrial trucks *shall* meet the requirements of § 1926.600 and the following: ...  
(vi) All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance and operation, as defined in [B56.1].

29 C.F.R. § 1926.602(c)(1)(4) (emphasis added). It requires operators of industrial trucks to adhere to requirements related to, among other things, stability, loading, testing, and operation.<sup>19</sup> (Tr. 339; Exs. C-1, C-9.) See *Merchant’s Masonry, Inc.*, 17 BNA OSHC 1005, 1007-9 (No. 92-424, 1994) (upholding a violation of 29 C.F.R. § 1926.602(c)(1)(vi) when forklift was not operated in a manner consistent with B56.1); *Sal Masonry Contractors, Inc.*, No. 87-2007, 1989 WL 298917, at \*2 (O.S.H.R.C.A.L.J., Feb. 3, 1989) (finding a violation of 29 C.F.R. § 1926.602(c)(1) when vehicle did not meet ANSI requirements), *aff’d in part, vacated in part*, 15 BNA OSHC 1609 (No. 87-2007, 1992) (not reviewing violation of 29 C.F.R. § 1926.602(c)(1)); *A.L. Baumgartner Constr., Inc.*, No. 92-1022, 1993 WL 737997, at \*6 (O.S.H.R.C.A.L.J., Apr. 9, 1993) (stating 29 C.F.R. § 1926.602(c)(1)(vi) “makes the provisions of [B56.1] applicable to industrial trucks”), *aff’d*, 16 BNA OSHC 1995 (No. 92-1022, 1994); *Doyle K. Beckham*, 24 BNA OSHC 1878, 1884 (No. 12-2151, 2013) (ALJ) (29 C.F.R. § 1926.602(c)(1)(vi) “requires” industrial trucks to meet the requirements set out in B56.1); *Dandy Masonry, Inc.*, No. 10792, 1975 WL 4964, at \*4 (O.S.H.R.C.A.L.J., June 26, 1975) (stating the requirements set out in B56.1 are “mandatory by operation of 29 C.F.R. § 1926.602(c)(1)(vi)”). Cf. *Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776, 1782 (No. 90-0050, 1996) (upholding violation when conditions did not comply with the ANSI standard incorporated by reference in 29 C.F.R. § 1926.305(j)); *Paschen Contractors*,

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<sup>19</sup> Likewise, the specific subsections of B56.1 relied on by the Secretary do not use permissive language.

*Inc.*, 14 BNA OSHC 1754 (No. 84-1285, 1990) (finding the cited standard did not apply because the equipment did not fit within the definitions contained in the ANSI standard incorporated by reference).

B56.1 informs operators that “dynamic and static forces” affect stability. Stability may be affected by conditions, grade, speed, how the truck is loaded, and the operator's actions. (Tr. 340-41, 383-94; Ex. C-9 at 4.4.2.) Operators must consider operating conditions.<sup>20</sup> (Ex. C-9 at 4.4.4.) Part of this evaluation includes assessing the load the operator is transporting. *Id.* Operators must “[h]andle only stable or safely arranged loads.” *Id.* at 5.4, 605. To do this, the operator must “[c]ompletely engage the load with the load-engaging means.” *Id.* at 5.4.2. The Secretary alleges [redacted] failed to adhere to these stability requirements.<sup>21</sup>

#### *Load Stability - Failure to Secure Box*

As a preliminary matter, the Secretary raises issues with the type of box and [redacted]’s failure to secure it in any way. (Sec’y Br. 5-6.) While the cited standard does not prescribe specific requirements about the type of box to use or explicitly state that all loads must be secured, these facts impacted the load’s stability. (Tr. 339-41.)

Typically, Harvey employees used a metal box with two pockets at the base to transport items with the forklift. (Tr. 91, 120.) The fork tines could slip into these pockets to reduce the

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<sup>20</sup> Manufacturers may establish more stringent requirements than those in B56.1 for stability: “Some users may decide to establish, for their own use, stability requirements that will vary from those in para. 7.6. However, the requirements in para. 7.6 should serve as a guide for the user, working with the manufacturer, in establishing his own *more stringent* requirements.” (Ex. C-9 at 4.4.5 (emphasis added).) Respondent does not suggest nor is there evidence that the actions [redacted] took were equivalent to or more stringent than those set out in B56.1. (Ex. C-18.)

<sup>21</sup> The Citation alleges:

a forklift was used to move tools and equipment in a wooden box to the second level of a garage for unloading. The wooden box was not attached to the forklift, did not have fork pockets, did not have the tare weight identified, and was not placed up against the backstop of the carriage. The forks were not adjusted for maximum width and the load was not assessed for center and operating conditions, exposing the workers to an unstable load and struck-by hazards where operation did not account for dynamic forces.



possibility of the box falling off the machine. (Tr. 91.) However, the wooden box given to Eco on September 30th, did not have spaces for the forklift tines to secure the box. (Tr. 91; Exs. C-17, C-33 at 12.) According to Respondent's employees, the box given to Eco was meant for use with straps and a crane, not for unsecured loads transported by a forklift.<sup>22</sup> (Tr. 201, 204, 388; Exs. C-10, C-16, C-19, C-20.)

Despite the lack of fork pockets, neither [redacted] nor anyone else secured the load to the machine. (Tr. 92, 202, 205, 363; Exs. C-20, C-33 at 12, R-12, R-14.) Mr. Kieschnick explained that the wooden box used "wasn't designed to be lifted overhead with a forklift." (Tr. 92-93; Ex. C-19.) If a wooden box without fork pockets was not secured, it was at risk of falling off the tines and injuring workers on a lower level. (Tr. 92.) Thus, "if you are lifting the box overhead, it should have fork pockets on it to secure the box to the fork carriage." (Tr. 94.) Mr. Arce agreed, explaining he would have strapped the box to the forklift when raising the load up.<sup>23</sup> (Ex. C-18.)

As [redacted] explained, operators should not operate the forklift with a box that cannot be secured. (Ex. C-20.) Even if no one got into the box, [redacted] recognized it could have still fallen off the forklift because it was not secured. *Id.* Securing the box would have prevented this. (Exs. C-20, R-12, R-14, R-17.)

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<sup>22</sup> In an email, a representative of Skyline, the owner of the box, states it was possible to use the box with a "forklift." (Exs. C-15 at 5; C-34 at 54.) However, the email does not indicate the box could be used to move materials without making sure the box was stable by securing it to the forklift or through other means. *Id.* The email also states the box should not have been used without Skyline's permission. *Id.* Even accepting it may have been possible to use the box to move materials with a forklift, this does not mean Respondent did so in compliance with the cited standard.

<sup>23</sup> Respondent suggests its employee did not lift the box up, but instead merely moved it over the moat. (Resp't Br. 3.) The record shows [redacted] lifted the box off the ground and moved to a position equivalent to the second level of the garage. (Tr. 116, 356; Exs. C-3, C-6, C-20.) At that point, the load was suspended approximately fifteen feet in the air. (Tr. 86; Ex. R-30.) The box then fell from that height and landed on top of a worker. (Tr. 115; Exs. R-11, R-31.) The site superintendent acknowledged [redacted] was "lifting" and "extending" the box. (Tr. 51; Ex. C-20.) Likewise, [redacted] admitted he put the forks under the box and lifted it up before moving it forward toward the garage. (Tr. 225-26; Ex. C-20.) Respondent's claim there was not a lift is rejected. Moreover, as discussed above, the cited standard mandates compliance with the "operation" requirements set out in B56.1. 29 C.F.R. § 1926.602(c)(1)(vi). The requirements do not only apply when a load is being lifted. *Id.*

*Load Stability - Failure to Assess Weight of the Load and Its Center of Gravity*

Even though employees did not typically use the wooden box with the forklift, [redacted] failed to take sufficient steps to assess the suitability of the box for the task or how he might need to adjust operating procedures. (Tr. 340-41; Ex. C-20.) He did not know the weight of the box. (Tr. 338; Exs. C-6, C-20.) Nor did he know the weight of the items Eco placed in it. (Tr. 338; Ex. C-20.)

Although the record does not establish the loaded box exceeded the rated capacity for the forklift, the operator could not properly assess the load's stability or determine if the load was "safely arranged," as the standard requires if he did not look in the box. (Tr. 341, 369, 400-1; Exs. C-6 at 3, C-9 at 605A, C-15, C-20.) [redacted] did not know how the materials were loaded into the box or what exactly the items were. (Tr. 342, 338-39; Exs. C-6, C-20.) He did not evaluate whether the materials were leaning to one side or whether the weight was distributed evenly. (Tr. 267, 341; Exs. C-6, C-20.) Because of this, he could not know where the loaded box's center of gravity was at the start of the transport. (Tr. 341.) He then transported the unsecured load across the "rough terrain" with a "sloping grade." (Tr. 116-17, 355, 367, 399; Exs. C-6, C-24, R-18.) The contents could shift during transport and/or the unloading process. (Tr. 265, 267, 340-41, 347, 383.)

Besides not knowing the center of gravity initially, [redacted] could not assess shifts in the center of gravity as the Eco workers began removing items. (Tr. 362-63.) He transported the box with Eco's tools in the middle of the night. (Tr. 43, 182; Exs. R-13, R-15.) It was dark, and he could not see very well.<sup>24</sup> (Tr. 204, 219; Exs. C-20, R-15, R-16.) He could not see the load he was carrying. (Tr. 146.)

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<sup>24</sup> Similarly, the Eco employees could not see [redacted] as they unloaded their tools and equipment. (Tr. 279, 289.)

Mr. Reyes was in the parking structure and could see the load as [redacted] transported it. (Tr. 166-67; Ex. C-19.) According to him, [redacted] never centered the box on the forklift. (Tr. 265.) It was always out of balance. *Id.*

Nor could [redacted] see the load or the Eco employees as they pulled their tools and equipment out of the box to accommodate any change in weight distribution. (Tr. 204, 219, 230, 251-52.) Removing items can shift the box's center of gravity, but [redacted] could not determine what the workers pulled out or whether the center of gravity was shifting because he could not see what was occurring. (Tr. 362-63; Ex. C-20.) He could not even see the Eco worker get into the box or tell when it fell off the forklift. (Tr. 230; Ex. C-20; Resp't Br. 4.) He only realized something had happened when another worker ran over to his location. (Tr. 230; Ex. R-13.)

*Load Stability During Transport - Failure to Extend Forks*

Despite not assessing the weight of the loaded box or its center of gravity and knowing he had not secured the box, [redacted] did not extend the forks to the maximum allowable width as required. (Tr. 337, 363-64; Ex. C-6 at 2.) [redacted] knew operators were supposed to adjust the fork tines to the maximum width. (Tr. 205.) As the operations manual explained, "Loads can fall off incorrectly spaced forks. Always space the forks correctly for the load." (Tr. 337-38; Ex. C-8 at 2.)

*Load Stability During Transport - Placing load against the backrest*

B56.1 also directs operators to: "Place the load engaging means under the load as far as possible and carefully tilt the mast backward to stabilize the load." (Tr. 369; Ex. C-9 at 605.) [redacted]'s supervisor, Mr. Arce, explained how to position a load like the box of tools appropriately. The operator should tilt the forks "slightly back so the box is against the backrest." (Tr. 387; Ex. C-18.) Tilt the forks to move the box against the backrest would have made the load more stable. (Tr. 363, 369, 370, 387; Ex. C-18.) [redacted] did not adhere to this. (Tr. 266,

342; Exs. C-6, C-37 at 15.) He failed to position the box against the backrest to stabilize it and prevent it from flipping off the forks. (Tr. 206, 337-38, 342; Exs. C-6, C-8.)

*Respondent Violated the Cited Standard*

Respondent argues it is not liable under the multi-employer worksite doctrine for the violation. (Resp't Br. 11-13.) In so doing, it misconstrues the Secretary's allegation and the record. The Secretary did not cite Respondent for the failure of the Eco employee to use fall protection when he stepped over the wall. (Ex. C-1.) Respondent was cited for its employee's failure to operate an industrial truck in accordance with the requirements of 29 C.F.R. § 1926.602. (Tr. 344, 347-48.) Respondent's foreman operated the forklift, not anyone employed by Eco. (Tr. 169, 312, 442.) This failure to appropriately operate the forklift is the basis for Citation 1, Item 2.<sup>25</sup>

Respondent also suggests [redacted] merely exercised his judgment in a manner different than the Secretary would like. (Resp't Br. 16-17.) However, while what the standard requires varies depending upon the load, machine used, operating conditions, and other factors, the failures discussed above were not activities within the operator's discretion. (Ex. C-9.) His actions did not comply with the equipment manual for the forklift or how other Harvey employees indicated the industrial truck should be operated. (Tr. 337, 387; Exs. C-6, C-8, C-18, C-19.) The standard does not give an operator the discretion to fail to assess a load's stability, maneuver it two stories above the ground without securing it, without being able to see it while it was transported or tasking a "spotter" to watch it, and without any way to monitor if it was unstable or falling.

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<sup>25</sup> As discussed in the next section, the Secretary does rely on the multi-employer worksite doctrine for purposes of establishing exposure. (Tr. 344-45.)

Respondent's employee moved tools and equipment in a wooden box not attached to a powered industrial truck. (Ex. C-33 at 12.) The box did not have fork pockets and was not attached or secured to the forklift.<sup>26</sup> (Tr. 92, 97, 341-42; Exs. C-6, C-33.) Nor was the box placed up against the backstop of the carriage. (Tr. 342, 363; Ex. C-6.) The operator did not adjust the forks for maximum width or place them fully under the load. (Tr. 205-6, 337-38, 364.) He did not know the weight of the box or its contents. (Tr. 338.) No one assessed the load's center of gravity or other operating conditions, such as dynamic forces. *Id.* During transport, "tools can move." (Tr. 361.) For example, Mr. Reyes indicated they placed "come alongs," a type of tool, upright in the box. (Ex. 37 at 17.) "But, when the forklift moved them, they fell." *Id.* [redacted] could not assess how the stability of his load changed both during transport and as the workers removed the tools and equipment. (Tr. 204, 293, 339, 345, 361-63, 383-84.)

The operating conditions were "dark" and "hard to see." (Tr. 204; Exs. C-20, R-15, R-16.) [redacted] was not able to see if anyone entered the zone of operation. (Tr. 348-49; Ex. C-20.) Nor could he see the workers as they unloaded the materials.<sup>27</sup> (Tr. 204.) He could not see if the box shifted or was about to fall. (Tr. 204, 230; Ex. C-20.) The operation of the forklift did not comply with B56.1, so it violated the cited standard. (Tr. 343-44, 363.)

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<sup>26</sup> Respondent admitted "a Harvey Cleary employee operated a forklift at the worksite on or about September 30, 2019 to move tools and equipment in a wooden box which was not attached to the forklift and did not have fork pockets." (Ex. C-33 at 12.)

<sup>27</sup> Neither [redacted] nor the workers in the garage were in radio communication. (Tr. 425-26.)

### 3. Exposure

Initially, [redacted] was the only Harvey employee in the area.<sup>28</sup> (Tr. 290; 344-45.) He remained in the forklift until after the box and the Eco employee fell. (Tr. 230.) However, there is no evidence Harvey employees or others were prohibited from the area when [redacted] moved the load to the second level of the parking structure.<sup>29</sup>

Rather than rely on the exposure of Harvey employees, the Secretary cites to the exposure of the Eco employees to the hazardous condition. In his view, Harvey created and controlled the violative condition and was also the employer who could correct it. (Sec'y Br. 11, 27.) Respondent disputes this contention. (Resp't Br. 12.) It also argues that neither its employees nor those of any subcontractors were exposed to the violative condition. *Id.* at 18-19.

*Respondent Created the Violative Condition, Controlled the Worksite, and Could Have Corrected the Violation*

Respondent was the general contractor. (Tr. 108.) It controlled and supervised this worksite. Respondent identified the box and was responsible for moving it to the second-floor work area. (Tr. 158-59, 169, 192, 349; Exs. C-17, C-20.) Its employee operated the forklift and was responsible for doing so compliant with the cited standard. (Ex. C-16.) Its employee was in charge of the box and the forklift. (Tr. 349-50, 442.) Eco had neither the ability nor the authority to direct or control the forklift operator. (Tr. 123, 169, 312.) When the box could not be maneuvered over the partial wall and into the work area, Respondent's employee positioned it on the outer side of the wall. (Tr. 266; Ex. C-20.) This action forced the Eco employees to lean over

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<sup>28</sup> Mr. Arce and another assistant superintendent, Brian Castagna, were both at the worksite. (Tr. 45; Ex. R-21.) Mr. Arce was not around the area when [redacted] was delivering the load to the Eco workers. (Tr. 45-46; Ex. R-21.) It is unclear where Mr. Castagna was. Mr. Kieschnick believed Mr. Castagna had not seen the worker fall but did not know if he was present in the area. (Tr. 45-47.)

<sup>29</sup> There were four Eco employees on site. (Tr. 166-67, 271; Ex. C-16.) Two were working on the second level of the parking structure. (Tr. 166-67; Ex. C-16.) Another was in a vehicle uphill from where the worker fell. (Tr. 167.) The fourth employee was in a meeting in the same area. (Tr. 167, 280.)

the wall to obtain the items from the box. (Tr. 269, 345.) The box was not secured, so the box could shift on the forks as the load's weight and center of gravity changed with the removal of items. (Tr. 97, 345; Ex. C-17.) Such a change "could make the box flip and strike someone who is leaning over and trying to obtain items from the box." (Tr. 269, 345.)

[redacted] did not assess the load for stability before he began transport or after extending the forks to the second level of the parking structure. In fact, he could not even see the load or the workers. (Tr. 146, 204.) [redacted] was the operator and created this condition. He did not speak to the Eco workers to let them know he had not secured the box to the forks. (Tr. 198-99; Ex. C-17.) The superintendent acknowledged multiple failings with the transport of the items on September 30, 2019. For instance, the box was inappropriate for the task, and no employee should have been using it in the way [redacted] was. (Tr. 92-93.)

In contrast to Harvey's authority and control, Eco's role at the site was limited to placing and finishing concrete. (Tr. 151, 169; Ex. C-31.) Respondent's employees oversaw Eco's work. (Tr. 135-36.) They could stop work if Eco was being unsafe or not doing the work properly.<sup>30</sup> (Tr. 136.) Respondent could tell Eco what type of materials or tools to use. *Id.* It could tell them how to lay the concrete. *Id.* Eco employees could not, and did not, operate forklifts at the worksite. (Tr. 123, 153-54.) Nor did they rig equipment for transport or operate cranes.<sup>31</sup> (Exs. C-16, C-23 at 5, C-31 at 33.) Eco employees had no ability or training to direct, control, or correct the Harvey forklift operator. (Tr. 312; Ex. C-37 at 9.) Eco did not have any "say" or direction in choosing

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<sup>30</sup> [redacted] completed a JSA for the pouring of the concrete on September 30, 2019. (Tr. 207; Ex. C-23.) Harvey also required a JSA to be completed by Eco, but it is unclear if it did so. (Tr. 48-49, 51, 53.) The JSA in evidence does not refer to Harvey transporting the tools and equipment to the second floor of the garage and there is no JSA from Eco for the transport either. (Tr. 53, 207, 417-18; Ex. C-23.)

<sup>31</sup> Respondent's JSA for the concrete pours states, in all capital letters, "ONLY CERTIFIED RIGGERS TO RIG EQUIPMENT ECOCRETE EMPLOYEES DO NOT RIG." (Ex. C-23 at 5.)

the box used to transport the tools with the forklift. (Tr. 158-59, 189.) They did not control how Harvey moved the tools. (Tr. 169-70.)

Respondent had the authority and responsibility to determine the manner and means of how its employees transported the tools and equipment to the second level. (Tr. 163-64, 198.) The ability to operate the forklift in compliance with B56.1 was entirely under Respondent's control. (Ex. C-6.) It had control over the task, and the industrial truck used to complete it. Respondent controlled the lift, created the hazard, and had the sole ability to correct it.

*The Secretary Established Exposure to the Violative Condition*

Harvey's employee failed to take sufficient steps to ensure the dynamic forces did not impact the load's stability. (Tr. 339-41.) This failure created a risk for struck-by hazards. (Tr. 344-45; Ex. C-6.) Although the Harvey employee in the area was protected, other workers were not. (Tr. 344-45.) Harvey's employee placed the load outside the wall, forcing the Eco employees to reach over it and into the three-foot-deep box. (Tr. 266, 345, 349; Exs. C-6, C-20.) The dynamic forces of people reaching into the unsecured box and removing objects impacted the box's stability. (Tr. 339-40; Ex. C-6.) [redacted] could not see the employees or the box, which prevented him from realizing if the load was no longer stable. (Tr. 204, 348-49.) The dynamic forces could cause the box to flip over and strike someone, such as a worker removing tools. (Tr. 340-41; Ex. C-6.) [redacted] failed to account for the dynamic forces and the risks of the load becoming unstable when it was not secured. (Ex. C-6.)



After the Eco employee fell, he was struck by the box Harvey transported.<sup>32</sup> *Id.* The Secretary met his burden of establishing exposure.

#### 4. Knowledge

Knowledge of a violative condition may be imputed to an employer through the knowledge of a supervisory employee. *See e.g., Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999.) [redacted] was a foreman and a competent person. 18 BNA OSHC at 1726 (imputing the knowledge of employee who was, at least temporarily, a “leadman” or “supervisor”); *Mercer Well Serv., Inc.*, 5 BNA OSHC 1893, 1895 (No. 76-2337, 1977) (crew chief’s knowledge could be imputed because he maintained contact with the supervisor to relay orders and report problems). He was in sole control of the forklift at the time alleged in the Citation. The record establishes [redacted] was a supervisory employee. His knowledge of the violative condition is imputable to Respondent.<sup>33</sup>

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<sup>32</sup> Respondent’s argument resembles an unpreventable employee misconduct defense to exposure. But it cannot argue the defense to refute the evidence of exposure in this matter. The unpreventable employee misconduct “defense is predicated on the notion that the cited violative condition was caused by an employee’s misconduct if that misconduct was not reasonably foreseeable.” *Calpine Corp.*, 27 BNA OSHC 1014, 1020 (No. 11-1734, 2018), *aff’d*, 774 F. App’x 879 (5th Cir. 2019) (unpublished). The violative condition here is the failure to operate the forklift in compliance with B56.1, not the failure of the Eco worker to use fall protection. *See id.* (rejecting the claim of unpreventable employee misconduct claim because “the violative condition was the absence of either railings or an attendant at a temporary floor opening on the platform,” and so employer’s “rule requiring employees to use personal fall protection ... is not equivalent to the cited standard”). Further, as discussed in more detail below, any misconduct on the part of the decedent was done by a non-employee. The box could have fallen off the forklift even without the worker entering it. (Ex. C-20.) The Eco employee’s actions made the consequence of [redacted]’s failures worse, but they did not cause or contribute to violative conduct of Harvey’s employee.

<sup>33</sup> Respondent twists the Secretary’s burden to imply the Secretary had to show it knew the Eco employee would climb into the box on the forklift. (Resp’t Br. 19-20.) The knowledge requirement goes to the violative condition. “The knowledge element of a violation does not require a showing that the employer was actually aware that it was in violation of an OSHA standard; rather it is established if the record shows that the employer knew ... of the conditions constituting a violation.” *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1199 (No. 90-2304, 1994), citing *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1823 (No. 88-2572, 1992), *aff’d*, 26 F.3d 573 (5th Cir. 1994). The Secretary does not have to establish knowledge of the way an accident could or did occur. *See e.g., Am. Wrecking*, 19 BNA OSHC at 1707 n.4. The violation relates to the operation of the forklift. [redacted] knew how he was operating the forklift, knew the load was unsecured, knew he could not see the workers removing the tools, and knew there was not a spotter.

[redacted] knew the forks and the box could not fit inside the opening between the partial wall and roof of the garage level where the Eco employees were.<sup>34</sup> (Tr. 192, 345-46; Exs. C-20, R-18 at 9, 13-15, R-11.) He knew he would only be able to bring the box to the outside of the wall.<sup>35</sup> (Tr. 192, 345-46; Ex. R-18 at 9, 13-15.) He knew anyone trying to obtain the items from the box would have to reach over the wall and into the box. (Tr. 346.) [redacted] knew he did not secure the box to the forklift like he had done on previous lifts when he used a metal box. (Tr. 193-95.) He knew the box was not secure and could fall off. (Tr. 205.) Before he began moving the box, he understood that workers could not reach the bottom of the box from their position inside the garage. (Tr. 203.) He also understood how someone would need to get inside the box if they had to “get something out at the bottom and in the back.” (Tr. 202, 385; Ex. C-20.)

[redacted] was a foreman and designated competent person to move the tools. (Tr. 103.) “[H]e was in charge of lifting the box.” (Tr. 442.) [redacted] completed a jobsite analysis (JSA) before beginning work on the night of the incident. (Tr. 55, 206-7; Ex. C-23.) This JSA addressed the pouring of the cement in the garage. (Tr. 207, 244-46; Ex. C-23.) It did not discuss carrying the tools for Eco or who would be involved with transporting the items. (Tr. 207, 244-46; Ex. C-23.) It does not list any hazards associated with the task or address how they could be mitigated or eliminated. *Id.*

Besides [redacted]’s actual knowledge of the violative condition, the Secretary also points to Respondent’s lack of reasonable diligence. (Sec’y Br. 13, 33-34.) [redacted] had received training operating a forklift but was never observed transporting a box similar to the one used on

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<sup>34</sup> As noted above, another Harvey employee, assistant superintendent Arce, directed Eco to use the wooden box. (Ex. C-17.)

<sup>35</sup> On other occasions, [redacted] was able to place the loads into the parking structure beyond the parapet wall. (Ex. C-20.)

the night of the incident.<sup>36</sup> (Tr. 205, 386, 429; Ex. C-10.) Respondent held safety meetings and had policies which required the completion of a JSA for most tasks. (Tr. 98.) However, the Secretary showed Respondent failed to ensure all subcontractors attended safety meetings. (Tr. 98-99, 101-4.) Likewise, Respondent failed to enforce the requirement to prepare JSAs. (Tr. 100-1, 312-13, 418-19.) Neither Harvey nor Eco prepared a JSA for the transport of the tools. (Tr. 207, 244, 417-18.) In fact, Harvey never received a JSA from Eco for any task it performed on this worksite. (Tr. 417-18.)

If Mr. Kieschnick saw [redacted] or any other operator use the forklift with an unsecured load like the wooden box, he would have stopped the activity. (Tr. 93.) However, not all supervisors shared his diligence. Prior to September 30, 2019, [redacted] used other wooden boxes without securing them to prevent them from falling off the fork tines. (Tr. 92.) Mr. Arce was the assistant site superintendent in charge of the overnight concrete pours and other projects related to the parking structure. (Tr. 44; Ex. C-18.) He saw [redacted] move boxes without them being secured either by fork pockets or with chains. (Tr. 200, 349; Ex. C-20.) He never expressed concern, corrected [redacted], or disciplined him. (Tr. 92, 200, 349; Ex. C-20.) *See The Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997) (finding that even though crew was expected to work near electrical wires, employer still had a duty “to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence”), *aff’d*, 152 F.3d 918 (2d Cir. 1998).

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<sup>36</sup> [redacted]’s “Forklift Operators Evaluation” includes a list of twenty-five actions. (Ex. C-10.) Next to four of these actions “N/A” is written. (Exs. C-10, C-34 at 27, 48.) Dennet Wenske, Respondent’s Vice President, asserted that in this context “N/A” was shorthand for “not available,” rather than “not applicable.” (Tr. 428-29.) One of the actions with “N/A” written next to it is: “Carried parts/stock in approved containers.” *Id.* [redacted] and Mr. Wenske agreed no one evaluated [redacted] doing this action. (Tr. 429.)

Respondent argues it had a reduced duty of diligence under *Stormforce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530 (O.S.H.R.C., Mar. 8, 2021). (Resp't Br. 13.) Unlike the present matter, the employer in *Stormforce* did not create the violative condition. 2021 WL 2582530, at \*3. In contrast, Harvey is the creating, controlling, and correcting employer.<sup>37</sup> As such, it had a duty of reasonable diligence to detect and abate violative conditions.<sup>38</sup> See e.g., *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-360, 1992) (consolidated) (“the Secretary may establish the requisite employer knowledge by showing that a supervisor knew or with the exercise of reasonable diligence could have known of the violative conditions”); *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000) (imputing supervisor’s knowledge when the employer failed to take reasonable steps to monitor supervisor’s compliance), *aff’d*, 277 F.3d 1374 (5th Cir. 2001).

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<sup>37</sup> Further, in this matter the Secretary relies on the multi-employer worksite doctrine only for exposure to the violative condition. (Sec’y Br. 27-29.) He alleges, and established, Harvey created the violative condition, had control of the violative condition, had knowledge of it, and could have corrected it. *Id.* at 1-3, 13, 27. For this reason, Respondent’s citation to *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 WL 654129 (O.S.H.R.C., Feb. 1, 2019) is also inapposite. (Resp’t Br. 13.) Like *Stormforce*, and unlike the present matter, the employer in *Suncor* did not create the violative condition. 2019 WL 654129, at \*3. A controlling employer does not have a lesser duty of reasonable diligence on a multi-employer worksite for violative conditions it creates. See *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1199-1203 (No. 05-0839, 2010) (discussing liability of creating and controlling employers); OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy § X.E.1 (Dec. 10, 1999).

<sup>38</sup> The violation occurred in Texas and any final Commission decision could be appealed to either the Fifth Circuit or the D.C. Circuit. See 29 U.S.C. § 660(a) (parties may appeal to circuit where worksite is located or employer is headquartered; employer may also appeal to D.C. Circuit). (Ex. C-2.) The D.C. Circuit indicated it was “skeptical” of imposing the burden of proving a violation was foreseeable on the Secretary. *Wayne J. Griffin Electric, Inc. v. Sec’y of Labor*, 928 F.3d 105, 109 (D.C. Cir. 2019) (“Given the background common law of agency, we are skeptical of such a [foreseeability] requirement”). The Fifth Circuit has required such a showing in particular circumstances. See *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604, 605-09 (5th Cir. 2006) (requiring additional analysis when foreman knew his own conduct violated company policy and the law and still exposed himself to the violative condition). Respondent does not cite to *Yates* or otherwise allege the Secretary had to show [redacted]’s conduct was foreseeable. The Court agrees this analysis is not applicable when there is no contention of supervisory misconduct and where the Secretary does not rely on the exposure of the supervisor to meet his burden. Unlike *Yates*, there is no contention [redacted] was “disobedient.” *Id.* at 607-8. (Tr. 426.) In any event, because Respondent lacked appropriate and enforced work rules, [redacted]’s conduct was foreseeable. As noted, another supervisor saw [redacted] operate the forklift with loads at risk of falling off and did not take any action. (Tr. 91-92; Ex. C-20.)

## 5. Defense

While arguing it should not be considered the deceased worker's employer, Respondent simultaneously asks for the decedent to be treated as an employee for purposes of the unpreventable employee misconduct defense. (Resp't Br. 14-15.) The unpreventable employee misconduct defense has never been applied to such a situation.

Before the Eco worker stepped over the wall and onto the forks, Respondent had violated the cited standard. The decedent's conduct did not cause the violation. Instead, the failure of Respondent's employee to operate the vehicle in compliance with the cited standard is the basis for finding a violation. (Tr. 335, 347-48.) Whether [redacted] or anyone else knew an Eco employee would climb over the wall does not impact whether Respondent violated the cited standard. Respondent was cited for how [redacted] operated the forklift, mainly how he used the box and its positioning. (Tr. 347-48.) Any inappropriate actions taken by the decedent do not relieve Harvey of its obligation to operate industrial trucks in accord with the cited standard.

Respondent does not allege any of its employees, including [redacted], engaged in unpreventable employee misconduct. Nor would the record support the defense. While Respondent has a safety program, according to Vice-President Wenske, [redacted] violated no work rules. (Tr. 426; Exs. C-30, C-34.) Assistant superintendent Arce agreed. Harvey did not have a work rule regarding securing boxes without fork pockets to the forklift. (Tr. 349-50, 426; Exs. C-18, C-20.) Without an effectively communicated and enforced work rule regarding the violative condition, the Respondent cannot meet the affirmative defense's requirements.<sup>39</sup> See,

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<sup>39</sup> Respondent cites to "*Aquatek Sys. Inc. v. OSHRC*, 223 Fed. Appx. 404, 405 (5th Cir. 2007)" for support of its claim that the deceased Eco employee's action excuses its violation. (Resp't Br. 14-15.) The holding of this unpublished decision relates to an ALJ's denial of legal fees and expenses pursuant to an application. *Aquatek*, 223 F. App'x at 405.

*e.g., Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0558, 2007) (setting forth the unpreventable employee misconduct defense).

#### 6. Classification & Penalty

The Secretary argues the violation was serious and his proposed penalty of \$9,639 is appropriate. (Sec’y Br. 34.) He argues the violative condition created struck by and other hazards. (Sec’y Br. 34; Tr. 344; Ex. C-6.) To prove a serious violation, the Secretary does not have to show that an accident arising from the violation is probable. Instead, the burden is met by showing that the probable results would be death or serious physical harm if an accident were to occur. *See e.g., Shaw Constr., Inc. v. Sec’y of Labor*, 534 F.2d 1183, 1185 (5th Cir. 1976) (violations are serious “if they make possible an accident involving a substantial probability of death or serious physical harm”). Respondent makes no specific arguments regarding the classification of the violation or the proposed penalty.

Looking first at the violation’s gravity, unlike Item 1, the Court finds the record for Item 2 appropriately supports a finding the violation to be of high gravity. The violation presented the risk of being struck by objects falling from a significant height. (Tr. 344.) The proposed penalty reflects reductions for Respondent’s size and positive inspection history. (Tr. 353.) In terms of good faith, while Respondent had a safety program, the Secretary identified significant lapses. (Tr. 53-54, 58-59, 61, 99-100, 102, 104, 205, 418-19; Exs. C-10, C-25, C-26.)

Considering the section 17(j) penalty factors, with the greatest weight given to the violation’s gravity, the proposed penalty of \$9,639 is appropriate. *See* 29 U.S.C. § 666(j).

#### **C. Citation 2, Item 1 – Labels for Rigging Equipment**

Citation 2, Item 2 alleges an other-than-serious violation of 29 C.F.R. § 1926.251(a)(2)(i). This standard requires employers to ensure rigging equipment has permanently affixed and legible

identification markings indicating the recommended safe working load.<sup>40</sup> The Secretary alleges that the load specifications could not be read on the identification tags for wire rope slings at the worksite.<sup>41</sup> (Exs. C-11, C-12.) Respondent does not dispute that the tags were illegible. (Resp't Br. 20-22.) Rather, it argues they could have become illegible in the time between when their last use and when the CO inspected the site. *Id.*

### 1. Applicability and Violation

There is no dispute that the rigging equipment used at the worksite had to comply with the cited standard. The site superintendent, Mr. Kieschnick, was experienced with rigging equipment.<sup>42</sup> (Tr. 74-75.) He agreed that the cited standard applied to the equipment. (Tr. 78-79.)

Nor is there a dispute that the tags on equipment belonging to Respondent were not legible, as the cited standard requires, at the time of the inspection.<sup>43</sup> (Tr. 76, 78; Exs. C-12, R-18 at 4-5.) Employees could not read any of the required information for the rigging equipment tags. (Tr. 78.) It was readily apparent that Respondent needed to replace the tags.<sup>44</sup> (Tr. 79, 131-32.)

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<sup>40</sup> This standard addresses rigging equipment for material handling. "Employers must ensure that rigging equipment ... has permanently affixed and legible markings prescribed by the manufacturer that indicate the recommended safe working load ...." 29 C.F.R. § 1926.251(a)(2)(i).

<sup>41</sup> The allegation in the Citation is:

On or about 1 October 2019, and at times prior thereto, two wire rope slings used to lift metal baskets with a crane at the site did not have permanently affixed and legible markings to indicate the recommended safe work load, exposing workers near the path of movement to the hazard of being struck by the basket or materials in the basket.

<sup>42</sup> Mr. Kieschnick previously had a rigger training certification, but it expired by the time of the inspection. (Tr. 74.)

<sup>43</sup> The Secretary argues some rigging equipment was not labeled at all and other equipment had identification tags but there was no legible information on them. (Sec'y Br. 35.)

<sup>44</sup> When asked by Respondent's counsel whether the slings were in good condition, Mr. Kieschnick indicated they were "other than the tags." (Tr. 131-32.) There is no evidence the slings were frayed. However, this goes to the violation's gravity, not whether the slings had "affixed and legible markings ... that indicate the safe working load," as the cited standard requires. 29 C.F.R. § 1926.251(a)(2)(i).

Respondent challenges whether the equipment was in use. At the hearing, its counsel asked the narrow question of whether the slings were in use at the time of the inspection. (Tr. 131, 407.) At that time, the site “was shut down” with no work taking place. (Tr. 319.) However, the slings at issue were still attached to a large metal container used for debris. (Tr. 329, 379, 407.) The slings had not been “red tagged” or taken out of service. (Tr. 329.) And, Mr. Kieschnick told the CO the slings had been at the worksite for approximately three months and were used “on a daily basis up to six times per day.” (Tr. 76-79, 329-30, 379; Exs. C-11, C-19, C-16.) Mr. Kieschnick acknowledged that the equipment with the damaged tags belonged to Harvey and was used at the worksite.<sup>45</sup> (Tr. 76-77, 131, 328-29; Exs. C-12, C-19, C-16.) The Secretary showed the slings without the required information were in use at the worksite.

Respondent then attempts to argue that the information could have become worn off right before the inspection commenced. (Tr. 408.) The CO refuted this contention. The tags appear to be pock-marked and are entirely unreadable. (Ex. C-12.) While wear and tear occurs, a tag does not go from readable to completely unreadable in about a day. (Tr. 329-30.) Such a drastic change is not instantaneous. *Id.* Legibility fades slowly over time with prolonged use. *Id.* Respondent’s argument becomes even less plausible when multiple tags are missing or illegible. *Id.* The claim that two tags could go from readable to illegible in a day and two could disappear after the last use is entirely speculative and not supported by the record. (Tr. 329-30; Ex. C-12.) The inspection occurred not long after work had ceased, and the CO’s testimony about the information on the tags not disappearing in this short time is credited. *Id.*

The Secretary established the applicability of the cited standard and its violation.

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<sup>45</sup> The slings were used “daily,” and thus had last been used in the hours before the site was shut down. (Tr. 329-30.)



## 2. Exposure

Mr. Kieschnick admitted the slings with the unreadable identification tags were the hoisting equipment Harvey operators used at the worksite. (Tr. 76-77, 131, 328-29; Ex. C-12.) Employees used the slings on a large metal trash container and other things. (Tr. 76, 329-30; Exs. C-11, C-12.) Each use lasted for a few minutes at a time. (Tr. 76.) If the rigging equipment failed, the objects being lifted could fall on Respondent's employees or other workers at the site.<sup>46</sup> (Tr. 80-81.) Respondent's employees were exposed to the hazardous condition.

## 3. Knowledge

As noted, workers at the site used the rigging equipment four to six times a day, with each use lasting a few minutes. (Tr. 76; Exs. C-11, C-19.) Mr. Kieschnick understood that the riggers needed the information from the tags to move loads safely. (Tr. 332.) He also understood that 29 C.F.R. § 1926.251(a)(2) requires rigging equipment to have "legible" markings. (Tr. 77.) While Mr. Kieschnick indicated that "at a glance" a person just "walking through the site" might not have realized there was something wrong with the tags for the slings, the slings were in plain view, and one could easily discover some slings had no tags and other tags were illegible. (Tr. 132.) Indeed, Mr. Kieschnick acknowledged that if he "had looked" at the rigging equipment, he would have been able to tell the tags needed to be replaced. (Tr. 79-80.)

The slings were used multiple times a day and had not instantly become unreadable. (Tr. 329-30.) For the information to become illegible on two different tags, they must have been deteriorating for some time. (Tr. 329-30; Ex. C-12.) Respondent does not explain how the tags could have become removed from the rigging equipment when all work at the site ceased after the worker fell from the forklift.

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<sup>46</sup> Respondent's employees engaged in rigging loads and moving them by crane. (Tr. 75, 442.) Certain subcontractors, such as Eco, never rigged loads or used rigging equipment. (Ex. C-23 at 5.)

While someone just walking by might not have seen the issue, this does not constitute an inspection or reasonable diligence. *JPC*, 22 BNA OSHC at 1861. “Reasonable diligence includes taking into account all available, factual information relating to whether hazardous conditions exist, or reasonably could exist, where work is being performed.” *Id.* Employers must “inspect and perform tests to discover safety-related defects.” *Id.* The condition was in plain view for an extended time, and an employee could easily discover the issue through a quick visual inspection. *See Kokosing Constr., Inc.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996); *Simplex Time Recorder Co. v. Sec’y of Labor*, 766 F.2d 575, 589 (D.C. Cir. 1985) (non-compliant conditions were readily apparent). The Secretary established knowledge of the violative condition.

#### 4. Classification and Penalty

The Secretary characterized the violation as other-than-serious. Respondent does not raise any challenges to the violation’s characterization or the proposed penalty amount.

Although the tags could not be read, the slings themselves were in good condition. (Tr. 331-32; Ex. C-11.) There is no evidence that employees' use of the rigging equipment exceeded the load limits. *Id.* The Court agrees with the other-than-serious characterization.

Because of the low gravity nature of the violation, the Secretary proposed no penalty for this violation. (Sec’y Br. 36.) Respondent promptly abated the condition. (Ex. C-15 at 6.) After duly considering the section 17(j) penalty factors, the Court agrees with assessing no penalty.

#### **D. Citation 2, Item 2 – Failure to Use Equipment in Accordance with Instructions**

Citation 2, Item 2 alleges an other-than-serious violation of 29 C.F.R. § 1926.403(b)(2). This standard requires that certain equipment must be installed and used according to specified

instructions.<sup>47</sup> The CO saw two electrical power strips interconnected or daisy-chained into an extension cord in a worksite trailer.<sup>48</sup> (Ex. C-14.) As with Citation 2, Item 1, rather than dispute this condition's presence during the CO's inspection, it argues the Secretary failed to prove the condition violated the cited standard. (Resp't Br. 23-26.)

### 1. Applicability & Violation

In one of the jobsite trailers, the CO observed power strips and extension cords being improperly used. (Tr. 81-82; Exs. C-13, C-14.) They were connected to one another rather than each being plugged into a single outlet.<sup>49</sup> *Id.* Power strips are listed electrical equipment in the Underwriters Laboratories (UL) General Information for Electrical Equipment Directory ("UL Directory." (Tr. 379; Ex. C-13.) The UL Directory requires power strips to be connected directly into a branch circuit receptacle. (Ex. C-13.) They are not to be series connected to other power strips or extension cords. *Id.*

Mr. Kieschnick acknowledged that the power strips were connected improperly. (Tr. 81-82.) It does not matter that they were not permanent and could be relocated. The standard applies to "both temporary and permanent" installations. 29 C.F.R. § 1926.402 (addressing the applicability of §§ 1926.403-1926.408).

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<sup>47</sup> This standard is part of the Subpart K, which addresses electrical safety requirements. The cited provision concerns the examination, installation and use of equipment. "Listed, labeled, or certified equipment shall be installed and used in accordance with instructions included in the listing, labeling, or certification." 29 C.F.R. § 1926.403(b)(2).

<sup>48</sup> The Citation alleges:

On or about 1 October 2019, and at times prior thereto, an office within the General Contractor's worksite trailer had two relocatable power taps connected in series and then connected to an extension cord that was plugged into a wall outlet, creating a potential hazard for electrical shorts, overloads and fires.

<sup>49</sup> At times this equipment was referred to as "Relocatable Power Taps." (Tr. 379; Ex. C-13.)

Respondent argues that this did not create a hazard. (Resp't Br. 25.) However, for specific standards, such as the one cited here, the Secretary is not required to prove a hazard for the violation to be affirmed.<sup>50</sup> *Bunge*, 638 F.2d at 834 (“Unless the general standard incorporates a hazard as a violative element, the proscribed condition or practice is all the Secretary must show; hazard is presumed and is relevant only to whether the violation constitutes a ‘serious’ one ”); *Nat'l Eng'g & Contracting Co. v. Sec'y of Labor*, 928 F.2d 762, 768 (6th Cir. 1991) (employer could not “escape liability” by showing equipment did not comply with an OSHA standard was “safe for employee use”). In any event, the CO explained that the condition presented a fire hazard.<sup>51</sup> (Tr. 380.)

## 2. Exposure

The violative condition was present in the jobsite trailer used by the project engineer and his assistant. (Tr. 41-43, 81-82.) Respondent employed both directly. (Tr. 43.) In addition, other employees were regularly in the location of the power strips. (Tr. 82.) Mr. Kieschnick acknowledged being in the trailer where the CO observed the violative condition “several times a day.” *Id.* The Secretary established exposure to the violative condition.

## 3. Knowledge

The Secretary indicates a Harvey “superintendent or engineer had to have plugged these cords in initially.” (Sec'y Br. 37.) A non-supervisor also worked in the relevant jobsite trailer. (Tr. 81-82.) Non-employees were also routinely present in the location. *Id.* The Secretary did not establish who created the violative condition. In addition, no witness indicated they ever say the

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<sup>50</sup> As discussed below, Respondent's arguments about the likelihood of harm from the condition are relevant to the characterization and penalty for the violation.

<sup>51</sup> Mr. Kieschnick viewed the power strips as a hazard that could cause an electrical problem. (Tr. 82-83.)

power taps connected improperly.<sup>52</sup> (Tr. 132-33.) The Secretary failed to establish actual knowledge of the violative condition.

As for constructive knowledge, Respondent had a work rule preventing daisy-chaining or connecting power cords improperly. (Tr. 82-83.) Respondent's weekly auditing procedures required a supervisor to check the jobsite trailers. (Tr. 83, 105-6; Ex. C-28.) The audits also specifically directed employees to check for electrical issues. (Tr. 83, Ex. C-28.) The condition violated Respondent's rules and was within the scope of these weekly audits. (Tr. 82-83, 105-6; Ex. C-28.) Mr. Kieschnick knew the condition was improper and had looked for it in the past. (Tr. 81, 83; Ex. C-28.) Considering Respondent's training programs and auditing procedures, the Court finds the record does not support finding a lack of reasonable diligence to detect and correct violations of this type.

Accordingly, Citation 2, Item 2 is vacated.

### **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 is AFFIRMED, as a serious violation and a penalty of \$2,432 is ASSESSED;
2. Citation 1, Item 2 is AFFIRMED, as a serious violation and a penalty of \$9,639 is ASSESSED;

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<sup>52</sup> Mr. Kieschnick indicated he was familiar with the desk in the relevant trailer. (Tr. 133.) He did not recall seeing the power strips on the desk prior to the CO's investigation. (Tr. 133-34.) He agreed with Respondent's counsel that the power strips may have been behind the desk rather than on top of it as depicted in the CO's photos. (Tr. 133.)

3. Citation 2, Item 1 is AFFIRMED, as an other-than-serious violation and no penalty is assessed; and

4. Citation 2, Item 2 is VACATED and no penalty is assessed.

SO ORDERED.

*/s/ Peggy S. Ball*  
Peggy S. Ball, OSHRC ALJ

Date: January 18, 2022  
Denver, Colorado