UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,	)	
	)	
Complainant,	)	CONSOLIDATED
	)	
v.	)	OSHRC Docket Nos. 13-1770
	)	and 13-1771
National Pipe and Plastics, Inc.,	)	
	)	
Respondent.	)	
	)	
	)	

ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. FACTS

National Pipe & Plastics (NPP) provides PVC pipe for agricultural, commercial, municipal, and export markets in North America. During the afternoon of March 22, 2013, Christopher Rick was fatally injured by a Sellick, Model No. S-80, Fork truck no. 4198, that was operated, in reverse, by a NPP employee, Isaac Ravenell, in a yard at NPP's facility at 3421 Old Vestal Road, Vestal, New York 13850. Thereafter, Compliance Safety and Health Officers (CSHO) conducted inspections at NPP's premises. On September 16, 2013, OSHA issued two citations to NPP: one citation consisting of 16 serious items with a proposed penalty of $67,000 (Dkt. No. 13-1770) and one citation with no proposed penalty (Dkt. No. 13-1771).[1] On January 6, 2014, the Secretary filed his complaints and NPP filed its answers thereafter.

On July 24, 2014, Respondent moved for partial summary judgment on Citation 1, Items 7 and Item 8, Dkt. No. 13-1770 (Motion for Partial Summary Judgment).[2] Respondent's Motion for Partial Summary Judgment is based "upon the grounds that there are no material issues of fact and

[1] On August 22, 2014, the parties executed a Stipulated Partial Settlement resolving all items in Dkt. No. 13-1770, except Citation 1, Items 7 and 8. On the same date, the parties executed a stipulated Settlement resolving Dkt. No. 13-1771.

[2] Citation 1, Item 7, alleges a serious violation of 29 C.F.R. § 1910.178(n)(6) (failure to look in the direction of travel) and Citation 1, Item 8, alleges a serious violation of 29 C.F.R. § 1910.178(p)(1) (operation of an industrial truck without a functional backup alarm).

the Secretary cannot sustain his burden with regard to the citations." NPP asserts that it was in compliance with 29 C.F.R. § 1910.178(n)(6) on March 22, 2013. It also asserts that Citation 1, Item 8, should be dismissed because its forklift was not required to have a backup alarm and that 29 C.F.R. § 1910.178(p)(1) is unconstitutionally vague.

On August 19, 2014, the Secretary timely filed his Memorandum of Law in Opposition to Respondent's Motion for Partial Summary Judgment (Opposition). The Secretary asserts that the Motion for Partial Summary Judgment should be denied because it has adduced substantial evidence that establishes that NPP did not require its employees to comply with 29 C.F.R. § 1910.178(n)(6) and failed to take the fork truck out of service because it was "unsafe," or at least "in need of repair" and/or "defective." The Secretary argues that NPP did not require its fork truck drivers to always look in the direction of travel while the drivers operated in reverse. Complainant asserts that evidence before the Court demonstrates that NPP did not adequately communicate to its employees how to safely operate fork trucks in reverse. The Secretary argues that NPP's instructions about traveling safely in reverse were inconsistent and confusing. He further argues that NPP did not effectively enforce its own rules about safe travel in reverse. Complainant further asserts that it has submitted evidence before the Court that shows that NPP failed to equip its supervisors with enough information to discover and discourage violations of NPP's safety rules. The Secretary asserts that there is, at a minimum, a triable dispute as to what, if anything, NPP required of its fork truck drivers when traveling in reserve. Lastly, with regard to Citation 1, Item 8, the Secretary asserts that he has sufficiently shown that 29 C.F.R. § 1910.178(p)(1) put NPP on notice that it was unsafe to keep in service a fork truck with a broken backup alarm when the driver of the fork truck was required to operate the fork truck in reverse in an area characterized by frequent foot traffic and tight spaces.

Discovery has closed. On August 22, 2014, the parties filed their Joint Pre-Hearing Statement. The case is set for a trial on September 10, 2014.

II. DISCUSSION

The requirements for granting summary judgment are well established. Summary judgment is granted only where "there is no genuine dispute as any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Ford Motor Co.*, 23 BNA OSHC 1593, 1593 (No. 10-1483, 2011) (finding the same). Summary judgment is appropriate only if the pleadings, the discovery and disclosure materials on file, and any affidavits and depositions show that there is no genuine issue as to any material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Ford Motor Co.*, 23 BNA OSHC at 1594 (reversing a finding of summary judgment where the parties "disagree[d] on the meaning of …inspection reports and related work orders with respect to the requirements of the cited standard.").

Motions for summary judgment before the Commission are covered by Fed. R. Civ. P. 56. *See* 29 C.F.R. § 2200.61. In reviewing a motion for summary judgment, a judge is not to decide factual disputes. *Ford Motor Co.*, 23 BNA OSHC at 1593 (*citing Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir. 1994)). The role of the judge is to determine whether any such disputes exist. *Id.,* at 1224. When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 85 (2d Cir. 2006); *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006). The trial court's function "is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is

confined at this point to issue-finding; it does not extend to issue resolution." *Gallo*, 22 F.3d at 1224. In order to obtain summary judgment there must be no genuine dispute as to the evidentiary facts and there must also be no controversy as to the inferences to be drawn from them. *Schwabenbauer v. Bd. of Educ. of the City Sch. Dist. of the City of Olean*, 667 F.2d 305, 313 (2d Cir. 1981).

The initial burden is on the party seeking summary judgment to point to evidence that demonstrates the absence of a genuine issue of material fact. The Court finds that Summary judgment is inappropriate here where significant matters of what the parties' still dispute are factual in nature. The parties disagree as to whether and to what extent NPP required its fork truck drivers to "always look in the direction of travel" as they traveled in reverse and whether fork truck 4198 was "in any way unsafe" and/or "in need of repair" and/or "defective" on March 22, 2013. Court determinations of these disputed matters, with their concomitant credibility findings, are best made after a trial. The Court finds that the Secretary has presented sufficient evidence that places in dispute whether Respondent required its employees to comply with 29 C.F.R. § 1910.178(n)(6) and/or failed to take out of service a fork truck that was "unsafe," or at least "in need of repair" and/or "defective."

Citation 1, Item 7

Citation 1, Item 7 of the Secretary's citation asserts that NPP violated 29 C.F.R. § 1910.178(n)(6), which states, "[t]he driver shall be required to look in the direction of, and keep a clear view of the path of travel." *Id.* The OSHA citation states "Employee operating a powered industrial truck did not look in the direction of travel." Citation and Notification of Penalty, p. 14. The Respondent asserts that it "affirmatively require[d] that its forklift drivers look in the direction of travel, and required extensive training of its employees consistent with this." Motion for Partial

Summary Judgment, p. 7. The Respondent seeks to limit the scope of the case to only "NPP's rules regarding forklift drivers facing the direction of travel." *Id.*, at p. 10. Respondent's assertion that Mr. Ravenell's conduct on March 22, 2013 is not relevant to this Citation Item is not correct. His conduct on that date is relevant and facts related to his conduct remain in dispute.

Here, for example, there is a question as the whether Mr. Ravenell was facing the direction of travel. Mr. Ravenell states that "I continued to look back and to both sides the whole time while I was backing up, except for one or two glances to the front to be sure the load was not shifting. […] After traveling a little further, I heard yelling and stopped the fork lift immediately. That is when I saw Chris Rick on the ground. I don't believe Mr. Rick walked around the truck because I never saw him on the driver's side before the accident." Motion for Partial Summary Judgment, Exh. E, Ravenell Aff. ¶¶ 8 & 9. This Affidavit, dated June 26, 2014, includes evidence that Mr. Ravenell may have looked away from his direction of travel to look at the load. If Mr. Ravenell glanced at the load, then he may not have been facing the direction of travel. *See also* Opposition, Exh. U, Deposition Transcript of Isaac Ravenell, at pp. 91-92, 141-47, 151, 218-24. There is a question of whether Mr. Ravenell looked in the direction of travel as he traveled in the fork truck immediately prior to striking Christopher Rick on March 22, 2013.[3]

Respondent cites to *D'Amico v. City of New York*, which held that the non-moving party "must offer some hard evidence showing that its version of the events is not wholly fanciful." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). The evidence before the Court at this time, including Mr. Ravenell's affidavit, dated June 26, 2014, and Mr. Ravenell's August 11, 2014 deposition, demonstrates that the Secretary's version of the events relevant to this citation

[3] Mr. Ravenell's statement to the police also raises a factual question as to what direction Mr. Ravenell was looking when he backed up. He makes no mention whether or not he was looking in the direction of travel. Motion for Partial Summary Judgment, Exh. I, Ravenell Statement, dated March 22, 2013.

item is not wholly fanciful. Other material facts that the Court finds in dispute include:

1. Whether NPP required its fork truck drivers to look in the direction of travel as they reversed in the fork truck.

2. Whether NPP's training of its fork truck drivers was adequate to comply with 29 C.F.R. § 1910.178(n)(6).

3. Whether NPP required its fork truck drivers to comply with 29 C.F.R.§ 1910.178(n)(6).

4. Whether NPP's written test for fork lift drivers included a question about where to look when backing up a fork lift.

5. What, if anything, did NPP require of its fork truck drivers when traveling in reverse.

6. Whether CSHO Duane Gary deemed NPP's fork lift training during the time period leading up to this accident to be adequate.

7. Whether NPP adequately communicated to its employees how to safely operate fork trucks in reverse.

8. Whether NPP's instructions about traveling safely in reverse were inconsistent and/or confusing.

9. Whether NPP effectively enforced its own rules about safe travel in reverse.

10. Whether NPP failed to equip its supervisors with enough information to discover and discourage violations of NPP's safety rules.

See Opposition and Joint Pre-Hearing Statement.

Citation 1, Item 8

The Respondent also moves for summary judgment on Citation 1, Item 8. The Citation is for an alleged violation of 29 C.F.R. § 1910.178(p)(1), which requires that "[i]f at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition." 29 C.F.R. § 1910.178(p)(1). The citation was based on the alleged non-functioning backup alarm.

The Respondent asserts that the citation does not define the terms "in need of repair," "defective", or "in any way unsafe." Motion for Partial Summary Judgment, at p. 11. An agency's

construction of its own regulations are generally entitled to substantial deference. *Martin v. OSHRC*, 499 U.S. 144, 150 (1986); *Florez v. Callahan*, 156 F.3d 438, 442 (2d Cir. 1998). Where the regulatory language is ambiguous, the agency's interpretation will be given effect "so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Martin v. OSHRC*, 499 U.S. at 150-51.

29 C.F.R. § 1910.178(a)(2) states that "[a]ll new powered industrial trucks acquired and used by an employer shall meet the design and construction requirements for powered industrial trucks established in the 'American National Standard for Powered Industrial Trucks, Part II, ANSI B56.1-1969.'"[4] ANSI B56.1-2009, § 4.15.2 states "[t]he user shall determine if operating conditions require the truck to be equipped with additional sound-producing or visual (such as lights or blinkers) devices, and be responsible for providing and maintaining such devices." Respondent's fork truck 4198 had a functional backup alarm when obtained by NPP. This presents a question as to whether the Respondent determined that operating conditions required the fork truck to be equipped with a functional backup alarm. There remains a question of fact whether fork truck 4198 was in a condition on March 22, 2013 that may be categorized as "in need of repair," "defective," or "in any way unsafe".

The Respondent cites to *American Timber Co.*, where the Court vacated a citation under 29 C.F.R. § 1910.178)(p)(1) that alleged that lift trucks were unsafe because there was either broken or no glass in the windows of their cab's doors. Motion for Partial Summary Judgment, at p. 13; *American Timber Co.*, 12 BNA OSHC 1900, 1986 WL 53495 (No. 85-0761, 1986). The Court held that the absence of 3/16" safety glass in the windows did not constitute a hazard to the driver. *Id.*, at 1901.[5] The decision in *American Timber Co.* may be distinguished from the matter now

[4] ANSI B56.1 was revised in 2009. No changes were made to § 4.15.
[5] Instead, the Court found that "[if] the window contained glass, the driver would be pelted with glass fragments if the

before the Court. There, the 3/16" safety glass was not a safety device such as a backup alarm. The glass was not there to deter a log propelled with sufficient force to enter the cab and strike the operator. The Court found that the cab itself was intended for operator comfort or noise attenuation. It further found that the absence of door window glass did not place the machine in an unsafe operating condition. There, also the Court made its decision after a trial was conducted, not in summary judgment. *Id*. Here, a fork truck's backup alarm may not be viewed as an optional device intended for operator comfort. Instead, it may be viewed as a safety device intended to alert individuals of the location of the forklift and to signal that it was backing up.

The Respondent also cites to *Tyson Foods, Inc.*, which may be distinguished for similar reasons. *Tyson Foods, Inc.*, 18 BNA OSHC 2039, 2047-48 (No. 97-1682, 1999); 1999 WL 1065174. In *T*yson *Foods, Inc.,* a forklift overturned and killed an employee. *Id.,* at 2040. The Respondent was issued a citation for violating 29 C.F.R. § 1910.178(p)(1) for failure to fasten one end of an eye hook at the other end of a chain. *Id*., at 2041. The Compliance Officer opined that the chain and eye hook assemblage was meant to function as a safety device. After trial, the Court found that the Compliance Officer's conclusion was not supported by any evidence other than the officer's speculative belief. Accordingly, the Court vacated the citation. *Id.,* at 2042.

Here the Secretary asserts that there is evidence that shows that Mr. Ravenell knew that the purpose of a backup alarm was to keep pedestrians present in close proximity of a fork truck safe from harm or risk. *See* Opposition, Exh. A, Transcript of Sierra Interview with Isaac Ravenell, April 1, 2013, at pp. 13-14. The Secretary points to several Commission cases in support of his position that a failure to maintain warning devices on a forklift is a violation of 29 C.F.R. § 1910.178(p)(1). *See, e.g.*; *Sec'y v. Western Metal Decorating Co.,* 2 BNA OSHC 1604, 1975 WL 4675, at *5, 8, n. 1 (No. 1657, 1975); *Sec'y v. Southwest Marine, Inc.,* 15 BNA OSHC 1671 (No.

window broke." *American Timber Co.*, 12 BNA OSHC at 1901.

91-0493, 1992) (holding that a fork truck without functioning emergency brakes violated 29 C.F.R. § 1910.178(p)(1) where brakes not required under the standard because their absence rendered it defective in an instance where brakes originally came with the truck).

Beyond the above, the Court finds that other material remaining in dispute relating to Item 8 includes:

1. Whether the fork truck's backup alarm was intended to function as a safety device.

2. Whether the back-up alarm on fork truck 4198 was functional at the time of the accident on March 22, 2013.

3. Whether Kevin Reynolds knew or could have, with reasonable diligence, known that the back-up alarm on NPP fork truck 4198 was not working prior to the accident.

4. Whether Isaac Ravenell checked the backup alarm on fork lift 4198 on March 22, 2013 and correctly answered any question related thereto.

5. Whether the backup alarm on fork lift 4198 was working at the start of the 3:30 p.m. shift on March 22, 2013.

6. Whether operating fork truck 4198 on March 22, 2013 without a functional back-up alarm at the location where Mr. Ricks was fatally injured was unsafe.

7. Whether the words "in need of repair," "defective," or "in any way unsafe", as used in 29 C.F.R. § 1910.178(p)(1) are ambiguous, and if so, should the agency's interpretation be given any deference.

8. Whether 29 C.F.R. § 1910.178(p)(1) gives reasonable notice to employers that a broken backup alarm on a fork truck used in an area with heavy foot traffic falls requires the fork truck to be taken out of service.

See Opposition and Joint Pre-Hearing Statement

Constitutionality of 29 C.F.R. § 1910.178(p)(1)

The Respondent also asserts that the standard at 29 C.F.R. § 1910.178(p)(1) fails to give fair notice of prohibited conduct and is unconstitutional as applied in this case. Motion for Partial Summary Judgment, at p. 13. Respondent asks the Court to dismiss Item 8 by finding ambiguity and vagueness in the standard. The Secretary argues that there is nothing ambiguous or unclear

about the words "in need of repair," "defective," or "in any way unsafe" as used in 29 C.F.R. § 1910.178(p)(1). The Secretary argues that the standard gives reasonable notice to employers that a broken backup alarm on a fork truck used in an area characterized by heavy foot traffic falls squarely within the scope of the standard and thus, needs to be taken out of service when the alarm is broken. NPP argues that Item 8 was based solely on the lack of a backup alarm on the forklift.[6] See Motion for Partial Summary Judgment, at p. 11. The Secretary asserts that NPP received Item 8 because although the fork truck in question was equipped with a backup alarm, it was in service at the time of the accident despite the fact that the truck's backup alarm was broken.

The Court agrees with the Secretary that the Commission evaluates a claim of unconstitutional vagueness "not from the face of the standard, but from its application to the facts of the case." *Sec'y v. N&N Contractors, Inc.,* 18 BNA OSHC 2121 (No. 96-0606, 2000) (affirming judge's finding "that the common sense meaning of the standard provides notice that one must be tied off where there is a danger of failing off the side of the walk/work surface.") (citing *Sec'y v. Ormet Corp.,* 14 BNA OSHC 2134, 2135 (No. 85-531, 1991). In performing this evaluation, "the words of a standard are to be viewed in context, not in isolation," *Id.*, at 2135. Both "the language and purpose of the standard," as well as the "physical conditions to which is applies," should be taken into consideration. *Id.,* at 2136. The Court's evaluation is best done after a trial; not through a disposition by summary judgment where so many facts remain disputed, as here.[7]

[6] The Respondent concedes that "[a]t best, the Secretary has given notice that items required by the ANSI standard must be in good repair." Motion for Partial Summary Judgment, at p. 16. ANSI states "[t]he user shall determine if operating conditions require the truck to be equipped with additional sound-producing or visual (such as lights or blinkers) devices, and be responsible for providing and maintaining such devices." ANSI B56.1-2009, § 4.15.2. The Respondent's forklift was originally equipped with a backup alarm, which brings into question whether it was responsible for maintaining the backup alarm on March 22, 2013.

[7] *See Duquesne Light Co.*, 8 BNA OSHC 1218, 1222 (No. 78-5034, 1980) ("There is a policy in the law in favor of deciding cases on their merits."); *Morgan & Culpepper, Inc.*, 5 BNA OSHC 1123, 1124-25 (No. 9850, 1977)

III. CONCLUSION

The Court finds that Respondent has not shown the absence of any genuine issues of material fact with regard to Items 7 and 8, a requirement for prevailing in a motion for summary judgment. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080 (3d Cir. 1996). Accordingly, for the aforementioned reasons, NPP's Motion for Partial Summary Judgment must be denied.

IV. ORDER

Respondent's Motion for Partial Summary Judgment is DENIED.

SO ORDERED.

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

Dated: August 26, 2014
Washington, D.C.

(Commission generally favors resolving cases on their merits after a trial); Mark A. Rothstein, Occupational Safety and Health Law, § 17.22 (2014) (Commission strongly opposed judge deciding a case on the merits before the presentation of all the evidence.).