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

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CSA EQUIPMENT COMPANY, LLC,<br><br>Respondent | OSHRC Docket No. 12-1287 |

APPEARANCES:

Carla M. Casas, Attorney; Christopher D. Helms, Counsel; Stanley E. Keen, Regional Solicitor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Atlanta, GA
For the Complainant

McCord Wilson, Attorney, Rader & Campbell, P.C.; Ron Signorino, Consultant, The Blueoceana Company, Inc.
For the Respondent

**REMAND ORDER**

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

CSA Equipment Company, LLC, a stevedoring company, handles cargo at the Port of Mobile, Alabama. CSA's work includes unloading cargo from vessels, as well as checking and transferring large steel coils. On December 29, 2011, a CSA employee was struck by a forklift while checking a coil and later died from his injuries. At that time, CSA used a process whereby the coils were unloaded from a vessel and delivered by forklift to the doors of a CSA warehouse where an employee, known as a "checker," was stationed. The checker would check the coil, and then signal for a forklift to come and move it to a location inside the warehouse.

Following an inspection, the Occupational Safety and Health Administration issued CSA a one-item serious citation alleging a violation of section 5(a)(1) of the Occupational Safety and

Health Act of 1970, 29 U.S.C. §§ 654 (a)(1).[1] The citation alleged that CSA "failed to provide a clear view of the designated path of travel for the powered industrial trucks, exposing employees to crushing hazards while materials are checked into the warehouse," and listed three alternative abatement methods. After a hearing, Administrative Law Judge Sharon D. Calhoun issued a decision in which she affirmed the citation. She did not address the first two abatement methods proposed by the Secretary in the citation, but concluded that the third method—setting up a separate "safe area" where employees could check coils free from forklift struck-by hazards—was feasible, because she found that CSA had already implemented that method when it moved its coil-checking operation from the warehouse to the dock after the accident. In its petition for review, CSA contends that the judge erred in concluding that this is a feasible method of abating the cited hazard.[2] For the following reasons, we remand this case to the judge for further proceedings consistent with this opinion.

A method of abatement is feasible under section 5(a)(1) if the Secretary "demonstrate[s] both that the measure[] [is] capable of being put into effect *and* that [it] would be effective in materially reducing the incidence of the hazard." *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1190, 2000 CCH OSHD ¶ 32,227, p. 48,981 (No. 91-3344, 2000) (consolidated) (emphasis added); *see Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979) ("It is the Secretary's burden to show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred."). The Secretary is not required to show that the proposed abatement would completely eliminate the hazard. *Acme Energy Servs.*, 23 BNA OSHC 2121, 2127, 2009-2012 CCH OSHD ¶ 33,236, p. 56,129 (No. 08-0088, 2012), *aff'd*, 542 F. App'x. 356 (5th Cir. 2013); *Morrison-Knudsen Co./Yonkers Contracting Co.,* 16 BNA OSHC 1105, 1122, 1993-1995 CCH OSHD ¶ 30,048, p.

[1] Section 5(a)(1) of the Act requires that each employer "furnish to each of his employees employment and a 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." 29 U.S.C. § 654(a)(1). To prove a violation of this provision, known as the "general duty clause," the Secretary must show that: (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. *Pegasus Tower*, 21 BNA OSHC 1190, 1191, 2004-2009 CCH OSHD ¶ 32,861, p. 53,077 (No. 01-0547, 2005).

[2] The other three elements the Secretary must establish to prove a violation of the Act's general duty clause are not in dispute. CSA recognized that its employees were exposed to the hazard of being struck by a forklift, and that the hazard was likely to cause death or serious physical harm.

41,279 (No. 88-572, 1993). But if the proposed abatement "creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility . . . ." *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1875 n.19, 1995-1997 CCH OSHD ¶ 31,207, p. 43,727 n.19 (No. 92-2596, 1996); *Royal Logging Co.*, 7 BNA OSHC 1744, 1751, 1979 CCH OSHD ¶ 23,914, p. 28,997-98 (No. 15169, 1979) (finding it proper to reject proposed abatement methods that "cause consequences so adverse as to render their use infeasible"), *aff'd*, 645 F.2d 822 (9th Cir. 1981)).

Here, the judge found that "[s]ince CSA implemented the abatement method without technological, economic, or other adverse consequences, the issue of abatement feasibility is essentially rendered moot." She also found that "[f]or the same reason, CSA's greater hazard defense fails." In concluding that implementation of this abatement method resulted in no "adverse consequences," the judge refused to consider testimony from CSA's expert, John Faulk, who testified that implementing the abatement method exposed CSA employees to other hazards. She found Faulk's testimony on this point "unreliable" because she viewed his testimony that "you couldn't conduct cargo handling operations unless you had people on the ground and you had machines in the immediate area[,]" as in conflict with her factual finding that CSA had "in fact" completely separated the checkers from the forklifts while they check the coils at the dock.

But Faulk did not testify that this abatement method could not be implemented nor did he suggest that CSA had not already done so. On the contrary, when the Secretary questioned Faulk about this specific method, he responded: "Reluctantly I believe they have [implemented it]. Yes." Rather, according to Faulk, there are two "adverse consequences" to using this method: (1) checkers are still exposed to the "immediate area" where the forklifts operate, and (2) checking coils on the dock presents additional hazards—specifically, increased traffic from other moving vehicles such as small forklifts, 18-wheeler trucks, and road trucks, as well as hazards posed by overhead crane loads.

In determining whether this proposed abatement method "will cause consequences so adverse as to render [its] use infeasible[,]" *Royal Logging Co*., 7 BNA OSHC at 1751, 1979 CCH OSHD at p. 28,997-98, the judge should have considered Faulk's testimony in this regard, along with other evidence indicating that the proposed abatement method fails to materially reduce the cited hazard and in fact, introduces other hazards to which the checkers are exposed. *See also Kokosing*, 17 BNA OSHC at 1875 n.19, 1995-1997 CCH OSHD at p. 43,727 n.19

(Secretary has the burden of rebutting evidence that abatement method presented a greater hazard); *Western Mass. Electric Co.*, 9 BNA OSHC 1940, 1945 n.11, 1981 CCH OSHD ¶ 25,470, p. 31,766 n.11 (No. 76-1174, 1981) (referring to principle articulated in *Royal Logging Co.* that there is no greater hazard defense *per se* in case arising under section 5(a)(1), i.e., "evidence which would be relevant to the affirmative defense of 'greater hazard' under § 5(a)(2) is properly treated as rebuttal evidence to the Secretary's case [for a § 5(a)(1) violation].").

Accordingly, on remand, the judge shall determine, based on all of the evidence in the record, whether the method of separating the checkers and the forklifts proposed by the Secretary will materially reduce or eliminate the cited hazard, taking into account whether implementing that method of abatement would create safety consequences so adverse as to render its use infeasible. If the judge concludes that the Secretary did not establish this as a feasible method of abatement, she shall determine whether the two other methods of abatement proposed by the Secretary are feasible.[3]

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: March 26, 2014

[3] The other two proposed (alternative) methods of abatement listed in the citation are: (1) the installation of mirrors on the forklift to allow an unobstructed view to the rear during backing; and (2) providing spotters to "safely marshal the forklifts to the rear so that a clear view of the path of travel can be maintained" and allow the operator to observe other traffic, personnel and safe clearances as prescribed by the "Safety Standard for Low Lift and High Lift Trucks" ANSI B56.1-2009, paragraph 5.3.6 (2007).

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| Secretary of Labor,<br>Complainant,<br>v.<br>CSA Equipment Company, LLC,<br>Respondent. | OSHRC Docket No. **12-1287** |

Appearances:

Carla M. Casas, Esquire, U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Complainant

Ronald L. Signorino, Consultant, The Blueoceana Company, Inc., Basking Ridge, New Jersey
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER**

CSA Equipment Company (CSA) is a Mobile, Alabama, based stevedoring company which engages in cargo handling at the Port of Mobile. On January 30, 2012, an Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) conducted an inspection of CSA's facility located at 55 State Docks Road, Mobile, Alabama. The inspection was initiated due to the death of an employee which occurred on January 29, 2012. The employee's death resulted from injuries he sustained in an accident on December 29, 2011. The employee was crushed while engaging in the steel coil operation at the facility. As a result of the inspection, the Secretary issued a serious citation to CSA on June 4, 2012.

The serious citation alleges CSA violated the general duty clause set out at § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (Act) by failing to provide a clear view of the designated path of travel for powered industrial trucks. This failure exposed employees to crushing hazards as they checked materials into the warehouse. The Secretary proposed three feasible means of abatement which included installing mirrors on the forklift, providing spotters, and establishing a safe area separate from the forklift operating areas

for checker/clerk[4] employees to work in. The Secretary proposed a penalty of $6,300.00 for this alleged violation.

CSA timely contested the citation. It contends the Secretary did not meet her burden of proof for the alleged general duty clause violation and that the general duty clause is inappropriately cited because a specific standard is applicable. CSA also argues that the methods of abatement proposed by the Secretary for the alleged general duty clause violation are not feasible. The undersigned held a hearing in this matter on December 20, 2012 and January 23, 2013, in Mobile, Alabama. The parties filed post-hearing briefs on April 1, 2013.

For the reasons discussed below, the citation is affirmed as serious and a penalty of $6,300.00 is assessed.

**Jurisdiction**

At the hearing, the parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. The parties also stipulated at the hearing that at all times relevant to this action, CSA was an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 10-11).

**Background**

CSA is a stevedoring company which engages in cargo handling at the Port of Mobile in Mobile, Alabama. CSA's employees are union employees provided by the International Longshoremen's Association (ILA) Local 1410. The longshoremen provided by ILA include lift drivers, crane operators, and labor workers (Tr. 22, 122, 123). Some of the longshoreman employed by CSA work as cargo handlers who load and unload ships, railcars, trucks, and trailers on the marine terminal (Tr. 21).

On December 29, 2011, one of CSA's longshoremen working as a checker was injured when he was struck by a forklift and crushed between the counterweight of the forklift and a steel coil (Tr. 178). The employee succumbed to his injuries on January 29, 2012 (Tr. 230-231). OSHA initiated its inspection of the jobsite the next day, January 30, 2012. OSHA's inspection was conducted by OSHA Compliance Officer Eliseo Hernandez (Tr. 177). During the inspection, Hernandez was informed by CSA management that the deceased employee had been

[4] The job titles "checker" and "clerk" will be used interchangeably in this decision. During the hearing, both terms were used to refer to employees tasked with the duties of checking the steel coils, although the job duties of the clerk appear to differ from those of the checker in that clerks performed administrative tasks.

struck by the rear end of a forklift and was caught between the rear end of the forklift and the steel coil (Tr. 178).

The forklift believed to be involved in the accident is Forklift 16744, manufactured by Taylor (Tr. 29-30; Exh. C-3). It is a 30,000 pound machine (Tr. 31). Standard operating procedure when transferring steel coils was for the forklift operators to operate the forklift in reverse for better driver visibility (Tr. 33-34). Although visibility was better in reverse, the area directly behind the counterweight on the forklift posed an obstruction for the operator, creating a blind spot (Tr. 34). An alarm on the forklift sounds constantly when operating the forklift in reverse (Tr. 35). Checker interviews revealed that they were briefed to be aware of the blind spot behind the forklift and to be aware of, or to avoid, the rear of the forklift (Tr. 187).

CSA checkers are responsible for checking the cargo as it comes off the vessel. The cargo was large, consisting of steel coils, rolls of plump paper, and bundles (Tr. 79). The coils range in height from knee high to taller than a checker (Tr. 80, 100). Checking the cargo involves retrieving the identification number from coils unloaded from the vessel and checking it with the bill of lading, manifest or check sheet. In order to obtain the identification number, sometimes checkers would have to bend or crouch to be able to read the label (Tr. 37). When checkers were bent down, they could not be seen by the forklift operator due to the counter weight. The checkers also check the coil to ascertain its condition by walking around the coil looking for gouges or dents in the metal (Tr. 36, 79, 80). After checking for damage, the checkers use a magic marker to write the location of the coil's destination on the coil, so the forklift operators will know where to place the coils in the warehouse (Tr. 81). This coil checking procedure underwent changes before and after the accident.

The coil checking procedure in place at the facility prior to the accident involved using a forklift to remove the steel coils from the ship and taking them to the door of the warehouse where a checker would be standing at the opening near the yellow safety posts. The forklift operator placed the steel coil on the ground for the checker (Tr. 131). The steel coils were delivered to the checker one at a time. The checker would then check the steel coil as described above. Once the checker finished, he or she would signal for a forklift operating inside the warehouse to retrieve the steel coil and take it to the proper place in the warehouse (Tr. 131, 135-136, 179-180). The forklift inside the warehouse could not retrieve the steel coil until the checker let the operator know where the coil was to be placed. This procedure was changed in

December 2010 in response to the needs of a customer who wanted to have steel coils unloaded more quickly (Tr. 137-140, 143).

The new procedure implemented in December 2010 was in use on the day of the accident. With the new procedure, clerks continued to be stationed by the doorway. However, once a coil was transported by the forklift to the doorway where the checker was located and placed on the ground, the forklift operator immediately returned to the vessel to retrieve another coil and bring it to the checker (Tr. 39-40). With this new procedure, at times there were several coils (ten or more) in the area of the checker. Accumulations of ten coils occurred often (Tr. 98). The procedure resulted in forklifts being operated in the area where coils already delivered to the warehouse door were being checked (Tr. 84). There were no barriers to separate or protect the clerks from the forklift traffic, and there were no designated paths for the forklifts in the warehouse (Tr. 47-48, 322). The forklift route depended on the load, the way the warehouse was stacked, and where the checkers were in proximity to the forklifts (Tr. 187-188). CSA relied on the forklift operator and the clerk to communicate during the process. CSA also relied on employees staying out of the way and making sure they were not hit by the forklift (Tr. 323).

After the accident the procedure was changed so that the coils are handled on the dock (Tr. 99). With this procedure, clerks are located shipside, outside of the warehouse. As soon as the coils are lowered from the ship to the ground by the crane and the crane moves away, the checker goes over to check the coils (Tr. 115-116). After the checking is completed shipside, the checkers walk to where the other longshoremen are located (Tr. 114). Forklifts do not approach to move the coils until all the coils are checked and the checkers have moved away (Tr. 95, 97).

During the inspection, Hernandez took measurements which included measuring the blind spot created by the design of the Taylor 330, 30,000 pound forklift (Tr. 180, 186). The height of the counterweight in the rear of the forklift was measured to be 5.1 feet (Tr. 185; Exh. C-14). The smallest coil was measured to be 3.8 feet (Tr. 182; Exh. C-11).

As a result of Hernandez's inspection, the Secretary issued the citation that gave rise to the instant case.

## The Citation

The citation alleges a serious violation of the general duty clause, § 5(a)(1) of the Act. Section 5(a)(1) requires each employer to "furnish to each of his employees employment and a 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." 29 U.S.C. § 654(a)(1). The citation alleges a violation of § 5(a)(1) as follows:

> In warehouse North "A": On or about December 29, 2011 and at times prior to; the employer failed to provide a clear view of the designated path of travel for the powered industrial trucks, exposing employees to crushing hazards while materials are checked into the warehouse.

As a feasible means of abatement, OSHA proposed:

> [I]nstallation of mirrors on the forklift that would allow for unobstructed vision to the rear during backing or to provide spotters to safely marshal the forklifts to the rear so that a clear view of the path of travel can be maintained and allow for the operator can [sic] observe for other traffic, personnel and safe clearances as prescribed by the 'Safety Standard for Low Lift and High Lift Trucks' ANSI B56.1-2009, paragraph 5.3.6. Additionally, the employer could establish a safe area that was separate from the forklift operating areas where the checker/clerk employees could perform their duties free from forklift struck-by hazards.

## DISCUSSION

### Applicability of a Specific Standard

CSA contends that a specific standard is applicable which addresses the hazards for which the Secretary cites CSA. Therefore, CSA contends the Secretary has improperly cited a violation of § 5(a)(1) of the Act. The Secretary disagrees. It is well-settled Commission precedent that a citation under § 5(a)(1) of the Act is only proper if no specific standard applies. Applicability of a specific standard will preempt the general duty clause, with respect to conditions or practices expressly covered by the specific standards. *Con Agra, Inc.,* 11 BNA OSHC 1141 (No. 79-1146, 1983).

CSA contends that the standard found at § 1917.43(b)(8) is applicable and should have been cited in lieu of the general duty clause (CSA's brief, p. 13). The standard found at § 1917.43(b)(8) provides as follows regarding powered industrial trucks:

> The employer shall direct drivers to slow down and sound the horn at crossaisles and other locations were visibility is obstructed.

This standard is one of the Marine Terminals standards found in Part 1917. Subpart A of the Marine Terminals standards sets forth general provisions regarding the scope and applicability of these standards. Section 1917.1 provides in relevant part:

> (a) The regulations of this part apply to employment within a marine terminal as defined in § 1917.2, including the loading, unloading, movement or other handling of cargo, ship's stores or gear within the terminal…All cargo transfer accomplished with the use of shore-based material handling devices shall be regulated by this part.

Part 1917, therefore, is applicable to the cargo handling operations performed by CSA. Further, the applicability provision of § 1917.43 provides in relevant part that the "section applies to every type of powered industrial truck used for material or equipment handling within a marine terminal." Therefore, the forklifts and other powered industrial trucks used for material handling by CSA, at the marine terminal, would be generally covered by the standard. But the inquiry does not stop there. As set forth above, in assessing the applicability, the conditions or practices expressly covered by the specific standard are determinative. *Con Agra, Inc., id*. CSA is of the mistaken belief that because a standard in general applies, that every subsection of the standard also applies regardless of the conditions or practices expressly covered by the specific standard.

The specific standard found at § 1917.43(b)(8) sets forth conditions and practices that must be considered in determining whether that standard applies. It is applicable where visibility is obstructed such as at crossaisles and other locations. Evidence adduced at the hearing addressed the meaning of the phrase "where visibility is obstructed" used in § 1917.43(b)(8). The Secretary's expert, Paul Rossi, Safety and Health Specialist in the Office of Maritime Enforcement for OSHA, testified that the regulation did not apply because the standard applies to intersections or other areas where visibility is obstructed (Tr. 422). Rossi was very familiar with this standard because he was part of an association that submitted comments into the rule making record relating to Part 1917, and specifically the provisions covered in § 1917.43(b)(8) (Tr. 388, 390-392). It is not disputed that the obstruction at issue in this case was not at a crossaisle or other location, but instead was due to the counterweight that was a part of the forklift. This type of obstructed visibility is not covered by this specific standard, and a review of Part 1917 does not reveal any other applicable standard which would preempt the general duty clause citation. The standard found at § 1917.43(b)(8) is not applicable. Section 5(a)(1) applies to the cited condition.

**Elements of a § 5(a)(1) Violation**

> Section 5(a)(1) of the Act mandates that each employer "furnish to each of his employees employment and a 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." 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary must show that: (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. *Pegasus Tower,* 21 BNA OSHC 1190, 1191, 2005 CCH OSHD ¶ 32,861, p. 53,077 (No. 01-0547, 2005).

*Erickson Air-Crane, Inc.,* 2012 WL 762001 at *2 (No. 07-0645, 2012).

In addition to the above-quoted elements of a § 5(a)(1) violation, the Secretary must also establish the employer had either actual or constructive knowledge of the hazardous condition. *Deep South Crane & Rigging Co.,* 23 BNA OSHC 2099 (No. 09-0240, 2012), *aff'd Deep South Crane & Rigging Co. v. Seth D. Harris,* 24 BNA OSHD 1089 (5th Cir. 2013).

*Whether an Activity or Condition at the site Constituted a Hazard*

The Secretary contends that when operating the forklift in reverse, the operator's view to the rear was obstructed and that employees working in the area of the forklift were exposed to the hazard of being struck by the forklift (Secretary's brief, p.18). The record evidence reveals that an employee was struck by a forklift and fatally injured.

OSHA's investigation revealed forklifts were operating in proximity to checkers while they were checking the coils. No barriers precluded the forklifts from coming into contact with the checkers as they performed their duties. At the time of the accident, there were six forklifts in operation at the facility, three inside the warehouse and three outside on the dock (Tr. 39-40, 88, 187). While performing their tasks, checkers sometimes crouched down beside the coils and, while doing so, they were not visible to the forklift operators, subjecting them to being struck by the 30,000 pound equipment. These were the conditions at the time the checker was struck by a forklift on December 29, 2011.

Michael Crimson, employed as a checker/clerk by CSA since August 2011, testified at the hearing. According to Crimson, whenever a forklift approached he could hear it so he tried to make sure he was seen (Tr. 85). At times there could be more than one forklift accessing his pile of coils (Tr. 86). Crimson testified that although forklifts would not come up to the coil he was working on, if there were other coils in his area, the forklift would come up and retrieve those coils (Tr. 87). Forklifts operated both forward and in reverse, in proximity to Crimson, to

retrieve coils and move them away from him (Tr. 92). The undersigned finds the conditions and activities at the jobsite were hazardous and that employees were exposed to the hazard of being struck by a forklift.

*Whether CSA or its Industry Recognized that the Activity or Condition was Hazardous*

A recognized hazard is a practice, procedure or condition under the employer's control that is known to be hazardous by the cited employer or the employer's industry. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). The Secretary contends that both CSA and the marine cargo handling industry recognized the hazard.

Regarding whether CSA recognized the hazard, the evidence adduced at the hearing shows that CSA implemented the coil checking procedure in place at the time of the inspection, and was aware that there were no boundaries between the forklifts and the checkers/clerks. Its foremen and general superintendents attended briefings before each offloading operation during which the hazards of working near forklifts as well as the blind spots behind the forklifts were discussed (Tr. 191-192, 285-286). CSA management warned employees to watch out for the forklifts (Tr. 46, 51). Also, as reflected in minutes from CSA safety meetings, CSA was aware that forklifts hit posts during the coil operation procedure. During those meetings concern was expressed that if not careful, the next time a person could be struck by a forklift (Tr. 55, 57; Exh. C-7). Mark Bass, President of ILA Local 1410, testified that he had called CSA General Superintendent Miles Covington with concerns about the procedure which was in place at the time of the accident. He told Covington he was concerned that the clerks and checkers were in harms way (Tr. 140). CSHO Hernandez determined that at least three CSA employees were exposed to the hazard (Tr. 194). Undoubtedly, CSA recognized there was a hazard of employees being struck by a forklift as employees were in proximity to the forklifts while they were engaged in the coil checking procedure.

In addition to CSA's recognition of the hazard, the record supports a finding that the marine cargo handling industry also recognized the hazard. Paul Rossi, OSHA's Office of Maritime Enforcement Safety and Health Specialist, was qualified as an expert in the field of safety and marine cargo handling operations to testify whether the industry recognizes struck-by hazards and whether CSA should have protected its employees from said hazards (Tr. 335, 347). Rossi referred to Exhibit C-18 as demonstrating the industries' recognition of the hazard. Rossi testified that Exhibit C-18 was not produced by OSHA, but instead was developed by the

Maritime Advisory Committee which is comprised of various experts and others in the marine cargo handling industry as well as the shipyard industry. According to Rossi, the document addresses how to prevent accidents, particularly involving container handling (Tr. 350-352). Rossi testified that the marine cargo handling industry recognized the hazard of employees being struck by mobile equipment when working in proximity to the equipment (Tr. 360-361). The undersigned finds that both CSA and the marine handling cargo industry recognized the cited hazard.

*Whether the Hazard Caused or was Likely to Cause Death or Serious Physical Harm*

There is no question, and the facts of this case demonstrate, the hazard cited in this case caused death. An employee who worked as a checker was hit by a forklift and crushed between the forklift and a steel coil (Tr. 178). Approximately thirty days after the accident, the employee died (Tr. 177, 230-231; Exh. R-10). The violation is properly characterized as a serious violation. The Secretary has established the third element of his burden of proof.

*Whether Feasible Means Existed to Eliminate or Materially Reduce the Hazard*

The Secretary proposed three abatement methods to alleviate the hazard of being struck by the forklift: (1) installing mirrors on the forklift to compensate for the obstructed view when operating in reverse; (2) providing spotters to secure a clear path of travel to the rear as set forth in ANSI B56.1-2009; or (3) establishing a safe area for the checkers/clerks by separating them from the forklifts (Citation and Notification of Penalty). CSA disputes that a feasible means exists to eliminate or materially reduce the hazard and takes issue with each of the abatement methods proposed by the Secretary. Nonetheless, after the accident, CSA implemented the third abatement method proposed by the Secretary of separating the forklift operations from the clerks. As a result, CSA now requires its clerks to work shipside rather than at the warehouse, and requires them to check all coils once they are lowered from the ship. Once the checking is completed, the clerks move to a safe area away from the coils, and only then are forklifts allowed to retrieve the coils (Tr. 115-116).

The Secretary only is required to set forth one feasible means of abatement. The evidence supports a finding that the abatement method implemented by CSA is feasible; therefore, the undersigned will not address the feasibility of the other two proposed abatement methods.

CSA contends that checkers and forklifts cannot always be separated because of the nature of the marine cargo handling operations. The issue is not whether they always can be

separated, but whether they can be separated during the coil checking operation so that they are not exposed to the hazard of being struck by a forklift. The fact that CSA has implemented a procedure separating the forklifts from the checker/clerks is in direct conflict with its argument that this cannot be done. No evidence was adduced at the hearing to show that separating the forklifts from the checker/clerks was technologically or economically infeasible or impractical. Further, Rossi testified that it could be done (Tr. 370-372).

Eustis John Faulk testified as an expert for CSA. He has an extensive background in marine terminal cargo operations and applicable OSHA regulations as well as the industry's consensus standards (Tr. 436-441). Faulk was qualified as an expert to testify generally regarding occupational safety and health at marine terminals and to render opinions regarding the accident in this case, the OSHA standards, consensus standards and the manner in which the investigation was conducted (Tr. 443-444). Faulk addressed the feasibility of separating checker/clerks from the forklifts and testified that it is not feasible because "you couldn't conduct cargo handling operations unless you had people on the ground and you had machines in the immediate area." (Tr. 462). The fact that CSA is in fact separating the checkers/clerks and forklifts and there is no evidence that CSA is adversely affected by doing so, renders Faulk's testimony unreliable. Therefore, the undersigned credits Rossi's testimony on this issue over Faulk's. Since CSA implemented the abatement method without technological, economic, or other adverse consequences, the issue of abatement feasibility is essentially rendered moot. For the same reason, CSA's greater hazard defense fails. A feasible means of abatement is established.

*Whether CSA had Knowledge of the Violative Condition*

An essential requirement for meeting the Secretary's burden of proof is establishing the employer had knowledge of the hazard. "As part of the Secretary's *prima facie* case, [he] must show that the employer had actual knowledge of the violation or could have discovered it with the exercise of reasonable diligence." *Otis Elevator Co.,* 21 BNA OSHC at 2207.

The Secretary contends CSA had actual knowledge of the violative conditions and it should have known of the conditions. According to the Secretary, knowledge is established because CSA implemented the procedure in place at the time of the accident and the conditions were in plain view (Secretary's brief, p. 24-26). In further support, the Secretary asserts the general superintendent had knowledge of the conditions in the warehouse because he was the one who determines how things were going to be offloaded and directed the operation (Tr. 195). CSA does not dispute knowledge.

The record evidence shows that for business reasons, CSA implemented a coil checking procedure which placed employees in proximity to operating forklifts. There were no barriers separating the employees from the forklifts and no designated paths of travel for the forklifts. Forklifts operate in reverse to retrieve coils although a blind spot on the forklift obstructs the view from the rear of the forklift. CSA was aware that employees crouched to check the coils and when doing so might not be seen by the forklift operator. Issues associated with forklifts striking posts and employees' safety around forklifts were discussed during management safety meetings. Actual knowledge is established.

Further, because the conditions were in plain view, CSA could have discovered the conditions with reasonable diligence. "Reasonable diligence" includes the employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). The Commission has held that "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000 (citations omitted), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001). Constructive knowledge is established.

For the foregoing reasons, the undersigned concludes the Secretary has met his burden of proving that CSA failed to provide a clear view of the designated path of travel for powered industrial trucks, exposing employees to crushing hazards while materials are checked into the

warehouse. The Secretary has met his burden of proving the alleged violation in this case. The violation is affirmed.

**Penalty Determination**

The Secretary proposed a penalty of $6,300.00 in this case. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* section 17(j) of the Act. The violation was classified as serious because injuries involving permanent disability or death can be reasonably expected if struck by a forklift (Tr. 197). The gravity of the violation was determined to be of high severity with greater probability because employees were working near a hazard that could produce a serious physical injury or death if an accident occurred, and because the accident resulted in a fatality (Tr. 197, 302-303).

In consideration of the number of employees CSA employs, a 10 percent adjustment to the penalty was applied, resulting in the proposed penalty of $6,300.00 (Tr. 303-304; Exh. C-16). No adjustments were made for good faith, due to the high severity and greater probability ratings, or for history, as CSA had not been inspected within the past five years (Tr. 309-310). In consideration of the statutory penalty factors, the undersigned finds the proposed penalty of $6,300.00 is appropriate.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

Based upon the foregoing decision, it is ORDERED that:

Item 1 of Serious Citation 1, alleging a violation of § 5(a)(1) of the Act, is affirmed, and a penalty of $6,300.00 is assessed.

SO ORDERED.

**/s/**
**SHARON D. CALHOUN**
**Judge**

**Date: November 19, 2013**
**Atlanta, Georgia**