

**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

Secretary of Labor,

Complainant,

v.

Nova Group /Tutor-Saliba, a Joint Venture,

Respondent.

DOCKET NO. 10-0264

Appearances:

Matthew Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington
For Complainant

Robert D. Peterson, Esq., Rocklin, California
For Respondent

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a Nova Group/Tutor-Saliba, a Joint Venture, (“Respondent”) worksite on Puget Sound Naval Shipyard in Bremerton, Washington on November 24, 2009. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging one serious violation of the Act with a proposed penalty of \$3,500.00. Respondent timely contested the citation and an administrative trial was conducted on July 20, 2010 in Seattle, Washington. Both parties submitted a post-trial brief and the case is ready for disposition.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (Tr. 9). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). Furthermore, because California manages its own OSHA state plan, it is important to note that Respondent was a Federal contractor engaged in construction on a Federal military installation under Federal OSHA jurisdiction. (Tr. 17, 112-113, 179-180).

Applicable Law

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

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

Factual Stipulations

1. The alleged violation occurred on November 23, 2009;
2. Respondent consented to the OSHA search of Respondent's worksite and OSHA's investigation following the accident;
3. The proposed penalty of \$3,500.00 was computed in accordance with Federal policy and procedures and was properly calculated for the alleged violation;
4. Respondent's employees were working at the following site on the Puget Sound Naval Shipyard on November 23, 2009: Z-lot, B-447 Farragut Avenue, Bremerton, Washington 98124;
5. Respondent was engaged in a business affecting interstate commerce. (Tr. 6-9).

Additional Factual Findings

Four witnesses testified at the hearing: (1) Selves Smith, a Mi-Jack Crane Operator employed by Respondent; (2) *{redacted}*, a Laborer employed by Respondent; (3) Ed Delach, an OSHA Compliance Safety and Health Officer; and (4) Gary Sager, a Casting Yard Superintendent employed by Respondent (Tr. 13, 99, 110, 165). Based on their testimony and discussion of evidentiary exhibits, the court makes the following factual findings:

On November 23, 2009, Respondent was a Federal contractor which maintained a work site on Puget Sound Naval Shipyard, manufacturing concrete and steel piles used in the construction of a new Navy pier. (Tr. 113, 115, 153; Ex. G-1A, G-2). The worksite at issue was known as the "Z-Lot" and was the location at which Respondent manufactured and stored the piles until they were needed in the pier construction process. (Tr. 18-21). The piles, sometimes called pilings, were two feet wide octagonal concrete and metal cylindrical poles that varied in length. (Tr. 18-19, 149-150; Ex. G-2, G-3, G-4). The average weight of each piling was 55,000 pounds. (Tr. 19).

Respondent's work process, as illustrated in a drawing of Z-Lot, was for piles to first be

formed and cured in a 400 foot-long casting bed. (Tr. 64; Ex. G-1A). Once cured, a Mi-Jack crane, which straddles the casting bed, would pick up a pile and set it immediately to the side in a temporary storage area. (Tr. 20, 70-72; Ex. G-1A, G-6). At that location, Respondent's employees patched any visible deficiencies on each piling, like air bubbles or areas in which concrete had crumbled off. (Tr. 169, 171). Once the cosmetic deficiencies were addressed, the piles were moved a few feet away and stacked in the more permanent storage area until needed at the location of the pier construction. (Tr. 45-46, 138; Ex. G-1A, G-2, G-3, G-6, G-7).

This process typically involved two employees: the Mi-Jack Crane Operator and a Rigger. (Tr. 26). The Mi-Jack Crane Operator remained in the crane, picking up and setting down piles as directed by the Rigger. (Tr. 42, 50). The Rigger was responsible for hooking the crane slings and hooks to lifting eyes on each pile, placing dunnage (wood) in the area where the pile was going to be placed, and removing the crane slings and hooks once a pile was positioned by the crane. (Tr. 27, 30-31, 86; Ex. G-6). The dunnage placed under each pile to secure it from movement consisted of various pieces of lumber ranging from plywood, to 2x4's, to 6x6's. (Tr. 22-24, 33, 182; Ex. G-9, G-24, G-25).

On the date of the accident, Selves Smith was the Mi-Jack Crane Operator and Justin Fryar was the Rigger. (Tr. 26-27, 169-170). A Laborer, *{redacted}*, was also working in the area assisting the Rigger. (Tr. 100, 102). Although Gary Sager was the Z-Lot Superintendent, he was gone that day and Larry Tinney was acting as the Z-Lot supervisor in his place. (Tr. 37, 76, 107). About 2-3 weeks before the accident, Mr. Sager had implemented a change in the way piles were to be placed in the temporary storage area. (Tr. 37-38, 102-103, 173). The new procedure was to set the piles on the asphalt next to the casting bed four-piles-wide, and then start an upper row on top of those beginning with the fifth pile. (Tr. 41, 115, 172). Respondent had double-stacked piles on occasion in the past, but the primary method used prior to the accident consisted of

setting two piles side-by-side, moving down the casting bed, and then setting two more piles side-by-side. (Tr. 89, 172). The procedure was changed because the piles being poured at the time were too long to set them all on the ground at one level next to each other; it was easier to start stacking them vertically on top of one another. (Tr. 57). Every pile lift required a supervisor to be present. (Tr. 36).

The asphalt area next to the casting bed on which the piles were initially stored was not level. (Tr. 89). It was described as having “waves.” (Tr. 89). In contrast, the permanent storage area only a few feet away had been specifically constructed by Respondent when this project began to ensure that the piles in the permanent storage area would be sitting on a level concrete surface. (Tr. 90, 136; Ex. G-24, G-25). Respondent also used significantly more and better quality dunnage to secure the piles in the permanent storage area than in the initial temporary storage area. (Tr. 126-127, 136; Ex. G-24, G-25). When placing the dunnage in the temporary storage area before a pile was set down, Rigger Justin Fryar did not use any kind of leveling tool to ensure that the 55,000 pound piles would be sitting level once they were released by the crane. (Tr. 24, 104). He just “eyeballed it.” (Tr. 24, 104).

This was the process Mr. Selves, Mr. Fryar, and *{redacted}* were following, under the supervision of Larry Tinney, when the accident happened. Justin Fryar and *{redacted}* had placed four pieces of dunnage on top of the four piles already set down in the temporary storage area so that the second row of piles could be placed on top of them. (Tr. 41, 49-50). Mr. Fryar then called Mr. Selves on the radio and signaled for him to lift and place the fifth pile on top of the four previously placed piles. (Tr. 42, 50, 73, 79). After the fifth pile was set on top of the previous four, *{redacted}* began walking over to work on rigging the next pile when the upper pile that had just been set down, and one of the lower piles, began to roll. (Tr. 50, 77, 105-106). *{redacted}* was pinned between the piling and the casting bed, resulting in multiple injuries including the partial amputation of one of *{redacted}* legs. (Tr. 51-52, 106).

After the accident, it was clear that some of the pieces of dunnage used to secure the piles were cracked, broken, or partially crushed under the weight of the piles. (Tr. 129-133; Ex. G-24, G-25). Respondent's post-accident investigation concluded that the collapse of the piles resulted from three factors: (1) the lack of formal, standardized inspection criteria for dunnage, (2) the lack of a consistent practice of ensuring adequate dunnage beyond the resting, bottom horizontal surface of the pile, and (3) the use of the softer wood as leveling dunnage. (Tr. 185; Ex. G-26). Respondent's Job Hazard Analysis had identified a hazard from stacked piles falling or collapsing and recommended the use of good, quality dunnage. (Tr. 140; Ex. G-10). After learning about the incident from a news report, OSHA sent CSHO Ed Delach to the worksite to conduct an investigation the following day, which resulted in the issuance of the alleged violation in this case. (Tr. 110-112).

Discussion

Citation 1 Item 1

The Secretary alleged in Citation 1 Item 1 that:

29 C.F.R. §1926.250(a)(1): Materials stored in tiers were not stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling, or collapsing. (a) Casting yard Z-Lot, concrete piles approximately 90 foot in length and weighing approximately 55,000 lbs, were stacked in a temporary storage area in a manner which allowed them to collapse.

The cited standard provides:

(a) General. (1) All materials stored in tiers shall be stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling or collapse.

Respondent was engaged in the construction of a new pier using the piles it created at the

nearby Z-Lot. In the process of preparing the piles for use in the construction of the pier, Respondent's crane operator was stacking piles next to one another in rows of four, and then on top of one another, in a second row of four. It was during the placement of a pile in the upper row that the collapse occurred. Respondent disputes that this process constituted storing materials in tiers. "Tier" is defined as "one of a series of rows placed one above another." *Webster's New Riverside University Dictionary, 1984*. Therefore, the court finds that Respondent was storing material in tiers. The cited standard applies to the condition.

The piles being stacked in the initial temporary storage area were secured with smaller and fewer pieces of dunnage than the nearby permanent storage area, on an unlevel surface, where the Rigger merely "eyeballed" whether he thought the 55,000 pound piles were sitting level. The size, weight, and shape of the piles were exactly the same at the temporary storage area vs. the nearby permanent storage area, except for some minor cosmetic repairs. There was no logical reason presented at trial to explain why virtually identical piles in the unlevel temporary storage area would require less and smaller pieces of dunnage than they did in the permanent storage area just a few feet away. It is also entirely inconsistent with the requirements of the cited regulation to have one employee "eyeball" whether multiple piles, weighing 55,000 pounds each, stacked one on top of another, were sitting level. Respondent failed to stack the piles in a manner that would prevent sliding, falling, or collapsing. The terms of the cited standard were violated.

Two of Respondent's employees, the Rigger and the Laborer who was injured, were exposed to this violative condition because they were walking and working in the area of the stacked piles. (Tr. 51, 151). *Fabricated Metal Products*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997). To establish employer knowledge, an employer does not have to possess knowledge that a condition violated the Act, just knowledge that the condition existed. *Shaw Construction, Inc.*, 6 BNA OSHC 1341, 1978 CCH OSHD ¶22,524 (No. 3324,

1978). Respondent's supervisors specifically directed its employees to store the piles in this manner. The court finds that Supervisors Gary Sager and Larry Tinney knew that these 55,000 pound piles were being placed on an unlevel surface, stacked one on top of another vertically, without a clear system for determining whether the dunnage being used was adequate, or whether the piles were being stacked in a level manner. Such an imprecise method of stacking multiple 55,000 pound piles on top of one another could, and did, result in a collapse. Mr. Sager's and Mr. Tinney's knowledge of these conditions is imputed to Respondent. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶129,223 (No. 85-0369, 1991). Lastly, the violation was properly characterized as serious because stacking 55,000 pound piles in such a manner could have, and unfortunately did, result in permanently disabling injuries to one of Respondent's employees. (Tr. 156). *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1989 CCH OSHD ¶128,501 (No. 87-1238, 1989). Accordingly, Citation 1 Item 1 will be AFFIRMED.

Affirmative Defenses

Respondent did not argue any affirmative defenses in its post-hearing brief.

Penalty

In calculating the appropriate penalty for affirmed violations, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. §666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶129,964 (No. 87-2059, 1993). The parties stipulated that the proposed penalty of \$3,500.00 was computed in accordance with Federal policy and procedures and properly calculated for the alleged violation. Accordingly,

based on the penalty stipulation and the totality of the factual circumstances discussed above, the court will not alter the proposed penalty amount.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is hereby AFFIRMED and a penalty of \$3,500.00 is ASSESSED.

Date: November 29, 2010
Denver, Colorado

/s/ _____
SIDNEY J. GOLDSTEIN
Judge, OSHRC