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

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	OSHRC DOCKET NO. 13-1939
GRISMER TIRE COMPANY,	:	
	:	
Respondent.	:	

Appearances:

Wayne P. Marta, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, OH
For the Complainant.

Robert T. Dunlevey, Esquire, and Abigail K. White, Esquire
Dunlevey, Mahan & Furry, Dayton, OH
For the Respondent.

Before: Keith E. Bell, Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 451 *et seq.* (the Act). The Occupational Safety and Health Administration (OSHA) conducted an inspection of a worksite located at 5250 Cobblegate Drive in Dayton, Ohio, beginning July 16, 2013, through October 28, 2013. As a result, OSHA issued a Citation and Notification of Penalty (Citation) to Grismer Tire Company (Respondent or Grismer), alleging violations of the Act. The Citation has three items all stemming from a fatality that triggered the accident investigation that gave rise to these alleged violations. Specifically, Citation 1, Item 1,

alleges that Respondent violated 29 C.F.R. § 1910.177 (c)(1)(i) and has a proposed penalty of $ 6,300.00. Citation 1, Items 2 and 3, allege violations of 29 C.F.R. § 1910.244(a)(2)(i) and § 1910.244 (a)(2)(iii) respectively with a proposed penalty in the amount of $6,300 for each. Respondent timely contested the Citation.[1] The hearing in this matter was held on January 21 through January 23, 2015, in Cincinnati, Ohio. Both parties submitted post-hearing briefs that were considered by the undersigned in reaching this decision.[2] This case involves an accident that resulted in a fatality. The undersigned acknowledges that a loss of life is both serious and tragic. However, the goal of this decision is not to assign blame, but rather to objectively evaluate the evidence to determine whether the cited conditions were violations of the Act. The evidence in this case reveals that sometimes an accident is just an accident. For the reasons discussed below, Citation items 1, 2 and 3 are VACATED.

Jurisdiction

The parties have stipulated to the Commission's jurisdiction over this proceeding and coverage under the Act. (Tr. 12). Further, I find that the Act applies and the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c). The record establishes that at all times relevant to this case, Respondent was an "employer" engaged in a "business affecting commerce" within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). Resp't Answer, 2.

[1]Despite raising it in its Answer, Respondent has not claimed the unforeseeable employee misconduct defense in its post hearing briefs. *L&L Painting Co*., 23 BNA OSHC 1986, 1989 n. 5 (No. 05-0055, 2012) (finding item not addressed in post-hearing briefs deemed abandoned); *Midwest Masonry Inc*., 19 BNA OSHC 1540, 1543 n. 5 (No. 00-0322, 2001) (noting arguments not raised in post-hearing briefs generally deemed abandoned).

[2] At the conclusion of the hearing, the record was left open for the Secretary to determine the availability of a witness named Harworth and have the court reconvene for the purpose of receiving his testimony. Tr. 789-90. Subsequently, the record was closed by Order dated February 6, 2015, on motion by the Secretary with the representation that he decided not to call Mr. Harworth. On May 21, 2015, the Secretary filed a Motion and Supporting Memorandum to Re-open the Record for Additional Evidence. By Order dated May 26, 2015, the Secretary's motion was denied.

Background

This case involves an accident that resulted in the death of J.C.[3] who died of compressional asphyxiation after getting pinned beneath a piece of heavy machinery (JCB 4CX backhoe).[4] Tr. 11; C-36. J.C. was on site at Siebenthaler Company (Siebenthaler's) to change two rear tires on the backhoe. Tr. 157. There were no eyewitnesses to the accident. However, there were a few witnesses who observed J.C. and the worksite before and after the accident.

Witness Accounts

Robert Hupp, Commercial Truck Tire Salesman for Grismer, arrived on site at Siebenthaler's around 10:00 on the morning of the accident when he saw J.C. attempting to demount a tire from a rim. Tr. 264. The backhoe was already in a raised position. Tr. 270. Hupp did not see J.C. remove the left rear wheel. Tr. 266. Mr. Hupp observed some jacks, jack stands, and wooden blocks but couldn't recall how many. Tr. 267. He also noticed that J.C. was having some problems demounting the tire. So, he called Matt Miller to ask if J.C. could bring the tires and wheels into the shop so he could get some help. Mr. Miller said it would be okay and Hupp informed J.C. At that point, Hupp saw J.C. gathering up his tools and putting them back on the truck. Tr. 265.

Andrew Jones, Siebenthaler's Maintenance Supervisor, arrived at the site around 10:30 a.m. At that time, he could hear the sound of a compressor running.[5] Also, he observed the backhoe was on the lot with a tire dismounted and the backhoe was tilted. When he approached, he saw J.C. underneath and called to him. Tr. 170. J.C. was unresponsive so Jones proceeded to

[3] The decedent's initials are used here out of respect for his privacy.

[4] The parties entered a stipulation as to the cause of death listed in the coroner's report and the report was admitted into evidence with no objection.

[5] Photographs in evidence show the compressor hose running from the back of the stake/flatbed truck to the backhoe. Tr. 90-91; CX-27, 29.

the office to get Leonard Willenbrink and to call 9-1-1. Mr. Willenbrink went to get a piece of equipment (a floor jack) to get the backhoe off J.C. Tr. 171. However, the floor jack was never used. Tr. 172. Jones recalls seeing two bottle jacks under the backhoe. Tr. 176. He also observed that the outrigger stabilizers on the backhoe were up. Tr. 177. The front bucket of the backhoe was on the ground. Tr. 179. Jones recalled that it was very hot that day. Tr. 180.

Leonard Willenbrink, Siebenthaler's Landscape Production Supervisor, was approximately 100 feet away from the backhoe in his office when the accident occurred. Tr. 157. He too heard the sound of an air compressor along with a banging noise. Tr. 157. After Andy Jones informed him that something was wrong, he went to where the backhoe was located and observed J.C. under the backhoe and unresponsive. Willenbrink yelled and tugged on J.C. then called 9-1-1. Tr. 161. First responders arrived shortly thereafter. Tr. 162. According to Willenbrink, there were so many first responders (fire department, EMTs, police) that he couldn't see anything at one point. Tr. 162. He didn't recall if anyone else moved equipment during the course of the rescue and recovery but said that he didn't. Tr. 163.

Rescue/Recovery Operations

Lieutenant Douglas Baumgartner, from the Moraine City Fire Division, (MCFD), responded to an emergency call at Siebenthaler's on the day of the accident (July 16, 2013). His unit was 3rd or 4th to arrive on scene at approximately 10:52 a.m. Tr. 27, 47. Upon arrival, he found J.C. trapped underneath a backhoe. Tr. 28. At some point after his arrival, Lt. Baumgartner indicated that efforts to free J.C. switched from rescue to recovery operations when the Incident Commander said that J.C. was no longer viable and had been without a pulse for several minutes. Tr. 35. According to Lt. Baumgartner, rescuers had to disturb the scene "a bit" in order to extricate J.C.'s body. Tr. 62, 66. He indicated that it was difficult to lift the backhoe

because there was "not a lot of good surface area with which to stabilize, it was in a state of disassembly, and because of the fact that it was leaning towards one side." Tr. 72. At some point, Lt. Baumgartner became the Incident Commander. Tr. 28, 31. As part of his duties, Lt. Baumgartner took 17 photographs of the accident scene. Tr. 29; CX-4 – CX-20. In an effort to rescue/recover the body of J.C., MCFD used wooden blocks called "cribbing and wedges." Tr. 44. Lt. Baumgartner described the cribbing belonging to MCFD as lighter in color and shorter in comparison to other pieces of wood at the scene. Tr. 39, 41; CX-8, CX-10. MCFD also used step chocks which are commonly used to stabilize a vehicle involved in an accident. Tr. 40; CX-8. MCFD also used the jaws of life. Tr. 41; CX-10.

OSHA's Investigation

OSHA Compliance Officer (CO) James Lopez was assigned to conduct an investigation of the accident at Siebenthaler's on July 16, 2013. Tr. 78. He learned about the accident from a media report. Tr. 79. When he first arrived on scene, he encountered Attorney Robert Dunlevey (Respondent's Attorney) who informed him that information requests for Grismer had to go through him. Tr. 80. He also encountered Matt Miller from Siebenthaler's along with some emergency personnel. *Id.* CO Lopez spent approximately two hours at the accident scene. Tr. 774. No formal interviews were conducted on that day. Tr. 204. As part of his investigation, CO Lopez did the following:

1. took pictures of the accident scene;
2. took down information about the backhoe;
3. took down information about the positioning of the jacks;
4. looked at the tires on the backhoe;
5. inspected the ground composition; and
6. conducted management and employee interviews at a later date. Tr. 80-81.

CO Lopez testified that he did not get up into the stake bed truck to photograph any equipment at the back of the truck. Tr. 777. He didn't know there were "things (sic)" behind the air

compressor. Tr. 778.

Admitted Facts[6]

1. J.C. was an employee of Respondent Grismer Tire Company;
2. J.C.'s training included but was not limited to, the Tire Industry Association (TIA) CTS-200 and 300 level technician training programs;
3. J.C. completed the TIA CTS-200 and 300 level technician training programs prior to July 16, 2013;
4. J.C. was assigned to service two rear tires on a JCB 4CX backhoe at the Siebenthaler Company, located at 5250 Cobblegate Drive, Dayton, OH (the Siebenthaler job), on July 16, 2013;
5. While J.C. was working at the Siebenthaler job on July 16, 2013, the backhoe fell onto him;
6. J.C. died on July 16, 2013.

Pre-hearing Motion

Prior to the start of the hearing, on January 15, 2015, Respondent filed a Motion *In Limine* to exclude the testimony of Messrs. Thomas Klinge of Klinge & Company and John Funke of Triple JR, LLC. Resp't Mot. 1. The basis of Respondent's objection to the testimony of Messrs. Klinge and Funke was the belief that these witnesses may be called to testify as experts even though they were also listed as lay witnesses. In any case, Respondent pointed out that these witnesses were first identified in the Secretary's Pre-hearing Report thereby denying Respondent the opportunity to depose these witnesses. *Id.* at 3. Finally, Respondent contended that the Secretary intended to call these witnesses in support of the qualifications of the Secretary's designated expert, James Johns, which would have been an unusual method of qualifying an

[6] The admitted facts were set forth in Respondent's prehearing statement without objection.

expert. *Id.* at 4. The undersigned held this motion in abeyance until the hearing. After the undersigned ruled that Mr. James Johns would be accepted as an expert witness in this case, Counsel for the Secretary represented that he no longer intended to call Messrs. Klinge and Funke to testify concerning the qualifications of Mr. James Johns. Tr. 323. Based on that representation, the undersigned granted Respondent's Motion *In Limine* with respect to Messrs. Klinge and Funke. Tr. 324.

In its motion, Respondent further sought to exclude photographs taken by Lt. Douglas Baumgartner of MCFD. Resp't Mot. 4. Respondent asserted that none of the photographs provided during the discovery phase were identified as having been taken by Lt. Baumgartner. *Id.* At the hearing, Counsel for the Secretary moved for admission of the photographs taken by Lt. Baumgartner (CX-4 through 20) following his testimony. Tr. 74. There was no objection by counsel for Respondent; therefore, all of the photographs were admitted into evidence. *Id.*

Motion for Sanctions

After the hearing, the Secretary filed a Motion for Sanctions to Remedy Spoliation of Evidence on September 3, 2015.[7] Specifically, the Secretary moves this court for an adverse inference against Respondent. Sec'y Mot. 1. This motion is based on the testimony of Mr. Matthew Miller who testified that he sent the metal equipment to the scrap yard and everything else was thrown into a dumpster.[8] Tr. 579. The Secretary characterizes this action by Miller as

[7]Rule 40(b) of the Occupational Safety and Health Review Commission's Rules of Procedure (Commission Rules) provides in part "Any other motion shall be made as soon as the grounds therefore are known". 29 C.F.R. § 2200.40(b). In the instant case, the grounds for the Secretary's motion were known as of the hearing in January 2015. However, counsel for Respondent understood the undersigned's comment, "this issue is not before me…I won't be deciding it" to mean the court lacked jurisdiction to hear such a motion. Notwithstanding the passage of time between the hearing and the filing of the Secretary's Motion for Sanctions, it was filed before issuance of this decision. Therefore, I consider the motion timely filed.

[8] Miller testified that there were two jack stands on the flatbed already when he looked into it. Tr. 579, 588. He further testified that there was one plate, and approximately 10 pieces of wood. According to Mr. Miller, Cranford had everything he needed to do the job at Siebenthaler's. Tr. 588.

"destruction" of the evidence. However, the evidence of record does not support the Secretary's contention that Miller "destroyed" the evidence; neither does it support the imposition of sanctions.

"When it would be natural under the circumstances for a party to call a particular witness, or to take the stand as a witness in a civil case, or to **produce documents or other objects in his or her possession as evidence** and the party fails to do so, this failure may serve as the basis for invoking an adverse inference." 2 *McCormick on Evidence* § 264 (Kenneth S. Broun, ed., 2006) (emphasis added). Here, the equipment used by the deceased on the day of the accident was taken back to Grismer after the accident and locked in a closet. Tr. 573-574. Mr. Miller had sole access to that closet containing the equipment. Tr. 575. Respondent concedes that the equipment retrieved from the accident site would have supported its position that the deceased had all of the equipment necessary to perform the assigned task. Resp't Opp'n Mem. 7. Therefore, it would seem natural under the circumstances for Respondent to preserve the evidence and present it as evidence at the hearing as part of its defense. Accordingly, I find that the Secretary's argument for an adverse inference has merit.

> A party seeking an adverse inference for evidence spoliation must establish:
>
> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the evidence was destroyed "with a culpable state of mind"; and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support the claim or defense.

Beaven v. United States Department of Justice, 622 F.3d 540, 553 (6th Cir. 2010) (*Beaven*) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99, 107 (2d Cir. 2002). Prong 3 of the *Beaven* test (relevance of the evidence destroyed) is undisputed and established by the evidence; therefore, I will not address it. In *Beaven*, the Sixth Circuit enunciated the

following as standards to govern the district court's discretion:

> [A]n adverse inference for evidence spoliation is appropriate if the defendants knew the evidence was relevant to some issue at trial and [their culpable] conduct resulted in its loss or destruction. This depends on the alleged spoliator's mental state regarding any obligation to preserve evidence and the subsequent destruction. An obligation to preserve may arise when a party should have known that the evidence may be relevant to future litigation. The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or negligently.

Beaven, 622 F.3d at 553–54 (internal citations omitted, second brackets in original). Although the *Beaven* decision focuses on federal district court proceedings, the Commission has recognized the existence and application of the common law principle of adverse inference in administrative proceedings. *See Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1343 (No. 00-1968, 2003). The Secretary failed to establish prongs 1 and 2 of the *Beaven* test for determining whether a moving party is entitled to an adverse inference for spoliation of evidence. Prong 1 requires an "obligation" to preserve the evidence. In his motion, the Secretary failed to articulate the existence of a statutory provision or regulation requiring an employer to preserve evidence at the scene of an accident following an investigation. The OSHA CO testified that he did not tell any Grismer representative to preserve the equipment at issue. Tr. 775. Further, the CO testified that he only makes such requests on a case-by-case basis. Tr. 774-776. Moreover, the CO never asked to see any of the equipment after the day of the accident. Tr. 776. Mr. Miller testified that no one ever told him to preserve the equipment. Tr. 575, 581, 593. He further testified that CO Lopez never directed him to gather up the equipment following the accident. Tr. 586. He alone made the decision to do so. *Id*. Also, Miller testified that if CO Lopez had made a request to check out the equipment, he would have kept it longer. *Id*. Accordingly, I find that there was no duty to preserve imposed by statute, regulation, or request. When pressed, by Counsel for the Secretary, on when he got rid of the equipment/evidence relative to the issuance of the Citation,

Mr. Miller testified that it was before the Citation was issued. Tr. 584. In the absence of a timeframe for the destruction of the evidence, it is impossible to know whether Respondent should have known that there would be future litigation. The Secretary has failed to prove prong 1of the *Beaven* test.

Prong 2 requires that the spoliation of evidence be done with a "culpable state of mind." Mr. Miller testified that he didn't want the equipment ever being used again because it was involved in an accident and would have made the other technicians feel weird using J.C.'s equipment after he was killed. Tr. 584. As before stated, Miller also testified that no one ever told him to preserve it. Tr. 575, 581. Miller further testified that the equipment wouldn't be used anymore since J.C. was deceased. Tr. 580. Whatever one may think of his reasons, they don't reveal a "culpable" state of mind to destroy the evidence, but rather an assessment that it was no longer needed. Moreover, Miller's initial act of sending the metal to the scrap yard while throwing all else in the dumpster did not result in the immediate "destruction" of the equipment though destruction seemed likely once the equipment reached its destination. Based on the facts, I find that the Secretary has failed to prove prong 2 of the *Beaven* test by establishing that Respondent had the requisite "culpable" state of mind when it got rid of the equipment.

For the reasons stated above, the Secretary's Motion for Sanction to Remedy Spoliation of Evidence is DENIED.

Expert Witnesses

Both parties called expert witnesses to testify at the hearing. The Secretary tendered Mr. James Johns while Respondent tendered Mr. Kevin Rohlwing.[9]

In 1993, the Supreme Court changed its standard for admitting expert testimony under

[9] The qualifications for the expert witnesses were admitted into evidence as CX-47, at 5-6 and RX-3 respectively.

Federal Rule of Evidence 702. *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 588-89 (1993) (*Daubert*). Rule 702, as amended to incorporate the Court's rationale in *Daubert*, provides that a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

> the expert's scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. Rule 702. Under this rule, the judge is required to serve as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[10] *Daubert*, 509 U.S. at 589; *see Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (extending the court's gatekeeper function to all expert testimony). Fulfilling the gatekeeper function requires the judge to assess the reasoning and methodology underlying the expert's opinion, and determine whether it is both valid and applicable to the particular set of facts. 509 U.S. at 592-93. The Supreme Court has made clear that "where [expert] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.' " *Kumho Tire*, 526 U.S.at 149. (quoting *Daubert*, 509 U.S. at 592). The gatekeeper has the responsibility to exclude unreliable expert testimony. *Id.*

To assist in the assessment of reliability, the *Daubert* court listed four nonexclusive factors district courts may consider: (1) whether the opinion at issue is susceptible to testing and has been subjected to such testing; (2) whether the opinion has been subjected to peer review; (3) whether there is a known or potential rate of error associated with the methodology used and whether there

[10] Federal Rule of Evidence 702 addresses whether the testimony will assist the "trier of fact," be that a judge or the jury.

are standards controlling the technique's operation; and (4) whether the theory has been accepted in the scientific community. *Daubert*, 509 U.S. at 593-94. District courts applying *Daubert* have broad discretion to consider a variety of other factors as well, dependent on the "particular circumstances" of each case. *Kumho Tire*, 526 U.S.at 150 ("[W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert* . . . ."). It has been held that the trial judge has wide latitude in deciding whether to admit or exclude the testimony/report. *U.S. v. Sebaggala*, 256 F.3d 59, 65 (1st Cir. 2001).

In this case, the undersigned admitted the testimony and report of both experts with the belief that doing so would assist with an understanding of the evidence. It is important to note that counsel for Respondent objected to the tender of Mr. John's as an expert witness. Tr. 285. Following an extensive *voir dire* by counsel for both parties, the undersigned accepted Mr. Johns as an expert witness, based on his practical experience, on the grounds that his testimony might assist the undersigned with understanding the evidence. Tr. 321. The undersigned further ruled that although Mr. Johns was accepted as an expert at the hearing, an evaluation of his testimony thereafter would determine the weight accorded. Tr. 325.

Having accepted both parties' experts, the undersigned acknowledges that not all experts are equal. Although both gentlemen demonstrated knowledge and familiarity with the issues related to servicing tires on large pieces of "off-the-road" equipment, I find the knowledge and experience of Respondent's expert, Kevin Rohlwing, to be superior to that of the Secretary's expert, James Johns. For the reasons set forth below, I credit the testimony and opinions of Mr. Rohlwing over those offered by Mr. Johns. *ACME Energy Servs. d/b/a Big Dog Drilling*, 23 BNA OSHC 2121, 2125 (No. 08-0088, 2012) (comparing experts and finding one "in a better position" based on "professional training and extensive experience"), *aff'd*, 542 F. App'x 356 (5th

Cir. 2013) (unpublished).

Mr. Rohlwing's curriculum vitae reveals that his experience with the servicing of tires dates back to 1982. RX-3. That experience includes working for the Tire Industry Association.[11] *Id.* Under Rule 201 of the Federal Rules of Evidence, the undersigned takes "judicial notice" of the fact that the TIA is a nationally recognized organization regarded as the leading authority in the tire industry for advocacy and training. Mr. Rohlwing has served as Sr. Vice President of the TIA for 13 years. Tr. 634-35. In his position with TIA, Mr. Rohlwing's primary responsibility is to develop training and educational programs for tire service technicians. This training includes service on commercial tires including earthmoving equipment. Tr. 635. Mr. Rohlwing has serviced tires on backhoes between 30-50 times in his career. Tr. 638. He has been a guest speaker at industry conferences and addressed topics such as tire safety issues. Tr. 639; RX-3, at 4-5. Mr. Rohlwing has published articles on topics such as servicing "off the road" tires in a safe manner. Tr. 640; RX-3, at 6-7. He worked with the cited standard almost daily from the beginning of his career in 1997 until 2007. Tr. 644. Most notably, Mr. Rohlwing was invited by OSHA to develop new charts related to this standard. Tr. 660. OSHA eventually approved the charts and they are now part of the standard. Tr. 661-62. Mr. Rohlwing has testified in court proceedings twice before. RX-3, at 8. His opinions were expressed within a reasonable degree of certainty based on his experience as a technician and an educator in the tire service industry. RX-2, at 1. There was no objection to Mr. Rohlwing being qualified as an expert. Tr. 641. In fact, even the Secretary's expert conceded that Mr. Rohlwing's credentials are "impeccable." Tr. 339.

Mr. Johns' qualifications were listed at the end of his expert report. CX-47, at 5. He has

[11] The Secretary's expert, Mr. Johns, acknowledged that TIA is the authority on consensus in the universe of tires. Tr. 462.

worked in the tire industry since 1973. *Id.* Altogether, he has 20 years of experience changing tires. Tr. 320. He has one certification from TIA for completing the CTS-200 course. Tr. 274. He has never taken TIA's CTS-300 course. Tr. 319. He worked on backhoes more than 100 times. While working for Toledo tires for 13 years, he worked on "off-the-road" tire and wheel assemblies. Tr. 277. His extensive practical experience servicing tires served as the basis for the undersigned accepting him with the belief that his testimony would be helpful. However, Mr. Johns' lack of formal experience and his methodologies used to support his opinions rendered his testimony unhelpful and unreliable. For example, Mr. Johns never had any formal OSHA training. Tr. 283. The formal training he did receive came from the Mine Safety and Health Administration. Tr. 284. When testifying about the industry standard for servicing tires, Mr. Johns repeatedly referenced "best practices"; however, he could not cite the source for them. Tr. 414. These "best practices" he talks about are derived from his own experience along with conversations with others such as the trainer from Klinge, Inc. who he speaks to regularly. Tr. 409. He also spoke to the Safety Director of the Triple S Tire Company. Tr. 410. They spoke about cribbing and blocking a machine. Tr. 411. He also spoke to a service technician at the Triple S Tire Company in the summer of 2014. Tr. 411-12. None of these conversations addressed servicing a backhoe specifically. Mr. Johns defined "best practices" as "a compilation of ideas, thoughts, and experiences from people that are knowledgeable in a particular area reviewing best practices to come up with a recommended procedure." Tr. 637. An exchange between counsel for the Secretary and Mr. Johns to further clarify the concept of "best practices" yielded the following:

> Q. And who do you mean by this? That is what would be the universe of these best practices that you're referencing?

> A. Well, it would be certainly within my own company experienced technicians, other people in --- outside of our company that are in similar situations asking, or inquiring or discussing what they find to be best practices. It can also be training people that are experienced just to ask a question. Tr. 367

These "best practices" aren't written down, but rather just word of mouth conversations. Tr. 371. The undersigned rejects Mr. John's theory of "best practices" on the grounds that they are not based on sufficient data and are not the product of reliable principles and methods widely accepted by the tire industry.

Ultimately, the experience (practical and formal training) of each of the experts along with the information reviewed concerning this case serves as the basis for the opinions offered. Based on the evidence of record, the experience of Mr. Rohlwing is superior to that of Mr. Johns in that it directly relates to working with OSHA standards on a regular basis in order to develop appropriate safety training for the tire industry. His work for TIA developing training for service technicians to include the CTS-200 and 300 modules give him expert knowledge of what it takes to achieve compliance with 29 C.F.R. § 1910.177. Finally, his opinions are well supported by his experience in dealing with OSHA and the standards at issue. Mr. Rohlwing's testimony was based on methodologies that represent industry practices and it assisted me to understand the evidence and decide the facts in issue. By contrast, the testimony of Mr. James Johns was not helpful and the opinions set forth in his report seemed to be his own, not well supported, and not reflective of industry practices. *See, i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010) (noting that a federal judge can give little weight to expert testimony although found reliable enough to pass the threshold of Rule 702 of the Federal Rules of Evidence, is not of much assistance to the judge in finding facts). In furtherance of my gatekeeper function under Rule 702 of the Federal Rules of Evidence, I have weighed the testimony and reports of both experts. Accordingly, the testimony and report of Mr. Kevin Rohlwing are accorded great weight while the

testimony and report of Mr. James Johns are accorded little weight.

Burden of Proof

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Grp., Inc*., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). A preponderance of the evidence is "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Astra Pharma. Prods*., 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

All of the alleged violations at issue in this case have been classified as "serious." To prove that a violation was "serious" under section 17(d) of the Act, the Secretary must show that there is a substantial probability of death or serious physical harm that could result from the cited condition and that the employer knew or should have known of the violation. The Secretary need not show the likelihood of an accident occurring. *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Discussion

Alleged Violations of 29 C.F.R. § 1910.177(c)(1)(i)

Citation 1, Item 1a alleges a violation of 29 C.F.R. § 1910.177(c)(1)(i) which requires that:

> The employer shall assure that no employee services any rim wheel unless the employee has been trained and instructed in correct procedures of servicing the type of wheel being serviced, and in the safe operating procedures described in paragraphs (f) and (g) of this section.[12]

[12] 29 C.F.R. § 1910.177(f) provides: *Safe operating procedure – multi-piece rim wheels*. The employer shall establish a safe operating procedure for servicing multi-piece rim wheels and shall assure that employees are instructed in and follow that procedure. Thereafter, it sets forth 11 elements that the safe operating procedure must include.

Specifically, Item 1a alleges that the deceased was exposed to a struck-by, caught-in-between hazard due to the inadequacy of his training and instruction on off-the-road construction vehicles and equipment. The statement of "scope" for this standard indicates that, "[t]his section applies to the servicing of multi-piece and single-piece rim wheels used on large vehicles such as…off the road machines." Servicing of Single Piece and Multi-Piece Rim Wheels, 49 Fed. Reg. 4338, 4350 (Feb. 3, 1984) (to be codified at 29 C.F.R. part 1910). According to the regulation, the term "service" means "the mounting and demounting of rim wheels, and related activities such as inflating, deflating, installing, removing, and handling." 29 C.F.R. § 1910.177(b). In this case, the facts reveal that J.C. was servicing (mounting/demounting) the tires on a backhoe at the time of the accident. I find that the standard applies.

The Act contemplates performance standards, specification standards, and standards which combine both approaches. *Am. Iron & Steel Inst. v. OSHA*, 577 F.2d 825, 837 (3d Cir. 1978). The standard at issue doesn't set forth specific requirements for compliance thereby making it a performance standard. Unlike a specification standard, which details precise requirements an employer must meet, a performance standard indicates the degree of safety and health protection required, but leaves the method of achieving the protection to the employer. Compliance with a performance standard is determined by whether the employer acted as a reasonably prudent employer would: [T]he employer is required to assess only those hazards that a "reasonably prudent employer" would recognize. *See W.G. Fairfield Co*., 19 BNA OSHC 1233, 1235 (No.

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29 C.F.R. § 1910.177(g) provides: *Safe operating procedure – single piece rim wheels.* The employer shall establish a safe operating procedure for servicing single piece rim wheels and shall assure that employees are instructed in and follow that procedure. Thereafter, it sets forth 12 elements that the safe operating procedure must include.

The Secretary's photo appears to show that the Siebenthaler's backhoe has a single-piece wheel assembly. CX-22. Also, the Secretary acknowledges this interpretation in its brief. Sec'y Br. 15. However, neither of these provisions (1910.177 (f) or (g)) were the focus of the Secretary's case.

09-0344, 2000), *aff'd*, 285 F.3d 499 (6th Cir. 2002); *see also, Thomas Indus. Coatings, Inc*., 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) ("[P]erformance standards ... are interpreted in light of what is reasonable."). A reasonably prudent employer is a reasonable person familiar with the situation, including any facts unique to the particular industry. *W.G. Fairfield Co.*, 19 BNA OSHC at 1235; *Farrens Tree Surgeons, Inc*., 15 BNA OSHC 1793, 1794 (No. 90- 998, 1992); *see also Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843, 845 (9th Cir. 1976). Under Commission precedent, industry practice is relevant to this analysis, but it is not dispositive. *W.G. Fairfield*, 19 BNA OSHC at 1235-36; *Farrens Tree Surgeons*, 15 BNA OSHC at 1794; *see also Smoke-Craft*, 530 F.2d at 845 (noting that in absence of any industry custom the need to protect against an alleged hazard "may often be made by reference to" what a reasonably prudent employer "familiar with the industry would find necessary to protect against this hazard"). *Associated Underwater Servs.*, 24 BNA OSHC 1248, 1250 (No. 07-1851, 2012).

CO Lopez testified that his conclusion regarding the inadequacy of J.C.'s training was based largely on CX-37 showing that J.C. did not pass the written exam for the TIA Certified Tire Service (CTS) 300 level exam. Tr. 121. He reached this conclusion notwithstanding the fact that he saw documents showing that J.C. completed the TIA CTS-200 course along with the skills portion of the 300 level exam. *Id*. CO Lopez also based this conclusion on the fact that the job J.C. was initially sent to do changed following a phone call between Mr. Robert Hupp, and Matthew Miller. Tr. 128. The change CO Lopez referenced had to do with the fact that although J.C. was initially to service the backhoe tires on site at Siebenthaler's, this changed once Mr. Miller approved having both tires removed and brought back to Grismer for servicing. Tr. 128-29.

Respondent produced documentary and testimonial evidence that J.C. received training.

Respondent's exhibit number 5 (RX-5) consists of documents reflecting training provided by Grismer to J.C. Of those documents in RX-5, some were directly related to the task of servicing tires:

- "Lifting it Right" – Safety quiz taken by J.C. in May 2011. He achieved a score of 24 out of a possible 25 points; and

- "Tire Cages" – Training on the use of tire cages given to J.C. in September 2011. This training consisted of having the trainee demonstrate such skills as: demounting of tires, use of equipment required by 29 C.F.R. § 1910.177, mounting of tires, installation and removal of rim wheels. J.C. received additional training on the use of Tire cages in November 2012 and again in April 2013.

Marsha Crawford is the Human Resource Manager for Grismer who also oversees the company's safety program. Tr. 481. According to Ms. Crawford, J.C. received CTS-200 training, as does every employee, on his first day of work. Tr. 482. Additionally, Ms. Crawford testified that J.C., received equipment safety training on the proper use of jacks and jack stands. Tr. 522; RX-7. This training was completed in May of 2011 using a training video developed by the TIA. Tr. 485; RX-5. According to Respondent's expert, Kevin Rohlwing, 1910.177 is taught as part of TIA's CTS-200 program. Tr. 664. Ms. Crawford also testified that J.C. received hazard recognition training. Tr. 486. J.C. also received video training on the proper way to do automotive lifting. Tr. 489; RX-5, at 8. Ms. Crawford testified that J.C. was tested on the skills presented in the TIA CTS-300 training on September 21, 2011. The Trainer, Jim Harworth, noted that J.C. demonstrated and maintained the ability to perform the tasks in accordance with 29 C.F.R. § 1910.177(c)(2). Tr. 492. Finally, Ms. Crawford testified that Grismer utilizes the TIA CTS-200 training for its service technicians because it meets the requirements for 29 C.F.R. § 1910.177. Tr. 495.

Respondent's expert, Kevin Rohlwing, testified that the CTS-200 training module addresses safety hazards associated with servicing tires such as: inflation and separation, jacking

and lifting, installation and removal of rim wheels. Tr. 668. A technician must demonstrate these skills and others in order to receive a certification from the TIA. *Id.* With regard to the CTS-300 training, equal weight is given to the written and skills portion of the examination. Tr. 668-69. However, anyone who achieves a score of 90 or better on the written portion doesn't have to do a skills demonstration. *Id.* Conversely, anyone who gets an A+ on the skills demonstration only needs a score of 50% on the written exam. Tr. 669. In Mr. Rohlwing's expert report, he pointed out that the cited standard does not require a written examination and only references the skills outlined in 29 C.F.R. § 1910.177(c)(2). RX-2, at 2. Mr. Rohlwing testified that he submitted a written inquiry to OSHA regarding its interpretation of 29 C.F.R. § 1910.177. Tr. 646. In response, he received a letter in February 1997.[13] RX-8. According to the letter, OSHA recognizes that some employees may require "relatively little training" or "no refresher training" while others may require additional training to develop their "knowledge of safe methods and procedures." RX-8. According to the interpretive letter, under this standard, OSHA simply requires that each employee receive "appropriate" and "effective" training. RX-8. The letter from OSHA also indicate that the agency gives the employer the flexibility to determine the training necessary to comply with this standard with the understanding that it bears the responsibility to ensure that training provided must be adequate. *Id.* Finally, the letter indicates that certification exams are not required by the standard. *Id.* This interpretive letter provided by OSHA in addition to the fact that the plain language of the standard (1910.177) does not require a written exam makes the Secretary's argument regarding J.C.'s failing score (59) on the written portion of the TIA CTS-300 exam moot. Rather, the focus for determining compliance with this

[13] Counsel for the Secretary objected to the admission of this letter (RX-8) on the grounds that it is hearsay. Tr. 646. However, the undersigned took judicial notice of this letter based upon the representation that it is published on OSHA's website. Tr. 653. Rule 201 of the Federal Rules of Evidence states in relevant part: "The court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. Rule 201(b)(2).

standard must be on the training provided and whether Grismer acted as a reasonably prudent employer in providing adequate training to protect J.C. against the hazards contemplated by 29 C.F.R. § 1910.177.

Based on his observations of J.C. after he came to work for Grismer, Mr. Miller described him as "highly proficient." Tr. 547. Mr. Miller testified that J.C. was selected to service the backhoe at Siebenthaler's because it was "his strength" and he was familiar with that backhoe and had serviced its tires at least twice previously. Tr. 555-56. There was a service manager present on both occasions and there were no problems. Tr. 556. Mr. Miller testified that he personally observed J.C. servicing a backhoe at least twice. During those observations, he observed J.C. jack and secure the backhoe, place the jack stand or cribbing, remove the tire(s), replace and inflate the tire(s). Tr. 548. One of those observations was made shortly before the accident that led to J. C.'s death. Tr. 549. According to Mr. Miller, J.C. never had any "near misses" and was never cited for any safety violations. Tr. 554.

According to the Secretary's expert, James Johns, the training provided to J.C. by Grismer was inadequate because it did not specifically address the hazards associated with "off-the-road" vehicles such as a backhoe.[14] CX-47, at. 3. This argument is similar to that of CO Lopez who testified that J.C. should have had training specifically related to backhoe lifting to know lifting points and how to properly lift. Tr. 205. However, Respondent's Expert, Kevin Rohlwing testified that TIA's CTS-200 training course, utilized by Grismer, meets the minimum requirements for compliance with § 1910.177. Tr. 691. He further testified that the CTS-200 training translates to all types of equipment including "off-the-road" machines such as the backhoe

[14] According to the Secretary's Expert, Mr. Johns, Grismer should have offered Mr. Cranford training specific to "off the road" vehicles such as TIA's Basic Farm Tire Service (FTS) course that addresses equipment like Siebenthaler's backhoe. CX-45; Tr. 347-50. Interestingly, Mr. Johns has never taken TIA's FTS course despite the fact that he has serviced backhoes more than 100 times. *Id*. at 347.

at Siebenthaler's. *Id.* With regard to training specific to a particular piece of equipment, Mr. Rohlwing testified that it is not feasible because there is such a wide variety of equipment thereby making this type of training unreasonable and infeasible. Tr. 691. Moreover, even Mr. Johns agreed that the TIA CTS 200 and 300 courses training on the proper method of lifting on an axle and how to replace a jack stand after you have raised it would work for a backhoe. Tr. 416. Additionally, he conceded that after taking the TIA CTS 200 and 300 courses, J.C. would have been adequately trained to service the backhoe. Tr. 416.

I find that Grismer provided adequate training to J.C. in compliance with 29 C.F.R. § 1910.177(c)(1)(i). The documentary and testimonial evidence all demonstrate that he was provided training designed to protect him against the hazards associated with servicing tires to include tires on "off-the-road" vehicles such as a backhoe. Additionally, the observations made by Mr. Miller coupled with J.C.'s satisfactory skills demonstration on the TIA CTS-200 and 300 exams reflect his competency to service tires including those on off the road equipment such as backhoes. The evidence reveals that Grismer's training program and periodic observations and evaluations of its service technicians are reflective of what a "reasonably prudent" employer familiar with the tire servicing industry standards would have done in this situation. Therefore, I find that the Secretary has failed to establish a violation of 29 C.F.R. § 1910.177(c)(1)(i) by a preponderance of the evidence.

With regard to Grismer's knowledge of the alleged violation, the Secretary has established actual knowledge. The testimony of Ms. Crawford (Grismer's Human Resources Manager) and Matthew Miller (Grismer's Service Manager) establish the employer's direct knowledge of training provided to J.C. in an attempt to comply with 1910.177. Specifically, both of these witnesses testified regarding their direct involvement in his training. Further, through Mr.

Miller's periodic evaluations of J.C., he had the opportunity to determine whether J.C. needed additional training under this standard. Knowledge of the violation is established.

Regarding employee exposure, the record is clear that J.C. was exposed to the hazard addressed by 29 C.F.R. § 1910.177(c)(1)(i).

Alleged Violation of 29 C.F.R. § 1910.244(a)(2)(i)

Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1910.244(a)(2)(i), which states: "*Operation and maintenance.*(i) In the absence of a firm foundation, the base of the jack shall be blocked. If there is a possibility of slippage of the cap, a block shall be placed in between the cap and the load."

Specifically, the Citation alleges that J.C. was exposed to a caught-in-between hazard from the lack of blocking of the base of two 20 ton air hydraulic jacks located under the JCB 4CX Backhoe due to the unstable foundation consisting of dirt, gravel and depressions in the ground on which the rear of the backhoe was raised in order to remove the two rear tires.

The cited standard falls under Subpart P which is titled *Hand and Portable Powered Tools and Other Hand-Held Equipment*. 29 C.F.R. 1910 Subpart P. Within that subpart, § 1910.244 is titled *Other portable tools and equipment.* 29 C.F.R. § 1910.244. Subsection (a) of 1910.244 specifically addresses jacks. Respondent argues that the second part of this standard does not apply to the tire industry. Resp't Br. 35. However, the Secretary points out, and I concur, that "[t]his is a 'general industry' standard which applies to any usage of a jack outside the construction industry or another specialized activity." Sec'y Br. 18. 29 C.F.R. § 1910.5 (c) (2) provides: "[A]ny standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry…to the extent that none of such particular standards applies." Moreover, the focus of the Secretary's case has to

do with the first sentence of this standard. The evidence of record reveals, and it is undisputed, that at least one jack was used by J.C. to service the tires on the backhoe. I find that the standard applies.

The central argument regarding this standard is whether the ground at Siebenthaler's was firm on the date of the accident. Neither Commission case law nor the cited regulation provides guidance on the definition of the word "firm." Therefore, it is reasonable to look to the plain meaning of the word as defined in an authoritative dictionary. *Johnson Controls, Inc.*, 15 BNA OSHC 2132 (No. 89-2614, 1993) (noting that authoritative dictionary definitions are helpful). The online version of the Merriam-Webster dictionary defines "firm" as: (1) securely or solidly fixed in place; (2) having a solid or compact structure that resists stress or pressure; or not easily moved or disturbed.[15] This definition of "firm" is consistent with the language used to describe ideal ground composition (**clean, flat, and stable**) when using a jack/jack stand on pg. 4 of CX-44 (Module 5 of TIA course titled "Basic Commercial Tire Service: Jacking and lifting"). (emphasis added). CO Lopez testified that the ground upon which the hydraulic jack(s) and jack stand were being used was unstable. Tr. 235. Among the photos that he took of the accident scene, CO Lopez testified that CX-25 and CX-30 reflect the ground instability. Tr. 254-57. The photographs of the ground were not helpful to the undersigned in making a determination of the stability of the ground. Interestingly, the government did not present an expert on soil composition or results of a soil composition test. However, in his brief, the Secretary takes the position that Respondent should have provided a soil compaction report or expert. Sec'y Br. 18. Apparently, the Secretary believes that Respondent bears the burden of proving that the ground at Siebenthaler's was firm. In any case, the undersigned had to weigh the quantum of evidence

[15] http://www.merriam-webster.com/dictionary/firm. (last visited July 25, 2016).

offered regarding the stability of the ground. First responder Lt. Baumgartner testified that it was difficult to stabilize the backhoe because there was not a lot of good surface area. Tr. 72. Put into context, this reference to "not a lot of good surface area" was in response to a question regarding the difficulty of lifting a backhoe because it has few surfaces. *Id.* Siebenthaler's Landscape Production Supervisor, Leonard Willenbrink, testified that ground was composed of small/compactable gravel that was "pretty much perfectly level." Tr. 165. Siebenthaler's Maintenance Supervisor testified that the ground underneath the backhoe was "hard packed gravel." Tr. 179. Grismer's Commercial Truck Tire Salesman, Robert Hupp, testified that the ground was "pretty well compacted." Tr. 269. Grismer's Service Manager, Matthew Miller, testified that he had been to the parking lot of Siebenthaler's where the accident occurred previously and it was the same as the day of the accident. He described it as gravel, mud, and broken up concrete. Tr. 56. He further described the ground beneath the backhoe as gravel that had been crushed many times and compacted into concrete form. Miller believed that the ground was suitable for the use of a jack and jack stand. Tr. 564. Based on the testimony, the evidence suggests that the ground at Siebenthaler's was firm. Also, there is no way of knowing whether J.C. cleaned the area where he placed the jack given the disturbance of the scene during the rescue/recovery operations. The undersigned did not consider the opinion of either expert (Johns, Rohlwing) concerning the alleged violation of 29 C.F.R. § 1910.244(a)(2)(i) because neither visited Siebenthaler's to make an observation of the ground composition. Moreover, neither Mr. Johns nor Mr. Rohlwing purports to be an expert on ground composition. The quantum of the evidence regarding the ground composition at Siebenthaler's parking lot on the date of the accident does not support the alleged violation. Accordingly, the Secretary has failed to establish a violation of this standard by a preponderance of the evidence.

Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not be shown that the employer understood or acknowledged that the physical conditions were actually hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) *aff'd without op.*, 79 F.3d 1146 (5th Cir. 1996) citing *E. Tex. Motor Freight v. OSHRC,* 671 F.2d 845, 849 (5th Cir. 1982). Here, Matthew Miller testified that he had been to the parking lot of Siebenthaler's where J.C. was servicing the backhoe before the accident occurred. Tr. 563. He further testified that the ground composition prior to the accident was the same as the day of the accident. *Id.* His expressed belief that the ground was suitable does not negate his knowledge of the physical conditions constituting the alleged violation. Therefore, knowledge is established.

The exposure of J.C. to the hazards that 29 C.F.R. § 1910.244(a)(2)(i) was designed to prevent is not disputed. The record clearly reflects that J.C. died while servicing tires on a backhoe using at least one jack. Employee exposure is established.

Alleged Violation of 29 C.F.R. § 1910.244(a)(2)(iii)

Citation 1, Item 3 alleges a violation of 29 C.F.R. § 1910.244(a)(2)(iii) which states: "After the load has been raised, it shall be cribbed, blocked, or otherwise secured at once."

Specifically, the Citation alleges that the deceased employee was exposed to a caught-in-between hazard due to the unsecured load of the JCB 4CX Backhoe once he initially raised the rear of the backhoe with two 20 ton air hydraulic jacks and one 22 ton jack stand to remove the two rear tires.

Based on the Secretary's allegations and the language of the cited standard, the "load" in this instance is the backhoe. Employing the same analysis used in the discussion of the previous standard, I find that the standard applies.

CO Lopez testified that Grismer was cited under this standard because the backhoe was raised. Tr. 131. It was not secured in place to prevent it from sliding or tipping over. *Id.* Also, it was not blocked adequately to ensure that it would not tip or fall over. *Id*. Although he conceded that there were no eyewitnesses to the accident, CO Lopez speculated that the backhoe must have been raised because one can't remove the tire without raising the backhoe. Tr. 133. CO Lopez stated that the standard required that the backhoe be blocked, cribbed, or secured with at least two jack stands or a sufficient number of blocks of wood. Tr. 133-34. With regard to the equipment used to "crib, block, or secure" the backhoe, CO Lopez recalls two wood blocks (6x6x20) and some wedges. Tr. 140. In an email exchange with CO Lopez, Lt. Baumgartmer stated, "all those 20 4x4s and various wedges belong to the MCFD." CX-49. "There were two 6x6 (possibly 8x8) pieces of wood that were not ours that were farther under the backhoe near the person…[t]hose did not belong to us." *Id*. However, on cross-examination, Lt. Baumgartner conceded that he couldn't say with certainty which cribbing belonged to someone other than MCFD. Tr. 64. According to CO Lopez, the photo marked as CX-33 depicts a floor jack that was under the backhoe along with two hydraulic jacks next to it. Tr. 97. The jack stand under the backhoe had a warning label that stated it should be used in a pair. Tr. 98. With regard to other means of "securing the load", CO Lopez testified that the photo marked as CX-24 shows the backhoe outrigger in an upright position. Tr. 85. He stated that the outrigger was raised approximately 6". Tr. 86. He testified that the photo marked as CX-27 depicts the backhoe with the right tire removed and the outrigger in the upright position. Tr. 90. The testimony concerning the position of the outriggers suggests that they were not being used by J.C. to secure the backhoe. However, use of the outriggers to secure the load is not mandated by this standard. CO Lopez testified that he saw no blocks or cribbing on the stake bed. Tr. 88. However, the

record reveals that CO Lopez did not examine all of the contents of the stake/flatbed truck. Lt. Baumgartner testified that the photo marked as CX-5 showed cribbing blocks and a floor jack that belonged to MCFD. He further testified that the blocks of lighter wood belonged to MCFD. Tr. 39. Also he stated that some, but not all, of the cribbing that belonged to MCFD had markings such as blue or yellow bands. Tr. 51-54. Lt. Baumgartner conceded that he did not know if there were crib blocks on J.C.'s flatbed truck. Tr. 37. During his testimony, Lt. Baumgartner went on to describe the equipment reflected in photographs marked as exhibits by the Secretary:

- CX-11 – photo of a red jack already on the scene when first responders arrived. Tr. 42-43;
- CX-15 – shows more cribbing and wedges all belonging to MCFD.

Taken altogether, the testimony of CO Lopez and Lt. Baumgartner appear to establish that J.C. didn't have the equipment necessary to "crib, block, or secure" the backhoe while he was servicing the tires.

However, the record reveals that MCFD had to disturb the scene during its efforts to free J.C. Tr. 62, 66. In fact, by the time CO Lopez arrived on the scene at Siebenthaler's, J.C.'s body had already been removed from under the backhoe. Tr. 89. According to Leonard Willenbrink, there were so many fire departments, EMTs, and police along with a big crowd that, at one point, he couldn't see anything. Tr. 162. In response to an inquiry by the undersigned, CO Lopez stated that he didn't get on the flatbed equipment truck and did not take pictures showing the back of the truck. Tr. 777. He further stated, "I didn't know there was [sic] things behind the air compressor at that time." Tr. 778. When confronted with his interview statement, Andrew Jones again confirmed that he saw two bottle jacks under the backhoe along with a couple of wooden blocks. Although his interview statement reflects that there was one bottle jack under on each side of the axle; he couldn't remember the exact placement when asked at the hearing. Tr.

175-77. Mr. Jones testified that the backhoe's outrigger stabilizers were up. Tr. 177. However, he also testified that the whole machine was tilted from the blocks and the backhoe was nearly on its axle where the tire was dismounted. Tr. 178. Mr. Hupp testified that once he informed J.C. that he should take the tires back to Grismer and work on them in the shop, J.C. started getting his tools together and putting them on the truck. Tr. 265. Mr. Hupp's testimony supports Matthew Miller's contention that there was equipment already on the flatbed behind the tires. Given the fact that there were no eyewitnesses, J.C. was observed putting tools back on the truck, there were multiple first responders on the scene when CO Lopez arrived, and the scene had been disturbed in order to extricate J.C.'s body, it is reasonable to believe that equipment was moved from its original position before the accident. Moreover, Miller testified that he conducted a routine inspection of the equipment on the stake/flatbed truck prior to J.C.'s departure for Siebenthaler's to service the tires on the backhoe. Tr. 557. According to Miller, J.C. had everything he needed to do the job to include: two jack stands; plenty of cribbing; Murphy's soap to seat the tire; two pneumatic jacks, a smaller (hand crank) jack, a plate, his gun [sic], sockets etc. Tr. 557-58. As a whole, the evidence suggests that J.C. had the necessary tools. Also, because there were no eyewitnesses and the scene was disturbed before the investigation, we just don't know whether the backhoe was appropriately cribbed, blocked, or otherwise secured as required by this standard. Additionally, CO Lopez's incomplete examination of the accident scene leaves open the possibility that Mr. Miller's account of the equipment on the flatbed truck before and after the accident could be true. Accordingly, I find that the Secretary has failed to establish a violation of 29 C.F.R. § 1910.244(a)(2)(iii) by a preponderance of the evidence.

With regard to Respondent's knowledge of the alleged violation, the Secretary has failed to establish actual or constructive knowledge. CO Lopez testified that another employee of

Grismer, Robert Hupp, was on site at Siebenthaler's on the day of the accident to ensure that the tires on the backhoe were marked before being sent back to the manufacturer. Tr. 142. However, Mr. Hupp arrived around 10:00 a.m., before the accident, and observed J.C. struggling in the heat while attempting to dismount a tire from a steel rim. Tr. 264. The record is unclear with regard to whether one or both tires had been removed while Mr. Hupp was on site. The record is also silent regarding any cribbing, blocking, or securing of the backhoe at the time Mr. Hupp was present. However, we do know that Mr. Hupp was not present when the load/backhoe fell because there were no eyewitnesses. The Secretary has not established actual knowledge of the alleged violative condition. With respect to constructive knowledge the Secretary establishes it by showing that an employer could have known of the violative conditions if it had exercised reasonable diligence. In *Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87–692, 1992), the Review Commission set forth criteria to be considered when evaluating reasonable diligence. Reasonable diligence involves several factors, including an 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). Several factors are considered to determine if an employer exercised reasonable diligence. These include the "employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of a violation." *Precision Concrete Constr*., 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001) (citing *Pride Oil Well Serv.*, 15 BNA OSHC 1809-1814 (No. 87-0692, 1992). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a

supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corporation*, 11 BNA OSHC 2177, 2179 (No. 77–1598, 1984).

The record establishes that Mr. Hupp was the only other Grismer employee on site at Siebenthaler's prior to the accident. After observing J.C., he called Mr. Miller to ask if he could bring the tires back to Grismer to work on them in the shop. Tr. 265. When Miller agreed, Hupp informed J.C. and observed him putting his equipment back on the truck. *Id*. Based on his actions and observations, Mr. Hupp had no reason to know that an accident would occur because, as alleged by the Secretary, the backhoe was not secured.

Regarding its obligation to adequately train and supervise J.C., the evidence does not establish that Grismer's safety program was deficient. To the contrary, it reveals that Grismer provided training designed to teach its employees, including J.C., how to service tires safely. Tr. 481. Additionally, every employee, including J.C., completed the TIA CTS-200 training on the very first day of work at Grismer. Tr. 482. Moreover, Grismer provided J.C. with training orientation on a variety of safety topics at the beginning of his employment. RX-5, at 2. With regard to supervision, Mr. Miller clearly testified that he made field visits to observe service technicians once a month and when he did so, he stayed the entire time. Tr. 546-47. Specifically, he observed J.C. service a backhoe at least twice; one of those observations was made shortly before the accident. Tr. 548-49. In fact, J.C. had replaced the front and back tire(s) on the backhoe at Siebenthaler's on separate occasions while being observed by a service manager. There were no problems on either occasion. Tr. 555-56. In fact, Mr. Miller testified that J.C. was chosen for the job at Siebenthaler's because it "was his strength." Tr. 556. Grismer's company protocol required Mr. Miller to check the trucks every Saturday to ensure that service technician had the equipment needed and that it was in good working order. Tr. 562. Every

Tuesday, replacement equipment was ordered. *Id.* Also, there was a TIA training manual behind the driver's seat of the flatbed carrying J.C.'s tools. Tr. 568. The training manual was customarily kept in this location. Tr. 569. Based on the foregoing, I find that Grismer provided adequate supervision to J.C. I further find that Grismer had adequate work rules and training programs. Finally, I find that Grismer took appropriate measures to anticipate hazards to which employees may be exposed, and to prevent the occurrence of a violation. Accordingly, the Secretary has failed to establish "knowledge" of the alleged violative condition.

The exposure of the deceased, J.C., to the hazards that 29 C.F.R. § 1910.244(a)(2)(iii) was designed to prevent is not disputed. The record clearly reflects that J.C., died while servicing tires on a backhoe using at least one jack. Employee exposure is established.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing 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 Findings of Fact and Conclusions of Law, it is ORDERED that:

Items 1, 2, and 3 of Serious Citation 1, alleging violations 29 C.F.R. §§ 1910.177(c)(1)(i), 1910.244(a)(2)(i), and 1910.244(a)(2)(iii) respectively are VACATED.

/s/
Keith E. Bell
Judge, OSHRC

Dated: August 9, 2016
Washington, D.C.