Some personal identifiers have been redacted for privacy purposes

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. WALKER INDUSTRIAL, LLC, Respondent.	DOCKET NO. 20-0562

Appearances:

Brian L. Hurt, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Frank Davis, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Dallas, Texas
Jeff T. Leslie, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Dallas, Texas
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On October 4, 2019, the Dallas Area Office of the Occupational Safety and Health Administration ("OSHA") received a report that an employee of Respondent, Walker Industrial, LLC ("Walker"), died as a result of an accident at a warehouse in Irving, Texas. (Ex. J-1, at 3). That same day, OSHA sent Compliance Safety and Health Officer ("CSHO") Ryan McAliney to inspect the worksite and investigate the cause of the fatality. (*Id.* at 3). From his investigation, CSHO McAliney learned that another Walker employee, while operating a JLG aerial lift (the "Aerial Lift"), had inadvertently backed into a Genie scissor lift (the "Scissor Lift") on which three Walker employees were standing while engaged in electric wire pulling activities. (*Id.*). The force

from the Aerial Lift caused the elevated Scissor Lift to fall over sideways to the ground, along with the employees in its basket. (*Id.*). The three employees all suffered severe injuries, and one of the employees died as a result. (*Id.* at 2).

Following the CSHO's investigation, OSHA issued, a two item *Citation and Notification of Penalty* ("*Citation*"). Item 1 of the *Citation* alleged a serious violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (the "OSH Act"), commonly referred to as the "general duty clause," for exposing the employees on the Scissor Lift to struck-by hazards from moving equipment. Item 2 of the *Citation* alleged a serious violation of 29 C.F.R. § 1926.451(f)(1) for loading the Scissor Lift in excess of its maximum intended load or rated capacity. Respondent filed a *Notice of Contest*, which brought this case before the Occupational Safety and Health Review Commission ("Commission").

A trial was conducted from August 31 to September 1, 2021, in Dallas, Texas. Nine witnesses testified at trial: (1) [redacted], an electrical apprentice with Walker and one of the employees working on the Scissor Lift when it fell; (2) [redacted], an apprentice electrician with Walker and the operator of the Aerial Lift at the time of the accident; (3) James Nichols, the Regional Safety Manager for Walker at the time of the accident; (4) Chris Smith, the superintendent for Walker at the site where the accident occurred; (5) CSHO McAliney; (6) Paul Guthorn, Respondent's expert witness[1]; (7) [redacted], an employee of Walker who was present at the time of the accident and had been acting as a "spotter"; (8) Rachel Neal, a Safety Coordinator for Walker at the time of the accident; and (9) Scott Sears, the Director for Safety and Loss Control at Walker at the time of the accident. Both parties filed post-trial briefs.

[1] Mr. Guthorn demonstrated his qualifications and was accepted as an expert witness "on JLG and scissor lifts that were involved in this case as to whether three people on the particular scissor lift in this case would increase the capacity for tip-over as it relates to the accident that happened in this case." (Tr. 438-48).

In accordance with Commission Rule 90(a)(1), 29 C.F.R. § 2200.90(a)(1), the Court now issues this *Decision and Order* setting forth its findings of fact and conclusions of law.

Jurisdiction

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the OSH Act and that Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3), (5). (Joint Pre-Trial Statement 3; Tr. 26-27); *see also Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Factual Background

I. Walker and the Frito Lay Worksite

Walker is a company engaged in electrical subcontracting. (Tr. 54, 295-97, 342-43; Ex. J-1 at 3). At the time relevant to this case, Walker had been subcontracted by general contractor Haskell to provide its services at a warehouse facility owned and operated by Frito Lay and located in Irving, Texas.[2] (Tr. 249-50, 266-68, 297-98, 309-11, 342-43; Ex. J-1 at 2).

II. The Accident

The accident occurred in the afternoon of October 4, 2019. On that date, seven Walker employees relevant to the events at issue were working at the Frito Lay jobsite: Chris Smith, Walker's superintendent at the Frito Lay worksite; [redacted], a foreman for Walker; [redacted], an apprentice electrician; [redacted], another apprentice electrician; and three additional Walker

[2] More specifically, Haskell had contracted with Frito Lay to construct a 110,000 square-foot addition to the existing warehouse, and Haskell had subcontracted with Walker to install the electricity in the new addition. (Tr. 245, 266-68, 342-43).

employees,[3] [redacted], [redacted], and [redacted].[4] (Tr. 54-55, 115-18, 121-24, 135-37, 268-70, 296-300, 314; Ex. J-1).

On the morning of October 4, 2019, Smith had assigned [redacted] to "pull"[5] wire in the warehouse along with [redacted] and [redacted]. (Tr. 138-39, 154, 313-15). To accomplish this task, [redacted] utilized the Aerial Lift. (Tr. 146). Meanwhile, [redacted] had been assigned to "run pipe"[6] in another area, while [redacted] and [redacted] worked elsewhere.[7] (Tr. 56-59).

Sometime after lunch, [redacted] repositioned the Aerial Lift to a different location in the warehouse so that he could address an issue he had encountered with his wire pulling.[8] (Tr. 157-58; Exs. J-40 at 33:09 to 34:14; J-41 at 41:48 to 42:24). This area was in front of several bay doors which were apparently used by Frito Lay for loading and unloading of freight trucks. (Tr. 90-92, 205-06, 360-63, Exs. J-26 to 30, 34).

As can be seen from the video footage admitted at trial, [redacted] drove the Aerial Lift into position with the aid of [redacted] acting as a spotter to pull around the corner of some shelving. (Tr. 115-18; Exs. J-40 at 33:09 to 34:14; J-41at 41:48 to 42:24). [redacted] ultimately positioned the Aerial Lift near a stack of pallets, which had been placed there by Frito Lay employees. (Tr. 123-24, 271, 347-48, 361-62; Exs. J-27, 28; J-40 at 34:40; J-41 at 43:04).

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[3] The official title of these last three employees is not clear from the record; however, based on their work activities, they were all apparently electricians of some sort.

[4] The Court has redacted the decedent's name for privacy purposes.

[5] According to multiple witnesses, "pulling wire" was the process of feeding multiple wires through an electrical conduit previously installed throughout the ceiling of the warehouse. (Tr. 69, 106-08, 131-33, 154-55, 217-18).

[6] "Running pipe" meant installing the electrical conduit through which wires would later be "pulled." (Tr. 59).

[7] [redacted] did not testify at trial, and the only witness to mention his activities on the morning of the accident was [redacted], who stated [redacted] and [redacted] were working somewhere in proximity to himself but also that he did not know what they were doing that morning. (Tr. 56-57).

[8] According to [redacted], there was an issuing with "get[ting] a hold" of the "mule tape" with the "fish tape" that was being used to pull the wires. (Tr. 157). The area to which he ultimately moved the Aerial Lift was in the vicinity of a 90-degree bend in the conduit where [redacted] believed the mule tape may have broken, causing the issue. (Tr. 157-58, 215-16, 236-37).

Shortly after [redacted] positioned the Aerial Lift (i.e., less than two minutes), [redacted] drove the Scissor Lift into the same area of the warehouse. (Tr. 67-68, 76, 79-80, 121-24; Exs. J-40 at 34:40 to 35:30; J-41 at 43:10 to 44:00). [redacted] acted as [redacted]'s spotter as he positioned the Scissor Lift, which ultimately stopped approximately five to ten feet from the Aerial Lift.[9] (Tr. 118-21, 161-62, 164, 166-67, 470-71, 491-92; Exs. J-40 at 34:55 to 35:50; J-41 at 43:10 to 44:00). A second stack of pallets was behind the Scissor Lift. (Exs. J-26, 31, 34; J-40 at 35:30). Together, the two stacks of pallets, one on either side of the stationary lifts, acted as "natural barricades" to other forklift traffic in the area. (Tr. 123-24, 271, 347-48, 361-62; Exs. J-26 to 28, 31 to 34; *see also, e.g.*, J-40 at 38:50 to 39:15 (example of forklift traffic pattern)). The Court also notes that that Aerial Lift involved in the accident had a working flashing strobe light, and an audible backup alarm. (Tr. 120, 220, 349; Ex. J-40 at 34:50). There was also a concave mirror on the ceiling of the warehouse above this area, to help view traffic and activity nearby. (Tr. 210-211; J-33).

As employees from the two machines worked, [redacted] was acting as a spotter, standing only a few feet away from the middle space between the Aerial Lift and Scissor Lift, holding a length of wire so it would not get tangled. (Tr. 118-19, 131-33, 162-64, 166-67, 218-29, 407, 470-71, 491-92; Ex. J-40 at 35:45 to 50:06). [redacted] was also acting as a second spotter on the far side of the warehouse while also operating a "wire tugger" at an electrical panel. (Tr. 120-21, 123, 184, 216, 260, 492-93; Ex. J-40 at 35:30 to 50:06; J-41 at 43:04 to 58:37). He moved closer to the

[9] The Court notes that this distance between the two lifts was the subject of some speculation at trial and seems to have represented the distance between the bases of the lifts. (Tr. 88-89 (five to ten feet), 92 (ten feet), 488-89 (five to ten feet)). Except for some slight movements, neither lift moved its base from these positions until the occurrence leading to the accident. (Exs. J-40 at 35:30, 44:45 to 45:07, 48:28 48:34; J-41 at 53:16 to 53:32, 56:55 to 57:04). However, the video footage demonstrates that when [redacted] lowered the arm and basket of the Aerial Lift, from which [redacted] was actually controlling the Lift's movement, the basket of the Aerial Lift was much closer than the bases of the two lifts. (Ex. J-40 at 49:16 to 50:02). Guthorn, Respondent's expert witness, ultimately concluded based on reviewing the video footage: "The total distance traveled by the boom lift from it's [sic] rest position until after the event was measured 3.93 feet." (Tr. 455).

Aerial Lift and Scissor Lift just before the collision. (J-40 at 49:48).

Moments before the accident, [redacted] was joined by [redacted] and [redacted] on the Scissor Lift, and all three can clearly be seen working from the lift basket at the same time. (Tr. 67-69, 75-76, 121-22, 130, 268; Exs. J-40 at 40:30 to 44:18; J-41 at 49:00 to 52:55). The three employees worked from the Scissor Lift basket despite the presence of a clear placard stating the "[m]aximum number of occupants" was "2." (Tr. 109-10, 126-27, 284-85; Exs. J-24, J-35, at Walker0097).

The four employees worked in close proximity for approximately six minutes. (Exs. J-40 at 35:30-50:06; J-41 at 44:00 to 58:37) The Scissor Lift was nearly fully extended upward with [redacted], [redacted], and [redacted] standing in the elevated basket, when [redacted] lowered his Aerial Lift basket, shortening the distance between the Aerial Lift and the Scissor Lift to about four feet. (Tr. 181, 455; Exs. J-40 at 49:16 to 50:02; J-41 at 58:18 to 58:37). Then, [redacted] inexplicably backed up the Aerial Lift and accidentally struck the extended Scissor Lift. (Tr. 181-82; Exs. J-40 at 50:02 to 50:06; J-41 at 58:18 to 58:37). The force from the Aerial Lift was sufficient to topple the Scissor Lift with all three employees on board. (Tr. 183, 450-51, 456, 459-60; Exs. J-40 at 50:06 to 50:11; J-41 at 58:37 to 58:46). The fall resulted in severe injuries for all three employees on the Scissor Lift and ultimately the death of [redacted]. (Ex. J-1, at 2)

III. OSHA's Investigation and Conclusions

OSHA received a report of the fatality the same day, October 4, 2019. (Ex. J-1, at 3). In response, CSHO McAliney was sent to investigate. (Ex. J-1, at 3). Following his investigation, CSHO McAliney concluded that Respondent had failed to sufficiently address the known struck-by hazard of the warehouse traffic in violation of the general duty clause. (Tr. 365-67; Ex. J-2). Even though Respondent had employed some of the methods of abatement identified in the

Citation, including the use of natural barricades, other employees acting as spotters, flashing strobe lights, and audible backup alarms[10], McAliney nonetheless found that Respondent failed to address the known hazard. (Tr. 373-75). CSHO McAliney also found that the maximum capacity for the Scissor Lift was listed as two people, but three of Respondent's employees were working from the Scissor Lift in violation of 29 C.F.R. § 1926.451(f)(1). (Tr. 375-76, 428-30; Ex. J-4). As a result, Complainant issued Respondent a *Citation and Notification of Penalty* alleging two serious violations of the Act, with a proposed total penalty of $24,290.

Discussion

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> *OSH ACT of 1970 Section (5)(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to struck-by hazards:*
>
> *a) On or about October 4, 2019 in the loading and unloading area, employees working from a Genie scissor lift were exposed to struck-by hazard from moving equipment.*
>
> *Among other methods, some feasible methods of abatement for this violation include but are not limited to:*
>
> *(a) Ensure all operators who utilize aerial lifts when other moving equipment and vehicles are present follow precautions such as but not limited to flags, roped off areas, flashing lights, and barricades as outlined in ANSI/SAIA A 92.6-2006 (R2014);*
> *(b) Ensure all operators who utilize aerial lifts always keep their attention in the direction of travel in accordance with Association of Equipment Manufactures, Safety Manual for Operating and Maintenance Personnel (Aerial Platform).*

The general duty clause of the Act states:

Each employer … shall furnish to each of his employees employment and a

[10] The Court also notes, although not listed in Citation 1, Item 1 as an abatement measure, the presence of the concave mirror above the work area. (J-33).

> *place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees ….”*

To prove a violation of the general duty clause, Complainant must show: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *K.E.R. Enters.*, 23 BNA OSHC 2241, 2242 (No. 08-1225, 2013); *Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005). Complainant must also prove the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Cranesville Block Co., Inc.*, 23 BNA OSHC 1977, 1985 (No. 08-0316, 2012) (consolidated); *Burford’s Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010).

Complainant has the burden of establishing each element of his case by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361, 1365 (No. 92-3855, 1995). “Preponderance of the evidence” has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the Evidence, BLACK’S LAW DICTIONARY (10th ed. 2014).

Respondent’s Preemption Argument Fails

Before addressing the elements of the alleged general duty clause violation, the Court will first address Respondent’s argument that the general duty clause violation alleged here is preempted by Subpart L of Part 1926 of OSHA’s regulations. In this regard, the Commission has held that “an applicable standard preempts application of the general duty clause where the standard is addressed to the particular hazard for which the employer has been cited.” *Healy*

Tibbits Builders, Inc., No. 15-1069, 2020 WL 5934209, at *2 (O.S.H.R.C. Sept. 30, 2020). Thus, "a citation alleging a violation of section 5(a)(1) is inappropriate when a specific standard applies to the facts." *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 2015 (No. 13390, 1981). "A citation under section 5(a)(1) will not be vacated, however, where the hazards presented are interrelated and not entirely covered by any single standard, or where a specific standard does not address the particular hazard for which the employer has been cited." *Id.*

In sum, Respondent argues that Subpart L of Part 1926, OSHA's scaffolding regulations for construction activities, "specifically address operation of boom and scissor lifts" and these "agreed safety standards associated with boom and scissor lifts have been discussed and adopted through lawful avenues, and the Secretary cannot expand upon those without pursuing those adjustments through the legislative process." *Resp. Br*. 4-5. Complainant did not address Respondent's preemption argument in its brief. As the Commission recently made clear in *Healy Tibbits Builders*, "preemption by a more specifically applicable standard is an affirmative defense" and Respondent must point to a specific standard "addressed to the particular hazard for which the employer has been cited." *Healy Tibbits Builders*, 2020 WL 5934209, at *2.

As framed in the *Citation*, the specific hazard that is the subject of the general duty clause violation is the "struck-by hazard from moving equipment" to the employees working on the Scissor Lift. Although the Court finds Subpart L generally applied to the use of the Scissor Lift,[11]

[11] Subpart L of Part 1926 applies to "all scaffolds used in workplaces covered by this part." 29 C.F.R. § 1926.450(a). "Scaffold" is defined as "any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or material or both" and "platform" is defined as "work surface elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated planks, fabricated decks, and fabricated platforms." 29 C.F.R. § 1926.450(b). Subpart L also covers any "mobile scaffold," which is a "powered or unpowered, portable, caster or wheel-mounted supported scaffold." By all accounts, the Genie Scissor Lift at issue here met these definitions. Moreover, the preamble to the promulgation of Subpart L as well as OSHA's own interpretation of Subpart L reinforce the conclusion that Subpart L applied to the use of the Scissor Lift. *See* Safety Standards for Scaffolds Used in the Construction Industry, 61 Fed. Reg. 46,026, 46,095 (Aug. 30, 1996) (to be codified at 29 C.F.R. pt. 1926) (determining that "elevating and rotating work platforms" are "scaffold[s] and that [they] should be addressed by subpart L"); Ex. J-6, OSHA Interpretation Letter, Re: "Subpart 'L' [of Part 1926] – Scissor Lifts" (Aug. 1, 2000) ("While there are no OSHA provisions that specifically address scissor

Respondent has failed to point to a specific standard that addresses the struck-by hazard alleged in the *Citation*. Instead, Respondent has pointed to a patchwork of different regulations, interpretation letters, hazard bulletins, and trial testimony in making its argument that the general duty clause violation is preempted on the facts presented here. Resp. Br. 4-5. The Court finds that Respondent failed to meet its burden to identify a specific applicable standard in arguing for preemption of the general duty clause violation. *See Healy Tibbits Builders*, 2020 WL 5934209, at *2 (analyzing the employer's preemption argument in terms of a specific standard cited by the employer as well as a closely related standard); *Ruhlin Co.*, 21 BNA OSHC 1779, 1784 (No. 04-2049, 2006) (employer failed to prove preemption where the advisory standard relied upon had not been incorporated into OSHA's regulations); *Ted Wilkerson, Inc.*, 9 BNA OSHC at 2014-15 (finding no preemption where specific standard cited by the employer did not "entirely cover[] the hazard alleged"); *cf. also Mansfield Indus., Inc.*, No. 17-1214, 2020 WL 8871368, at *2 (O.S.H.R.C. Dec. 31, 2020) ("the issue, for purposes of preemption, is whether that standard is effectively displaced by another standard that is *more* specifically applicable" (emphasis in original)).

Complainant Established the Existence of the Struck-by Hazard

To establish a violation of the general duty clause, Complainant must first define the hazard at issue. *K.E.R. Enters.*, 23 BNA OSHC at 2242. "A safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm

lifts, they do meet the definition of a scaffold …"); Ex. J-5, OSHA Interpretation Letter, Re: "Subpart 'L' [of Part 1926] and Appendices, Scissors Lifts" (Feb. 23, 2000) (stating that "since scissor lifts do meet the definition of a scaffold … employers must comply with other applicable provisions of Subpart L when using scissor lifts"); *see also Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1444 (No. 80-3203, 1983), *aff'd,* 725 F.2d 1237 (9th Cir. 1984) ("The preamble is the best and most authoritative statement of the Secretary's legislative intent."); *Union Tank Car Co.*, 18 BNA OSHC 1067 (No. 96-0563, 1997) (interpretation letters serve as some authority as to the meaning of ambiguous regulations).

to employees will occur." *Baroid Div. of NL Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 660 F.2d 439, 444 (10th Cir. 1981). When Complainant proceeds under the general duty clause he must define the hazard "in a way that apprises the employer of its obligations and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004); *see also Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993) (consolidated) ("When the Secretary proceeds under the general duty clause, he must meet the same minimal criterion regarding the nature of the alleged hazard as he does when promulgating a section 5(a)(2) standard."). There is no requirement that there be a significant risk of the hazard coming to fruition, only that if the hazardous event occurred, it would create a significant risk of harm to employees. *Waldon Health Care Ctr.*, 16 BNA OSHC at 1060, citing *Kelly Springfield Tire Co. v. Donovan,* 729 F.2d 317, 322-25 (5th Cir.1984).[12] The Commission has held that "the existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances." *Waldon Health Care Ctr.*, 16 BNA OSHC at 1060, citing *Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n,* 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973).

Here, the *Citation* framed the hazard as a "struck-by hazard from moving equipment" for the employees working on the Scissor Lift. The CSHO's Violation Worksheet refers to the hazard of the Aerial Lift and the Scissor Lift "being operated within 3-5 ft. from each other." (Ex. J-2, at 3). In his brief, Complainant argues both the proximity of the Aerial Lift as well as the forklift traffic in the warehouse exposed the employees on the Scissor Lift to a potential struck-by hazard.

[12] *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000) ("Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent.").

Complainant's Br. 9-10.

The Court finds that Complainant established the existence of a struck-by hazard from other moving equipment to the employees on the Scissor Lift. It is clear from multiple points in the videos submitted at trial that the Frito Lay forklifts passed in close proximity to the employees working on the elevated Scissor Lift. (*E.g.*, Ex. 40 at 41:50-42:00, 48:35-48:43; J-41 at 47:30 to 47:43). It is also undisputed that the Aerial Lift was working in even closer proximity to the Scissor Lift, approximately five to ten feet from base to base, with less than four feet between the baskets. (Tr. 88-89, 92, 455, 488-89). Particularly because an accident did in fact occur, the Court finds Complainant has proven the alleged struck-by hazard from other moving equipment could "occur under other than a freakish or utterly implausible concurrence of circumstances." *Waldon Health Care Ctr.*, 16 BNA OSHC at 1060; *see also S&G Packaging Co.*, 19 BNA OSHC 1503, 1505 (No. 98-1107, 2001) (occurrence of injuries can be evidence that a hazard existed); *Pratt & Whitney Aircraft Grp.*, 12 BNA OSHC 1770, 1772 (No. 80-5830, 1986) ("Injury records are relevant evidence to establish the presence or absence of a hazard.").

Respondent Recognized the Struck-by Hazard

Complainant can establish hazard recognition either "by proof that a hazard is recognized as such by the employer or by general understanding in the employer's industry." *Integra Health Mgmt., Inc.*, 2019 WL 1142920, at *7 (No. 13-1124, 2019) (internal quotations and punctuation omitted); *see also Kelly Springfield Tire Co., Inc.*, 729 F.2d 317, 321 ("Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry."). Complainant argues that he has established both types of recognition here. Comp. Br. 10-13.

A. Employer Recognition

With regard to an employer's recognition of a hazard, work rules and safety precautions taken by the employer are evidence that the employer recognized the hazard. *See Integra Health Mgmt., Inc.*, No. 13-1224, 2019 WL 1142920, at *8 (O.S.H.R.C., Mar. 4, 2019) ("Work rules addressing a hazard have been found to establish recognition of that hazard."); *Waldon Health Care Ctr.*, 16 BNA OSHC at 1061 ("Commission precedent establishes that precautions taken by an employer can be used to establish recognition in conjunction with other evidence."). "While an employer's safety precautions alone do not establish that the employer believed that those precautions were necessary for compliance with the Act … precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence." *Beverly Enters, Inc.*, 19 BNA OSHC 1161, 1186 (No. 91-3144, 2000) (consolidated).

Respondent's Safe Work Plan, which was to be completed before each work task, included an assessment of whether equipment traffic would be present in the workspace, and whether precautions, including the use of spotters and barricades, were necessary to address that hazard. (Tr. 190-92, 194-96, 226-28, 328-30, 352-55; Ex. J-3). The Code of Safe Practices for Haskell, the general contractor on the Frito Lay project, likewise contained the following requirement: "When working from an elevation, the work area must be properly barricaded and/or utilize spotters to prevent other personnel or traffic from entering the area." (J-36, at 4). As a subcontractor of Haskell, Walker was required to comply with this Code, and Smith, Respondent's superintendent on the Frito Lay worksite, was aware of this requirement. (Tr. 266-68, 270-72, 309-11).

Respondent's safety and supervisory personnel were also specifically aware of the struck-by hazards posed by moving vehicles for employees working on scissor lifts. As just recounted, Smith was aware of Haskell's Code for addressing this hazard. (Tr. 309-11). Neal, Walker's

Safety Coordinator, described the training Respondent had implemented for its employees to address hazards posed by moving equipment, including the use of barricades, flags, and spotters. (Tr. 506-07). Likewise, Nichols, Walker's Regional Safety Manager, indicated that the Job Hazard Assessments completed by employees prior to work, would include assessing whether hazards presented by other moving equipment would be present and how to address them. (Tr. 251-55).

Respondent's supervisory and safety personnel all indicated that Walker's employees were trained in methods to address these hazards and authorized to employ various methods on a case-by-case basis. (Tr. 251-55, 307-08, 506-07). More particularly, the evidence shows that the employees involved in this accident had all taken multiple precautions, many of which are listed as abatement measures in the *Citation*, to address these hazards. [redacted] employed the use of a spotter and the "natural barrier" of the stack of pallets when moving the Aerial Lift into position; [redacted] did likewise when moving the Scissor Lift into position. (Tr. 115-18, 123-24, 271, 347-48, 361-62; Exs. J-26 to 28, 31, 34, J-40 at 33:09 to 35:50; J-41 at 41:48 to 44:00). [redacted], [redacted], and [redacted] were all familiar with methods to address the struck-by hazard posed by moving equipment. (Tr. 62, 124, 149, 162, 196-97, 470-71, 477).

The Court finds that Respondent specifically recognized the struck-by hazard alleged in the *Citation*.

B. Industry Recognition

"Where a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question." *Kelly Springfield Tire Co., Inc.*, 729 F.2d at 321. Industry recognition "centers on the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question." *Id.* at 322, quoting *Nat'l Realty & Constr. Co.*, 489 F.2d at 1265 n.32. In arguing for a finding of industry recognition, Complainant

relies on the existence of ANSI A92.6-2006 governing the use of "Self-Propelled Elevating Work Platforms." Comp. Br. 10-11; *see also* Exs. J-19 (text of ANSI standard), J-22 (manual for Scissor Lift incorporating the same ANSI standard). "Industry standards and guidelines such as those published by ANSI are evidence of industry recognition." *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996); *see also Seward Motor Freight Inc.*, 13 BNA OSHC 2230, 2232 n.5 (No. 86-1691, 1989) ("An ANSI standard is relevant evidence that a hazard is 'recognized' within the meaning of section 5(a)(1)"). However, the Commission has sometimes been reluctant to rely on a relevant industry standard as the *sole* evidence of industry recognition. *See, e.g.*, *Beverly Enters., Inc.*, 19 BNA OSHC at 1187-88 (finding an industry standard was evidence of industry recognition but also relying on expert testimony to find industry recognition); *Kokosing Constr. Co.*, 17 BNA OSHC at 1873-74 (relying on ANSI standards and expert witness testimony to find industry recognition); *Coleco Indus., Inc.*, 14 BNA OSHC 1961, 1966 (No. 84-546, 1991) ("Because we find that Coleco acquired knowledge of the hazards through its own supervisors and the warnings of Simmons Elevator, we do not rely on the ANSI standard as evidence of industry recognition."); *Duriron Co.*, 11 BNA OSHC 1405, 1407, 1407 n.2 (No. 77-2847, 1983) (noting that reliance on industry standard was permissible in establishing recognition but basing recognition on employer's actual recognition as well as expert testimony of industry recognition); *but see Kan. City Light & Power Co.*, 10 BNA OSHC 1417, 1421-22 (No. 76-5255, 1982) (finding that industry standards could establish industry recognition but also recounting testimony from the CSHO and multiple lay witnesses as to the issue of recognition).

Because the evidence firmly establishes that Respondent recognized the hazard and Complainant need only prove the employer's recognition *or* industry recognition, Complainant has sufficiently established this element of the violation. *See Integra Health Mgmt., Inc.*, 2019

WL 1142920, at *7 (No. 13-1124, 2019). The Court therefore declines to further analyze the separate ground of industry recognition. *See Coleco Indus., Inc.*, 14 BNA OSHC at 1966 ("Because we find that Coleco acquired knowledge of the hazards through its own supervisors and the warnings of Simmons Elevator, we do not rely on the ANSI standard as evidence of industry recognition.").

Death or Serious Physical Harm

To determine whether a hazard is "causing or likely to cause death or serious physical harm" the Commission does not look to the likelihood of an accident or injury occurring, but whether, if an accident occurred, the results would likely cause death or serious harm. *Beverly Enters., Inc.*, 19 BNA OSHC at 1188; *Waldon Health Care Ctr.*, 16 BNA OSHC at 1060; *R.L. Sanders Roofing Co.,* 7 BNA OSHC 1566, 1569 (No. 76–2690, 1979), *rev'd on other grounds*, 620 F.2d 97 (5th Cir.1980). Respondent has not contested this element of Complainant's case. The Court finds the serious injury of two Walker employees working on the Scissor Lift and the death of the third employee are sufficient to establish the serious characterization of the violation. *See Coleco Indus., Inc.*, 14 BNA OSHC at 1964 (finding element established where employer did not challenge it and fatality resulted from the instigating accident); *cf. Trumid Constr. Co., Inc.*, 14 BNA OSHC 1784, 1789 (No. 86-1139, 1990) (finding "[t]he fatality demonstrates the seriousness of the … violation" in the context of a violation's serious classification).

Complainant Failed to Establish Abatement Element

To prove feasible means of abatement, Complainant "must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enters., Inc.*, 19 BNA OSHC at 1191.

Item 1 of the *Citation* set forth the following as feasible means of abatement:

> (a) Ensure all operators who utilize aerial lifts when other moving equipment and vehicles are present follow precautions such as but not limited to flags, roped off areas, flashing lights, and barricades as outlined in the ANSI/SAIA A.92.6-2006 (R2014);
>
> (b) Ensure all operators who utilize aerial lifts always keep their attention in the direction of travel in accordance with Association of Equipment Manufactures [sic], Safety Manual for Operating and Maintenance Personnel (Aerial Platform).

At trial, the CSHO made it clear that the abatement listed in (b) only relates to the training and activity of the employee who was working from the JLG aerial lift. (Tr. 369, 371-72, 434). However, as set forth in the *Citation*, the general duty clause violation alleges a failure to protect the "employees working from a Genie scissor lift." The Court therefore focuses its attention primarily on the abatement methods set forth in (a), as those are the ones Complainant seemed to focus on as the subject of the general duty clause violation alleged here.[13] *Beverly Enters., Inc.*, 19 BNA OSHC at 1191.

The abatement set forth in (a) alleges several different abatement methods, "such as but not limited to flags, roped off areas, flashing lights, and barricades." Nothing from the CSHO's testimony nor Complainant's post-trial brief suggest that *all* of these methods were meant to be employed as "component[s] of a single means of abatement [where] all of the measures must be implemented to abate the violation." *A.H. Sturgill Roofing, Inc.*, No. 13-0224, 2019 WL 1099857, at *9. The Court therefore reads these as alternative abatement measures, in which case Complainant "can prevail on [the abatement] element only if he proves [Respondent] implemented none of the measures." *Id.*

[13] The Court also notes that [redacted] was trained to look in the direction of travel when operating aerial lifts and was disciplined in connection with this incident. (Tr. 198-202, 208-09, 342). Although there was testimony that [redacted] did not look in the direction of travel, the Court's review of video evidence indicates that he knew the scissor lift was right behind him, interacted with the workers on the Scissor Lift, looked back at them before he moved the Aerial Lift, and again just before impact. (J-40 at 46:40, 49:51, 50:04).

Here, Complainant failed to prove feasibility and effectiveness of the identified abatement items because the trial record establishes that Respondent's employees had actually implemented many of the abatement methods listed. Two employees, [redacted] and [redacted], were acting as spotters. (J-40 at 49:48). Two stacks of pallets acted as barricades from other traffic and activity in the warehouse. ((Tr. 123-24, 271, 347-48, 361-62; Exs. J-26-28, 31, 34; J-40 at 35:30). The Aerial Lift involved in the accident had a working flashing strobe light, and a working audible backup alarm. (Tr. 120, 220, 349; Ex. J-40 at 34:50). There was also a concave mirror on the ceiling of the warehouse, above this area, to help view traffic and activity in the area. (Tr. 210-211; J-33).

Despite the fact that Respondent had already implemented many of Complainant's proposed abatement methods, Complainant may yet establish the abatement element of a general duty clause violation if he can demonstrate that Respondent's existing measures were inadequate. *U.S. Postal Serv.*, 21 BNA OSHC, 1767, 1773-74 (No. 04-0316, 2006). Complainant has not done so. Complainant failed to demonstrate that additional spotters, additional lights, additional backup alarms, or additional barricades[14] would have materially reduced the hazard. Complainant's argument that Respondent's use of natural barriers was inadequate boils down to two points. First, the pallets did not completely eliminate the ability of the Scissor Lift to move into the "aisleway" that had been created by the pallets, where other warehouse forklifts were traveling. Complainant's Br. 18-19. Complainant refers to several points in the videos where he argues the natural barriers were not providing the Scissor Lift with full protection from the struck-by hazard from nearby moving forklifts. *Id.* at 19. Second, Complainant further argues that the setup of the

[14] Even addressing the possibility of an additional barricade placed between the Aerial Lift and the Scissor Lift, the Aerial Lift basket which struck the Scissor Lift can (and did) extend horizontally well beyond the base of the Aerial Lift.

pallets here actually "increased the struck-by risk between the [Aerial Lift] and [the Scissor Lift]." *Id.* In this regard, Complainant argues that the pallets presented an obstacle to [redacted] when he attempted to move the Aerial Lift and his attempt to maneuver around the pallet, at least in part, is what caused the accident to occur. *Id.* 19-20.

It is Complainant's burden to demonstrate that his proposed abatement measures would materially reduce the hazard beyond the existing measures. *See Mo. Basin Well Serv., Inc.*, 26 BNA OSHC 2314, 2319 (No. 13-1817, 2018); *Pelron Corp.*, 12 BNA OSHC 1833, 1838 (No. 82-388, 1986) ("In summary, the Secretary failed to prove, through the testimony of experts familiar with [respondent's] industry, any measure to improve [respondent's] safety program that would have materially reduced the hazard here."); *see also U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006); ("To show that a proposed safety measure will materially reduce a hazard, the Secretary must submit evidence proving, as a threshold matter, that the methods undertaken by the employer to address the alleged hazard were inadequate. Where the Secretary fails to show any such inadequacy, a violation of the general duty clause has not been established.")

Here, Complainant produced no expert witness to demonstrate that its proposed abatement methods would materially reduce the hazard as compared to Respondent's existing and already implemented measures. *See Mo. Basin Well Serv., Inc.*, 26 BNA OSHC at 2319-20 (no expert testimony supported the Secretary's proposed abatement measure); *Pelron Corp.*, 12 BNA OSHC at 1838 ("In summary, the Secretary failed to prove, through the testimony of experts familiar with [respondent's] industry, any measure to improve [respondent's] safety program that would have materially reduced the hazard here."). Complainant's reliance on the ANSI standard in place of expert testimony is misplaced where the standard is general and not tailored to the specific scenario

presented in this case.[15] *See Mo. Basin Well Serv., Inc.*, 26 BNA OSHC at 2320-21 (finding industry standard insufficient to establish the proposed abatement measure where it did "not appear to have been intended to address the circumstances at issue here"); *Peacock Eng'g, Inc.*, 26 BNA OSHC 1588, 1593 (No. 11-2780, 2017) (finding industry standard insufficient to establish the proposed abatement measure where it did "not address the high degree of precision required in [respondent's] installation work"). Thus, while Complainant's arguments may identify some perceived imperfections in Respondent's use of stacks of pallets as natural barricades, two employee spotters, flashing strobe light, backup alarm, and an overhead traffic/activity mirror, neither argument points to any evidence that use of different or additional measures as proposed in the *Citation*, would have been any more effective at addressing the particular struck-by hazard at issue – when [redacted] suddenly and inexplicably drove the Aerial Lift into the Scissor Lift. (J-40 at 49:57).

Accordingly, Complainant failed to meet his burden of demonstrating feasible alternative means of abatement that would have materially reduced or eliminated the hazard, and thus failed to establish a violation of the general duty clause.

Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

[15] The Court notes that the copy of ANSI 92.6 – 2006, submitted as Exhibit J-19, is nearly 40 pages long. Nowhere in the *Citation*, or even in Complainant's post-trial brief, is a specific section of this standard identified as the one upon which Complainant is relying for its proposed method of abatement. Taken from Respondent's cross-examination of the CSHO, the relevant section appears to be 7.10(10), which reads:

> **Precaution for other moving equipment.** When other moving equipment and vehicles are present, special precautions shall be taken to comply with local ordinances or safety standards established for the workplace. Warnings *such as, but not limited to*, flags, roped off areas, flashing lights, and barricades shall be used *as appropriate*.

(Tr. 408-12; Ex. J-19, at 28 (emphasis added)). Thus, by its own terms, the section of the ANSI standard upon which Complainant is apparently relying implies a deal of discretion in which abatement methods should be used depending on the specifics of the work environment involved.

29 CFR 1926.451(f)(1): Scaffold and/or scaffold components were loaded in excess of their maximum intended loads or rated capacities, whichever was less:

a) On or about October 4, 2019, in the loading and unloading Area, employees working and operating a Genie scissor lift in excess of its maximal occupancy were exposed to scaffold collapse and tip over hazards.

The cited standard states:

Scaffolds and scaffold components shall not be loaded in excess of their maximum intended loads or rated capacities, whichever is less.

29 CFR §1926.451(f)(1).

To establish a violation of an OSHA Section 5(a)(2) standard, Complainant must prove: (1) the standard applied to the work being performed; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).[16]

The Cited Standard Applied to the Scissor Lift

Respondent's arguments do not focus on the applicability of the cited standard.[17] The Court finds that the Scissor Lift meets the definition of a "scaffold" and thus the standard applied to its use. *See* 29 C.F.R. § 1926.450(a) ("This subpart applies to all scaffolds used in workplaces covered by this part."; *id.* at (b) (defining "scaffold" as "*any* temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for

[16] As with each element of a general duty clause violation, Complainant again has the burden of proving each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC at 1365.

[17] Although Respondent argues "[t]he cited standard does not apply to the cited condition," the arguments that follow this statement all relate to whether having three employees in the Scissor Lift constituted a violation based on their total weight, not whether the standard governed the use of the Scissor Lift at all. *Resp. Br*. 16-18. See also Tr. 376-377.

supporting employees or materials or both" (emphasis added)); Safety Standards for Scaffolds Used in the Construction Industry, 61 Fed. Reg. 46,026, 46,095 (Aug. 30, 1996) (to be codified at 29 C.F.R. pt. 1926) (determining that "elevating and rotating work platforms" are "scaffold[s] and that [they] should be addressed by subpart L"); Ex. J-5, OSHA Interpretation Letter, Re: "Subpart 'L' [of Part 1926] and Appendices, Scissors Lifts" (Feb. 23, 2000) ("[S]ince scissor lifts do meet the definition of a scaffold … employers must comply with other applicable provisions of Subpart L when using scissor lifts."); Ex. J-6, Re: Subpart 'L' [of Part 1926] – Scissor Lifts, (Aug. 1, 2000) ("While there are no OSHA provisions that specifically address scissor lifts, they do meet the definition of a scaffold …."); *see also Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1444 (No. 80-3203, 1983), *aff'd,* 725 F.2d 1237 (9th Cir. 1984) ("The preamble is the best and most authoritative statement of the Secretary's legislative intent."); *Union Tank Car Co.*, 18 BNA OSHC 1067 (No. 96-0563, 1997) (interpretation letters serve as some authority as to the meaning of ambiguous regulations). The cited regulation applied to the Scissor Lift and working conditions.

The Standard Was Violated

According to its plain language, Complainant can demonstrate a violation of 29 C.F.R. § 1926.451(f)(1) by showing that the Scissor Lift was loaded in excess of either its "maximum intended load" or its "rated capacity." 29 C.F.R. § 1926.451(f)(1). The parties seem to agree that the term "maximum intended load" relates to a weight limitation. Rather, the parties' disagreement stems from whether "rated capacity" *also* refers to a weight limitation or whether it can be applied to the two-person occupancy limitation the manufacturer had placed on the Scissor Lift. (Tr. 109-10, 126-27, 284-85; Exs. J-24, J-35, at Walker0097). Respondent argues that Complainant failed to prove that the three employees on the Scissor Lift exceeded the manufacturer's total weight limitation. Based on its interpretation of the term "capacity," the Court agrees with Complainant

that Respondent violated the standard when three employees were working from the Scissor Lift with a two-person occupancy limitation.

Subpart L of Part 1926 does not define the term "capacity" or "rated capacity."[18] However, as the Commission recently held, "[Commission] precedent makes it clear that an undefined term's meaning can be determined by consulting a contemporaneous dictionary." *Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785, at *2 (O.S.H.R.C., July 22, 2021). Dictionaries contemporaneous to the promulgation of this standard[19] define "capacity" as "the maximum amount or number that can be received or contained."[20] The Court does not find that this definition sufficiently clears the ambiguity in the meaning of the standard because while it includes "the maximum … number," which would support Complainant's theory that "capacity" can cover occupancy limitations, it also includes "the maximum amount," which would support Respondent's theory that the term refers to weight. However, additional contextual evidence supports Complainant's interpretation. *See Garcia-Carias v. Holder*, 697 F.3d 257, 263 (5th Cir. 2012) ("a statutory provision cannot be read in isolation, but necessarily derives meaning from … context of the statute as a whole.").

First, the regulation refers to "maximum loads *or* rated capacities." 29 C.F.R. § 1926.451(f)(1) (emphasis added). "Terms connected by 'or' … normally are read to have separate meanings and significance." *U.S. v. Wilson*, 41 F.3d 399, 401 (8th Cir. 1994); *see also*

[18] Respondent points to the definitions of "maximum intended load" and "rated load" in 29 C.F.R. § 1926.450 and argues that "neither definition make any reference to number of persons" and further that "[i]t is undisputed through testimony that 'load' equals weight, not numerosity." Resp. Br. 17. While these statements are true enough, the Court does not find these definitions particularly illuminating as to the meaning of "capacity," which under the standard is a separate limitation on the use of scaffolds.

[19] 29 C.F.R. § 1926.451(f)(1) was promulgated in 1996 as part of OSHA's "Safety Standards for Scaffolds Used in the Construction Industry." 61 Fed. Reg. at 46,058. Thus, the Court has consulted dictionaries contemporaneous with the original promulgation of the standard. *See Roy Rock, LLC*, 2021 WL 3624785 at *3 (consulting a 1986 dictionary for a regulation promulgated in 1988).

[20] *Capacity*, RANDOM HOUSE WEBSTER'S 194 (1997) (definition 2); *Capacity*, RANDOM HOUSE COMPACT UNABRIDGED DICTIONARY 308 (1996) (definition 2, defining the term identically).

Quindlen v. Prudential Ins. Co. of Am., 482 F.2d 876, 878 (5th Cir. 1973) ("[A]s a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately."). However, under Respondent's proposed meaning, both terms refer to weight limitations, effectively reading "rated capacity" out of the standard. Such a reading not only violates the standard's explicit use of the word "or" but also violates the canon against surplusage – "the idea that every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019), quoting A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012).

Second, the standard's preamble, which "is the best and most authoritative statement of the Secretary's legislative intent,"[21] further suggests that the terms "maximum load" and "rated capacity" were intended to have different meanings. The preamble, in salient part, states: "This final rule [i.e., 29 C.F.R. § 1926.451(f)(1)] also complements § 1926.451(a)(1), which requires that scaffolds be capable of supporting four times the maximum intended load without failure. Compliance with [29 C.F.R. § 1926.451(f)(1)] ensures that the scaffold's capacity is not exceeded." 61 Fed. Reg. at 46,058. This statement bolsters the Court's conclusion that the two provisions are meant to have different meanings, with "maximum load" having a similar meaning to "maximum intended load"[22] and "capacity" or "rated capacity" to have a different meaning. Under the dictionary definition previously set forth, "capacity" naturally encompasses "the maximum … number" of people allowed on the Scissor Lift, as Complainant has charged the

[21] *Phelps Dodge Corp.*, 11 BNA OSHC at 1444.

[22] "Maximum intended load" *is* defined under Subpart L as "the total load of all persons, equipment, tools, materials, transmitted loads, and other loads reasonably anticipated to be applied to a scaffold or scaffold component at any one time." 29 C.F.R. § 1926.450(b). Neither party disputes that this refers to a weight limitation.

violation here. RANDOM HOUSE COMPACT UNABRIDGED DICTIONARY 308; RANDOM HOUSE WEBSTER'S 194.

In arguing for the standard to apply exclusively to weight limitations, Respondent relies on sources extraneous to the standard to support its proffered meaning. Respondent first points to the testimony of Mr. Guthorn, Respondent's expert witness, in which he stated the meaning of "load" is equivalent to "weight." Resp. Br. 17, citing Tr. 461. However, the Court does not defer to Mr. Guthorn's opinion as to the meaning of industry terms or regulations as they relate to scissor lifts. He was first offered by Respondent as an expert as to "whether th[e] Scissor Lift was subject to greater exposure to tip over because of the three people on it" and ultimately recognized by the Court as an "an expert on JLG and scissor lifts that were involved in this case as to whether three people on the particular scissor lift in this case would increase the capacity for tip-over as it relates to the accident that happened in this case."[23] (Tr. 447-48). The Court therefore gives no determinative weight to Mr. Guthorn's testimony as to the meaning of the terms found in 29 C.F.R. § 1926.451(f)(1).

The remaining pieces of evidence on which Respondent relies fare no better in swaying the Court to Respondent's reading of the standard. Respondent first points to an OSHA "Hazard Alert" on the subject of scissor lifts issued in February of 2016. (Ex. J-21, at 2). One portion of this Hazard Alert reads: "Never allow the weight on the work platform to exceed the manufacturer's load rating." By its own terms, the Hazard Alert "is not a standard or regulation," "creates no new legal obligations," and its "recommendations are advisory in nature [and] informational in content." (Ex. J-21, at 4). Even if its lack of substantive legal value is forgiven,

[23] The Court notes that both of these subjects closely relate to the cause of the accident. However, "[d]etermining whether the standard was violated is not dependent on the cause of the accident." *Ceco Concrete Constr., LLC*, No. 17-0483, 2021 WL 2311867, at *8 n.4 (O.S.H.R.C. Feb. 26, 2021), quoting *Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1707-08 n.4 (No. 96-1330, 2001).

the Hazard Alert does not support Respondent's interpretation. The prohibition in the Hazard Alert refers to a "load rating." (J-21, at 2). It thus, at most, merely reflects the first limitation found in 29 C.F.R. § 1926.451(f)(1) for "maximum intended loads" but does not provide any insight into the separate meaning of "capacity" or "rated capacity."

Respondent also points to the ANSI 92.6 – 2006. Resp. Br. 18. Because these standards have not been incorporated into OSHA's regulations,[24] they are not authoritative as to the meaning of the standard. *See Ruhlin Co.*, 21 BNA OSHC at 1784. In any event, the portion of the ANSI standard on which Respondent relies again does not support Respondent's proffered meaning. Respondent points to Section 4.8.1 which refers to a "rated horizontal load." (Ex. J-21, at 17). This again provides no insight into the separate term "capacity" found in 29 C.F.R. § 1926.451(f)(1).[25]

The final piece of evidence on which Respondent relies, the manual for the Genie Scissor Lift involved in the accident, does refer to a "maximum platform capacity" of 700 pounds. (Ex. J-35, at Walker0097). However, in the same table there is also a column for "Maximum occupants [of] 2" for the Scissor Lift. (*Id.*). The manual thus offers no support for the notion that the cited standard exclusively governs weight limitations, as Respondent suggests.

The Court finds that the term "capacity," as used in 29 C.F.R. § 1926.451(f)(1), includes the manufacturer's stated, and labeled, limitation on the maximum number of people that can work

[24] The Court notes that a previous version of this standard, ANSI 92.6 – 1990, is listed as part of "Non-Mandatory Appendix C to Subpart L of Part 1926" entitled "List of National Consensus Standards." App'x C to Subpart L of Part 1926 (2022). Being non-mandatory in nature, this Appendix is not incorporated as a substantive OSHA regulation. *See Ruhlin Co.*, 21 BNA OSHC 1779, 1784 (No. 04-2049, 2006) ("an advisory, not a mandatory, standard … is *not* incorporated as an OSHA standard" (emphasis in original)).

[25] The Court notes two further aspects of this section of the ANSI standard. First, the primary measurement being discussed in this section is force measured in Newtons, a unit of measurement which encompasses both weight and acceleration. *Newton*, BRITTANICA, https://www.britannica.com/science/newton-unit-of-measurement (last visited June 8, 2022). Thus, this section is not primarily concerned with weight alone. Second, this section also refers at one point to "rated *number* of occupants." (Ex. J-21, at 17). If anything, this cuts against Respondent's proffered meaning of the standard.

from a scaffold – such as the two-person manufacturer limitation on the Scissor Lift at issue here. Because it is undisputed that three Walker employees were working from the Scissor Lift which had a two-person capacity limitation, the Court finds Complainant established that Respondent violated 29 C.F.R. § 1926.451(f)(1). (Ex. J-40 at 46:10).

Employees Were Exposed to the Hazard

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Here, it is uncontroverted that three employees were on the Scissor Lift and were actually exposed to the violative condition.

Nevertheless, Respondent argues there was no exposure here because "[t]here is no evidence in the record to prove Walker violated the weight requirements or that the number of employees on the lift created a hazard." Resp. Br. 19. As to Respondent's first point, the Court has already found that the standard applies not only to weight limitations but also "capacity" limitations, which includes the maximum number of people allowed in the Scissor Lift basket. As to Respondent's second point, where, as here, Complainant has promulgated and enforced a safety standard, the hazard is presumed.[26] *See Sanderson Farms v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016) ("Since OSHA is required to determine that there is a hazard before issuing a standard, the

[26] Under the law of the Fifth Circuit, "lack of hazard is an affirmative defense to a *prima facie* case establishing violation of a safety standard." *Sanderson Farms*, 811 F.3d at 735. As such, it must be raised in a Respondent's answer or may be considered waived. *See* 29 C.F.R. § 2200.34(b)(3) & (4). Here, Respondent did not raise this affirmative defense in either its Answer or its First Amended Answer. It is not clear to the Court that in raising this issue vis-à-vis the exposure element of the Secretary's *prima* facie case that Respondent is attempting to assert such a defense now. Indeed, Respondent's brief cites to no case law setting forth the lack-of-hazard defense in making its argument. In any event, to the extent Respondent is raising a lack-of-hazard defense for the first time in its post-trial brief, the Court finds any reliance on this defense to have been waived. *See Mansfield Indus., Inc.*, No. 17-1214, 2020 WL 8871368, at *3 (O.S.H.R.C. Dec. 31, 2020) ("Mansfield failed to include preemption in its answer and did not raise the argument until its post-hearing brief, which was filed with the judge at the same time as the Secretary's post-hearing brief, with no reply briefs for either side. As such, we find that the company waived [this affirmative defense].").

Secretary is not ordinarily required to prove the existence of a hazard each time a standard is enforced. … Therefore, hazard is generally presumed in safety standards unless the regulation requires the Secretary to prove it."); *BP Prods. N. Am., & Husky Refining*, No. 10-0637, 2018 WL 5314836, *14 (O.S.H.R.C. Sept. 27, 2018); *A.L. Baumgaartner Constr.*, 16 BNA OSHC 1995, 2001 (No. 92-1022, 1994) ("Separate proof of a hazard is not required by the standard"). The Court finds the three employees on the Scissor Lift were exposed to the violative condition.

Complainant Established Actual Knowledge of the Condition

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Here, Respondent has not contested the knowledge element of the violation, and the record sufficiently establishes Respondent's actual knowledge. [redacted] was designated as a foreman who had supervisory responsibility over the other two employees working on the Scissor Lift. (Tr. 54-55, 225, 285, 298; Ex. J-3). He directed the two employees to work on the Scissor Lift along with himself and thereby violated 29 C.F.R. § 1926.451(f)(1). (Tr. 67-70, 77-78). [redacted]'s actual knowledge of the violation is imputed to Respondent.

The Violation Was Serious

Complainant characterized Citation 1, Item 2 as a serious violation of the Act. A violation is properly classified as serious under the Act if "there is substantial probability that death or

serious physical harm could result." 29 U.S.C. § 666(k). Complainant need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010). Here, the accident resulted in death, which demonstrates the seriousness of the violation. As explained above, the Court rejects Respondent's argument that exceeding the Scissor Lift's capacity did not present a hazard, as the promulgation and enforcement of a standard presumes the existence of a hazard. *See Sanderson Farms*, 811 F.3d at 735. The Court therefore declines Respondent's request to reduce the violation to an "other-than-serious" violation.[27]

Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to the four criteria: (1) the size of the employer's business; (2) the gravity of the violations; (3) the good faith of the employer; and (4) the employer's prior history of violations. 29 U.S.C. § 666(j); *Chao v. Occupational Safety & Health Review Comm'n (Erik K. Ho)*, 401 F.3d 355, 376 (5th Cir. 2005). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *See Southern Hens, Inc. v. Occupational Safety & Health Review Comm'n*, 930 F.3d 667, 683 n.16 (5th Cir. 2019).

[27] The Court also notes that Respondent did not argue unpreventable employee misconduct in its *Post-Hearing Brief* with regard to Citation 1, Item 2, though it was included as an affirmative defense in Respondent's *Amended Answer*. Accordingly, the Court will not address that defense and deems it abandoned by Respondent.

At trial, CSHO McAliney testified that he calculated the proposed penalty for both violations using the methodology in OSHA's Field Operations Manual. (Tr. 389). The CSHO calculated the gravity of the violation as "high" based on a function of severity and probability. (Tr. 383; Ex. J-4). The CSHO found the severity, which is the "most serious injury that could occur as a result of … the hazard," to be "high" because "the most serious injury which could have occurred … is death or permanent disability." (Tr. 383-83; Ex. J-4). The CSHO further found the probability, which is the "likelihood of this occurring," to be "greater due to the probability that employees would be seriously injured from falling off the scissor lift and the number of employees that were in the scissor lift and the duration and frequency of the use of the equipment." (Tr. 384; Ex. J-4).

Based on interviews conducted at the accident site, the CSHO concluded that several Walker employees, including those on the Scissor and Aerial Lifts as well as those acting as spotters, were exposed to the hazard. (Tr. 384-85; Ex. J-4). Additionally, Frito Lay employees working in the area were also potentially exposed. (Tr. 385). The video evidence established that three employees were working in the basket of the elevated Scissor Lift for approximately six minutes prior to the accident. (J-40 at 44:01 through 50:10). The CSHO reduced the initial penalty calculation by 10% based on Respondent's size, resulting in a proposed penalty of $12,145. (Tr. 387-88; Ex. J-4, at 1). Based on his review of Respondent's safety program, the CSHO did not reduce the penalty for good faith. (Tr. 388). Nor was the penalty adjusted based on Respondent's violation history because "OSHA had not inspected the employer in the past," (Tr. 388). Respondent did not contest the calculation of the proposed penalty in its post-trial brief. Considering the totality of the circumstances in the record for Citation 1, Item 2, the Court finds the proposed penalty of $12,145 to be appropriate.

Conclusion

Complainant failed to prove all of the elements necessary to support the general duty clause violation alleged in Citation 1, Item 1. Complainant met its burden of establishing all of the elements necessary to prove a serious violation of 29 C.F.R. § 1926.451(f)(1) as alleged in Citation 1, Item 2.

Order

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

1. Citation 1, Item 1 is VACATED; and
2. Citation 1, Item 2 is AFFIRMED as a SERIOUS violation, and a penalty of $12,145 is ASSESSED.

/s/ *Brian A. Duncan*

Date: July 12, 2022
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission