Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. 84 LUMBER COMPANY, dba 84 LUMBER COMPANY, A LIMITED PARTNERSHIP Respondent.	OSHRC Docket No. 20-0876

Appearances:

Dolores G. Wolfe, Esq., Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

James J. McMullen, Jr., Esq., Laura E. De Santos, Esq., and Clyde Oates Adams, Esq., Gordon Rees Scully Mansukhani, LLP, San Diego, California & Houston, Texas
For Respondent

Before: First Judge Patrick B. Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act). Respondent, 84 Lumber Company (84 Lumber), is a purveyor of construction and building materials, primarily lumber. (Tr. 76-79). In November of 2019, an 84 Lumber employee was using a forklift to load bundles of wood onto the bed of a semi-truck owned and operated by BLS Trucking (BLS), a company with which Respondent contracted to deliver its customers' orders to their respective jobsites. (Tr. 79-80, 272-73). The driver of the truck, a BLS employee, asked the forklift operator to rearrange a particular bundle of wood on the bed of the truck's trailer. (Stipulation 7, Tr. 228-29). As the forklift operator was in the process of fulfilling

this request and had the bundle of wood suspended in the air, the BLS driver unexpectedly ran under the suspended load on the forklift. (Tr. 229-30, 252-53). The bundle thereafter became unstable and fell onto the BLS employee, killing him. (Stipulation 4).

As a result of the BLS employee's death, the United States Occupational Safety and Health Administration (OSHA) sent Compliance Safety and Health Office (CSHO) Daniel McGurk to conduct an inspection of the site of the accident. (Tr. 313-14). Following the inspection, OSHA issued a one-item *Citation and Notification of Penalty* (Citation) to Respondent alleging a serious violation of 29 C.F.R. § 1910.178(m)(2), which prohibits an employer from allowing any person to stand or pass under the elevated portion of any truck, whether loaded or empty. The Citation proposed a penalty of $13,494. (Citation 6). The Citation was issued on September 6, 2018. Respondent timely filed a Notice of Contest (Notice).

A two-day trial was held on August 2 and 3, 2021, in Houston, Texas. Four witnesses testified at the trial. The Parties submitted post-trial briefs. Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and arguments of counsel, the Court issues this Decision and Order as its Finding of Facts and Conclusions of Law. Based on what follows, the Court vacates the Citation.

II. Stipulations

The parties agreed to the following stipulations:[1]

1. [redacted], the decedent, was an employee of BLS Trucking.

[1] In addition to the seven stipulations laid out in the parties' post-trial briefs, Complainant agreed to two further stipulations at trial, represented in paragraphs 8 and 9. (Tr. 269-70). Complainant has not set forth any alternative wording to encompass these stipulations. (Complainant's Br. 3-4). Because Respondent's wording of these stipulations as laid out in its brief is consistent with the trial record, the Court accepts the stipulations in full. (Tr. 269-70; Resp't Br. 3-4). Respondent further conceded it was a "controlling employer" for purposes of liability under the multi-employer worksite doctrine (*see* note 3, infra), which stipulation is represented by paragraph 10.

2. On November 19, 2019, an accident occurred at 22770 NW Lake Drive, Houston, Texas, involving [redacted].

3. On that date, [redacted] was employed by BLS.

4. [redacted] suffered a fatality after he walked under a forklift load.

5. 84 Lumber's employee, [redacted], was operating the forklift at the time of the incident involving [redacted] on November 19, 2019.

6. The November 19, 2019 incident involving [redacted] occurred at a location that is considered 84 Lumber's property.

7. 84 Lumber understands [redacted] was attempting to reposition the forklift's load per [redacted]'s request at the time of the Accident.

8. November 19, 2019, the date of the incident, 84 Lumber had a work rule in place at Store 1949 (the store implicated in this matter) that instructed and communicated to 84 Lumber employees to not let people work under the elevated loads or pass under the elevated loads of forklifts (Work Rule).

9. 84 Lumber adequately communicated the Work Rule to its employees at Store 1949.[2]

10. 84 Lumber was a "controlling employer" for purposes of liability under the Commission's multi-employer worksite doctrine.[3] (Tr. 70-71).

---

[2] Respondent introduced a good deal of evidence on the issue of employee training and devotes a substantial portion of its post-trial brief to the issue. In light of Stipulations 8 and 9, as well as the fact Complainant has apparently abandoned its theory premised on Respondent's failure to enforce its Work Rule, the Court does not find significant discussion of this evidence to be warranted. *See PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306 (No. 06-1201, 2008) (discussing employee evidence of training in determining whether a work rule was adequately communicated); *Gary Concrete Prods, Inc.*, 15 BNA OSHC 1051, 1055-56 (No. 86-1087, 1991) (discussing evidence of training in determining whether employer had a work rule in place).

[3] The Fifth Circuit, where this case arose, has adopted Complainant's construction of the Act as imposing a duty on an employer at a multi-employer worksite to ensure the safety of non-employees in certain situations. *See Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723 (5th Cir. 2018); *see also Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000) ("Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent."). More specifically, a "controlling employer" of a multi-employer worksite i.e., an

III. Jurisdiction

Neither party has contested, and the record supports, Respondent is engaged in a business affecting interstate commerce and is an "employer" within the meaning of section 3 of the Act. (Answer ¶ 2; Tr. 8-9; 76-77). The Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act by Respondent filing its Notice. (Tr. 8-9); *Joel Yandell*, 18 BNA OSHC 1623, 1628 n.8 (No. 94-3080, 1999).

IV. Factual Background

A. The Worksite and Respondent's Work Processes

Respondent is a purveyor of construction and other building materials and employs approximately 5,000 people nationwide. (Tr. 76-77). The accident occurred at one of its stores, Store 1949, located at 22770 NW Lake Drive, Houston, Texas. (Stipulations ¶¶ 2, 6; Tr. 74). Store 1949 employs approximately 25 to 30 employees. (Tr. 76). The main activity conducted at Store 1949 is the sale of lumber to general contractors for construction projects. (Tr. 76-77).

When an order for lumber is placed at Store 1949, a coordinator creates a "dispatch list" for the order, which contains information about the specific products in the order as well as the date it is to be delivered to a construction site. (Tr. 77-78). When the delivery date arrives for a given order, the dispatch list is sent to an 84 Lumber employee called a "builder," who prepares the order. (Tr. 78-79). In preparing for an order, the builder assembles the order into different

---

employer with "general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them," has a duty to protect more than its own employees working at the site. *See Hensel Phelps*, 909 F.3d at 729. As is relevant here, the Fifth Circuit in *Hensel Phelps* held:

> In a place of employment like a construction worksite, populated by subcontractors, sub-subcontractors, and their employees performing various (and often overlapping) tasks, only the general contractor maintains supervisory authority over—and has access to—the entire space. If a general contractor enjoys the benefits of project supervision, it follows that he should also bear the burdens, by being held to comply—and to direct its subcontractors to comply—with the Act's safety standards. *Hensel Phelps*, 909 F.3d at 735.

bundles or loads of lumber. (Tr. 79, 217-18). Some bundles are prefabricated from the manufacturer, while others have to be collected and assembled by the builder. (Tr. 217-18; Ex. C-2).

Once an order has been built, it is assigned to a "dispatcher," another 84 Lumber employee. (Tr. 79). The dispatcher is responsible for loading the order onto a truck for delivery. (Tr. 153, 211-13, 273-74). 84 Lumber does not handle the delivery of its order itself; rather, it contracts this work out to BLS. (Tr. 79, 211-213, 272-73). However, the same BLS drivers, approximately seven to ten, generally were assigned to work at Store 1949 daily. (Tr. 80-81, 272-73).

A typical order is divided into different bundles, all of which must be loaded by the dispatcher onto a BLS truck via forklift. (Tr. 79-80, 120, 143-47, 212-13, 216-19; Ex. C-2). At the time of the accident, BLS' drivers were instructed to remain at the side of the truck, away from the operating path of the forklift, while the dispatcher was operating the forklift. (Tr. 223-24, 277-78, 308; Ex. C-2). Once a bundle was loaded on to the dispatcher's forklift, the dispatcher would approach the BLS truck trailer and lower the bundle down to approximately four inches above the bed of the trailer. (Tr. 134-35, 140, 146-47, 221, 277-78, 297-98, 306; Ex. C-2). At this point, the dispatcher would put the forklift in "neutral" and activate the safety brake. (Tr. 134-35, 140, 185). Following this, either the dispatcher, or the dispatcher with the assistance of the BLS driver, would, if necessary, place wooden dryers[4] under the slightly elevated bundle. (Tr. 139-40, 168-69, 185-86, 219-21, 239-44, 277-78, 290-92, 297-98, 304-05). The workers placed the dryers while standing on the ground by sliding them under the slightly elevated bundle. (Tr. 137-43, 185, 188-

[4] As described at trial, dryers are pieces of wood, typically a half-inch to two inches thick and four feet long, that are placed under a bundle of lumber to make it easier to insert the forks of the forklift under the bundle. (Tr. 115-16, 140, 207-08, 286-87; Ex. C-2). At Store 1949, some bundles would have dryers already attached to the bundle, either from the 84 Lumber builder when the bundle was assembled or else "banded" by the manufacturer in a prefabricated bundle. (Tr. 118-19, 130-31, 133-34, 216-19, 278-81; Ex. C-2).

91, 239-40) Because of the location of the bundle over the bed of the truck trailer, the workers passed behind the stationary forklift to place the dryers on either side of the bundle. (Tr. 139-43, 185, 188-91, 201-02, 239-40). Thus, at no point did the placement of dryers cause either the dispatcher or the BLS driver to pass under either the forks of the forklift or the slightly elevated bundle on the bed of the truck.[5] (Tr. 139-43, 185, 188-95, 304-05). The dispatcher would then repeat this process for the remaining bundles of the order, distributing the bundles evenly over the bed of the truck. (Tr. 273-74).

B. The Accident and Investigation

The accident leading to the issuance of the Citation occurred on November 19, 2019, at 84 Lumber's Store 1949. (Stipulations ¶¶ 2, 6; Tr. 81-83, 313). On that day, [redacted], a driver for BLS, pulled his truck into the loading area and handed [redacted], a dispatcher for 84 Lumber, paperwork regarding the order that was to be loaded onto [redacted]'s semi-truck trailer.[6] (Stipulations ¶ 5; Tr. 212-13, 216). [Redacted] started loading the truck bed by loading Bundles A and B,[7] which had been banded together as one load. (Tr. 217; Ex. C-2). [Redacted] then loaded Bundles A and B onto the passenger side of the truck bed, before loading Bundles C and D,[8]

[5] Indeed, given that the bundles were elevated only four inches above the bed of the truck, it is hard to conceive as to how an employee would pass under such a bundle.

[6] The truck [redacted] was driving on the date of the accident was a semi-truck pulling a 45-foot flatbed trailer. (Tr. 276; Ex. C-1).

[7] At trial, notations were made on Exhibit C-2 signifying the different bundles of wood that comprised the order being loaded onto [redacted]'s truck on the date of the accident. (Tr. 112-15). Because all of the witnesses' testimonies referred to these notations in describing the events leading to the accident, the Court will likewise refer to the different bundles by the notations made at trial.

[8] As depicted in Exhibit C-2, the Bundles marked D, E, F, and G split when they fell off the forklift, but had been banded together as a single bundle at the time [redacted] was loading the truck. (Tr. 117). The Court refers to these collectively as "Bundle D" to represent the events leading up to the accident.

together, on top of Bundles A and B. (Tr. 225-28; Ex. C-2). While this was occurring, [redacted] was waiting between the semi-truck and the truck's trailer.[9] (Tr. 223-24, 229; Ex. C-2).

After [redacted] had loaded Bundles J and K behind Bundles A and B, [redacted] approached [redacted] on his forklift and asked him if he could move Bundle D to the other side of the truck bed so that the "strap c[ould] match up." (Tr. 229; Ex. C-2). At this point in time, [redacted] was standing in front of the front wheel of the trailer, where the cords attached it to the semi-truck.[10] (Tr. 229; Ex. C-2). [redacted] obliged [redacted]'s request and loaded Bundle D onto his forklift.[11] (Tr. 230). With Bundle D elevated on the forks of the forklift, [redacted] began backing away from the trailer. (Tr. 230). When [redacted] had backed up approximately two or three feet away from the trailer, [redacted], "[like] a jackrabbit … out of nowhere," ran underneath the forks of the forklift and the elevated Bundle D thereon and told [redacted] to get another "bite" on the load. (Tr. 230, 253-54).

[Redacted] told [redacted] at least three or four times to get out from underneath the elevated bundle. (Tr. 231, 249-51). [Redacted] also honked his horn to warn [redacted] of the danger in which he had put himself by going underneath the elevated bundle. (Tr. 330). [redacted], however, did not move from underneath the forklift, but instead kept telling [redacted] to back up the forklift. (Tr. 231-32). [redacted] did so, but only because he was concentrated on moving the

[9] [Redacted] stated [redacted] was between the wheelbases of the tractor and the trailer by the "Douglas County" wrapping on the left side of the photograph in Ex. C-2. *See also* Exs. C-3 & 4 (photographs of the semi-truck and trailer post-accident taken from different angles).

[10] The Court notes that this was outside of the "danger zone" of the moving forklift, which was anywhere within 180 degrees of an elevated or moving load. (Tr. 191-95).

[11] Complainant attempted to impeach [redacted] with deposition testimony seemingly indicating he had not yet loaded Bundle D when [redacted] ran under the forklift. (Tr. 255-57). The Court credits [redacted]'s account at trial the Bundle had been loaded onto the forklift by the time [redacted] ran under it. The Court finds the proceeding events, which occurred over a matter of seconds, could not have occurred as they did without the bundle having already been on the forklift at the time [redacted] ran under it. Moreover, the Court was able to observe [redacted]'s demeanor at trial and found him to be a forthright and credible witness.

elevated load and abruptly stopping the forklift with the load still elevated could have caused the bundle or the forklift to topple. (Tr. 174-78, 232, 247-48). After a matter of seconds,[12] Bundle D fell off the forklift onto [redacted] beneath, killing him. (Stipulations ¶¶ 2, 4; Tr. 252).

Following Respondent's report of [redacted]'s death, OSHA sent CSHO McGurk to investigate. (Tr. 313). CSHO McGurk arrived at Store 1949 the same day, inspected where the accident had occurred, and reviewed various documents produced by Respondent. (Tr. 313-14).

C. The Citation

Following his investigation, CSHO McGurk concluded Respondent had allowed [redacted] to pass under the loaded forklift and thereby violated 29 C.F.R § 1910.178(m)(2). The CSHO's conclusion was based on his inference that [redacted] and [redacted] had had a "conversation" in the process of moving Bundle D and that "it wasn't a quick situation where [redacted] jumped in. It was more of an ongoing loading process that led to the accident." (Tr. 315). He found there was an "extended amount of time" where either [redacted] or [redacted] could have removed themselves from the dangerous situation that had been created. (Tr. 321). The CSHO also believed Respondent did not have a process in place to inspect or enforce its Work Rule prohibiting passing under raised forklifts. (Tr. 315). The CSHO further concluded Respondent's standard operating procedure regularly placed employees in the position [redacted] was in when the load fell on top of him. (Tr. 320). Based on the CSHO's conclusions, Complainant issued the serious Citation to Respondent.

In addition to the CSHO, the following witnesses testified at trial:

[12] [Redacted] was not able to articulate an exact timeframe for the events leading up to the accident, instead stating it happened "so fast" and "too quick" (Tr. 248, 252). However, in response to a clarifying question from the Court, he indicated that by "too quick" he meant "Just seconds. It just happened – [snaps fingers] – like that." (Tr. 252). The Court credits this account, especially in light of the fact Complainant has failed to offer any alternative view of the facts, even when directed to do so by the Court. (Tr. 342-44).

Gary Leonard Murray III was the general manager for Store 1949 at the time of the accident, managing approximately 25 to 30 employees. (Tr. 76, 160). He was the highest-ranking employee at Store 1949 and, along with his co-manager Matt Kuzniar, was responsible for employee safety. (Tr. 83-84)

[Redacted] was the driver of the forklift at the time the bundle fell onto [redacted]. (Stipulations ¶ 5; Tr. 205). He had been in that position since 2017. (Tr. 205).

Matthew Martindale was the area manager for BLS' West Houston location, which covered BLS' activities at 84 Lumber's Store 1949. (Tr. 272). He oversaw ten drivers, including [redacted]. (Tr. 272, 302). Even though he worked on the premises of Store 1949, he did not observe the accident leading to the issuance of the Citation. (Tr. 273, 285-86).

V. Discussion

A. Applicable Law

To establish a violation of a safety or health standard promulgated pursuant to section 5(a)(2) of the Act, Complainant must prove: (1) the cited standard applies; (2) the terms of the standard were violated; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant must establish his case by preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

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

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

B. Citation 1, Item 1 – The Alleged Forklift Violation

Complainant alleged a serious violation of 29 C.F.R. § 1910.178(m)(2) as follows:

> 29 CFR 1910.178(m)(2): Persons were allowed to stand or pass under the elevated portion of trucks, either loaded or empty.
>
> On or about November 19, 2019 employees were exposed to struck by hazards while working underneath the elevated portion of the [sic] a load that was being moved with a forklift.

The cited standard provides: "No person shall be allowed to stand or pass under the elevated portion of any truck, whether loaded or empty."

1. The Standard Applies

Respondent has not contested, and the record supports, the cited standard applied to Respondent's activities involving loading and unloading wood bundles while using a forklift on the date of the accident. The Court finds the cited standard applies. (Tr. 344); *see also* 29 C.F.R. § 1910.178(a)(1) ("This section contains safety requirements relating to … use of fork trucks …").

2. The Standard Was Not Violated

29 C.F.R. § 1910.178(m)(2) prohibits a person from being "allowed" to stand or pass under the elevated portion of a truck. The regulation does not define the word "allowed" or "allow." However, as the Commission recently held, "[Commission] precedent makes it clear that an undefined term's meaning can be determined by consulting a contemporaneous dictionary." *Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785, at *2 (O.S.H.R.C., July 22, 2021). Dictionaries

contemporaneous to this regulation[13] define "allow" as "to give permission to or for; permit,"[14] "to permit by neglect, oversight, or the like,"[15] and "to permit by way of concession"[16] or "by neglecting to restrain or prevent."[17] Thus, the definition of "allow" contemplates either explicit or implicit permission given for certain conduct.[18]

Likewise, in Texas where the accident occurred, an employer can be deemed to have authorized an employee's conduct either explicitly or implicitly. *See Kennedy v. Am. Nat'l Ins. Co.*, 107 S.W.2d 364, 366 (Tex. 1937) (finding an employer can be liable for torts committed by an employee acting within the scope of employment "if the servant's use of the automobile or other vehicle was authorized, either expressly or impliedly."); *Mexico's Indus., Inc. v. Banco Mexico Somex, S.N.C.*, 858 S.W.2d 577, 583 (Tex. Ct. App. 1993) (finding that, in a principal-agent relationship, "actual authority includes both express and implied authority"); *see also* Restatement (Third) of Agency § 2.01 cmt. b (defining "actual authority" to include "implied authority," meaning, in relevant part "to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent.").

[13] 29 C.F.R. § 1910.178(m)(2) was first promulgated in 1972, and the language has not changed since that time. *Compare* Part 1910 – Occupational Safety and Health Standards, 37 Fed. Reg. 22,102, 22,257 (Oct. 18, 1972), *with* 29 C.F.R. § 1910.178(m)(2). Thus, the Court has consulted dictionaries contemporaneous with the original promulgation of the standard. *See Roy Rock, LLC*, 2021 WL 3624785 at *3 (consulting a 1986 dictionary for a regulation promulgated in 1988).

[14] *Allow*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 40 (1971) (definition 1).

[15] *Id.* (definition 3).

[16] *Allow*, WEBSTER'S THIRD NEW INT'L DICTIONARY 58 (1971) (definition 4a).

[17] *Id.* (definition 4b).

[18] Indeed, in the commentary to the definition of "allow" in the Random House dictionary consulted by the Court, it is noted that "allow" and its synonyms "let" and "permit" all "imply granting or conceding the right of someone to do something." RANDOM HOUSE DICTIONARY at 40.

Indeed, in *Clements Paper Co.*, No. 419, 1972 WL 4101, at *5 (O.S.H.R.C., June 26, 1972), the Commission interpreted the regulation at issue in this case consistent with these dictionary definitions and agency law concepts as follows:

> It seems apparent that the connotation implied from this phrase is that the petitioner [Secretary] must prove that responded 'allowed' Sells to pass under the truck. Section 1910.178(m)(2) is not explicit as to what constitutes 'allowed' an employee to undertake a certain course of action. It seems axiomatic that the word 'allow' implies permission either implicit or explicit, given by the employer. The word permission in turn implies that the employer had knowledge of that act which he has given his permission to the employee to do so."

Thus, the Court finds to prove a violation of 29 C.F.R. § 1910.178(m)(2), Complainant must prove Respondent either explicitly or implicitly permitted [redacted] to stand or pass under the forklift. Here, Complainant has proven neither.

i. Explicit Permission

As to explicit permission, Complainant has stipulated Respondent "had a Work Rule in place at Store 1949 (the store implicated in this matter) that instructed and communicated to 84 Lumber employees to not let people work under the elevated loads or pass under the elevated loads of forklifts … and "84 Lumber adequately communicated the Work Rule to its employees at Store 1949." Additionally, Martindale, [redacted]'s supervisor, acknowledged that BLS trained [redacted] to never work under a forklift's forks or a suspended load thereon. (Tr. 302-03, 305-06). Further still, both Martindale and Murray both stated this Work Rule was common in the industry because of the obvious dangers posed by working under a suspended load on a forklift. (Tr. 148, 160-61, 302-04; Ex. R-5, at 7 ("USE COMMON SENSE [when operating a forklift]: … ALLOW NO ONE under or near lift mechanism or load.")).

Against the weight of this evidence, Complainant makes no argument in his post-trial brief Respondent had given [redacted] explicit permission to stand under the elevated load on the

forklift. Indeed, the record indicates [redacted] responded according to the Work Rule by yelling at the deceased to get out from under the elevated load and also sounded his horn. These actions by [redacted] cannot be interpreted as Respondent providing explicit permission to be under the elevated load. Accordingly, the Court finds Respondent did not give explicit permission for [redacted]'s conduct.

ii. Implicit Permission

As to implicit permission, while adequate work rules, training, and employee experience can bear on whether implicit permission was granted for purposes of 29 C.F.R. § 1910.178(m)(2),[19] Complainant instead focuses on the practice of placing dryers under the elevated loads as evidence Respondent implicitly permitted employees to walk under elevated loads. (Complainant's Br. 7-8). More specifically, Complainant argues Respondent allowed employees, including BLS employees, to approach elevated loads on forklifts to place dryers, which "required BLS employees to be in very close proximity or even under elevated loads." *Id.* at 7.

However, the uncontroverted evidence adduced at trial demonstrated: (1) while 84 Lumber employees were loading bundles onto a truck, the policy at the time of the accident was that BLS drivers would wait in front of the bed of the truck, well out of the zone of danger for an active forklift (Tr. 191-95, 223-24, 229, 277-78, 308); (2) dryers were only placed under an elevated load when it had been lowered to approximately 3 or 4 inches above the bed of the truck

[19] *See Clements Paper Co.*, 1972 WL 4101, at *7 (discussing employee's experience and safety measures instituted by employer in determining there was no implicit permission for the employee to pass under a roll lift). Due to the Stipulations that Respondent had a Work Rule which prohibited employees from passing or walking under elevated loads and the Work Rule was adequately communicated to the employees as well as BLS employees having been trained on the same rule, no further discussion is needed as to whether implicit authorization was provided on these bases. *See* Stipulations ¶¶ 8, 9. Finally, no party has questioned the experience of [redacted], who had been a forklift driver since 2017, at Respondent's work location. (Tr. 205).

(Tr. 134-35, 139-140, 146-47, 185-86, 219-221, 239-44, 277-78, 290-92, 297-98, 304-306); and (3) employees placed the dryers while standing on either side of the forklift, neither underneath nor on top of the elevated load. (Tr. 139-43, 185, 188-91, 201-02, 239-40). Thus, although Complainant's argument that "[t]he manual process of placing dryers requires employees to approach elevated loads" is technically true, it fails to account for the fact that the loads were elevated only a few inches and were above a truck bed when the employees approached them, such that an employee would be physically unable to "stand or pass" under the loads.

Complainant also argues Respondent failed to require dryers to be banded together when the bundles were being assembled, despite this being feasible, and thus perpetuated the need for employees to "manually place dryers in the [sic] direct proximity of elevated forklift loads." (Complainant's Br. 8). Again, while this statement is technically true, it ignores the reality of Respondent's practice, which prohibited employees from approaching the load to place the dryers until it was suspended only a few inches above the bed of a truck. (Tr. 134-35, 139-140, 146-47, 185-86, 219-221, 223-24, 277-78, 290-92, 297-98, 304-06).

Finally, Complainant argues Respondent failed to designate a "muster area"[20] for BLS drivers to wait while their trucks were being loaded, thus giving "BLS drivers little choice but to be involved in the loading [of] the trucks, placing dryers, or lingering in the proximately [sic] of the loading process." (Complainant's Br. 7). However, the evidence established BLS drivers waited between the front of the semi-truck and the truck's trailer, well out of the 180-degree radius comprising the "zone of danger" of an active forklift. (Tr. 191-95, 223-24, 229, 277-78, 308). Only after the load on the forklift was above the bed of the truck and the forklift's brake were

[20] Martindale indicated that, following the accident in this case, BLS drivers must now stand in a designated "muster area" near a fire hydrant and further from the loading area while 84 Lumber employees load BLS' trucks. (Tr. 307-09).

activated would the BLS employees approach the trailer to place the dryers. (Tr. 134-35, 140, 185). Respondent's practice did not implicitly permit BLS employees to pass under a loaded forklift; in fact, it specifically avoided that practice.

The Court therefore does not find Complainant has proven Respondent's practice of manually placing dryers implicitly permitted its employees to stand or pass under elevated loads on forklifts. Complainant has not proffered any other theory for how Respondent implicitly permitted [redacted]'s actions on the date of the accident.[21] Accordingly, the Court finds the standard was not violated.

VI. Conclusion

Complainant has failed to establish Respondent violated the cited standard, and thus failed to make out an essential element of his case. *Atl. Battery Co.*, 16 BNA OSHC at 2138. Accordingly, the Citation is vacated. In light of this, the Court need not address the remaining elements of Complainant's prima facie case.[22]

ORDER

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.

Based upon the foregoing Findings of Fact and Conclusions of Law, is it ORDERED that Citation 1, Item 1 is VACATED.

---

[21] Despite the Court's order for the parties to do so (Tr. 345-47), Complainant has not briefed the issue of the timing of the events leading to the accident, whether [redacted]'s actions during this time could be considered implicit permission of [redacted]'s actions, or whether [redacted], as a forklift operator with no supervisory authority over [redacted], could even consent to [redacted]'s actions on behalf of Respondent. *See* Resp't Br. 20-22 (discussing these issues). The Court therefore considers any reliance on these issues as a basis for a finding of implicit permission to have been abandoned by Complainant. *See, e.g.*, *Castro v. McCord*, 259 F. App'x 664, 665-66 (5th Cir. 2007) (unpublished); *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2063 n.4 (No. 10-0551, 2014); *Altor, Inc.*, 23 BNA OSHC 1458, 1460 n.3 (No. 99-0958, 2011), *aff'd*, 498 F. App'x 145 (3d Cir. 2012) (unpublished).

[22] Likewise, the Court need not address Respondent's arguments regarding employer knowledge or the classification of the violation. (Resp't Br. 23-29).

Some personal identifiers have been redacted for privacy purposes.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
First Judge – OSHRC

Date: December 13, 2021
Denver, CO