United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. WALMART, INC., Respondent.	OSHRC Docket No. 17-0949

ON BRIEFS:

Juan C. Lopez, Appellate Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund Baird, Acting Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

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For the Respondent

DECISION

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

This case is before the Commission on remand from the United States Court of Appeals for the Second Circuit. *Walsh v. Walmart, Inc.*, 49 F.4th 821 (2d Cir. 2022). Administrative Law Judge Keith E. Bell affirmed a citation issued by the Occupational Safety and Health Administration to Walmart, Inc., alleging that pallets of merchandise kept on racks at a Walmart distribution center in Johnstown, New York, were "stored in tiers" but not "blocked . . . so that they [were] stable and secure against sliding or collapse," as required by 29 C.F.R. § 1910.176(b). The Commission vacated the citation on review, concluding that the cited provision did not apply because "stored in tiers," as used in § 1910.176(b), is limited "to articles stacked one on top of another with nothing in between." *Walmart, Inc.*, No. 17-0949, 2020 WL 10759260, at *3 (OSHRC, Dec. 31, 2020); *see Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247,

1981) (proof of a violation includes showing the cited standard applies), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

On appeal, the Second Circuit reversed the Commission's decision, concluding that the "the plain language of [§ 1910.176(b)] appl[ies] to material arranged one above another vertically, including on shelves, not just materials stacked directly on top of another." 49 F.4th at 829. The court remanded the case for consideration of whether the Secretary established the remaining elements of the alleged violation. *Id.* at 829-30; *see Astra Pharm. Prods.*, 9 BNA OSHC at 2129 (Secretary must show, in addition to the applicability of the cited provision, the employer's failure to comply with the provision, employee exposure, and knowledge of the violative condition).

For the following reasons, we conclude the Secretary has established that Walmart failed to comply with § 1910.176(b), that Walmart's employees were exposed to the violative condition, and that the company had knowledge of that condition. Accordingly, we affirm the citation.

BACKGROUND

Walmart's Johnstown distribution center processes between 45,000 and 50,000 pallets of merchandise per week to fill orders placed by its stores. Pallets are stored on approximately 30-foot-high racks, with one pallet per rack level. The racks are positioned back-to-back, such that pallets are accessible by forklift only from aisles at the fronts of the racks. At each rack level, a 48-inch-long and 40-inch-wide pallet rests on the front and back beams of the rack, which are 42 inches apart. This means that each pallet, when properly placed, overhangs the beams by three inches at the front and back. Pallets on back-to-back racks are positioned about four to five inches from one another.

Each rack has seven or eight levels, the lowest of which is the "10 slot" on the distribution center floor, with the "20 slot" just above it. These two levels are also known as "pick slots," from which employees retrieve items to fill merchandise orders. The 20-slot has an additional beam that runs front-to-back in the center and allows employees to remove empty pallets, each weighing more than 60 pounds, without them falling into the space between the front and back beams. The upper levels, where pallets of excess merchandise are placed, are known as "T slots" or "reserve locations," and do not have additional front-to-back beams. When pallets in the pick slots run out of merchandise, they are removed by hand and replaced, via forklift, with stocked pallets from the T slots above.

On February 25, 2017, J.S., an order filler at the distribution center, sustained neck and spinal injuries when she was struck by falling merchandise while retrieving items from a pick slot. A forklift was pulling a stocked pallet from the T slot of a rack immediately behind the rack from which J.S. was filling orders when the pallet bumped another stocked pallet stored in a T slot in the aisle where J.S. was working. The bumped pallet tipped into the space between the rack's front and back beams, causing some items on the pallet to spill out into the aisle and strike J.S.

DISCUSSION

I. Noncompliance

The Secretary alleges a violation of § 1910.176(b), which provides as follows:

> *Secure storage.* Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.

The Secretary asserted in his post-hearing brief to the judge that Walmart failed to comply with the provision because "there were no bumpers, barriers, or other devices to *block* a bumped pallet from sliding perpendicular to the beams and tipping," and "the thin beams and large gap between the beams [means that] a bumped pallet needed only to slide a matter of inches to slide off of one of the beams." (Emphasis in original.) The judge agreed with the Secretary, finding that "[g]iven the dynamic atmosphere of this distribution center where pallets and their contents are constantly being placed and pulled from the racks, it is clear to see why these . . . pallets . . . become unstable when struck by moving equipment."[1] Walmart contends that this was error because the Secretary failed to prove the pallets are not "stable and secure against sliding or collapse," given that their instability occurs only when they are dislodged by a forklift. 29 C.F.R. § 1910.176(b). Walmart further argues that the company's racking system cannot be considered noncompliant with § 1910.176(b) because it is widely used in the warehousing industry.

To begin, § 1910.176(b) requires stored materials to withstand outside forces. The standard defines none of the following terms, but: (1) "secure" means "free from danger" and "affording safety"; (2) "slide" means "to change position or become dislocated"; and (3) "collapse" includes in its definition to "fall into a jumbled or flattened mass *through the force of external pressure*."

[1] The judge found that Walmart's pallets are 46 inches long and thus stated in his decision that "a perfectly placed pallet only has 2 [inches] of overhang on each beam." The Secretary concedes in his brief on review, however, that "all the pallets are forty-eight inches [long] and that the overhang on each side is three inches."

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 443, 2053, 2142 (1971) (emphasis added). Putting these definitions together, a plain language reading of § 1910.176(b) does not limit an employer's compliance obligation to simply ensuring that materials are stored such that they will not give way under their own weight.

Contrary to Walmart's claims on review, this reading of § 1910.176(b) is consistent with two Commission cases in which violations of the provision were affirmed. In *Pratt & Whitney Aircraft*, 9 BNA OSHC 1653 (No. 13401, 1981), the Commission found noncompliance with § 1910.176(b) where "three pallets of metal barrels" could be toppled by "mechanical handling equipment used in the area." *Id.* at 1667. The Commission stated that "the Secretary need not prove that the barrels could fall off by themselves"; rather, "[p]roof that the barrels were on pallets in areas used by mechanical handling equipment [was] sufficient." *Id.* at 1668. Three years later in *Clement Food Co.*, 11 BNA OSHC 2120 (No. 80-0607, 1984), the Commission stated that § 1910.176(b) "is not limited by its words to stacks so unstable that they might collapse of their own weight," and found noncompliance where three witnesses testified that "a tiered stack of boxes fifteen feet high" could be knocked over by "any shock or vibrations from forklift trucks and machinery in the area." *Id.* at 2122. In each of these cases, the § 1910.176(b) violation was unquestionably based on the materials at issue potentially being dislodged by an outside force. Thus, Walmart's attempt to distinguish these cases based on the materials at issue being inherently unstable is unfounded.[2]

Here, the outside force dislodging materials was not merely potential—the record shows that forklifts routinely tipped pallets stored on the distribution center's racks, causing merchandise to fall to the floor from reserve locations as high as 30 feet. J.S. testified that "[r]oughly, during

[2] Walmart also attempts to distinguish two judges' decisions that affirmed violations of § 1910.176(b) on the ground that both cases involved inherently unstable storage. Unreviewed decisions by Commission judges are not binding precedent. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) ("[A] Judge's opinion . . . lacking full Commission review does not constitute precedent binding upon us."). In any event, one judge simply followed *Clement Food* in finding that "stacked material must be stable and secure *even when struck by forklifts*." *Sanderson Farms, Inc.*, No. 07-1623, 2008 WL 5203149, at *5 (OSHRCALJ, Aug. 12, 2008), *aff'd*, 348 F. App'x 53 (5th Cir. 2009) (unpublished) (emphasis added). The other followed both *Clement Food* and the Fifth Circuit's decision in *Sanderson Farms* in declaring that "[i]t is enough . . . [that] the record establishes the stack [of stored materials] was capable of sliding or collapsing *when struck or disturbed*." *Gen. Dynamics Land Sys., Inc.*, No. 17-0637, 2018 WL 3046401, at *5 (OSHRCALJ, May 4, 2018) (emphasis added).

my [three-day] work week," items would fall from pallets after being dislodged "three to four times during that [time]." The OSHA compliance officer who inspected the distribution center testified that a Walmart employee told him that "material falling through the rack . . . was a problem and something that needs to be fixed to avoid somebody getting hurt." According to the distribution center's asset protection manager, "[w]e would have, probably, an incident in the racking, we call it a tipped pallet, because frequently it will tip, but not fall, maybe a couple of times a month." Likewise, the distribution center's general manager testified that items fall from pallets dislodged by forklifts "a few times a month." We find this evidence shows that the way Walmart stored its pallets—overhanging the front and back rack beams by only 3 inches, with pallets on back-to-back racks only 4 to 5 inches apart—was not "stable and secure against sliding and collapse" caused by a known and frequently occurring outside force. 29 C.F.R. § 1910.176(b); *see also Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2119 (No. 07-1578, 2012) (noting "the well-established principle that the purpose of the [OSH] Act is to prevent the first accident") (internal citations omitted).

As to Walmart's assertion that its racking is industry-standard, the company has provided no evidence to support this claim beyond a single statement made by its general manager that the center's "selective racking [is] standard in the industry." In fact, Walmart effectively concedes that this bare assertion stands alone in this regard, as the company notes only that the general manager's testimony was uncontradicted at the hearing. Even if Walmart's racks are industry-standard, "[w]hatever the practice of an industry, . . . members of it are required to take into account all available, factual information relating to whether hazardous conditions exist, or reasonably could exist, where work is being performed." *Bland Constr. Co.*, 15 BNA OSHC 1031, 1036 (No. 87-0992, 1991); *see also Baker Tank Co.*, 17 BNA OSHC 1177, 1179 (No. 90-1786, 1995) ("[E]vidence as to current industry practice is relevant, but it is not dispositive if industry practice is shown to be inadequate."). As such, the undisputed awareness of two Walmart managers that pallets regularly tip and spill merchandise establishes a known hazard, regardless of any purported industry-standard practice.[3] *See Wiley Organics, Inc.*, 17 BNA OSHC 1586, 1597

[3] The Secretary contends that industry practice is relevant only when interpreting a performance standard, and he correctly notes that § 1910.176(b) is a specification standard. *See, e.g., Cleveland Wrecking Co.*, 24 BNA OSHC 1103, 1106 (No. 07-0437, 2013) ("Although [29 C.F.R.] § 1926.501(c) grants the employer the discretion to select a method to protect employees from falling objects, it is a specification standard because it requires that the employer choose from a

(No. 91-3275, 1996) ("An employer has a general obligation to inform itself of the hazards present at the worksite and cannot claim lack of knowledge resulting from its own failure to make use of the sources of information reasonably available to it."), *aff'd*, 124 F.3d 201 (6th Cir. 1997). Therefore, the Secretary has established a failure to comply with § 1910.176(b).

II. Exposure

"To establish exposure, the Secretary must show that an employee was actually exposed to the cited condition or that access to the cited condition was reasonably predictable." *Calpine Corp.*, 27 BNA OSHC 1014, 1016 (No. 11-1734, 2018), *aff'd*, 774 F. App'x 879 (5th Cir. 2019) (unpublished). The judge found that J.S. "had access to the hazard [of falling merchandise] and was within the zone of danger to perform her assigned task at the time of the [incident]." Walmart attempts to sidestep this incident, asserting that J.S.'s exposure resulted from her having broken the company's "twenty-foot work rule," which requires employees to stay at least twenty feet from a forklift when its forks are raised. Walmart also argues, somewhat in the alternative, that the citation was not based on J.S.'s exposure, but rather on that of employees at the distribution center generally, and that the company's work rule made it such that exposure was not reasonably predictable.

Walmart's arguments are predicated on a misunderstanding of our exposure jurisprudence. As noted, "[e]xposure to a violative condition may be established either by showing actual exposure *or* that access to the hazard was reasonably predictable." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Indeed, in *Phoenix Roofing*, reasonable predictability of exposure was merely an alternative rationale to the Commission's finding of actual exposure. *See id.* ("Actual exposure to the fall hazard involved in this case is unquestioned," but "even if we were to ignore this evidence of actual exposure, . . . the evidentiary record still establishes that access to the violative condition was reasonably predictable."). Walmart does not dispute that J.S. was struck by falling merchandise at the distribution center, so actual exposure has been established regardless of whether the company's

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list of specific enumerated methods."). Industry practice, however, may not be wholly irrelevant in terms of compliance with the cited provision's requirements. While § 1910.176(b) requires materials stored in tiers to be "blocked," it does not specify how such blocking must be accomplished, so industry practice could show what type of blocking might suffice. But given the record evidence here of regularly falling merchandise, whether Walmart's racking is industry-standard is immaterial.

twenty-foot rule was violated.[4] *See Am. Luggage Works, Inc.*, 10 BNA OSHC 1678, 1682 (No. 77-0893, 1982) (finding actual exposure based on employees' hands being one inch from point of operation and rejecting argument that "employees were not exposed . . . because they were instructed in safe operating procedures and were required to remove their hands from the point of operation during the operating cycle"); *Wayne Farms, LLC*, No. 17-1174, 2020 WL 5815506, at *3 n.2 (OSHRC, Sept. 22, 2020) ("[T]he injury sustained by Employee #1 here is . . . relevant to assessing actual exposure and would likely satisfy that element of the case if we were to reach that issue . . . ."). Additionally, where a citation alleges hazards affecting multiple employees, the "[e]xposure of only a single employee to a zone of danger has been universally accepted by the courts and the Commission to satisfy the element." *Hartford Roofing Co.*, 17 BNA OSHC 1361, 1365 (No. 92-3855, 1995). Therefore, we find the Secretary has established that Walmart employees were exposed to the violative condition here.

III. Knowledge

"Knowledge of the violative condition, either actual or constructive, is an element of the Secretary's burden of proving a violation: the Secretary must prove either that the employer knew of the violative condition or that it could have known with the exercise of reasonable diligence." *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1939 (No. 97-1676, 1999). "[K]nowledge can be imputed to the cited employer through its supervisory employee." *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). The judge found that Walmart had actual knowledge based on testimony from: (1) J.S. "that she personally informed a couple of managers of her concerns regarding items falling"; (2) the distribution center's general manager "that merchandise occasionally falls from the racking when struck by a lift driver," and that "he received reports regarding tipped pallets and [was] aware that it happens at least a few times per month";

[4] Walmart's argument in this regard resembles an unpreventable employee misconduct defense, but it is not one, nor can it be. Such a "defense is predicated on the notion that an employer should not be held responsible when *the cited violative condition* was caused by an employee's misconduct if that misconduct was not reasonably foreseeable." *Calpine Corp.*, 27 BNA OSHC at 1020 (emphasis added). Here, the violative condition is the company's failure to block merchandise to keep it from falling, not a failure to keep employees away from forklifts. *See id.* (rejecting unpreventable employee misconduct defense 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").

and (3) the distribution center's asset protection manager "that material falls off the reserve level of the selective racking system when hit by an associate thereby causing a pallet to tip." In the face of this evidence, Walmart's only response is that "[w]hile the testimony demonstrated that [the company] was aware that pallets were partially displaced from racking a few times per month, there was no indication that [Walmart] had knowledge that this was a violative condition."

Again, this argument is premised on Walmart's misapprehension of the law. "The knowledge element of a violation does not require a showing that the employer was actually aware 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, 1993) (emphasis added) (citing *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1823 (No. 88-2572, 1992)), *aff'd*, 26 F.3d 573 (5th Cir. 1994). Here, the testimony relied upon by the judge shows that Walmart managers were aware the pallets stored on the racks were not blocked and therefore were not "stable and secure against sliding or collapse." 29 C.F.R. § 1910.176(b). Their knowledge is properly imputed to the company.

For these reasons, we find that the Secretary has established employer knowledge, in addition to noncompliance and exposure, and therefore affirm Citation 1, Item 1.

IV. Abatement Date

Given our affirmance of the citation, one additional argument raised by Walmart on review must be addressed. Walmart contends that the 19-day abatement period set by OSHA in the citation is unreasonable because the installation of front-to-back beams in reserve locations on the distribution center's racking—a blocking method suggested by the Secretary—would take up to six months given that the beams would need to be custom made. *See* 29 U.S.C. § 658(a) ("[T]he citation shall fix a reasonable time for the abatement of the violation."). The judge declined to address this issue, finding that it was not litigated. This was error.

The record shows that Walmart disputed the abatement period from the outset, and that the issue was in fact litigated. The only abatement requirement in the citation is the date, and Walmart's notice of contest expressly states that the company "hereby contests the citation, the proposed penalty, *and abatement requirements associated with the citation*." (Emphasis added.) *See Druth Packaging Co.*, 8 BNA OSHC 1999, 2003 (No. 77-3266, 1980) ("When an employer contests a citation, it may place in issue the reasonableness of the abatement date specified in the citation."). The use of front-to-back beams was first suggested by the Secretary as an abatement

method in the parties' joint pre-hearing statement, where he listed as exhibits three "Photograph[s] of Storage Racks Without Crossbar" and one "Photograph of Storage Racks With Crossbar." Then at the hearing, the Secretary's counsel asked the compliance officer about "perpendicular cross beams" and their effectiveness in keeping pallets from falling.

In response, Walmart's counsel specifically questioned the distribution center's general manager about how long it would take for Walmart to install such front-to-back "cross bracing," and the general manager responded that it would take six months, given that the company would have to "cut a purchase order for the cross bracing" and it would have to be fabricated and custom-installed because it is "not a stock part for this selective racking." Walmart relied on this testimony in its post-hearing brief, arguing that "the abatement period should be set at six months."

When an employer contests the abatement date, "the burden of proving [the date's] reasonableness lies with the Secretary." *Id.* The Secretary, however, presented no evidence that front-to-back beams could be installed in 19 days—indeed, the general manager's testimony that such beams would take six months to install is unrebutted. On review, the Secretary asserts that Walmart can achieve compliance with § 1910.176(b) by simply rearranging back-to-back racks so that there is more space between adjacently-stored pallets, but the Secretary did not proffer this option before or at the hearing, so Walmart had no opportunity to contest this proposed method.[5] And the Secretary's argument appears somewhat disingenuous, given that his post-hearing brief to the judge specifically stated that "one straightforward method of abating these hazardous storage conditions would be to put an interior cross-beam (cross-brace) in the storage racks underneath each pallet," and did not mention additional separation of the racks. Under these circumstances, we agree with Walmart that the time for abatement should be extended to six months from the date of the final order in this case. *See* 29 U.S.C. § 659(b) ("[T]he period permitted for . . . correction [of the violation] . . . shall not begin to run until the entry of a final order by the Commission . . . .").

[5] We also question whether rearranging racks would achieve compliance with the cited provision, which requires stored materials to "be stacked, blocked, interlocked and limited in height." 29 C.F.R. § 1910.176(b).

ORDER

In light of the foregoing, we affirm Citation 1, Item 1, extend the time for abatement to six months, and—because Walmart does not contest penalty—assess the proposed penalty of $10,864. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (assessing proposed penalty where not in dispute).

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: February 8, 2023