THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

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. WALMART, INC., Respondent.	OSHRC DOCKET No. 17-0949

Appearances:

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For the Complainant

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For the Respondent

Before: Keith E. Bell, Administrative Law Judge

Some personal identifiers have been redacted for privacy purposes

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. § 659 (c) (the Act). On March 28, 2017, the Occupational Safety and Health Administration (OSHA) conducted an inspection of a worksite located at 300 Enterprise Road in Johnstown, New York. Following the inspection, OSHA issued a Citation and Notification of Penalty (Citation) to Walmart, Inc. (Respondent) alleging a violation of the Act. Respondent filed a timely Notice of Contest (NOC), bringing this matter before the Commission.

Citation 1, Item 1 is classified as "Serious" and alleges that Respondent violated 29 C.F.R. § 1910.176(b), stating that "employees are exposed to struck-by hazards from unstable material storage." A penalty of $10,864.00 is proposed for this item.

A hearing in this case was held on December 19, 2017, in Albany, New York. The parties each filed a post-hearing brief. For the reasons that follow, the Citation is **AFFIRMED** and the proposed penalty is assessed.

Jurisdiction

The record establishes, and the parties stipulated, 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. § 625(5). JX-1.[1]

Factual Background

The Accident

[redacted] is an employee of Respondent, Walmart, at distribution center #6096 in Johnstown, NY (worksite). Tr. 22. On February 25, 2017, she was struck on her head, shoulders and back by items that fell from a pallet.[2] As a result of her accident, she suffered injury to her spine. Tr. 23 – 27. At the time of her accident, [redacted] was filling orders which required her

[1] JX denotes Joint Exhibit; CX denotes Complainant's Exhibit; and RX denotes Respondent's Exhibit.

[2] Although [redacted] testified that her accident occurred sometime in April 2017, she also stated that she couldn't exactly remember the date. The record reflects that the accident occurred on February 25, 2017. Tr. 138.

to go up and down the aisles to remove items from the rack. Although she did not see the items fall, she later learned that a pallet was tipped by another employee causing the items on the pallet to fall. Tr. 26.

Storage Racks

Walmart uses a "selective racking" system which is the industry standard. The selective racking system has two orange beams (front and back) that are load beams where the stored merchandise rests. The selective racking system includes several slots used to store merchandise to fill orders. The slots on the floor are called "10" slots and just above are the "20" slots. The slots closer to the floor are more commonly referred to as "pick" slots. Tr. 33. The upper slots in the selective racking system are called "T" slots. Tr. 33. The tallest T-slot is approximately 40 to 50 feet high. Tr. 36.

A hauler brings merchandise to storage racks on pallets and leaves them on the floor in the aisles. Then, a driver assigned to put the items away places them in the T-slots. Tr. 46. Merchandise placed in the T-slots eventually gets moved down to the "pick" slots which are used to fill orders. Tr. 46. Throughout the day, employees move through the aisles to place or move merchandise on the racks. Tr. 47. Occasionally, the driver putting the merchandise away hits the adjacent pallet while attempting to push the pallet into its designated slot. Sometimes, the pallet does not fall completely; but rather, items fall off the pallet. Due to the design of the selective racking system, there is nothing to stop a pallet from sliding when it is bumped. Tr. 49.

Once a pallet is empty, it is pulled and stored in with other empty pallets in a separate location. Tr. 122-23.

Inspection

Walmart's Distribution Center #6096 was inspected on March 28, 2017, by OSHA

Compliance Officer (CO), Charles Harvey, based on a complaint concerning an employee injury and an unsafe condition. Tr. 70. CO Harvey began his inspection with an opening conference conducted with General Manager (GM) Paul Lund and other Walmart managers. As part of his inspection, CO Harvey walked through the worksite, conducted employee interviews, took photographs, and held a closeout conference before leaving. Tr. 75. Following his inspection, CO Harvey recommended that a citation be issued for a violation of 29 C.F.R. §1910.176(b). Tr. 91. Based on the information gathered during his inspection, CO Harvey determined that the citation should be characterized as "serious" with a proposed penalty in the amount of $10, 864.00. Tr. 92-93.

Stipulated Facts and Issues of Law (JX-1)

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act.
2. The Respondent, Walmart, Inc., a corporation organized under the laws of the State of Delaware, maintaining its principal office and place of business at 702 SW 8th Street, Bentonville, Arkansas, 72716, and doing business in the State of New York, is and at all times hereinafter mentioned was engaged in business operating department stores, distribution centers and related activities.
3. Respondent operates a distribution center located at 300 Enterprise Road, Johnstown, New York (the worksite).
4. Many of the materials and supplies used by Respondent at the worksite originated and/or were shipped from outside the State of New York and Respondent was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and is an employer within the meaning of section 3(5) of the Act.

5. OSHA conducted an inspection at the worksite as a result of which OSHA issued the citation that is contested in this action.

Secretary's Burden of Proof

The Secretary has the burden of establishing that the employer violated the cited standard. To prove a violation of an OSHA safety or health standard promulgated under § 5(a)(2) of the Act, the Secretary must establish, by a preponderance of the evidence, that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980). 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.* at 2131, n. 17.

Discussion

29 C.F.R. §1910.176(b) states: "Handling materials-general. *Secure storage.* Storage of materials shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse." In this case, the Secretary alleges that on March 28, 2017, and at all times prior, employees were exposed to "struck by" hazards from unstable material storage.

Applicability

The language of 29 C.F.R. §1910.176(b) plainly states that it applies to "storage of materials" and requires them to be maintained secure and stable to prevent sliding or collapsing. The violation at issue in this case resulted from an accident at the worksite, Walmart Distribution Center #6069, where pallets of inventory were stored on racks until used to fill orders. Tr. 26, 75-

78, 138-39. Specifically, a pallet slid, when bumped, causing its contents (cans of crescent rolls) to fall through the racking system and strike [redacted]. Respondent argues that the "material" that fell on [redacted] is not covered by this standard because it was in the process of being placed into storage. Resp't Br. 8-9. However, this contention is not supported by the evidence. On the contrary, the evidence reveals that [redacted] was in the process of removing materials from the racks to fill an order when a pallet of crescent rolls, already in place, was dislodged by another pallet being placed on (or removed from) an adjacent rack. Tr. 26-27, 77-78, 138-39. Respondents argument is unconvincing given its concession that the crescent rolls fell through the rack before striking [redacted] which is a clear indication that they were on the rack prior to the accident. Tr. 139. The cited standard applies.

Standard Violated

That the pallet holding the crescent rolls that struck [redacted] was tipped or pushed by another pallet being placed or removed by a lift driver on an adjacent aisle is undisputed. Instead, the dispute centers on what caused the rolls to fall. CO Harvey testified that the pallet of crescent rolls was stacked/racked in an unstable manner because it was resting only on a front and back beam with no other support. Tr. 96. By contrast, Respondent contends that the pallet was stable in the racking system and would have remained so but for being displaced by another pallet which was being moved on an adjacent rack.[3] Tr. 139. Previously, the Commission has held that stacked material must be stable and secure even when struck by forklifts. *Clement Food Co.*, 11 BNA

[3] Respondent also argues that [redacted] violated the company's "20-foot" rule when she entered the aisle while a lift was moving pallets on an adjacent aisle thereby placing herself in harm's way. Tr. 139. Respondent's "20-foot rule" requires order fillers to stay 20 feet back when a driver honks their horn and yells "20 feet" while placing items in or removing them from a pick-slot or T-slot. Tr. 52. This argument fails for two reasons: (1) it attempts to place blame on [redacted] which goes to an "unpreventable employee misconduct" defense not properly raised prior to the hearing; and (2) it has no bearing on whether the pallet of crescent rolls was stored in compliance with the cited standard. Respondent's 20-foot rule is referenced in RX-5; however, it states "[p]edestrians must maintain a safe distance around operating forklifts and/or power equipment…".

OSHC 2120, 2122 (No. 80-607, 1984) (holding that §1910.176(b) is not limited by its own words to stacks so unstable that they might collapse under their own weight). Here, Walmart uses 46" pallets on a 42" (measured from front beam to back beam) span selective racking system. Tr. 124. That means that a perfectly placed pallet only has 2" of overhang on each beam to keep it in place. The General Manager (GM) of Walmart Distribution Center #6096, Paul Lund, testified that merchandise occasionally falls from the racking system due to "operator error" that pushes a pallet on an adjacent rack and causes it to fall. Tr. 133-34. Given the dynamic atmosphere of this distribution center where pallets and their contents are constantly being placed and pulled from the racks, it is clear to see why these 46" pallets resting on 42" span racks become unstable when struck by moving equipment. The evidence supports a finding that Respondent violated 29 C.F.R. § 1910.176(b).

Employee Access

The Commission has recognized that exposure may be established by showing "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012). The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *KS Energy Servs., Inc*., 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008) (citing *RGM Constr. Co*., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)).

At the time of her accident, [redacted] was filling orders which required her to go up and down the aisles to remove items from the rack. Tr. 26. Walmart's own investigation into the accident revealed that she entered the 20-foot zone while a lift driver was retrieving a pallet from the top level. Tr. 138. The pallet was bumped and caused merchandise to fall inside the racking

system where it ultimately struck [redacted]. Tr. 139. GM Paul Lund testified that [redacted] should not have been within 20 feet of the area where the accident occurred because there was a forklift operating on the adjacent aisle. Further, Mr. Lund testified that [redacted] should have recognized that a forklift was in the area by sight and by sound. Tr. 139. According to [redacted], she didn't hear the driver shout "20 feet". Tr. 55-56. She also testified that the 20-foot rule is not always followed. Tr. 53-54. [redacted]'s contention is supported by the testimony of CO Harvey that, during his inspection, he observed that employees were not adhering to the 20-foot rule. In fact, while CO Harvey was walking around the distribution center with GM Lund, there was a moving piece of equipment in the adjacent aisle and no one invoked the 20-foot rule. Tr. 90-91. In sum, the facts clearly show that [redacted], and possibly others, was exposed to the "zone of danger" which, in this case, was an aisle between the racks where a piece of equipment was operating within 20 feet. The evidence supports a finding that [redacted] had access to the hazard and was within the zone of danger to perform her assigned task at the time of the accident.

Employer Knowledge

The knowledge requirement may be satisfied by proof either that the employer actually knew, or had constructive knowledge and "with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Pride Oil Well Serv.,* 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). Although the Secretary has the burden to establish employer knowledge of the violative conditions, when a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program. *Dover Elevator Co. Inc.*, 16 BNA OSHC 1286-87 (No. 91-862, 1993) quoting *Baytown*

Constr. Co., 15 BNA OSHC 1705, 1710 (No. 88–2912S, 1992), *aff'd*, 983 F.2d 282 (5th Cir. 1993) (unpublished).

According to [redacted], prior to her accident, items would fall 3-4 times during her work week (Friday, Saturday, and Sunday). Tr. 28. [redacted] testified that she personally informed a couple of managers of her concerns regarding items falling off the T-slots. In particular, [redacted] recalled telling a manager named Dean who no longer works at the distribution center. However, [redacted] testified that her concerns were "brushed off". Tr. 30. CO Harvey interviewed an unnamed male employee who told him that material falls through the racks frequently. Tr. 85. CO Harvey testified that GM Lund stated he was aware of material falling through the racks but had not received funding from the corporation to put "fixes" in place such as intermediate/perpendicular bars as seen in CX-4a.[4] Tr. 86-87. Thomas Rimmer who is an Asset Protection Manager at this worksite testified that material falls off the reserve level of the selective racking system when hit by an associate thereby causing a pallet to tip. Tr. 161. He further testified that pallets frequently tip but only fall a couple of times a month. Tr. 162. GM Lund testified that merchandise occasionally falls from the racking when struck by a lift driver. Tr. 133-34. Although he never saw a pallet fall, Mr. Lund stated that he received reports regarding tipped pallets and is aware that it happens at least a few times per month. Tr. 134, 136-37. The evidence supports a finding that Respondent's managers had actual knowledge of the hazard and that knowledge may be imputed to Respondent. However, Respondent is still entitled to rebut a prima facie showing of supervisor knowledge and avoid imputation of that knowledge by coming forward to show that it had work rules addressing the cited hazard that were adequately communicated to supervisors

[4] According to CO Harvey, the perpendicular beams would prevent pallets from falling through if dislodged. Tr. 87. In fact, Mr. Lund stated the perpendicular beams were placed in this area because smaller items are kept there. *Id*.

and effectively enforced. *Pride Oil Well Serv.*, 15 BNA OSHC at 1815. The work rule referenced repeatedly in relation to this violation is Respondent's "20-foot" rule. However, the record reveals that the 20-foot rule was not always followed, nor was it effectively enforced. Employer knowledge is established.

Penalty Determination

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

Serious Characterization

The penalty proposed in this case was based on a violation characterized as "serious". To demonstrate 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). Knowledge has already been established. So, the only determination left to make is whether death or serious physical harm could result from the cited condition. In this case, [redacted] was struck by cans of crescent rolls that fell from a pallet. 27. CO Harvey testified that the resulting injury was "bruising". Tr. 105. Respondent argues that this violation should be characterized as "other-than-serious" because "bruising" does not constitute serious

physical harm. Resp't Br. 16. If bruising had been the extent of [redacted]'s injuries from the accident, Respondent would be correct that this violation should be characterized as "other-than-serious". *See Lisbon Contractors, Inc.,* 5 BNA OSHC 1741 (No. 11097, 1977) (holding that the violation at issue was "non-serious" because bruises or contusions could have resulted from the hazard). However, the evidence reveals that "bruises" were not the extent of [redacted]'s injuries. [redacted] gave uncontroverted testimony that, according to her doctor and chiropractor, she has spacing between her T3 and T4 spinal vertebrae and has lost curvature of the spine. Tr. 27. In weighing the difference between CO Harvey's description and that of [redacted] regarding her injuries, the undersigned finds that the two are not inconsistent, but [redacted] offers a more detailed explanation of her condition after the accident. [redacted] further testified that, because of her injuries from the accident, she had to transfer to a different department. Interestingly, CO Harvey's testimony regarding the nature of [redacted]'s injuries seems to belie OSHA's characterization of this violation as "serious". However, [redacted] is clearly in the better position to know the true nature and extent of her injuries. Since the Secretary is not required to show that an accident did occur, an analysis of whether this violation is properly characterized as "serious" requires a look at not just the physical harm that occurred in this case, but also the physical harm that **could** occur. The evidence reflects that the T-slots where the pallets are stored are up to 40 or 50 feet high. Tr. 36, 79. The testimonial evidence and photographs show that the pallets at this worksite are loaded with various merchandise consisting of cans, jars, and boxes --- some shrink wrapped and others not. CX-1, 3 & 4. Given the height of the T-slots on Respondent's racking system, the size of the pallets, and the bulk items stored on each pallet, it is reasonable to infer that death or serious injury would likely occur to an employee working in the adjacent aisle when a pallet is dislodged. *See A.G. Mazzocchi, Inc.*, 22 BNA OSHC 1377, 1387 (No. 98-1696, 2008)

(Commission held that reasonable inferences may be drawn from circumstantial evidence) (citing 1 Clifford S. Fishman, Jones on Evidence §§ 1.5, 4.2 (7th ed. 1972)). The violation is properly characterized as "serious".

Penalty Calculation

Regarding the proposed penalty for this violation, CO Harvey testified that the gravity was rated as "medium to high" because there was an injury that wasn't disabling. He further testified that probability was rated as "greater" because of the likelihood that this could happen again. Tr. 91-92. No good faith adjustment was given because CO Harvey never received a full safety and health plan to evaluate. Tr. 94. Also, Counsel for Respondent stipulated that the company is not entitled to a good-faith adjustment. Tr. 93. No evidence was adduced regarding the size; however, it is well-known that Walmart is a large company. In any case, Respondent only disputes the characterization of the violation not the penalty calculation. The evidence supports a finding that the proposed penalty is appropriate.

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[5]

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

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1910.176(b), is AFFIRMED, and a penalty of $10,864.00 is assessed.

DATED: June 18, 2018
Washington, D.C.

/s/Keith E. Bell
KEITH E. BELL
Judge, OSHRC

[5] Respondent requested six months to abate the cited condition in its post-hearing brief. Resp't Br. at 16. However, this issue was not litigated. Therefore, the undersigned has no basis for determining a reasonable abatement time.