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. PHARMASOL CORPORATION, Respondent.	OSHRC DOCKET NO. 16-1172

Appearances:

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For Complainant

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For Respondent

Before: Administrative Law Judge Dennis L. Phillips

DECISION AND ORDER

Following a fatality, the Occupational Safety and Health Administration (OSHA) commenced an investigation under Inspection Number 1113130 on December 10, 2015 of Pharmasol Corporation's (Respondent or Pharmasol) facility located at 1 Norfolk Avenue, South Easton, Massachusetts. (Answer at 2; Stipulation regarding December 9, 2015 accident dated June 16, 2017, hereinafter Stip. 24; Tr. 62, 585-87.) At the conclusion of the investigation, on June 9,

2016, the Secretary issued one serious citation alleging five separate violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act), and one other-than-serious citation, alleging a violation of 29 C.F.R. § 1910.178.[1] Respondent timely contested the citations and a trial was held from June 26, 2017 thru June 30, 2017, in Boston, Massachusetts. (Answer at 4-5.)

For the reasons set forth below: (1) Citation 1, Item 1 is vacated, (2) Citation 1, Item 2 is affirmed as a serious violation and a penalty of $4,500 is assessed; (3) Citation 1, Item 3 is affirmed as a serious violation a penalty of $1,800 is assessed; (4) Citation 1, Item 4(a) is vacated; (5) Citation 1, Item 5 is affirmed as an other-than-serious violation for which no penalty is assessed; and (6) Citation 2, Item 1 is affirmed as an other-than-serious violation for which no penalty is assessed.

JURISDICTION

Respondent stipulates it is an employer for purposes of the Act and its employees work on and with goods and materials that are moving or have moved across state lines in interstate commerce.[2] (Stip. 1-2; Tr. 57.) It also admits to employing employees. (Answer at 1-2; Stip. 4, 7, 9, 11, 13, 15, 17, 19, 21, 23.) Specifically, Respondent admits to controlling the manner and means by which certain individuals, namely AV, HP, AA, JS, EG, AG, NR, JG, NG, and RF, perform his or her work at Pharmasol and that these individuals are all employees of Pharmasol

[1] The Secretary subsequently amended the characterization of Item 5 from serious, to other-than-serious. (Tr. 18, 922.)

[2] Respondent also admits that jurisdiction over this action is conferred upon the Occupational Safety and Health Review Commission (Commission) by section 10(c) of the Act and that it is a corporation with an office and place of business located at 1 Norfolk Avenue, South Easton, MA. (Answer at 1.)

for purposes of the Act, including any with ties to Employment 2000 Corporation (Employment 2000).[3] (Stip. 3-4, 6-23; Ex. XLVIII at 3; Tr. 315-16.)

Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. The Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the Act.

BACKGROUND

Pharmasol is a pharmaceutical and personal care products manufacturer. It produces cosmetics, including lotions, and hair and body sprays. It produces these consumer goods by combining chemicals and aerosols in aluminum cans and packaging the materials for their customers' distribution centers. (Answer at 1; Tr. 161, 318-19.) OSHA commenced its investigation of Pharmasol after the company reported the death of an employee, referred to herein as AV,[4] in one of its warehouses.[5] (Answer at 2; Stip. 24.) With respect to this fatality, the parties stipulated:

> The circumstances of the accident that occurred on December 9, 2015 involving [AV] are not relevant to the Citations, any Item, any defenses, or this case. [AV's] injuries and/or death may not be relied upon, or used, directly or indirectly, as a basis to support the Citations or any defenses. The causes or potential causes of [AV's] accident shall not be relied upon, or used, directly or indirectly, as a basis to support the Citations or any defenses. The parties may not submit evidence, and

[3] Pharmasol employs 120 full-time employees. It also brings in between 35 and 125 temporary employees "per day, per shift" pursuant to an agreement with Employment 2000. (Tr. 271, 317.)

[4] AV was an Employment 2000 employee who worked in the Respondent's Component Warehouse. The parties have also stipulated that AV was an employee of Pharmasol for purposes of the OSH Act. (Stip. 4.) At about 9:30 – 10:00 p.m., December 9, 2015, AV was asked to retrieve a pallet of empty containers located on a storage rack using a powered industrial truck (PIT). AV died shortly thereafter. (Ex. XXXVIII at 5-6, 9.)

[5] Pharmasol has three different warehouses: 1) a component warehouse, 2) a finished goods and raw material, including chemicals, warehouse on the other side of the building, and 3) an offsite warehouse in Stoughton where components are also kept. (Tr. 318.) Construction of the component warehouse was completed in 2012-2013. (Tr. 323, 376.)

> may not comment upon, either directly or indirectly, regarding the causes or circumstances of the accident and/or [AV's] injuries or death. Specifically, whether [AV] was in the operator's compartment or jumped out of the powered industrial truck around the time of the accident, the speed at which he was traveling around the time of the accident, whether he maintained control of the powered industrial truck at the time of the accident, whether he was under the influences of any substances around the time of the accident and his training and supervision as they relate to the accident, are not relevant, to this case and no evidence related to those issues may be submitted by the parties.
>
> It is understood that an accident involving [AV] did occur on December 9, 2015 and that the accident prompted OSHA's inspection. Further, the accident and OSHA's investigation promoted Pharmasol to take certain actions such as the additional training of its powered industrial truck operators and instituting new policies. The parties may submit evidence regarding Pharmasol's additional training of its powered industrial truck operators and any new policies that Pharmasol implemented which were prompted by or arose out of the accident or OSHA's investigation. Further, it is possible that the accident or the subsequent emergency response caused damage to the powered industrial truck and rack involved in the accident, including to the foam in the operator's compartment of the powered industrial truck. It is understood that the parties may present evidence regarding the powered industrial truck or the rack involved in the accident without presenting evidence as to whether [AV's] injuries and/or death were the result of an "underride." The parties may also submit evidence regarding the measurements that were taken of the powered industrial truck involved in the accident as well as the rack involved in the accident.[6]

(Stip. 24; Tr. 60-62.)

Thus, the parties agree that determining how AV died or what would have prevented his death is not the purpose of these proceedings. *Id.* What is at issue is the presence of conditions at Pharmasol's facilities that may violate the Act. *See Riverdale Mills Corp*., 29 F. App'x 11, 16 (1st Cir. 2002) (unpublished) (rejecting employer's focus on the accident's cause because the violation would have existed regardless of the accident's cause); *Arcadian Corp.*, 20 BNA OSHC 2001, 2008 (No. 93-0628, 2004) ("it is the hazard, not the specific incident that resulted in injury … that is the relevant consideration in determining the existence of a recognized hazard"); *Gen. Dynamics*

[6] The stipulations include the deceased's full name as well as the names of other allegedly exposed employees. For privacy reasons, only initials will be used herein.

Corp., 6 BNA OSHC 1753, 1757 (No. 1222, 1978) (finding in connection with a general duty clause violation that the ALJ improperly focused on the foreseeability of the accident as it occurred), *aff'd*, 599 F.2d 453 (1st Cir. 1979).

As to whether there were violations, the Secretary alleges that Pharmasol failed to provide a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1); *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1187 (No. 00-0553, 2005). (Sec'y Br. at 1.) The Secretary contends employees could be stuck or crushed by the storage racks because Pharmasol set a storage rack railing at a height which allowed a rack to enter the operator's compartment of the PITs employees operated.[7] (Sec'y Br. at 1, 19-28.) He refers to this situation as an underride hazard and alleges that permitting it to exist violates 29 U.S.C. § 654(a)(1), the provision typically called the general duty clause. *Id.* The Secretary also alleges that Respondent violated the powered industrial truck standard by failing to train its employees on the underride hazard (Citation 1, Item 4a),[8] and failing to maintain complete records for its forklift operators (Citation 2, Item 1). 29 C.F.R. § 1910.178(l)(3)(i)(A), 29 C.F.R. § 1910.178(l)(6). The remaining violations relate to: (1) storing and tiering materials in unsafe places and in an unsafe manner, in violation of 29 C.F.R. § 1910.176 (Citation 1, Items 2 and 3); and (2) failing to properly label a hazardous substance, in violation of 29 C.F.R. § 1910.1200(f)(6)(ii) (Citation 1, Item 5).

[7] The parties largely used the terms PITs, forklifts, lift trucks, or simply trucks interchangeably during the trial and in their briefs. This Decision and Order does the same.

[8] Initially, the Secretary also alleged Respondent violated 29 C.F.R. § 1910.178(l)(3)(ii)(E), which was designated Citation 1, Item 4b, but subsequently withdrew that item at trial. (Tr. 18.) Thus, Citation 1, Item 4b is not considered herein.

The Secretary and Respondent both presented expert testimony to support their claims. At the trial, the Court qualified Guy Snowdy, the Secretary's expert, as an expert in the use of PITs, training for the use and operation of PITs, and materials handling and storage generally; but not specific as to Pharmasol's facility except as to the scope shown in photographs in the record.[9] (Tr. 535-36.) The Court did not find Snowdy competent to provide expert opinion testimony with regard to the rear safety post feature of the Hyster model N35ZRS-14.5 PIT. (Tr. 535.)

In its brief, Respondent attacks Snowdy's methodologies arguing that his "opinions are not reliable and should not be considered."[10] (Resp't Br. at 58-59.) The Court finds that Respondent fails to identify sufficient grounds to overturn the qualification of Snowdy as an expert and the admission of his testimony.

The Commission follows Federal Rule of Evidence 702, which requires judges to serve as a gatekeeper to: "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 589 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (extending the court's gatekeeper function to all expert testimony); Commission Rule 71, 29 C.F.R. § 2200.71. Respondent's challenges go to the appropriate weight to give Snowdy's opinions, as opposed to their admissibility.[11] *See In re TMI Litig.*, 193 F.3d 613, 692 (3d Cir. 1999) (stating that "[s]o long as the expert's testimony rests upon

[9] Since 2014, Snowdy has been the Director of Training and Development for BED Industrial Asset Management. He produces, writes, researches, develops, and teaches training programs on material handling equipment, including the safe operation of stand-up PITs in warehouse settings with racking systems. He also performs audits on safety and environmental concerns related to material handling equipment. He has worked in this field for the last 33 years. He has operated stand-up forklifts on innumerable occasions. He has trained more than 100,000 PIT operators. He has served as an expert in a case where a PIT went under a rack that did not go to trial. (Tr. 473-78, 486-87, 501, 525-32.)

[10] Respondent has not filed a motion in limine to challenge this ruling. *See* Commission Rule 40(a), 29 C.F.R. § 2200.40(a) (requiring motions to be made in separate documents after conferring with the other party).

[11] The Secretary argues that Respondent "miscasts" some of Snowdy's testimony. (Sec'y Reply Br. at n.9.)

'good grounds,' it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded"). Snowdy had extensive experience in the areas for which he was qualified to give expert testimony and applied his background to the facts of this case. (Tr. 473-486; Ex. XLIX.) While Respondent highlights certain choices Snowdy made in conducting his review, it fails to show that these choices rendered his approach too unreliable to be considered.[12] *See Conn. Nat. Gas Corp*., 6 BNA OSHC 1796, 1800 (No. 13964, 1978) (noting that it is up to the trier of fact to determine what weight to give expert testimony).

DISCUSSION

Citation 1, Item 1– Serious Violation of Section 5(a)(1) (General Duty Clause)

According to the Secretary, Respondent violated the general duty clause by exposing its employees to the hazard of being struck by or crushed by what the parties refer to as "horizontal rack members." (Sec'y Br. at 17.) Specifically, the citation, as amended on May 18, 2017 with the Court's approval, alleges:

> [e]mployees who operate stand-up reach trucks were exposed to struck by or crushed by hazards because the racking system in the employer's warehouse was structured such that horizontal members of that system could enter the operator's compartment of the stand-up reach trucks.[13]

(First Amended Complaint, at 2, ¶ V; Ex. A; Tr. 11-12.) The Secretary calls this an underride hazard. (Sec'y Br. at 17.)

[12] Snowdy did not visit the location where the accident occurred. Nor did he examine either the PIT that was involved in the accident or the PIT used at the component warehouse after the accident. (Tr. 524-25, 535, 641, 650.) The Court finds these omissions go to the weight the Court gives to Snowdy's testimony and do not, in and of themselves, disqualify him as an expert in the use of PITs, training for the use and operation of PITs, and materials handling and storage generally.

[13] The Court inadvertently included the phrase "narrow aisle" between "stand-up" and "reach" when it read out-loud alleged Citation 1, Item 1, at the start of the trial. This is of no consequence, as the wording of Citation 1, Item 1, remained as stated in Complainant's First Amended Complaint. (Tr. 11-12; Sec'y Br. at n. 3.)

Respondent contests all elements of the Secretary's burden. (Resp't Br. at 29-42.) It argues that the general duty clause does not apply to the condition set forth in the citation because there is a specific standard addressing PITs; i.e.; the powered industrial trucks standard at 29 C.F.R. § 1910.178. (Resp't Br. at 42.) In the alternative, if the general duty clause applies, then Respondent argues that the Secretary failed to show employees faced underride hazards at its facility. (*Id.* at 30-36.)

For the reasons set forth below, the Court finds that the powered industrial truck standard does not preclude citation pursuant to the general duty clause for underride hazards, but the Secretary did not establish the presence of the condition at Pharmasol.

1. Powered Industrial Truck Standard does not Preclude Citation under the General Duty Clause

The parties agree to this principle of law:

> [a] violation of Section 5(a)(1) is invalid where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act. *Brisk Waterproofing Co., Inc*., 1 BNA OSHC 1263, 1264, 1973 WL 4103, at *2 (No. 1046, 1973).

(Tr. 64.) Because the general duty clause was designed to augment, rather than supplant standards, a citation pursuant to it cannot be sustained if a specific standard applies. *Active Oil*, 21 BNA OSHC at 1187. Citation to the general duty clause is not precluded merely because another standard also addresses the same machine or a similar hazard. *See Gen. Dynamics Land Sys. Div., Inc.*, 815 F.2d 1570, 1576-79 (D.C. Cir. 1987). It is not enough for the hazards to be interrelated—the specific standard must address the particular hazard for which the Secretary cited the employer. *Armstrong Cork Co.*, 8 BNA OSHC 1070, 1073 (No. 76-2777, 1980) *aff'd*, 636 F.2d 1207 (3d Cir. 1980); *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1261 n.9 (D.C. Cir. 1973).

Respondent argues that because 29 C.F.R. §§ 1910.178(l) and 1910.178(n) address underride hazards the Secretary cannot sustain a general duty clause violation for these conditions. (Resp't Br. at 42-43.) 29 C.F.R. § 1910.178(l) relates to training PIT operators and 29 C.F.R. § 1910.178(n) relates to traveling in a PIT.[14] The Secretary agrees these standards apply to Pharmasol's operations but argues that even strictly adhering to them would not entirely abate the cited hazard because a well-trained operator following work rules could still underride the rack system inadvertently. (Sec'y Br. at 7, 46.)

The standards Respondent points to for support of its preemption argument neither refer to, nor otherwise describe, underride hazards. 29 C.F.R. §§ 1910.178(l), (n). The requirements

[14] Specifically, 29 C.F.R. § 1910.178(l) addresses "operator training," and requires the implementation of training programs, including their content, the necessary certifications, and the timeline for implementation. Subsection (n) of the same standard addresses "traveling" in a PIT and requires:

> (1) All traffic regulations shall be observed, including authorized plant speed limits. A safe distance shall be maintained approximately three truck lengths from the truck ahead, and the truck shall be kept under control at all times. …
>
> (3) Other trucks traveling in the same direction at intersections, blind spots, or other dangerous locations shall not be passed.
>
> (4) The driver shall be required to slow down and sound the horn at cross aisles and other locations where vision is obstructed. If the load being carried obstructs forward view, the driver shall be required to travel with the load trailing. …
>
> (6) The driver shall be required to look in the direction of, and keep a clear view of the path of travel. …
>
> (8) Under all travel conditions the truck shall be operated at a speed that will permit it to be brought to a stop in a safe manner.
>
> (9) Stunt driving and horseplay shall not be permitted.
>
> (10) The driver shall be required to slow down for wet and slippery floors. …
>
> (15) While negotiating turns, speed shall be reduced to a safe level by means of turning the hand steering wheel in a smooth, sweeping motion. … .

29 C.F.R. § 1910.178(n). (Tr. 799-04.)

are not specific to workplaces where an underride hazard can exist. As Pharmasol's own expert plainly acknowledged, § 1910.178 "has nothing to do with an underride."[15] (Tr. 1274.)

Training requirements and traveling restrictions on PIT operators are risk management techniques but they do not address risks associated with under-riding the tiered racks in the warehouse completely. There is no evidence that Pharmasol, or any other employer, has been able to train its employees to eliminate inattention and inadvertence. Inadvertence can be a basis for a general duty citation even when there is an interrelated training standard. *See Ga. Elec. Co. v. Marshall,* 595 F.2d 309, 321 (5th Cir. 1979) ("operator knew about the reversal and ordinarily compensated for it, but the hazard was nonetheless present because a momentary lapse in concentration … could have resulted in … very serious consequences").

In the addition to the language of § 1910.178, an OSHA Safety and Health Information Bulletin (SHIB) 07-27-2009, Standup Forklift Under-ride Hazards, discussing underride hazards supports the Secretary's view that none of the specific standards address underride hazards completely. (Ex. II; Sec'y Br. at 47.) The SHIB notes the generality of the training and operation provisions set out in § 1910.178 and seeks to fill in the gaps on a topic that § 1910.178 does not fully address. (Ex. II.)

So, while 29 C.F.R. § 1910.178 relates to the cited condition, it does not address the particular hazard for which Respondent was cited. (Sec'y Br. at 46-47.) Accordingly, citing the

[15] Respondent claims that this statement should not be relied upon because its expert, Walter Girardi, was not qualified as an expert in preemption. (Resp't Reply Br. at n.8.) While true that he was not qualified as an expert in the legal theory of preemption, he was found qualified by the Court as an expert in the design, manufacturing and use of PITs, as well as the training of employees to use such equipment. The Court further found Girardi qualified as an expert in facility layout and design and material handling with respect to warehousing and material storage. It also found Girardi qualified as an expert on the impact a PIT's vertical rear post can withstand and the maintenance of PITs. (Tr. 1077, 1086, 1101.) As such, he was qualified to discuss the powered industrial truck standard, 29 C.F.R. § 1910.178. (Tr. 1077, 1086.)

general duty clause is permissible because even with adherence to the other identified standards the hazard could remain in the workplace. *See e.g., Armstrong*, 8 BNA OSHC at 1073.

2. **Did Pharmasol violate the General Duty Clause?**

Having found that the Secretary was permitted to cite the general duty clause for the hazardous condition it alleges exists, we turn to whether he met his burden of establishing such a violation. The parties stipulated to the requirements the Secretary must meet to show a violation of the general duty clause:

> to establish a general duty clause violation with respect to this citation, the Secretary must prove: (1) an activity or condition in the employer's workplace presented a hazard to an employee; (2) either the employer or the industry recognized the condition or activity as a hazard; (3) the hazard was likely to or actually caused death or serious physical harm; and (4) a feasible means to eliminate or materially reduce the hazard existed. *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007). "In other words, the Secretary must prove that a reasonably prudent employer familiar with the circumstances of the industry would have protected against the hazard in the manner specified by the Secretary's citation." *Id.*

(Tr. 63.)

So, the first element of the Secretary's burden is to establish that an activity or condition in the employer's workplace presented a hazard to an employee. *Id.*

Pharmasol's employees use a type of PIT that weighs 7,400 pounds unloaded, known as a stand-up reach forklift which requires the drivers to stand rather than sit while operating them.[16] (Tr. 87, 94-95, 124, 159, 1116, 1349-51.) The Secretary alleges that employees could drive one of these stand-up forklifts underneath the system of storage racks in Pharmasol's warehouse. (Sec'y Br. at 19.) And, because the forklift's frame is lower than the cross beam of the racking

[16] Snowdy opined that there were about 6.4 million stand-up reach or counter-balance trucks in use in the United States.

system, drivers could be struck or crushed by the beam. (Tr. 282-84, 418-19, 598.) The Secretary alleges this hazard is present whenever it is possible for the side or rear of the operator's compartment of a forklift to fit beneath a rail or racking system, thereby causing the rail or racking system to make contact with the operator. (Sec'y Br. at 17.) Put another way, the Secretary alleges that employees were at risk of being struck or crushed when they operated certain forklifts in the warehouse because horizontal rack members could enter the operator's compartment. According to the Secretary, permitting these conditions violated the general duty clause. *Id.*

a. What is the Hazard?

As an initial matter, Respondent seeks to define the hazard differently than how the Secretary describes it in the citation, at the trial, and in his brief. (Resp't Br. at 30-33.) It contends that an underride hazard is present only when a forklift can fit under a cross beam while backing up perpendicular into such a beam and contact is made from the rear. *Id.* According to Girardi,[17] Snowdy's view that an underride hazard occurs when a PIT is traveling in reverse and turns into a rack system is wrong. (Tr. 1118-19.) Respondent argues that the Secretary must adhere to its definition of an underride because it is consistent with a provision in a non-binding industry consensus document, specifically ANSI B56.1 Safety Standard for Low Lift and High Lift Trucks

[17] Girardi received a Bachelor of Science degree in Industrial Education from Northern Michigan University in 1976 and a Mechanical Engineering degree from Western Michigan University in 1992. (Tr. 1024-25.) From 1978 through 1987, he worked at Clark Equipment Company, a PIT manufacturer, as an industrial engineer and later as a product safety engineer. He has been a member of the American Society of Mechanical Engineers' ITSTF/ASME B56 Committee that sets standards for PITs since 1994. For the near past 40 years, he has been working with industrial trucks, performing testing, doing design of tooling and fixtures, and testing trucks involved in accidents. (Tr. 1080-81, 1084.) He has been qualified as an expert by courts regarding PITs, mechanical engineering, and materials handling and design about 15-20 times where he also provided testimony at trial. (Tr. 1029-36, 1065.) Girardi conducted an on-site factual investigation of the accident on April 7, 2017 at the component warehouse. He took a large number of photographs during this on-site visit. (Tr. 1067-69, 1075, 1128-29; Ex. R at 11-163.) He took measurements of the PIT involved in the accident, as well as the third set of racks where the accident occurred. He interviewed Rocha and another engineer that was on-site. (Tr. 1130-33, 1214-15.)

(ANSI B56.1-2012).[18] (Resp't Br. at 30-31; Tr. 1122-23; Ex. LIX.) The Secretary agrees that ANSI B56.1-2012 applies to Pharmasol's warehouse operations, including to the stand-up forklifts in use there. (Sec'y Br. at 11, ¶ 67.)

But, the citation itself is not so narrow. (Tr. 11.) It refers to struck by or crushed by hazards that are present when a forklift "collides with storage racks." (Citation.) The Secretary argues that the issue is the cross beams of the storage rack entering the driver's compartment of the forklift and it does not matter whether the beam enters through the rear of the truck or the side. (Sec'y Br. at 17; Sec'y Reply Br. at 6; Tr. 1118-19.) Thus, the Secretary considers the hazard to be present whenever a cross beam can contact the operator. *Id.*

The Secretary's definition of the hazard is consistent with the language of the citation. (Tr. 11-12.) It is also consistent with how Respondent itself appraised its employees of the hazard in a Memorandum to File (Underride Memo) that it prepared and distributed to all employees who operate PITs. (Exs. V, XXVII; Tr. 99, 411, 420, 448.) The Underride Memo explicitly refers to the possibility that the right side of the forklift could ride under the racking system. (Tr. 100, 102-4; Ex. V.)

It is the Secretary's burden to define the hazard and how he elected to do so in the citation, First Amended Complaint, and at the trial controls here for purposes of evaluating whether the hazard was present at the facility. *See Alden Leeds, Inc.*, 19 BNA OSHC 1007, 1009 (No. 95-1143, 2000) (following how the Secretary defined the hazard); *Mo. Basin Well Serv., Inc.*, No. 13-1817, 2018 WL 1309482, at *2 (O.S.H.R.C., March 1, 2018) (rejecting employer's claim that the Secretary improperly defined the hazard).

[18] Although Respondent refers to ANSI B56.1-2012 as "the Standard," it has not been adopted by OSHA as a mandatory safety standard. (Resp't Br. at 30.)

b. Was there an Underride Hazard?

As explained above, an underride hazard exists if a truck can fit beneath a horizontal rack beam.[19] (Tr. 536, 541.) The racking system at Pharmasol's facility consists of space for materials along the floor with shelving above. (Exs. LXX, R at 11, 32.) There were no bumpers or barriers along the floor. (Tr. 114, 1243-44; Exs. LXX, R at 11, 32.) The parties agree that the first shelf (or horizontal load rail) is 56.5 inches high (from the ground to the bottom of the horizontal rack beam) in the aisle where the accident occurred.[20] (Tr. 552, 1227, 1239-41; Exs. 10 at 1, R at 5.)

Girardi described the PIT involved in the accident as a side stance PIT because its operators are standing 90 degrees to the direction of travel, both forward and reverse. He said an operator's back is to the right-hand side of the PIT. The operator is facing the left side and has a steering tiller in front for his or her left hand to operate and a multifunctional joy stick to operate with the right hand. Tilting the joy stick to the front moves the PIT forward and tilting it to the back of the PIT moves it in reverse. The joy stick accelerates and reduces speed and "is spring modded to return to neutral." Forward is always with the forks leading and reverse is always with the forks trailing. (Tr. 1115-16.)

The operator's compartment of the PITs Pharmasol's employees use is akin to a four-sided box.[21] (Exs. IV, LXIV at 4, LXX, LXXI, A at 4, R at 4, 21; Tr. 613-14, 879-80, 1115.) The front

[19] The parties stipulated that evidence regarding the truck and rack involved in the accident were admissible, but evidence related to the "circumstances of the accident itself" and whether AV's injuries were the result of an underride were not. (Stip. 24; Tr. 26, 61-62, 585-86.) During the trial, the Court stated that it would apply the stipulations to the whole transcript. (Tr. 28, 1344.)

[20] At the trial, Snowdy said he relied upon measurements of the racking system made only by the "U.S. Department of Labor" apparently put together by Compliance Officer (CO) Elena Finizio. (Tr. 642, 650-51.) Snowdy was only aware of the height of the rack beam in the aisle where the accident occurred. (Tr. 699-700.)

[21] Two photographs of the stand-up reach forklift operated by AV at the time of the accident at Pharmasol are at Ex. IV.

faces the forks. (Exs. IV, LXIV; Tr. 1115.) The Secretary does not allege that the racking system could intrude into the operator's compartment at the front of the PIT. The forks are attached to a steel frame. (Exs. IV, LXIV.) On the left of the PIT involved in the accident, there is a metal frame, which Girardi measured its height from the ground to be 51 inches.[22] (Ex. R at 4.) The front corner of the left side meets the steel frame. (Ex. IV.) The controls for the PIT are on the left side so employees face this direction, with their back along the right side when they enter the compartment. (Exs. IV-V, LXVIII; Tr. 549, 1115.) Near the rear of the left side, a vertical post connects the top of the metal frame to an overhead guard that covers the top of the operator's compartment.[23] (Exs. IV-V, LXIV at 4, A at 5, R at 12 at "D"; Tr. 121, 1106-8.) The rear of the compartment, opposite the forks, also has a metal frame but there is a cutaway, so the operator can enter. (Exs. IV, LXIV, LXVIII; Tr. 1108.) The right side, which is behind the operator, has a 54 ¾ inch-high metal yellow frame measured from the ground to the top of the yellow metal (also referred to as the "chassis"). (Tr. 1217-19, 1223-24; Exs. XXXIII, R at 4, 27 (bottom photograph at "A").) Attached to the inside of the 54¾ inch-high metal frame and rising above it on this right side is an adjustable backrest comprised of metal (shown at Exs. XXXIII at "C", R at 27, bottom photograph at "B") and black very hard rubber extending above the metal portion of the backrest (black very hard rubber shown at Ex. XXXIII at "B" and R at 27, bottom photograph at "C").[24]

[22] Snowdy testified that the height of the left side is about 55 inches. (Tr. 550.) His expert written report states that this height was 55 3/4 inches. (Ex. 10, at 1.) Snowdy never inspected the PIT involved in the accident and the Court accepts Girardi's actual measurements of the PIT involved in the accident as the most accurate.

[23] A vertical black post is shown at "A" on the bottom photograph. (Tr. 94-95, 169, 273, 856-57; Ex IV.)

[24] Girardi described the black very hard rubber portion of the backrest as a "cushion pad" in his expert report. (Tr. 1223-24; Ex. R at 4.) At the trial, he referred to this portion of the backrest as "padding" or a polystyrene type "foam." (Tr. 1355.) He said it was "a very dense foam so that it's very hard to compress, but it does compress a little bit to give you some support and kind of flex with your body. The covering on that is an industrial grade vinyl covering." (Tr. 1335-37, 1355-56; Ex. VII at "B".) The Court notes that it is not accurate to attribute the most common meaning of "foam"; i.e. "a. The aggregation of minute bubbles formed in water or other liquids by agitation, fermentation, effervescence, ebullition, etc.", to this black hard rubber section of the backrest. Instead, considering how both experts

(Exs. IV next to "A", VII, XXXIII, LXX, R at 27; Tr. 466-67, 549-50, 583-84, 660-73, 1217-18.) The area between the top of the backrest and the overhead guard was open. (Tr. 704-05; Exs. VI, XXXIII.) The specification drawings for the Hyster Narrow-Aisle PIT, model N35-40ZRS, state the top of the operator's backrest on the side of the truck is at least 56.5 inches high, but it can be adjusted up to 62.5 inches high. (Ex. LXIV at 4, 10; Tr. 541, 1225.) Based on these specifications, the top of the backrest could be anywhere between the height of the first shelf at the aisle where the accident occurred; i.e. 56 ½ inches, or above that shelf by up to six inches. (Exs. LXIV at 4, LXX, R at 5; Tr. 552, 1227, 1241.) Snowdy acknowledged that if the PIT involved in the accident had its backrest extending upwards to the extent of the PIT used at Pharmasol after the accident, the steel part of the backrest would, most likely, be the first part of the PIT to make contact with the horizontal load rail. (Tr. 704-05; Exs. VI, XXXIII.)

From December 9, 2015 through March 7, 2016, Pharmasol had two different stand-up reach Hyster trucks at its component warehouse.[25] (Tr. 169-70, 291, 343.) One truck was used up

described the material, it is more accurate to ascribe one of the alternate meanings to the word "foam"; i.e. "e. Rubber or plastic in the form of a cellular mass similar to foam in structure." *See foam*, Oxford English Dictionary, online edition (2018).

[25] The dates of inspection in the First Amended Complaint and underlying citation are from December 10, 2015 through March 7, 2016. On May 12, 2017, the Court granted Complainant's motion to amend its original citation to delete the reference to an employee operating a stand-up reach truck on or about December 9, 2015 that was fatally crushed between the cross beam of the first shelf and the reach truck. The Court agrees with Respondent that there is insufficient evidence to show that on or after December 9, 2015 through March 7, 2016 any employee operated a PIT in the component warehouse that did not have its operator's backrest set at a height that was below the height of the first shelf. The Court further agrees with Respondent that the gist of the Secretary's case was an "under-ride", and not whether the PIT's extended operator's backrest can withstand a collision with the outside of a rack. (Tr. 978-79, 1007-09.) Complainant argues that its First Amended Complaint includes AV operating the Hyster model N35ZRS-14.5, serial number A265N02984L, on December 9, 2015 because that date is allegedly within six months of the date the original citation was issued on June 9, 2016. (Tr. 1015-16.) Complainant is correct. Under the six-month limitation, the citation, issued on June 9, 2016, may allege violations of the Act that occurred on or after December 9, 2015. *See Dravo Corp.*, 3 BNA OSHC 1085, 1086, n.2 (No. 1487, 1975) (citation issued on September 1, 1972 could allege violations of the Act on or after March 1, 1972); *Peco Energy Co.*, Order Granting Complainant's Motion to Amend Citation and Complaint, at 19, n.22 (No. 17-0531, 2018) (ALJ) available at https//www.oshrc.gov/assets/1/6/Peco_Sig_Order_issued_013118_Corrected_by_060818_Order.pdf (citation issued on February 27, 2016 could allege violations of the Act on or after August 27, 2015).

until the accident occurred on December 9, 2015[26] and then a similar truck was used exclusively afterward.[27] (Tr. 291, 343, 647-48, 1178.) As for the PIT involved in the accident, there are no actual measurements of its backrest before the accident. (Tr. 664-65.) After the accident, Girardi measured the distance from the ground to the top of the adjustable backrest of the PIT involved in the accident (excluding the very hard rubber section above) and found it to be 55 7/8 inches. When the black very hard rubber on top of the metal portion of the backrest was included, Girardi determined the height from the floor to be between 54 ¾ inches at its lowest point and 56 ¾ inches at the highest point.[28] (Tr. 705, 1214-24; Exs. R at 4, 26, 27 at "B" and "C", XXXIII.) The difference relates to the curved nature of the backrest and the fact that a piece of the hard rubber was missing. (Tr. 424, 549.) So, at the low point, the backrest on the truck involved in the accident was found after the accident to be beneath the height of the horizontal rack beam; i.e. 56 ½ inches,

[26] This PIT was a new Hyster model N35ZRS-14.5, serial number A265N02984L. (Tr. 582, 896; Ex. IV.) Pharmasol leased the PIT from Northland Industrial Truck Company Materials Handling Solutions (NITCO) in about February 2013. (Tr. 336, 873, 880,897; Ex. LVIII.) It was taken out of service at the time of the accident and replaced by a PIT of the same make and model. (Tr. 291, 342-43, 379-80; Sec'y Br. at 9, ¶ 54.) By leasing PITs from NITCO, Pharmasol was able to replace its PITs every two or three years and obtain the newest and best PITs. (Tr. 337-38.) The Hyster model N35ZRS-14.5 involved in the accident was the newer version with an electric braking system instead of a mechanical brake. (Tr. 573-74.) NITCO designed and sold the racks in the component warehouse, provided the PITs to Pharmasol, maintained the PITs and conducted "train to trainer" seminars for Pharmasol's employees. (Tr. 340-42, 876, 885-87; Ex. M.) Several months after the accident, NITCO's Chief Operating Officer at the time of the trial and former Senior Vice President of Operations, Rick Papalia, visited the area where the accident occurred for a couple of hours and observed the PIT involved during the investigation of the incident. He considered the Hyster truck involved in the accident to be appropriate and safe for its application in the component warehouse. (Tr. 883, 898-901.) Girardi also testified that the PIT involved in the accident had been used 2,700 hours at the component warehouse and that "solidifies my opinion that the truck is being safely used within that vicinity of the warehouse." (Tr. 1172-73.)

[27] The replacement PIT is the only Hyster model N35ZRS PIT that has been used at the component warehouse after the accident through March 2016. (Tr. 291, 342-43, 379-80; Sec'y Br. at 9, ¶ 54.)

[28] On March 18, 2016, CO Christopher Ayers and experts (not including Snowdy) examined the PIT involved in the accident and racks in the warehouse. (Tr. 665; Exs. XXXVIII at 6, XLIV at 2.) As noted above, the parties agreed to the submission of evidence: "regarding measurements that were taken of the powered industrial truck involved in the accident as well as the rack involved in the accident." (Tr. 62, 585-87; Stip. 24.) The stipulation does not preclude testimony about the backrest's height and whether it would contact a rack beam or underride it. *Id.*

and at the high point, the backrest was above the rack beam by one-quarter of an inch.[29] (Tr. 552, 1217, 1227, 1241; Exs. R at 4, 27 (bottom photograph), XXXIII.) Girardi testified that the black metal steel shown at Exhibit R at 27, between "A" and "B", located above the yellow metal had the same thickness width, three-eighths of an inch, as the yellow metal.[30] He opined that there was a "good possibility" that the black metal steel of the operator's backrest extension could withstand the impact of a horizontal member at .9 mile an hour, the testing speed set forth at ANSI B56-1-2012, ¶ 7.30.1.[31] (Tr. 1283-84; Exs. VII, LIX at 57, ¶ 7.30.1.) He further opined that he knew that the operator's backrest's black metal "plate not only made contact with the rack system, but that plate was damaged."[32] He said that the plate was deformed "as it was pushed forward and [there is] a good possibility [that it was] pushed downward toward the slide mechanism lock." He further said he could not adjust the black metal plate when he inspected the PIT that was involved in the accident. (Tr. 1283-84, 1333-34, 1337-57; Exs. R at 4, 27 (bottom photograph), 55, 56 at "A", VII.)

[29] The distance from the ground to the top of the black metal (excluding the very hard rubber above) was 55 7/8 inches. (Exs. XXXIII at "C", R at 4.)

[30] Girardi described the backrest as "a heavy metal plate that is geometry-wise consistent with the curvature of the frame." (Tr. 1334.)

[31] Girardi distinguished between the metal portion and the black hard rubber portion (above the metal) of the operator's backrest. He did not believe that the hard rubber portion was rated to meet the requirements of ANSI B56-1-2012, ¶ 7.30.1. (Tr. 1285-86, 1335-37; Ex. VII at "B".) Girardi admitted that he had not performed, or seen, any testing on the black metal portion of the operator's backrest. He also admitted, in prior deposition testimony, that he did not "know how strong" this portion of the backrest is. (Tr. 1283-85.) However, the Secretary failed to prove that the operator's backrest extensions in both PITs used at Pharmasol's component warehouse could not stop a low-speed impact with a rack beam.

[32] Girardi testified that the damage was probably a result of the accident. (Tr. 1333-34, 1337-41; Exs. A at 4, VII.)

As for the stand-up truck in use after the accident, the record lacks evidence about the exact height of its backrest.[33] (Tr. 343-44, 653-55, Ex. VI.) But, based on photographs, it appears to be higher than the one on the truck involved in the accident. Snowdy agreed that the PIT's operator's backrest used at Pharmasol after the accident shown in photographs was more than three-quarters of an inch higher than the PIT involved in the accident. (Exs. VI, XXXIII; Tr. 589, 654-55, 657, 703.) Snowdy agreed that the backrest on the post-accident PIT shown in the photographs would hit the horizontal load rail rather than go beneath it if the truck was backed up into the rack. (Tr. 654-55, 704-5.) Both the PIT involved in the accident and the PIT used at Pharmasol's component warehouse after the accident were equipped with backrest extensions that could reach a level that was above the level of the horizontal rack beam in the aisle where the accident occurred. The Secretary failed to prove that the operator's backrest extension would not stop a rack beam. The Secretary also failed to demonstrate that any operator ever drove a forklift with the extended backrest set below the rack beam height in the aisle where the accident occurred.

There is no dispute that both the truck in use on December 9, 2015, and the one in use afterward had guarding features, such as a backrest and rear post, to protect operators from under-riding the racks.[34] (Sec'y Reply Br. at 3; Resp't Br. at 32, 35; Tr. 540-41, 635, 656-67, 724, 750-53, 1260-61; Ex. LXIV at 9.) But the parties dispute whether these guarding features eliminate

[33] The Secretary asserts that there is "no evidence that the forklift depicted in Joint Exhibit VI was the replacement truck…." (Sec'y Reply Br. at 4, n. 5.) The Court finds that the forklift depicted in Ex. VI is the replacement PIT that was operated in Respondent's component warehouse after the accident through March 7, 2016. Ex. VI is a joint exhibit. Both parties used Ex. VI when questioning witnesses about the replacement PIT that was used at Respondent's warehouse during this period. Snowdy believed Ex. VI was the replacement truck. Neither Snowdy nor anyone else testified that the PIT shown in Ex. VI was not the replacement truck. (Tr. 589-90, 659-662, Resp't Br. at 13.)

[34] Snowdy agreed that adjusting the operator's backrest up is part of the guarding system for the Hyster PITs used at Pharmasol's component warehouse where the horizontal rail in the North-South aisle where the accident occurred was set at a height of 56.5 inches from the ground. (Tr. 656-66, 752-53; Exs. VI at "A", XXXIII, R at 5.)

the underride hazard. Girardi testified that there was no reason for the PITs used at Pharmasol to encounter an underride because of the PIT's rear post and very narrow right-angle stacking capability, and the aisle clearance within the component warehouse. He said the Hyster model N35ZRS-14.5 was the appropriate PIT to use in the aisle where the accident occurred. He further said, "there's no occurrence where the underride would come into play." (Tr. 1139-48; Ex. R at 6.)

In contrast, Snowdy argued that there still was an underride hazard despite the backrest and rear post because he assumed that the backrest on the truck involved in the accident was pushed down below the height of the horizontal bars of the racking system at the time of the accident.[35] (Tr. 578, 580, 678-79, 692, 971-72.) Snowdy bases this assessment on a comparison of the photographs at Exs. VI, "A" & "B", and XXXIII at "A" & "B", and measurements of the truck involved in the accident that he had not examined or personally measured, not a truck with a backrest set at least as high as the first horizontal member of the racking system.[36] (Tr. 343, 578, 588-90, 641-42, 647-50, 693-94, 705.) Snowdy testified he did not "have a problem with the way Hyster guarded their truck." He said he thought "that they [Hyster] did a very good job of guarding their truck." (Tr. 793.) While Snowdy indicated that the rack beam could enter the operator's

[35] Snowdy never heard of OSHA issuing a citation based on an underride hazard with a stand-up PIT equipped with a single vertical post. He also never heard of an accident, fatality, serious injury, or near miss involving a stand-up PIT with a single rear post that experienced an underride. (Tr. 776-79.) Snowdy also was aware that Hyster's Christopher Goodwin held the view there had never been a reported injury to the operator of any Hyster Model N35ZRS forklift due to any horizontal rack beam entering the operator's compartment. (Tr. 791-92.) OSHA's Assistant Area Director (AAD), Maria-Lisa Abundo, was also unaware of any case where injuries occurred in a reach truck that had a rear post. (Tr. 971-72.)

[36] Snowdy testified that the distance from the floor to the top of the metallic portion (not including the very hard rubber section above the metal) of the backrest was 55 3/4 inches. (Tr. 550, 692-93; Exs. XXXIII at "C", 10 at 1.) Snowdy did not identify the specific source of the truck's measurements he relied upon or identify when, how, and by whom these measurements were taken. (Tr. 642, 650-51.) As noted above, the Court accepts Girardi's measurements of the PIT involved in the accident to the extent they conflict with Snowdy's testimony or expert report.

compartment above the backrest, he did not opine on whether the rack beam could go through the backrest and contact the operator if the backrest was at its full height.[37] (Tr. 552-53, 685-86, 704.)

This limitation is problematic for two reasons. First, it is unclear whether the backrest was pushed down before the accident or whether it was damaged during the accident. (Stip. 24; Tr. 678-80.) There are no measurements of the backrest as of December 9, 2015, and the parties agree it could have been damaged during the accident. (Tr. 551-53, 664-65, 683-86; Stip. 24.) Snowdy appeared to believe that the backrest was damaged before the accident.[38] He acknowledged that he did not think there was a way to determine whether the metallic part of the backrest was bent during one incident or another. (Tr. 552-53, 668-69, 685.) Girardi and Gilson Rocha,[39] the manager of the warehouses at South Easton, suggest the backrest was pushed down during the

[37] Snowdy was not familiar with any documentation relating to whether the backrest could withstand an impact with a horizontal beam. He described the black area shown in the photograph at Ex. VI as being made of "very hard rubber." The Court finds Snowdy's description of the black material atop the backrest as "very hard rubber" to be the most appropriate description of it and uses it throughout this decision. (Tr. 588-90; Ex. VI at "B".) The Court further finds Snowdy also testified, to eliminate the underride problem, he would have advised Pharmasol to lower the horizontal load rails of its racking system by four inches to allow a horizontal load rail to hit the PIT's "actual load backrest position, the metallic part of the back rest, and the actual structural part of the frame of the truck." (Tr. 596, 612; Ex. LXX at "B".)

[38] Snowdy opined, by looking at a photograph, that the steel backrest extension was bent, separated from the frame, a half of an inch. (Tr. 769-84; Ex. VII, at "C".) He was unaware of the force needed to cause the separation. (Tr. 680.)

[39] Rocha has worked for Pharmasol for about seven to eight years. His duties as warehouse manager included providing materials and production flow, moving material to the production floor, directing the stacking of pallets, inventory control, supervising safety, driving forklifts, and training and certifying new employees on stand-up forklifts. (Tr. 85-92, 163-64.)

accident.[40] (Tr. 85, 110, 1333-34, 1341-54; Stip. 24.) So, although a section of the truck could fit under the rack beam after the accident where its backrest was at its lowest point and not adjusted upward, there is insufficient evidence showing such a truck was in use at the component warehouse from December 9, 2015 through March 7, 2016. The Secretary has failed to prove that a PIT configured in such a manner was in use during this period.[41] (Tr. 291, 343, 647-49, 664-65.) Second, as noted above, the truck that Pharmasol used after the accident had an elevated backrest "much higher" than the PIT that was involved in the accident.[42] (Tr. 589, 649, 654-55, 703.) Thus, the record does not establish a key premise underlying Snowdy's opinion—that the backrest of a truck in use at the component warehouse was below the height of the rack at any time.[43]

[40] The parties stipulated "it is possible that the accident or the subsequent emergency response caused damage to the powered industrial truck and rack involved in the accident." (Tr. 61; Stip. 24.) Photographs of the backrest on the stand-up forklift driven by AV at the time of the accident show markings and a void where a piece of very hard rubber was missing. Rocha testified that he thought that the [very hard rubber] piece became missing "because of the accident." (Tr. 109-10, 122-23; Exs. VII at "B", XXXIII at "B".) Pharmasol's Vice President of Operations and Technical Services (VP – OTS) Ferrandiz indicated that the CO noticed the piece missing during the investigation. (Tr. 446.) As for the markings on the backrest, Respondent argues they show that the backrest "made forceful contact with a horizontal rack beam." (Resp't Br. at 34; Ex. VII; Tr. 1338-54.) In its view, if the rack beam hit the backrest, then the truck did not underride the rack because the backrest had to be high enough to contact the beam rather than fitting beneath it. (Tr. 1284, 1338-54; Ex. VII.)

[41] Ferrandiz, who accompanied CO Finizio during her inspection, never saw a PIT underneath a racking. He did not know whether the PIT operated by AV could go under a racking. (Tr. 464.)

[42] As discussed above, the Secretary did not introduce any actual measurements of this replacement truck, but the specifications for it indicate that the backrest could be as low as 56.5 inches or as high as 62.5 inches. (Tr. 343-44, 648-49, 655, 698-99; Ex. LXIV at 4.) The Secretary offered no evidence that the backrest of the post-accident PIT was lower than the height of the horizontal load rail. Badia has no recollection that CO Finizio measured the truck used at Pharmasol after the accident while he accompanied her. (Tr. 343-44.) Snowdy never saw any measurements for this truck which he admitted had adjustable features. (Tr. 648-49.) He testified that unidentified photographs showed the black metallic part of the operator's backrest in the truck used after the accident was adjusted by a lever much higher than the backrest in the truck involved in the accident. (Tr. 649-54.) Snowdy testified the photographs showed that the operator's backrest was in excess of three-quarters of an inch higher on the PIT used at the component warehouse after the accident than it was on the PIT involved in the accident. (Tr. 654-55.)

[43] Instead, the Court credits the testimony of Girardi who concluded that the PIT's backrest was at an elevation higher than the bottom of the rack beam at the time of the accident. It further credits Girardi's conclusion that the black metal backing plate or black very hard rubber of the operator's backrest extension made contact with the horizontal beam. Girardi concluded that the very hard rubber pad contacted "the forward side of the rack beam, and almost instantaneously thereafter, the fame of the backrest made contact with the bottom radius of the rack beam, and then

The Secretary's position is also weakened by the fact that the backrest was not the only form of guarding on the trucks.[44] The truck is also equipped with a vertical rear post to prevent a horizontal load rail from entering the operator's compartment.[45] (Tr. 635, 730, 750-51, 943-45, 1110-11, 1124; Exs. II at 2-3, R at 12, at "D".) Girardi argues this post eliminates the possibility of a truck under-riding the rack.[46] (Tr. 1095-98, 1111, 1146, 1149, 1157, 1166, 1260-61.) He testified that the intent of the rear post "is to protect from the substantial crosswise member coming into the compartment at a slow speed perpendicular to the direction of travel. So therefore you move the post to the right of the left rear corner and keep it inboard, and that gives you the protection from the term underride."[47] (Tr. 1106-07; Ex. A at 7.) Snowdy agreed that if one of

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subsequently scored that and the underside of that particular racking at that point location." (Tr. 1341-57; Ex. VII at "B", "D", R at 56 (top photograph) at "A".)

[44] ANSI B56-1-2012 addresses guards that can be installed to protect against a potential under-ride. It states guards need to be tested at 1.6 KPH [kilometer per hour], or at about 1 mile per hour. (Tr. 759-60; Exs. A at 6, LIX at 57, ¶ 7.30.1.)

[45] Girardi's expert report states:

> There is no industry standard requiring rear posts on a stand-up rider forklift. Under-rides can be prevented with a single rear post installation because it protects against horizontal members substantially crosswise to the forklift's direction of travel. A safety post installed to the rear left corner of such a forklift is a preferred location by manufacturers because it protects the operator and allows for safe operation of the forklift and all of its controls/systems.

(Ex. A at 5.)

[46] Girardi testified that many manufacturers went to a standard rear post on the PIT's left corner because it also did not impede the operator's mobility and visibility. He said the industry avoided installing posts on PIT's right-hand side to avoid operators "bang[ing] their head on that post." (Tr. 1095, 1105). Girardi said the underride hazard only occurred before the installation of a rear post and since then the underride "hazard hasn't been a problem. It hasn't even surfaced as near misses, …." (Tr. 1096-98, 1174-76.) He stated "[a]nd as far as the industry is concerned, the [underride] hazard doesn't exist with the rear post." (Tr. 1158-68, 1251, 1254, 1267, 1272.)

[47] Girardi's expert report states:

> The Hyster rear post is intended and designed as a safety post to protect the operator. The Hyster specification brochure for the subject model N35ZRS-14.5 reach forklift (duplicative words omitted) states the following under the heading of "Standard Equipment":
>
> *Operator's Overhead Guard*

Pharmasol's trucks backed up perpendicular into the load rail, the rear safety post would hit first.[48] (Tr. 676, 741, 743.) Still, he asserted that the horizontal rack could enter the operator's compartment above where the backrest was pushed down despite the post if the driver backed up at certain angles.[49] (Tr. 552-53, 578.) In addition to Snowdy's testimony, the Secretary also argues there is insufficient information about what degree of impact this post could withstand.[50] (Sec'y Br. at 22; Sec'y Reply Br. at n.2.)

Markings on the PIT's post show that it encountered something, including perhaps a rack beam, at some time but do not establish that a horizontal rack beam could enter the operator's

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Rear Post Operator Protection

By installing the rear-left side post on the N35ZRS-14.5 reach forklift (duplicative words omitted), the operator is protected from being placed in an under-ride situation.

(Ex. A at 7, LXIV at 9.)

[48] Snowdy testified that the stand-up reach truck at Pharmasol met the requirements of ANSI B56-1-2012. He further testified OSHA standard 29 C.F.R. § 1910.178(a)(2) requires employers to use PITs that meet ANSI B56-1-2012. (Tr. 789-90; Ex. LIX.) Snowdy acknowledged that OSHA recommended in its 2009 SHIB that employers "[P]urchase, where appropriate, stand-up forklift trucks that have corner posts, extended backrests, rear post guards, or other features to prevent an under-ride from occurring." (Tr. 745; Ex. II at 3.) Snowdy further acknowledged the forklift industry installed rear "OEM" poles and relied upon "the raising of the operator's backrest" to prevent underrides from occurring with stand-up reach trucks that lacked a rear safety poll following OSHA's issuance of its SHIB in 2009. (Tr. 721-24, 729; Ex. II).

[49] At the trial, the Court concluded that Snowdy is qualified as an expert "in the use of powered industrial trucks." (Tr. 481, 535; Ex. XLIX.) However, the Court found he was not "competent to provide expert opinion testimony with regard to the rear safety post feature of the powered industrial truck of the kind that was being driven by the deceased in December of 2015." (Tr. 535-36.) In contrast, Girardi was qualified as "an expert on the impact of the vertical rear post." (Tr. 1101.) Girardi operated and inspected the PIT involved in the accident and was very familiar with its make and model. (Tr. 1113-14, 1301.) Snowdy, on the other hand, never inspected the PIT involved in the accident or the replacement PIT. (Tr. 641-48.)

[50] Girardi testified that the ANSI B56.1-2012 standard calls for PIT's rear posts to withstand an impact at about one mile an hour with a deflection of about three inches allowed. (Tr. 1097, 1103, 1116; Ex. LIX at 57, ¶ 7.30.1.1.) He said that there have not been any accidents that have occurred with a PIT backing up at a high speed that involve rear posts. (Tr. 1104-05, 1112, 1118.) Girardi also said that the ANSI B56.1-2012 "standard basically says that some type of guarding on the back side of a stand-up truck may be installed [provided]" (emphasis added) leaving it up to the user to decide whether the user wants to have some type of guarding on the PIT's back side or not. (emphasis added) (Tr. 1096, 1249-50; Ex. LIX at 57, ¶ 7.30.1.) Complainant agrees that the rear vertical post on the Hyster model N35ZRS is a type of guard. (Sec'y Br. at 8, ¶ 42, 24 at n. 10.)

compartment or otherwise contact the operator.[51] (Tr. 576-78; Ex. LXVIII at "A".) Indeed, AAD Abundo considered it "common sense" that the PIT's post could stop the rack from coming in on that side of the truck.[52] (Tr. 944-45.) Further, while the impact testing for the post was limited to slow speeds, the Secretary did not refute the evidence Pharmasol's employees only operated the PITs at slow speeds.[53] (Tr. 175, 209, 1078.) Nor did he offer evidence that the post could not withstand an impact at the maximum speed for the Hyster trucks.[54] (Tr. 1081, 1088.) Thus, the evidence about impact testing neither establishes nor rules out the presence of an underride hazard at Pharmasol.

There is no other evidence indicating that an underride could still occur with the truck's guarding features and the height of the racking system's crossbeams. (Tr. 747, 776, 780, 971-72.) The examples of an underride hazard included in the SHIB involve situations where the trucks fit squarely beneath the rack beam.[55] (Exs. II, XLVI, XLVII; Tr. 723-31, 742-43, 949, 1120-22, 1124.) These examples involve trucks with neither a post nor a backrest impeding the horizontal rack beam from making contact with an operator. *Id.* As the SHIB explains, "**corner posts, extended backrests, rear post guards**" can prevent an underride from occurring. (emphasis

[51] Rocha testified that he did not know of any instance where a horizontal rack beam entered the operator's compartment and made contact with an operator of a stand-up reach truck. (Tr. 223.)

[52] AAD Abundo studied electrical engineering at the University of California at Davis an obtained a Master's degree from the Harvard School of Public Health. (Tr. 905-06.)

[53] Rocha testified that he taught operators not to drive a PIT faster than someone can walk, which Snowdy estimated was 2-3 miles per hour. (Tr. 757-58.)

[54] The PIT involved in the accident was capable of traveling at a top speed of around 7-10 miles per hour. (Tr. 756, 1114.)

[55] The SHIB stated that the forklifts in the under-ride accident examples indicated for the period of 1993 through 2008 "did not have a protective rear guard or corner post to prevent under-ride from occurring." (Ex. II at 2.) Girardi testified that the PIT shown in the diagram on page 2 of the SHIB was an example of a forklift underride that would not have gone underneath the rack cross member had it had a rear safety post. (Tr. 1123-24; Ex. II at 2.)

added) (Tr. 1352; Ex. II at 3, ¶ 3.) Likewise, the description of underride hazards in the ANSI B56.1-2012 is consistent with the SHIB in that it considers the hazard may be present when there is no rear safety post. (Exs. II, LIX at 57; Tr. 1120-24.)

The Secretary also argues that while the Hyster trucks in use at Pharmasol had one rear post, some manufacturers offer the option of two rear posts as well as other guarding features for the same type of PIT. (Sec'y Br. at 25; Ex. IX.) The availability of additional guarding features does not establish that the guarding on the trucks in use at Pharmasol was inappropriate for the setting in which they were used. Because the existence of an underride hazard depends on the particular PIT being operated and the environment in which it is operated, the Secretary needed to establish that an underride hazard remained despite the backrest, rear post, and conditions of use. (Tr. 543-44, 639, 1248-49.) Certainly, some uses of PITs may require more guarding than the ones in use at Pharmasol had. But this does not mean that the guarding on Pharmasol's PITs was insufficient given how they were used in that workplace.[56] *Id.*

Perhaps in recognition of this deficiency in the record, the Secretary attempts to establish the presence of a hazard by showing that Respondent itself believed employees could underride the racks at its facility. (Sec'y Br. at 26-28.) To support this argument, it points to the Underride Memo Pharmasol issued to all of its PIT operators shortly after the accident. (Exs. V, XXVII; Tr. 283, 420.) The Underride Memo explains that the right side of the stand-up forklifts could run

[56] The Secretary also argues that Respondent cannot rely on the rear post and backrest because other engineering controls, such as raising the rack beam and adding bumpers, are a better way to address underride hazards. (Sec'y Br. at 3-4, 25-26, Sec'y Reply Br. at 3.) The sufficiency of an employer's abatement methods and the feasibility of the Secretary's abatement proposals are relevant only after the Secretary establishes the hazard exists. The Secretary failed to establish that a truck in use in the component warehouse could underride the racks, so the Court does not reach whether the Secretary establishes the other elements of his burden. (Tr. 343, 1283-85.) *See e.g., Cranesville Block Co.*, 23 BNA OSHC 1977, 1985 n. 6 (No. 08-0316, 2012) (consolidated) (finding the Secretary failed to establish knowledge and therefore it was unnecessary to reach the issue of abatement).

under the edge of the racking system in the warehouse, and explains that when such situations occur, a driver could become pinned under the racking.[57] (Tr. 100, 288, 419, 628; Ex. V.)

In its brief, Respondent alleges that the Underride Memo merely repeats what CO Finizio said during the inspection. (Resp't Br. at 17, 30; Tr. 280-84, 418-20, 448.) Essentially, Respondent contends that it told its employees there was an underride hazard, but the trucks could not underride the racks at its facility because of the guarding features. (Resp't Br. at 36.)

The Underride Memo neither establishes nor rules out whether there is an underride hazard at the facility. As discussed above, for there to be an underride hazard, it must be possible for a horizontal rack beam to contact the truck's operator. The Underride Memo does not change the measurements of the truck, the height of the rack, or how employees used the truck. Marc Badia, the President of Pharmasol,[58] explained that the truck with the pushed down backrest was put out of service right after the accident and therefore not covered by the Underride Memo, which was issued a few days after the accident.[59] (Tr. 291, 343, 448-49.) The Secretary did not establish that anyone used a truck with a backrest below the height of a horizontal rack beam. (Tr. 647-48.) As for the truck in use after the accident, the Secretary failed to show that it could underride the horizontal rack beam given the guarding features and conditions of use.[60] (Tr. 464, 648, 1145-46,

[57] Specifically, the Underride Memo admonishes that: "special attention must be taken no (sic) [not] to run under the rack backwards on the right side of the forklift as the driver may be pinned under the racking." (Ex. V; Tr. 419.) The warehouse manager explained that in this context "backwards" meant traveling in a direction with the forks trailing. (Tr. 103.)

[58] Badia has worked at Pharmasol for about 21 years and has been its president for about 7 years. (Tr. 269-70.)

[59] As discussed, there are no measurements of the height of the backrest on this truck prior to the accident.

[60] Pharmasol did not perform any analysis regarding whether the right side of the forklift could go under the rack. (Tr. 286-88.) Nor did the Secretary measure whether the truck in use after the accident could do so. (Tr. 343-44, 464, 642, 648.)

1157.) So, although the Underride Memo shows that Pharmasol believed the CO when she indicated that the trucks could underride the racks, this belief did not mean the hazard was actually present.[61] (Tr. 288, 349, 418-20, 1148, 1157-58.)

When asked whether or not there was an underride hazard with the PIT Hyster Model N35ZRS-14.5 used at Pharmasol both before and after the accident, Girardi testified:

> Well, based on my personal inspection of the facility, based on my operation of the truck, based on the load configurations I saw and based on the operating characteristics that are designed into this truck, my opinion is there's no underride hazard present at that facility and especially since it has a rear post on the truck to begin with.

(Tr. 1156-57; Ex. A.)

The Court agrees with Girardi's conclusion.[62] In short, the Secretary fails to show that the PITs in use at Pharmasol could underride the racking system given the PIT's guarding features and the dimensions of the racking system at the component warehouse. The Secretary failed to prove that any Pharmasol employee, or anyone at all, operated a PIT without a rear safety post and a raised operator's backrest from December 9, 2015 through March 7, 2016. Citation 1, Item 1 is vacated.

A. Violations of Particular OSHA Standards

In contrast to violations of the general duty clause, to establish a violation of a specific OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more

[61] Badia never knew of an alleged hazard of a rack's horizontal member entering the operator's compartment of a stand-up forklift while backing up before December 9, 2015. (Tr. 279, 347-49.) Ferrandiz testified that neither he nor to his knowledge anyone at Pharmasol knew that a PIT could actually go underneath a horizontal beam of the rack prior to the accident. (Tr. 448.)

[62] The Court found Girardi's testimony concerning Citation 1, Items 1 and 4(a), to be highly persuasive and credible.

employees had access to the cited condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

The Secretary alleges Respondent committed serious violations of: (1) 29 C.F.R. §§ 1910.176(a), (b), which concerns storing and tiering materials in unsafe places and in an unsafe manner (Citation 1, Items 2 and 3), and (2) 29 C.F.R. § 1910.178(l)(3)(i)(A), which concerns the content of the training programs for PIT operators (Citation 1, Item 4(a)). (Tr. 12-14.) The Secretary also alleges Respondent committed two other-than-serious violations by: (1) failing to properly label, tag, or mark a container of sanitizing solution in violation of 29 C.F.R. § 1910.1200(f)(6)(ii) (Citation 1, Item 5), and (2) omitting certain information from training records in violation of 29 C.F.R. § 1910.178(l)(6) (Citation 2, Item 1). (Tr. 14-15.)

1. Serious Citation 1, Item 2 – 29 C.F.R. § 1910.176(a) (aisle clearance)

The Secretary alleges that Pharmasol violated 29 C.F.R. § 1910.176(a) by not ensuring: "that aisles were maintained clear of obstacles for the safe operation of powered industrial trucks." (Tr. 12.) The cited standard relates to situations where mechanical equipment is used and, in such situations, aisles and passageways must be kept clear and free of obstructions that could create a hazard. (Tr. 529, 824, 916.) Specifically, the cited standard mandates that:

> Where mechanical equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstructions across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

29 C.F.R. § 1910.176(a). Respondent appears to concede that materials were in an aisle where mechanical equipment was used in its warehouse. (Resp't Br. at 15-16.) However, it argues that the Secretary did not establish that materials were in the aisles within six months of the citation

date as required by 29 U.S.C. § 658(c) and it also disputes that the materials depicted in the photographic evidence constitute a hazard. (Resp't Br. at 15, 45.)

Pharmasol employees acknowledged that Exhibits XII and XIII show an aisle in the company's component warehouse. (Tr. 126-32, 236-37, 425-27.) Respondent argues that because the individual who took the photographs did not testify, the Secretary cannot rely on them. (Resp't Br. at 15, 45.) The Secretary responds that Pharmasol agreed to the admissibility of these exhibits and argues the time to raise objections to their authenticity and relevancy was at, or prior to, the trial. (Sec'y Reply Br. at 11-12; Tr. 53, 56.)

a. Evidentiary Issues

Respondent's suggestion that Joint Exhibits XII and XIII are not relevant and admissible is rejected. Respondent agreed to their admissibility and failed to raise any objection to them at the trial.[63] (Tr. 52-53, 56, 1362.) The Secretary was entitled to omit foundational questions and utilize the joint exhibits during the trial and in his briefs. Similarly, Respondent's suggestion that evidence of conditions in the workplace from a time outside of the six-month statute of limitations period is inadmissible, is also rejected. (Resp't Br. at 45-46.) The six-month statute of limitations set forth in 29 U.S.C. § 658(c) is a bar on citing violative conditions that ceased more than six months before the issuance of the citation. It is not an evidentiary bar. *See* Commission Rule 71, 29 C.F.R. § 2200.71; Fed. R. Evid. 402 (all relevant evidence is generally admissible).

Still, conceding to the evidence's admissibility does not change what it establishes or otherwise alter the Secretary's obligation to issue a citation no more than "six months following the occurrence of any violation." 29 U.S.C. § 658(c). Consequently, even though Respondent

[63] Respondent also agreed to the admissibility of Exhibit XXXIX, OSHA's Violation Worksheet, which includes the same photographs that comprise Exhibits XII and XIII. (Tr. 53; Ex. XXXIX at 6, 10.)

agreed to the admissibility of the evidence, the record still must show that the violative condition existed within the statute of limitations. *Id.*

On this timeliness issue, Respondent suggests that the photographs could have been taken more than six months before the issuance of the citation and argues that the record lacks evidence of the date of the conditions depicted. (Resp't Br. at 12, 15, 47.) Respondent makes these allegations even though there is no dispute that: (1) OSHA investigators took photographs as part of their investigation, (2) this investigation began on December 10, 2015, within six months of when the Secretary issued the citation, and (3) Exhibits XII and XIII were photographs in OSHA's investigative file. (Resp't Br. at 15; Ex. XXXIX at 6, 10; Tr. 12, 449.)

While Respondent is correct that the record does not include testimony from the individual who took the photographs, Pharmasol employees explained that the Exhibits XII and XIII show Pharmasol's component warehouse. (Tr. 126-32, 234-37, 425-26, 449.) More specifically, while being questioned by Respondent's counsel, Rocha indicated that to the best of his knowledge the photographs of the pallets in the aisles were taken the day after the accident, which is less than six months before the citation was issued.[64] (Tr. 234.) Witnesses also suggest that the pallets depicted in Exhibits XII and XIII are also seen in the video admitted as Exhibit LIV. (Tr. 126-32, 232-39, 362-63, 1196-98, 1208.) It is undisputed that Exhibit LIV represents conditions in the warehouse around approximately 10:15 pm on December 9, 2015. (Tr. 234.) Girardi explained how the

[64] The Court credits Rocha's testimony and finds that the photograph at Ex. XIII was taken on December 10, 2015. (Tr. 234.) The Court further finds that the photograph at Ex. XIII was taken in the component warehouse. It also finds that the photograph at Ex. XII was also taken in the component warehouse on December 10, 2015. (Tr. 425-27; Ex. XXXIX at 6, 10.)

pallets depicted in the video were seen in Exhibit XIII.[65] (Tr. 1196-98; Exs. XIII, LIV.) Respondent also claimed that the location depicted in Exhibit XIII was only used temporarily for staging. (Tr. 357-60, 1153; Ex. LIV.) This testimony, if credited, makes it improbable that Exhibit XIII was taken as part of some other investigation because the exact same type of pallet stack at an end of an aisle is shown in Exhibit XIII is also visible in the video.

The similarity of the conditions in the surveillance video and the photographs undermine Respondent's supposition that Exhibit XIII could have been taken during some prior OSHA inspection as opposed to the inspection that commenced within hours of when the surveillance video is dated. (Tr. 234-39; Sec'y Br. at 49-50.) Moreover, Exhibits XII and XIII are both consistent with and support Rocha's testimony that the photographs of materials in the aisleway were taken on December 10, 2015 not long after the time depicted in the surveillance video. (Tr. 132-35, 234-37, 426-27; Exs. XII at "A" and "B", XIII, LIV at 2, "B" (both places).) Thus, the record does not support Respondent's recent claims that Exhibits XII and XIII might not reflect conditions that were present within the six-month period before the citation's issuance. (Resp't Br. at 12, 15, 47.)

b. Applicability of the Standard and Its Violation

Having found that Joint Exhibits XII and XIII were properly admitted and can be relied on by the Secretary to show the presence of a violative condition within the statute of limitations, we turn to whether the Secretary established a violation of the 29 C.F.R. § 1910.176(a). The Secretary points to several instances where materials were kept outside of the racking system and their

[65] Girardi argued that the condition seen in the other photograph, Exhibit XII, was not shown in the screenshot taken from the video. (Tr. 1314; Exs. XII, LIV at 2.) Badia and Rocha viewed the longer segment of the video rather than the single screenshot when they discussed seeing the pallets that the Secretary alleges are a hazard. Whether in the video, or not, the photograph at Exhibit XII shows the obstructions at "A" and "B". (Tr. 132-35, 232-39, 362-63; Exs. XII, LIV at 1, at "A", at 2 at "B" (both places).)

presence violated the cited standard.[66] (Tr. 126, 132-35, 234, 617-626, 830-31; Sec'y Br. at 12-14, 48-52; Sec'y Reply Br. at n. 10; Exs. XII at "A", "B", XIII (bottom right), LIV at 2, "B" (both places).) The Secretary's expert, Snowdy, explained that having materials outside of the racking system in the locations shown on Exhibits XII, XIII, and LIV pose a safety hazard by reducing and/or narrowing the area in which a forklift driver can safely maneuver, as well as by obstructing the operator's view.[67] (Tr. 614-18, 624-26; Exs. XII-XIII, LIV at 2 at "B" (both places).)

Rocha, the warehouse manager, was primarily responsible for ensuring that the aisles in the component warehouse were free of materials that should not be there.[68] Rocha acknowledged that the materials depicted in Exhibit XII could obstruct a truck operator's view and might pose a safety hazard.[69] (Tr. 125-31; Ex. XII.) With respect to the materials seen at the bottom right of Exhibit XIII, Rocha indicated that the materials sticking out from under the racking system might cause issues for truck operators and if he saw such a condition he would have the materials put under the rack completely.[70] (Tr. 134-35; Ex. XIII.) Rocha said that materials are never placed or

[66] The Secretary did not include the presence of materials shown in the photograph at Ex. XI, at "A" and "B", as instances where material outside of the racking system served as a basis for a violation of the cited standard. (Tr. 967-68.) Neither does the Court.

[67] Respondent cites a non-precedential decision of *Gen. Motors Corp*., No. 78-1368, 1979 WL 8354 (O.S.H.R.C.A.L.J., Jan. 1, 1979), for the proposition that the object in the aisleway must create an actual hazard. (Resp't Br. at 46.) In *Gen. Motors*, the aisle was wider than those at Pharmasol and the decision does not refer to a visual obstruction created by the intrusion of the materials into the aisle. 1979 WL 8354, at *1. Thus, the *Gen. Motors* decision does not support a different outcome than the one reached here. *Id.*

[68] Rocha testified that the component warehouse is where Pharmasol stores raw material for production and packaging, including caps, aluminum cans, valves and cartons. (Tr. 160-61.)

[69] Ferrandiz testified that the boxes shown in the photograph at Ex. XIII protruded about six inches into the aisle from the rack. The Court finds that these boxes protruded at least six inches, and more, into the aisle, narrowing the space PITs could operate in the aisle. (Tr. 450, 615-17; Ex. XIII.) Snowdy testified that stand-up reach PIT operators should take a path down the right side of an aisle about eight inches away from the rack system and not proceed down the middle of an aisle to avoid rack damage. (Tr. 565-67, 572-73.)

[70] At his deposition, Rocha went further and said that he considered the materials depicted in a photograph of the warehouse constituted a safety issue. (Tr. 132, 135.) The Court credits Rocha's testimony given during direct examination over contradictory and somewhat confusing testimony he later gave at the trial during cross-examination

stored in the aisles. (Tr. 125-31, 135-36.) He also told Girardi that if someone leaves something within an aisle, the next shift should notify a supervisor. (Exs. A at 8; R at 8.)

In contrast to Snowdy and Rocha, Badia and Girardi allege that pallets of materials in the aisles as depicted in Exhibits XII and XIII were not hazardous. (Tr. 362-63, 1312.) Badia's credibility on this point is undermined by the evidence indicating that in 2012-2013 Pharmasol acquired a new racking system to address the storing of materials in the aisles. (Ex. Q; Tr. 324-26, 329-30, 386, 875-76.) The appropriations request indicates that Pharmasol sought the new racking system so it could comply with a fire code that precludes storing products in the aisles or at the ends. (Ex. Q; Tr. 378, 384.) Badia and Rocha also both indicated that materials should be staged in the empty spaces beneath the horizontal load rail down to the right or left of the aisles themselves, as opposed to at the ends or within the passageway itself. (Tr. 165, 327, 361.)

Turning to Girardi's testimony, he contends that the materials in the aisles were not hazardous because the forklift operator likely placed them in those locations and thus was aware of the condition. (Tr. 1312.) Awareness does not cure a hazard. Further, although Girardi's theory that the condition was not a hazard was based on the fact that the worker pulled the pallet out and placed it in the aisle as part of his work process, he conceded that, at least with respect to the condition depicted in Exhibit XII, he did not know why the pallet was in that location or what stage the work was at. *Id.* Girardi's opinion also fails to account for situations when two employees are working at the same time in the warehouse. (Tr. 442-43.) One employee would not necessarily know the other left something in an aisle. Finally, his theory does not explain how knowledge of materials in the aisles eliminates the visual obstruction they created. (Tr. 130, 625-26.)

on whether or not materials shown at Exs. XIII (bottom right) and LIV posed hazardous obstacles to AV as he operated a stand-up reach forklift on December 9, 2015 at about 10:06 p.m. (Tr. 235-39.)

Girardi also expressed his view that there is sufficient space for PIT operators to move around objects in the aisles.[71] (Tr. 1192-93, 1312-13.) Ultimately, Girardi fails to persuade the Court that the aisles were so wide as to defeat any hazard. He did not conclude that any driver could maneuver safely around the pallets depicted. His testimony was limited to the video of AV turning in what he described as a "nice smooth straight arc."[72] (Tr. 1193; Ex. LIV.) Should another operator have deviated from this, the results may not have been the same. (Tr. 625.) *See Hughes Tool Co.*, 6 BNA OSHC 1366, 1369 (No. 15086, 1978) (one of two commissioners concluding that if safe maneuvering around obstacles depends on an operator's ability, the Secretary established a § 1910.176(a) violation).

In addition, Snowdy disagreed with Girardi's view that the aisles were so wide as to permit placement of materials in them.[73] (Tr. 615-18, 624-26, 830-31.) Snowdy explained that materials at the end of aisles "definitely would impede the operator's ability" to maneuver in the aisles. (Tr. 827.) While an operator might be able to get around an obstacle, he or she would have to take evasive action that would bring them closer to the storage rack. (Tr. 827, 831-32; Ex. LIV.) Similarly, Rocha also viewed the materials as presenting issues for the truck operators. (Tr. 131, 135.) Even Girardi seemed to recognize some flaws in his theory: he conceded he would not leave the materials in the aisle and that their presence in such locations should not be a common occurrence. (Tr. 1309.)

[71] As discussed below, the width of the aisle is relevant to the gravity of the violation for penalty purposes.

[72] Girardi essentially argues that the operators' training eliminated the hazard. (Tr. 1192-93; Ex. A at 14.) With this citation item, the Secretary is not alleging that Respondent's training was deficient with respect to maneuvering around obstacles. (Tr. 12.) His contention is that the aisles were not kept clear as required by 29 C.F.R. § 1910.176(a). *Id.* While training may lessen the severity of a hazardous condition, it does not preclude citation for it.

[73] A photograph of the aisle where the accident occurred is at Ex. LXX. (Tr. 176.)

c. Exposure

Having found that the standard applied and was violated, we turn employee exposure to the violative condition. At least three employees, HP, AA, and AV, were exposed to the violative condition. (Sec'y Br. at 52; Tr. 239-40, 357, 452-53, 1000; Exs. XXXIX at 2-3, LIV.) Respondent acknowledges that these individuals were its employees.[74] (Stip. 3-9.) However, it argues that there is no evidence in the record about the use of forklifts within six months of the issuance of the citation. (Resp't Br. at 28.)

Respondent is incorrect about the record evidence regarding the use of forklifts within six months of when the citation was issued.[75] Both Rocha and Badia acknowledged the use of such equipment within the six months before the citation was issued. (Tr. 85, 99, 103-4, 113-14, 124, 410-11; Exs. V, XXVII.) Rocha explained that at least "five to seven people" operated a forklift between December 9, 2015 and December 14, 2015, for hours a day.[76] (Tr. 113-14, 124.) Rocha and Girardi also agreed that HP was in the vicinity of the materials depicted in Exhibits XII and XIII on December 9, 2015. So to was AV. (Tr. 228, 239-40, 1278; Ex. LIV.) In addition, Badia

[74] The relevant stipulations are:

1. Pharmasol retained the authority to control the manner and means by which [AV] performed his work at Pharmasol.
2. [AV] was an employee of Pharmasol for purposes of the OSH Act.
3. [AV] was involved in an accident at Pharmasol's facility at 1 Norfolk Avenue, South Easton, Massachusetts on December 9, 2015, which resulted in his death (the "Accident").
4. Prior to the Accident, Pharmasol retained the authority to control the manner and means by which [HP] performed his work at Pharmasol.
5. Prior to the Accident, [HP] was an employee of Pharmasol for purposes of the OSH Act.

(Tr. 57-58.)

[75] Respondent also incorrectly claims that "[n]o warehouse employees were called to testify." (Resp't Br. at 48.) But, Rocha, the manager in charge of the warehouse and the person who had responsibility for ensuring pallets and boxes are in their appropriate location testified. (Tr. 92, 125-28.) The Court also notes that Respondent's own expert claimed to have extensive knowledge about Pharmasol's warehouse operations based on his investigation of the company. (Exs. A at 7-9, R at 5-10.)

[76] OSHA's Violation Worksheet states 19 PIT operators operate various PITs daily throughout two shifts at the Component Warehouse. (Exs. XXVII, XXXIX at 3.)

indicated that employees using mechanical equipment as depicted in Exhibit LIV is more than a daily activity at Pharmasol, it occurs hourly. (Tr. 355-56.)

Moreover, the Secretary does not have to show an employee was actually exposed to the violative condition. *See e.g., Giles & Cotting, Inc.*, 3 BNA OSHC 2002, 2004 (No. 504, 1976). Exhibit LIV shows that employees had actual access to the area in which the hazardous condition was present. This area was "three feet" from the production floor and both warehouse and production employees had access to it. (Ex. LIV; Tr. 164-65, 225-26, 355-57.) As it was reasonably likely an employee would be in the area of the hazardous condition in the regular course of his or her daily duties, the Secretary established exposure. *See Giles*, 3 BNA OSHC at 2004.

d. Knowledge

Turning to Respondent's knowledge of the cited conditions, the Secretary does not allege Pharmasol actually knew aisles and passageways were not kept clear. (Sec'y Br. at 53.) Instead, it alleges that Pharmasol could have known of the noncomplying conditions had it engaged in reasonable diligence. (Sec'y Br. at 53.) The materials in the aisle were in plain view. (Exs. LIV, XII-XIII.) Rocha acknowledged going into the warehouse daily and other members of management regularly went into the warehouse. (Tr. 252-54, 355-56.) *See Schuler-Haas Elec. Co.*, 21 BNA OSHC 1489, 1493-94 (No. 03-0322, 2006) (finding that employer had constructive knowledge because it could have known of the physical conditions constituting the violation); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992) (finding constructive knowledge when a supervisor could have discovered and eliminated the hazard with reasonable diligence).

In addition to materials being in plain view and capable of being discovered, the Secretary also showed that Pharmasol lacked a clear and enforced work rule.[77] *See Gary Concrete Prods., Inc*., 15 BNA OSHC 1051, 1054-55 (No. 86-1087, 1991) (finding inadequate works rules and a lack of specific training or instructions on stacking techniques supported a finding of constructive knowledge). There is no evidence of a written work rule or policy addressing the placement of materials in the aisles, such as what's depicted in Exhibits XII and XIII. (Tr. 136, 304-5, 426, 449-50.)

As to whether there was an unwritten policy or work rule addressing materials in the locations depicted in Exhibits XII and XIII, the employees disagreed. Rocha acknowledged the company did not have a written policy but explained that there was a policy against having materials in the aisles and had he seen conditions like what is depicted in Exhibit XIII, he would have directed employees to move the materials. (Tr. 135-36.) In Rocha's view, there was a never a time when materials are placed or stored in the aisles of the warehouse. (Tr. 135-36.)

Despite this testimony regarding an unwritten policy on the storage of materials, Rocha's superior, Badia, who also had responsibility for Pharmasol's safety programs, indicated materials could be staged in the aisles before being brought to the production area.[78] (Tr. 275-76, 357-59.) Similarly, since February 2016 VP – OTS Ferrandiz was unaware of any policy or rule that

[77] In discussing knowledge of this violative condition and the one alleged in connection with Item 3, Respondent cites two non-precedential ALJ decisions. (Resp't Br. at 48, 52.) Both cases involved construction standards and neither supports Respondent's claim that it lacked constructive knowledge of the violation. *Burch Constr., Inc.*, 21 BNA OSHC 1934, 1936 (No. 06-1068, 2007) (ALJ) (finding no violation and not reaching knowledge); *Franciscus Roofing & Siding, Inc.*, 21 BNA OSHC 2182 (No. 06-1551, 2007) (ALJ) (affirming violations of standards related to training and fall protection when employer had actual knowledge).

[78] In addition, at the time of his deposition, Badia was not aware of any training or instruction Pharmasol provided to employees about storing or placing materials in the aisles of its warehouses. (Tr. 307.) Badia worked for Pharmasol for over twenty years in several capacities. (Tr. 270.) During part of his employment, he had responsibility for stacking and storing materials and utilized stand-up forklifts as well as other kinds of PITs. (Tr. 272-74.)

addresses materials in the location depicted in Exhibits XII and XIII.[79] (Tr. 289, 400, 426-27.) He never had any conversations or communications with the production night shift manager, Brian Gerry, regarding pallets or objects obstructing the aisle.[80] (Tr. 136, 428, 440-41; Ex. LXI.) Nor was he aware of Rocha or Gerry taking any steps to determine if workers were improperly storing items in the aisles of the warehouses. (Tr. 428-30.) And, even if there was a policy of keeping the aisles free from materials, there is no evidence of a worker being coached or disciplined for violating this policy. (Tr. 138-39, 307, 428-31, 435-36.)

Considering the whole record, it is apparent that Pharmasol did not have a clear work rule regarding the storage of materials in the aisles of its warehouse. Given that one supervisory employee thought materials could not be stored in the aisle, one was not aware of any policy that addressed the issue, and a third who thought it was acceptable, Pharmasol lacked an adequately communicated and enforced work rule. This, particularly when coupled with the condition's open and obvious nature, shows constructive knowledge. *See Gary Concrete Prods.*, 15 BNA OSHC at 1055; *Pride Oil*, 15 BNA OSHC at 1815 (inadequate work rules supported finding constructive knowledge of the violative condition).

[79] Between 2006 and February 2016, Ferrandiz worked at Pharmasol in a variety of positions, including: 1) Vice President of Technical Services from about March 2015 through about February 2016 where he was responsible for new products in a non-supervisory role, 2) Director of Operations, and 3) Director of Quality Control/Assurance and Regulatory Affairs. He has been Pharmasol's VP – OTS since February 2016 and is responsible for manufacturing, packaging, warehouse inventory, engineering as it relates to operations, and commercial operations. He also investigates all incidents involving injuries and works on new products. (Tr. 400-02, 439-45.)

[80] Pharmasol operates two 10-hour shifts, Monday through Thursday. (Tr. 344-45, 427-28; Ex. R at 7.) Rocha indicated he was the only manager responsible for making sure the aisles were free of materials. (Tr. 125-26.) Gerry, the manager in charge of the night shift when OSHA commenced its investigation, did not testify. (Tr. 136, 427-28, 440.) Rocha was not aware of any conversation Gerry had with the night shift workers regarding storing items in the aisles. (Tr. 137-38.) Nor was Rocha aware of anything Gerry did to determine if workers engaged in such activity. (Tr. 139.)

e. Affirmative Defense – Unpreventable Employee Misconduct

Despite the lack of a clearly communicated and enforced work rule, Respondent argues that if there was a violation of 29 C.F.R. § 1910.176(a), it was the result of unforeseeable employee misconduct (UEM). (Resp't Br. at 48-49.) Defending against a citation on the grounds of UEM requires the employer to show: "that it established a work rule to prevent the reckless behavior or unsafe condition from occurring; (2) that it adequately communicated the rule to its employees; (3) that it took steps to discover incidents of noncompliance; and (4) that it effectively enforced the rule whenever employees transgressed."[81] *Modern Cont'l Constr. Co. v. OSHRC*, 305 F.3d 43, 51 (1st Cir. 2002). Respondent does not allege which employee engaged in misconduct. (Resp't Br. at 48-49.) It only argued that it had a rule requiring employees to put materials away appropriately. (Resp't Br. at 49.) As discussed above, different managers had different views as to what that instruction meant. While Rocha may have tried to keep the aisles clear, there is no evidence all managers enforced this policy. (Tr. 139, 428-29.) Respondent failed to show what instruction night shift employees received or how the night shift manager enforced the unwritten policy. (Tr. 138-39, 428-30.) Thus, the same facts showing constructive knowledge also defeat Respondent's UEM defense. *See Thomas G. Gallagher, Inc. v. OSHRC*, 877 F.3d 1, 14 n.11 (1st Cir. 2017) (same facts that show a lack of reasonable diligence also defeat UEM defense); *P. Gioioso & Sons, Inc.*, 115 F.3d 100, 109-10 (1st Cir. 1997) (having programs and rules is insufficient if the employer does not prove that "it insists upon compliance with the rules and

[81] Respondent appears to rely on *Gale Insulation*, 22 BNA OSHC 1795 (No. 08-1107, 2009) (ALJ), as support for its UEM defense. (Resp't Br. at 48.) In *Gale*, the ALJ found that the Secretary did not make out a prima facie case and then noted, in dicta, and while applying the Fifth Circuit's own version of the UEM test, that Respondent had an adequate work rule. 22 BNA OSHC at 1797-98. As Respondent had no such rule, even if it was binding and it is not, *Gale* does not support finding UEM here. *Id.*

regularly enforces them"); *Pride Oil*, 15 BNA OSHC at 1815-16 (concluding UEM not established when work rule was not enforced).

f. Characterization and Penalty

Having found that the Secretary showed the presence of a violative condition to which employees were exposed and that Respondent had constructive knowledge of the violation, Citation 1, Item 2 is affirmed. The Secretary argues that this is a serious violation and proposes a penalty of $4,500.[82] (Sec'y Br. at 67; Tr. 17; Ex. XXXIX.) Respondent does not specifically contest the characterization or proposed penalty for this citation item but does allege that for all citation items the record lacks evidence on the severity or probability of the violations and that this means no penalties are appropriate. (Resp't Br. at 63-64.) For the following reasons, the Court finds the violation is serious and a $4,500 penalty is appropriate.

A violation is "serious" if there was a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k). OSHA determined that an employee operating a truck might collide with a rack member while maneuvering to avoid obstructions in the aisle. (Tr. 917; Ex. XXXIX.) This could lead to a disabling injury or even death. *Id.* Therefore, it is appropriate to characterize the violation as serious.

Moving to the penalty amount, the Act requires consideration of four factors: (1) the violation's gravity; (2) the employer's size; (3) the employer's history; and (4) its good faith. 29 U.S.C. § 666(j); *Orion Constr., Inc.*, 18 BNA OSHC 1867, 1868-69 (No. 98-2014, 1999). (Tr. 908-11.) Of these, gravity is generally the most important factor. *Id*. at 1867. Looking first at gravity, an employee trying to avoid an obstruction in an aisle when operating a PIT might collide

[82] The statutory maximum penalty for a serious violation at the time alleged in the citation is $7,000. 29 U.S.C. § 666(b). The Secretary initially proposed a penalty amount of $6,300 but amended this request at the trial to seek a penalty of $4,500.

with an obstruction or the racking system and suffer serious injuries or death. (Tr. 833-34, 917.) While the evidence supports that potential injuries could be severe, the likelihood of an accident was reduced by the employee training and the width of the aisles in the warehouse. (Ex. A at 7-8; Tr. 1299.) The aisles were above the minimum necessary for trucks to operate, so employees had a better ability to maneuver around the hazards.[83] (Tr. 713-14.) Thus, the gravity suggests a penalty lower than the statutory maximum of $7,000. 29 U.S.C. § 666(b). As for size, Pharmasol employs over 120 full-time employees, as well as up to 125 additional temporary workers. (Tr. 317; Ex. XXXVIII at 1.) The Secretary indicates he provided a 10% reduction in the penalty amount to account for Respondent's size. (Tr. 908; Ex. XXXVIII at 4.) The Secretary does not argue that Respondent's history or a lack of good faith warrant a penalty adjustment. (Tr. 909-11.) Based on the record, the Court agrees. Therefore, after considering all the penalty factors, a penalty of $4,500 is assessed.

2. **Serious Citation 1, Item 3 – 29 C.F.R. § 1910.176(b) (material storage)**

Section 1910.176(b) requires employers to store materials safely by mandating that:

> 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.

[83] As discussed, the aisle width did not address the fact that the materials obstructed the view of PIT operators. Nor were the aisles so wide as to remove the hazard created by the materials not being within the racking system. (Tr. 833.) The Court finds that the materials labeled A and B in Ex. XII could obstruct the view of a PIT operator and limit an operator's ability to maneuver a PIT in the aisle by decreasing the floor area where the operator can travel. (Tr. 129-30, 614-626, 830-31.) The Court further finds that the materials shown in Ex. XIII narrowed the aisle of the component warehouse and could cause problems for PIT operators. A PIT operator might collide with a rack trying to avoid these obstructions. (Tr. 135, 616-17, 833, 917; Ex. XIII.)

29 C.F.R. § 1910.176(b). The Secretary alleges that Pharmasol violated this standard by stacking or tiering materials and pallets in a manner that did not prevent them from sliding or collapsing.[84] (Tr. 12-13.)

Respondent alleges that the Secretary did not show that his evidence of allegedly poorly stacked materials related to a time within six months before he issued the citation. (Resp't Br. at 17.) Further, Respondent argues that the Secretary failed to identify the location of the condition with sufficient precision. *Id.* at 24, 50. Finally, Respondent argues that the stack of materials relied on by the Secretary did not create a hazard to which employees were exposed and of which it had knowledge. *Id.* at 25-26, 52-53.

a. Timeliness of Citation

Exhibit XIV is a photograph of a stack of materials in Pharmasol's Stoughton warehouse taken by CO Finizio.[85] Inspection Number 1113130's Violation Worksheet for Citation 1, Item 3, refers to seven photographs regarding Instance a) at the Central Area warehouse. (Tr. 139-40, 384-85; Stip. 25; Resp't Br. at 23; Ex. XL at 1, 3.) While CO Finizio did not testify at the trial, Respondent agreed to the exhibit's admissibility before the trial commenced and did not object during the trial. (Tr. 53.) As to the timing of the photograph, Badia explained that he was with CO Finizio when she took the photograph and that he had a conversation with her regarding what

[84] Specifically, Citation 1, Item 3 alleges that Respondent committed a serious violation of subpart (b) of 29 C.F.R. § 1910.176 because materials in the Stoughton warehouse "were not adequately stacked, tiered, and/or limited in height to prevent sliding and collapsing." (Tr. 12.) Instance a), the only part of Item 3 still in dispute, refers to the "Central Area" where there were "three (3) pallets of cardboard boxes stacked on top of each other and the second wooden pallet was damaged, creating an unstable load." (Tr. 13.)

[85] The parties stipulated that "the materials stacked in the Stoughton warehouse related to Citation 1, Item 3 and present or depicted in Joint Exhibit XIV … were not present in that location and that position for a period of seven days." (Tr. 933-35.)

is depicted in Exhibit XIV.[86] (Tr. 310, 328, 365, 368, 372, 384-85; Ex. XIV.) Badia's testimony is corroborated by the violation worksheet for this citation item. (Ex. XL at 3-4.) The violation worksheet also includes the same photograph that constitutes Exhibit XIV. (Ex. XL at 4.) In addition, AAD Abundo explained that Exhibit XIV was the support for the violation and this pallet stack was noticed by the CO during her inspection. (Tr. 967-68.) Accordingly, the Court rejects Respondent's argument that the condition depicted in Exhibit XIV did not occur within six months of the citation's issuance.

b. Location of the alleged hazardous condition

When issued, the citation referred to materials not being "adequately stacked, tiered and/or limited in height" in two locations of the Stoughton warehouse: (a) the "Central Area," and (b) "Central Area east side." (Tr. 12-13.) But, at the trial, the Secretary presented photographic evidence of only one location in the Stoughton warehouse where he argued materials were allegedly stacked in violation of 29 C.F.R. § 1910.176(b). (Tr. 967, 1003, 1016.) The Secretary then withdrew subpart (b), the allegation of improperly stored materials in the "Central Area east side." (Tr. 1017.)

There is no dispute that the Exhibit XIV, which again is a joint exhibit, depicts a condition in the central area of Pharmasol's Stoughton warehouse. (Stipulation agreed to on June 29, 2017, at Tr. 933-35, hereinafter Stip. 25.) Rocha indicated that Exhibit XIV shows materials in the Stoughton warehouse. (Tr. 139-40.) Badia provided further confirmation by acknowledging he saw this stack of materials in the warehouse while with CO Finizio on December 10, 2015. (Tr. 310-11, 365, 368; Ex. XL at 3.) He also explained that the stack depicted in Exhibit XIV was the

[86] As noted above, there is no dispute that OSHA commenced its investigation on December 10, 2015 and that the citation was issued less than six months later, on June 9, 2016. (Tr. 11; Resp't Br. at 28.)

only one the CO discussed with him at that time. (Tr. 373.) Nor is there any dispute that the Secretary is only alleging one instance for this violation. (Tr. 1017.) Thus, there is no confusion about the stack's location and when it was observed. The citation sufficiently identifies the location of an alleged hazard at Pharmasol that was present within the six-month statute of limitations.

c. Applicability of Standard and its Violation

As for whether the standard applied to the materials shown in Exhibit XIV, the parties agree that Pharmasol used mechanical equipment in its warehouse and that the warehouse was used to store materials. (Tr. 242-43, 369-70; Ex. XL at 2-3.) And there is no contention about what Exhibit XIV depicts—a stack of materials leaning to one side. (Resp't Br. at 23-26, 51-52; Tr. 1209.) Finally, Respondent does not counter Snowdy's opinion that the cited standard applies to the storage of materials as depicted in Exhibit XIV. (Tr. 527-28, 626; Ex. XIV.) So, the cited standard applies to the materials shown in Exhibit XIV.

Turning to whether Pharmasol violated the standard, Respondent alleges that the Secretary failed to show that the stack of materials created a hazard. (Resp't Br. at 50-52.) However, Rocha explained that the boxes seen in Exhibit XIV were not stacked safely and conceded they might fall. (Tr. 140-41.) He acknowledged encountering materials stacked like what was seen in Exhibit XIV a few times a year.[87] (Tr. 144-45.) Snowdy also considered the stack to be unstable and

[87] When questioned by Respondent's counsel, Rocha retreated from his testimony that the stack was a possible safety issue or hazard. (Tr. 245-46.) He denied that the stack presented a hazard to employees, claiming that there was not enough space to walk by the stack and suggesting it would only fall to the side on the adjacent stack of materials. (Tr. 245-46.) To the extent Rocha was indicating that an employee could not be adjacent to the stack, his testimony is rejected. (Tr. 140-41, 368-69.) Further, Rocha's changed opinion did not offer a persuasive explanation as to why he believed that nothing would enter the aisle if the materials fell to the side. He admitted components would probably be damaged if the stack fall. (Tr. 245-46.) Badia indicated that he viewed and walked up to the stack with CO Finizio and two other employees during the investigation. (Tr. 310-15, 368-69.) Badia admitted workers could walk in front of the stack and be within 12 feet of the stacked materials. (Tr. 315.)

insecure.[88] (Tr. 626-27, 846, 857-59; Exs. 10 at 7, XIV.) He noted that cardboard seen in the stack bowed and explained that by mixing the bowed cardboard and flat pallets together the stack was neither stable nor secure from sliding or collapse. (Tr. 626-27; Ex. 10 at 7.)

In contrast, Girardi argued that the stack of materials was stable. (Tr. 1208-9.) He conceded that the stacking was tilted and suggested this "could be something with the cardboard or just could be something that's underneath" the stack. (Tr. 1209-11; Ex. A at 14.) He did not explain why the bowing of the cardboard was not problematic as Snowdy had opined. *Id.* Girardi also conceded that without seeing the condition in person he could not definitively say why the stack of materials would lean but not fall.[89] *Id.*

To show a violation of 29 C.F.R. § 1910.176(b), it is sufficient for the Secretary to show that materials are in a location where employees use equipment that could strike and topple the materials. *Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1668 (No. 13401, 1981) (finding that empty containers could still cause injury and the Secretary did not have to prove items would fall by themselves); *Clement Food Co*., 11 BNA OSHC 2120, 2122 (No. 80-607, 1984) (concluding that § 1910.176(b) "is not limited by its words to stacks so unstable they might collapse of their own weight"). The standard requires materials to be stored in a way so they "are stable and secure against sliding or collapse." 29 C.F.R. § 1910.178.176(b). The Secretary showed that some of the materials in the warehouse did not meet this requirement. The leaning nature of the stack is readily

[88] At one point in its brief, Respondent states that only Rocha discussed where the materials would fall. (Resp't Br. at 54.) However, Snowdy, Badia, and Girardi all discussed whether the stack presented a safety hazard. (Tr. 310-11, 626, 1211.)

[89] Girardi never visited the Stoughton warehouse where the CO observed the condition. (Tr. 1319-20; Ex. A at 14-15.) Thus, to the extent Respondent attacks Snowdy's opinions as invalid for not visiting the site, the same flaw would apply to Girardi's opinion that the stack was safe. (Resp't Br. at 59.) In any event, the leaning nature of the stack is apparent without the need for expert testimony. (Exs. XIV, XL.)

apparent. (Exs. XIV, XL, 10 at 7; Tr. 311-12.) The violation worksheet also indicates that the wooden pallets in the stack were damaged and the cardboard boxes were relatively soft. (Ex. XL at 3.) Respondent argues that the Secretary did not test the structural integrity of the stack.[90] (Resp't Br. at 51.) However, two employees viewed the stack as unstable and, during the inspection, Badia demonstrated that the multi-tiered stack could be moved by one person pushing it by hand. (Tr. 140, 310-11.) The Secretary also presented expert testimony that the stack was unstable and therefore a hazard. (Tr. 626-27, 857-58; Exs. 10 at 7, XIV.) The Court finds that the materials shown tiered at Ex. XIV might slide, collapse, or fall. (Tr. 140-41, 385-86, 626; Ex. XIV.)

Girardi disagreed with this evidence but was unable to conclude with certainty that the stack would not topple and did not refute the premise of Snowdy's opinion. (Tr. 1211.) Although Girardi concludes that because the stack was stable because it did not fall when Badia pushed on it, the same result might not have occurred if the stack was accidentally stuck by mechanical equipment.[91] (Tr. 242, 1211; Sec'y Br. at 58.) The Court credits Rocha's testimony on direct examination that he believed the stack to be unsafe and Badia's initial statements to the CO that he also considered the stack unsafe over their other somewhat contradictory testimony. (Tr. 140-41, 244, 310-12, 385-86.) Rocha never retreated from the view that the stack could topple and should be addressed right away. (Tr. 244, 246.) Even after changing his testimony to assert that the stack did not move when he touched it, Badia still agreed that the stack should be addressed.

[90] The Court notes Respondent alleges that it addressed the condition after the CO pointed it out during the inspection. (Tr. 371, 969-71.) The Court further notes that OSHA's Violation Worksheet for Citation 1, Item 3, indicates that "Mr. Marc Badia, President, stated that he would arrange to have the warehouse worker rearrange the stacks of boxes and replace the damaged pallets." (Tr. 371; Ex. XL at 3.)

[91] In reaching his conclusion that the stack was not a hazard, Girardi relied on Badia's May 17, 2017 deposition testimony that the stack moved when he pushed on it during the inspection. (Tr. 281, 385, 1211.) Girardi did not explain whether Badia's subsequent denial of this statement at the trial altered his opinion. (Tr. 371, 1211.)

(Tr. 371-72.) Accordingly, the Secretary established that the standard applies and Pharmasol violated it.

d. Exposure

The Secretary alleges at least one employee was exposed to the violative condition. (Ex. XL; Sec'y Br. at 58-59.) RF, a Pharmasol employee, receives various goods at the Stoughton warehouse and is responsible for putting them away.[92] (Tr. 59, 241-43, 366-69; Stip. 22-23.) To move and stack materials in the warehouse, RF uses a sit-down fork truck. (Tr. 242; Ex. XL at 3.) At the time the CO and Badia were discussing the stack shown in Exhibit XIV, RF was also present in the same "general vicinity," unloading materials and putting them away.[93] (Tr. 368-69.) Badia explained that employees can generally walk in front of the stack of materials shown in Exhibit XIV. (Tr. 315; Resp't Br. at 26.) And Snowdy explained that if the stack of materials were to slide, a person on the ground or in a PIT could be harmed. (Tr. 858.)

While RF was not observed "right next to" the improperly stacked materials, the Secretary established exposure because he had access to the violative condition.[94] *See Kaspar Wire Works*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) (finding exposure when an employee had access

[92] Stipulation 22 is: "Prior to the accident, Pharmasol retained the authority to control the manner and means by which [RF] performed his work at Pharmasol." (Tr. 59). Stipulation 23 is: "Prior to the accident, [RF] was an employee of Pharmasol for purposes of the OSH Act." *Id.*

[93] Respondent also indicates that AV was not near the pallets depicted in Exhibit XIV. (Resp't Br. at 15.) The Secretary does not rely on AV's exposure for this violation. Nor does he dispute that the video showing AV was taken in a different warehouse then where the CO observed the unstable stack of materials that is the basis for Item 3. (Ex. LIV; Stip. 25.)

[94] In addition to RF, another forklift operator employee, NR, also spent about half his day working in the Stoughton warehouse. (Tr. 241-43, 367.) His duties were generally limited to placing materials in the staging area, but he also sometimes helped RF put materials away. (Tr. 243; Resp't Br. at 25.) How close this staging area was to the area depicted in Exhibit XIV is unclear. *Id.* NR was also trained by Rocha as a forklift operator on October 1, 2014. (Ex. XVIII at 3.) The Court also finds that NR was exposed to the violative condition. (Tr. 241-43, 367; Resp't Br. at 25; Ex. XVIII at 3.)

to walkway adjacent to unguarded fan belt). Employees worked in the warehouse daily throughout their shifts and could walk in front of or near the leaning stack of materials. (Ex. XL at 3; Tr. 241-42, 315.) *See Clement Food,* 11 BNA OSHC at 2122 (affirming a violation of § 1910.176(b) when employees were "in the area" including one observed "using a walkway eight feet away".)

e. Knowledge

The Secretary asserts that Respondent "had constructive—if not actual—knowledge of the unstable tiered materials." (Sec'y Br. at 59.) The stack was in plain view and its lack of stability was readily apparent.[95] (Ex. XIV; Tr. 140, 369, 626-27.) Upon seeing the stack, both Badia and Rocha initially indicated that they believed the stack to be unsafe and wanted the condition addressed.[96] (Tr. 140-41, 244, 310-12.) Snowdy also was concerned about the stack's stability from the photograph of it. (Tr. 626-27, 857-58; Exs. 10 at 7, XIV.) Thus, the hazardous condition was plain. *See A.L. Baumgartner Constr. Inc.,* 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (obviousness of the condition sufficient for constructive knowledge).

Respondent asserts that the warehouse is "immense" and asserts there is no evidence that its inspections of the facility were inadequate. (Resp't Br. at 52-53.) While the size of a warehouse may relate to the likelihood of actual knowledge or to how it should be inspected, a large workplace does not excuse the need for reasonable diligence to discover unsafe work conditions. As to the sufficiency of its diligence, Respondent's claims are not supported by the record. It did not have a clear and enforced work rule and did not provide training regarding the safe stacking of materials. (Tr. 144-46, 313-15.) There is no evidence that Pharmasol conducted safety inspections of stacked

[95] Rocha has seen pallets stacked similarly in the Stoughton warehouse, probably at least three times per year. In each instance, he asked employees to unstack the materials and restack them safely. (Tr. 144-45.)

[96] Badia told the CO that the materials "looked unsafe" and were stacked like the "leaning tower of Pisa." (Tr. 310-13, 373-74.)

materials to assess if they were stable and secure.[97] (Tr. 241, 312.) Thus, the record does not show that Pharmasol engaged in reasonable diligence to discover the violation. *See Gary Concrete Prods.*, 15 BNA OSHC at 1054-55 (finding knowledge of a failure to safely stack materials because the employer failed to engage in reasonable diligence).

f. Characterization and Penalty

The Secretary asserts that the violation is serious because it could result in lacerations, broken bones, and hospitalization.[98] (Sec'y Br. at 68.) The record supports the serious characterization. *See Clement Food,* 11 BNA OSHC at 2122 (characterizing a similar violation as serious). If boxes or pallets slid or collapsed, an employee could experience a serious injury. (Tr. 858, 919; Ex. XL at 3.) Snowdy explained that falling boxes and pallets could harm employees using mechanical equipment in the warehouse. (Tr. 857-58.) AAD Abundo also asserted that if the pallet tipped, it could strike a forklift operator and result in broken bones or lacerations. (Tr. 919.)

The relevant statutory maximum penalty for a serious violation of 29 C.F.R. § 1910.176(b) at the time alleged in the citation is $7,000. 29 U.S.C. § 666(b). The Secretary proposes a penalty of $1,800 based on the gravity of the violation as well as Pharmasol's size, good faith, and violation history.[99] (Sec'y Br. at 66, 68; Ex. XL at 2; Tr. 17.) With respect to gravity, if the stack tipped it could injure a forklift operator, although the injuries would not likely be permanent. (Tr. 858, 919; Ex. XL at 2.) At least RF and NR were exposed to the condition. (Ex. XL at 2-3.) During the

[97] Pharmasol's insurance provider did perform audits, but there is no evidence about the frequency of these audits or whether they included issues related to stacking materials. (Tr. 313-14.)

[98] As noted above, Respondent does not make any specific arguments regarding the characterization and penalty for Citation 1, Item 3. (Resp't Br. at 63-64.)

[99] The Secretary initially proposed a penalty of $5,400 but amended his request to seek an $1,800 penalty. (Tr. 17, 921.)

inspection, Badia indicated that he would have the condition addressed, but it is unclear precisely when this occurred. (Tr. 371-72, 969, 971.) AAD Abundo indicated that OSHA considered the probability of injury from the violative condition to be "lesser." (Tr. 920.) As with Item 2, the Secretary does not dispute that Pharmasol's size warrants some reduction in the penalty amount. (Ex. XL at 2; Tr. 908.) Finally, there is no evidence that Pharmasol's violation history warrants a penalty increase. (Ex. XL at 2; Tr. 909, 919-20.) Considering all the penalty factors set out in 29 U.S.C. § 666(j), and with the most emphasis on gravity, an $1,800 penalty is assessed for this Citation 1, Item 3.

3. Serious Citation 1, Item 4(a) – 29 C.F.R. § 1910.178(l)(3)(i)(A) (training of PIT operators)

Section 1910.178 requires employers to train PIT operators on various topics. The training must include "instructions, warnings, and precautions for the types of truck the operator will be authorized to operate." 29 C.F.R. § 1910.178(l)(3)(i)(A). The standard does not dictate the precise language of the required training. *Id.* Instead, it requires training that addresses the specific types of PITs in use as well as the specific hazards employees may encounter in their workplace. (Tr. 1034, 1158.) The Secretary's position is that Pharmasol failed to inform employees about "crushed by" or "underride hazards" they faced while operating stand-up reach trucks.[100] (Tr. 13; Sec'y Br. at 60-61.)

[100] As issued, Citation 1, Item 4a alleges that:

> Powered industrial truck operators did not receive training on operating instructions, warnings, and precautions for the types of truck the operator was authorized to operate.
>
> Establishment: Employer did not inform employees of crushed by/under-ride hazards while operating a stand-up narrow aisle reach truck.

(Tr. 14.) The Secretary does not allege that Respondent failed to train employees on the how to use a narrow aisle reach truck or any other type of PIT.

Respondent acknowledges § 1910.178 applies to its employees and requires training. (Resp't Br. at 42-44, 57.) But Pharmasol argues it has a comprehensive training program that comports with the requirements of 29 C.F.R. § 1910.178(l)(3)(i)(A). (Resp't Br. at 54-57; Exs. A at 7-9, 15, R at 7-10.) It also argues that it has no history of accidents or near misses. (Resp't Br. at 57; Tr. 174, 222-23, 1174.) It does not point to anything specific in its training program regarding crushed by or underride hazards other than a warning label on at least one of the trucks. (Resp't Br. at 55-57; Ex. A at 15.)

First, as to the warning label, training obligations are independent of responsibilities regarding warning labels. The cited standard does not include exemptions if equipment includes product safety warnings. 29 C.F.R. § 1910.178(l)(3)(i)(A) (requiring instructions, warnings, and precautions for PIT operators). Second, as to Respondent's accident history, the standard imposes specific training obligations regardless of whether there has ever been an accident or near miss. *Id.* While an accident history may suggest deficiencies in a training program, the absence of documented accidents or injuries does not mean the program is compliant.[101] *See Arcadian*, 20 BNA OSHC at 2009 (stating that the goal of the Act is to prevent the first accident).

Third, as to the sufficiency of Pharmasol's training program, Rocha, the warehouse manager, is responsible for training its PIT operators.[102] (Tr. 85, 91.) His own training consisted of workplace experience and attending a one-day train the trainer course. (Tr. 85, 146-47, 156; Exs. LVII, XLVIII.) Pharmasol's PIT operator training program took anywhere from one-to-two

[101] According to Snowdy, if Pharmasol had inspected the truck before the accident, it would have revealed damage from a number of different incidents. (Ex. 10 at 1; Stip. 24.)

[102] At the trial, Secretary's counsel raised the issue that some of the exhibits related to Pharmasol's training contain a significant amount of hearsay. (Tr. 182; Exs. A, M, R.) Because Rocha was available and testified directly, his testimony is given more credence on what the training covered. (Tr. 1138.) *See Monroe Drywall Constr.*, 24 BNA OSHC 1111, 1113 (No. 12-0379, 2012) (hearsay evidence given its probative weight).

weeks.[103] (Tr. 1287; Ex. R at 8.) There is no evidence that Rocha or anyone else specifically trained employees about underride hazards prior to December 14, 2015.[104] (Tr. 95-115, 147-48, 185-86, 201-203, 628-29, 971; Exs. V, X, XLVIII, LV.)

However, Pharmasol's PIT training did address topics related to under-riding the rack system and potential crushed by hazards. (Tr. 175, 201-08; Exs. X at 9, LV.) For example, Rocha directed employees to: maintain positive control of the PIT,[105] travel down the middle of aisles, avoid collisions, not turn the PIT before a pallet being retrieved is first brought down to floor level, and not go too fast.[106] (Tr. 175, 201-16, 223, 246-48.) He instructed employees to stay a certain distance, at least three to five inches, away from the racks when they were backing up toward them.[107] (Tr. 117-18.) As testified to by Girardi, Rocha:

> trained truck specific for this N35ZRS. He trained work place specific. He walked people through the component warehouse. He told them how to handle the loads. He demonstrated it to them. He had them demonstrate and explain to him to make sure he understood that they understood, and he talked about the associated hazards.
> The question has been they didn't discuss the underride hazard, and the underride hazard really doesn't exist in that warehouse.

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[103] Girardi's expert report stated "[a]ctual training time for both classroom and practical training takes about 2 hours. The balance of training is observation of the operator by Mr. Roach (sic), with questions/answers as required." (Tr. 1287; Ex. R at 8.)

[104] Before the accident, Rocha did not provide any training to forklift operators relating to the vertical black post on the stand-up forklifts. (Tr. 95-96; Ex. IV, at "A", bottom photograph.) After the accident, around December 14, 2015, Rocha began training employees about underride hazards and the vertical post on the stand-up forklifts. (Tr. 97-115; Exs. V, XXXIV.) The Underride Memo was part of this training. (Ex. V.) It indicates that the post is on the left side and advises operators to take "special attention" not to drive "backwards on the right side of the forklift [where there is no post] as the driver may be pinned under the racking." *Id.*

[105] Rocha explained that maintaining positive control included "not hitting nothing [including racks]" and being able to "safely stop the forklift." (Tr. 208-11.)

[106] Rocha conducted verbal training in English and Cape Verde Creole, which was the primary language for some of the workers. (Tr. 157-58.) Training materials also included a video and a training booklet, both of which were in English. (Exs. X, LV; Tr. 191-92.) Rocha testified that the training booklet, entitled Forklift Operators Safety Training, was provided to new employees starting training "[f]or them to keep it, for them to read it, understand and review what is needed." (Tr. 191-92.)

[107] Rocha testified that stand-up reach truck operators never get that close to the rack. He said operators typically "stay about two to three feet away from the rack behind them." (Tr. 172-74.)

(Tr. 1158-66, 1238, 1273-75.)

The Court finds that Pharmasol's training satisfied the requirements of 29 C.F.R. § 1910.178(l)(3)(i)(A) (training of PIT operators). Its training included a video, written materials, discussions and practical demonstrations that was comprehensive as to the hazards related to its forklifts. As explained above, the Secretary failed to establish that employees faced underride hazards, thus specific instruction on that topic may not have been necessary. (Tr. 1166.) Overall, while the Secretary shows ways training could be improved, he failed to show that the precautions, warnings, and instructions provided were insufficient in the context of how PITs were used at Pharmasol. *See Trinity Indus., Inc.*, 15 BNA OSHC 1788, 1789 (No. 89-1791, 1992) (Secretary failed to prove the forklift training provided was insufficient).

Accordingly, Citation 1, Item 4a is vacated and no penalty is assessed.

4. **Other-Than-Serious Citation 1, Item 5 – 29 C.F.R. § 1910.1200(f)(6)(ii) (hazard communication)**

Pharmasol's production area includes a deionization water system. The water system purifies municipal water for use in production operations. The purification reduces the water's ionization, microbial content, and total organic content. The system includes a 10-gallon container of sanitizing solution. Section 1910.1200 specifies labeling requirements for hazardous solutions. Containers of hazardous solutions in the workplace must be labeled to identify the product contained therein and to give "at least general information regarding the hazards of the

chemicals."[108] 29 C.F.R. § 1910.1200(f)(6)(ii). The Secretary alleges that Respondent failed to ensure that the "10-gallon container of sanitizing solution was labeled, tagged, or marked with the information required." (Tr. 15, 388; Ex. XXIV at "A".)

The sanitizing solution Pharmasol uses contains a hazardous substance, sodium dichloroisocyanurate. (Tr. 436-37, 974; Ex. XLI at 3.) The container for the solution had no information or otherwise communicated any physical or health hazards—it is just a yellow container. (Tr. 468; Exs. LX, XLI, XXIV; Sec'y Br. at 63.) Respondent points out that five or six feet away from the container there was a schematic of the facility's water purification system hanging in a plastic cover. (Tr. 469; Resp't Br. at 27.) This schematic indicates that the container has "HOCl CHLORINE SANITISER. (Ex. LX.) It does not refer to the presence of sodium dichloroisocyanurate. *Id.* Nor does it convey in any manner the possible health effects of exposure to the chemical contained within the vessel. *Id.* Thus, the schematic would not satisfy the minimum requirements of the cited standard even if it was on the container itself instead of several feet away. The Secretary established a violation of the cited standard.

As for exposure, Respondent contends employees were not exposed to the violative condition because the container was maintained on its behalf by a third-party contractor. (Tr. 390; Resp't Br. at 27, 62.) However, the cited standard applies to the labeling of hazardous chemicals

[108] In particular, 29 C.F.R. § 1910.1200(f)(6)(ii) requires:

> the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with either: (i) the information … for labels on shipped containers; or, (ii) Product identifier and words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

The Secretary alleges that only subsection (ii) is applicable to the condition cited here. (Tr. 15.)

"in the workplace." 29 C.F.R. § 1910.1200(f)(6). The labeling requirement is triggered by the presence of the materials, not their use or handling. *Id.* A violation of the cited standard does not require actual exposure to a hazardous substance. *Id.* The test is the sufficiency of the information provided, as opposed to actual or potential exposure to a hazardous substance. *Id.* The use of outside workers to assist with the system did not diminish the need to convey information about hazardous substances to Pharmasol's own employees. *See Safeway Store No. 914*, 16 BNA OSHC 1504, 1505 (No. 91-373, 1993) ("The purpose of [29 C.F.R. § 1910.1200] is to make employees aware of the hazards arising from chemicals used in the workplace and ensure that they have access to information regarding means of protecting themselves from such hazards.") Pharmasol owns the container, and its employees work on the purification system that uses hazardous solution contained within the unlabeled vessel. (Tr. 460-61, 468; Ex. XLI at 5 at "A".) This work includes replacing cylinders downstream from where the sanitizing solution is a part of the process. (Tr. 453, 460-61; Exs. LX, XLI at 3.) In addition, employees walk within ten feet of the unlabeled container.[109] JG worked in the vicinity of the unlabeled container on a daily basis. NG worked in the production area where the water filtration system was located almost every day. (Tr. 395, 460; Ex. XLI at 2-3.) This is sufficient to show exposure to the violative condition. *Giles*, 3 BNA OSHC at 2004.

Pharmasol had the schematic and knew what was in the container and that it was a hazardous substance. (Ex. XLI at 3; Tr. 468-69.) Despite this knowledge, it failed to adhere to

[109] Respondent argues that the container was separated from another area by a partial wall. (Resp't Br. at 28, 62; Resp't Reply Br. at 13.) But the container itself is below where the wall starts. (Ex. XLI at 4-5.) Respondent also cites a case involving a violation of the general duty clause to support its position that the Secretary had to show that it was reasonably foreseeable that employees would be exposed to a hazardous substance. (Resp't Reply Br. at 13, *citing Fry's Tank Serv., Inc.*, 4 BNA OSHC 1515 (No. 4447, 1976) (consolidated).) Unlike a violation of the general duty clause, the cited standard relates to an employee being deprived of information that a container had a hazardous substance in it. 29 C.F.R. § 1910.1200(f)(6) (requiring labeling).

the standard by providing appropriate warning information for employees on the container itself. (Ex. XLI at 5-7.) The lack of a label was obvious. (Tr. 468; Ex. XLI.) There is no dispute that management employs where regularly in the area and that employees worked on the system. (Tr. 461, 468-69.) This is sufficient to show knowledge of the violative condition.

The Secretary alleges that this violation should be classified as other-than-serious and proposes no penalty.[110] While chemical irritation could occur from exposure, given how the substance was contained and the limited contact employees had with the system, the Secretary did not suggest that the violation could lead to serious injury or death. (Ex. XLI at 3; Tr. 922-23.) *See Safeway*, 16 BNA OSHC at 1517 (affirming violations of 29 C.F.R. § 1910.1200 as other-than-serious). The gravity appears to be low given that employees were less likely to encounter the solution and Pharmasol did provide some information about hazardous substances even if this container was unlabeled. (Tr. 274; Ex. XLI at 3.) As discussed above, Respondent is not a particularly large employer and the Secretary does not allege that the company's history or a lack of good faith warrants a penalty. (Tr. 908-11, 922-23.) Therefore, the Court agrees that this violation is other-than-serious, and no penalty should be assessed for it.

5. Other-Than-Serious Citation 2, Item 1 – 29 C.F.R. § 1910.178(l)(6) (certification of operator training)

The cited standard requires employers to certify that each PIT operator is trained and evaluated. 29 C.F.R. § 1910.178(l)(6). This certification must include: "the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation." 29 C.F.R. § 1910.178(l)(6). The Secretary alleges that Respondent "did

[110] The Secretary initially proposed a penalty of $2,700 for this item. (Ex. XLI at 2; Tr. 15.) At the trial, the Court granted the Secretary's motion to reclassify this citation item from serious to other-than-serious and reduced his penalty proposal to zero. (Tr. 18, 922-23.)

not ensure that the identity of the person(s) performing the training or evaluation was included in the training records for all employees who operate powered industrial trucks have been trained in accordance with this section [29 C.F.R. § 1910.178(l)(6)]." Pharmasol concedes that the standard applies and that its training records did not identify the person performing the training for AV and AA, but asserts that the violation is *de minimis*.[111] (Resp't Br. at 23, 60; Tr. 18, 64, 82-83, 152-53; Ex. XXIII.)

Rocha initially testified that he conducted all the PIT training for Pharmasol. (Tr. 85-86.) He explained that the only evidence of this training for employees that came to Pharmasol from Employment 2000 was copies of quizzes, entitled "Quiz & Answers 11-123," participants took after the training. (Tr. 151-53; Exs. XXIII, XXIX.) The quizzes do not identify who conducted the training or evaluation. *Id.* Rocha knew what information the evaluations contained and that there were no other certifications relating to the training for employees that came to Pharmasol from Employment 2000, including AV, AA, and JS.[112] (Tr. 151-53.) So, Respondent had actual knowledge that the quizzes did not include the required name of the trainer. (Tr. 151-53; Ex. XXIII.)

Respondent argues that since there was only one trainer, the failure to include this information in the quiz is of no import. (Resp't Br. at 23.) However, according to Rocha, at least during certain time periods Pharmasol had other trainers besides him.[113] (Tr. 148, 150, 187.) Further, to sustain his burden the Secretary did not have to prove the rationale behind the standard.

[111] The parties agreed that: "Citation 2, Item 1 – 29 C.F.R. § 1910.178(l)(6) applies to this citation." (Tr. 64.) The Court also finds that Pharmasol's training records did not identify the person performing the PIT training for JS. (Tr. 154.)

[112] Pharmasol included the name of the "Supervisor/Trainer" on its Forklift Training Records for at least some of its employees trained in 2014. (Ex. XVIII).

[113] Rocha testified that Messrs. Richard Szpala and Kevin Muldoon also trained PIT operators from December

Still, Respondent's contentions about the seriousness of the violation are relevant to the classification and appropriate penalty. And, as to that, the Secretary considers the violation to be other-than-serious and proposes no penalty for it. (Tr. 923-24.)

The Court agrees that the violation is other-than-serious as opposed to *de minimis*. Knowing that the training occurred and who conducted it is important to the assessment of the training's assessing sufficiency. Indeed, Respondent's expert himself recognized the importance of knowing who conducted the training to the evaluation of whether it met other subsections of the powered industrial truck standard, 29 C.F.R. § 1910.178. (Tr. 1069, 1175, 1275.) While in this case Respondent presented evidence that a qualified individual conducted the training, written confirmation of who did the training would give greater assurances about the company's safety program. As to the penalty, the Secretary acknowledges the violation is not particularly grave and does not suggest that the other penalty factors warrant a penalty. (Tr. 908-11, 923-24.) After considering the penalty factors, the Court agrees that no penalty is warranted, and none is assessed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 1 of Citation 1 for a serious violation of section 5(a)(1) of the Act is VACATED;
2. Item 2 of Citation 1 for a serious violation of section 5(a)(2) of the Act for failure to comply with the standard at 29 C.F.R. § 1910.176(a) is AFFIRMED and a penalty of $4,500 is ASSESSED;

2015 through March 2016. Both completed the same "train-the-trainer" course taken by Rocha in 2014. Rocha also testified that he was not the only PIT trainer during the six-month period prior to the accident. (Tr. 148-50, 186-87.)

3. Item 3 of Citation 1 for a serious violation of section 5(a)(2) of the Act for failure to comply with the standard at 29 C.F.R. § 1910.176(b) is AFFIRMED and a penalty of $1,800 is ASSESSED;
4. Item 4(a) of Citation 1 for a serious violation of section 5(a)(2) of the Act for failure to comply with the standard at 29 C.F.R. § 1910.178(l)(3)(i)(A) is VACATED;
5. Item 5 of Citation 1 for an other-than-serious violation of section 5(a)(2) of the Act for failure to comply with the standard at 29 C.F.R. § 1910.1200(f)(6)(ii) is AFFIRMED without the assessment of any penalty; and
6. Citation 2, Item 1 for an other-than-serious violation of section 5(a)(2) of the Act for failure to comply with the standard at 29 C.F.R. § 1910.178(l)(6) is AFFIRMED without the assessment of any penalty.

SO ORDERED.

/s/Dennis L. Phillips
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: September 4, 2018
Washington, D.C.