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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.
ROY ROCK, LLC,
Respondent.

OSHRC DOCKET No. 20-1212

Appearances:

Terrence Duncan, Esq.
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United States Department of Labor
201 Varick Street, Rm. 983
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For the Complainant

Eric Magnelli, Esq.
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101 Eisenhower Parkway
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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. § 659 (c) (the Act). The Occupational Safety and Health Administration (OSHA) investigated an accident that occurred at a worksite in Elizabeth, New Jersey on or about February 12, 2020. Following the inspection, OSHA issued a Citation and Notification of Penalty (Citation) to Roy Rock, LLC (Respondent) alleging a violation of the Act. Respondent filed a timely Notice of Contest, bringing this matter before the Commission.

Citation 1, Item 1 is classified as “serious” and alleges that Respondent violated § 5(a)(1) of the Act (also known as the general duty clause), and states:

The employer did not ensure the operator of the concrete pump truck set the outriggers on stable ground and used sufficient cribbing for the outriggers, as not to exceed the allowable bearing capacity of the underlying material, thereby exposing employees to a struck-by and crushing hazards when the truck[] tipped over.

A penalty of \$13,494.00 is proposed for this citation.

A virtual hearing in this case was held on November 9, 2021. 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 reveals and the parties agree (Complaint & Answer) 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).¹

Factual Background

Respondent, Roy Rock, LLC is a company located in East Orange, New Jersey engaged in

¹ Roy Rock, LLC is a construction company. *See Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983) (holding that there is an interstate market in construction materials and services and therefore construction work affects interstate commerce).

the business of commercial construction. (GX-2).² Respondent was hired by General Contractor (GC), March Associates Construction, Inc. (March Assoc.) to perform concrete work at a project site located at 190 Union Ave. in Elizabeth, New Jersey (worksite). (RX-2). On February 12, 2020, the OSHA Area Office in Avenel, New Jersey received a referral from a local fire dispatcher who reported an accident at Respondent's worksite. (GX-1). Subsequently, OSHA Compliance Safety and Health Officer (CO) David Pelton initiated an investigation of the matter the same day. (Tr. 17). The investigation lasted from February 12th through July 21st, 2020.

The Accident

Unfortunately, none of the witnesses who testified at the hearing for this case was an eyewitness to the events that gave rise to the OSHA investigation and Citation at issue. However, Respondent's Safety Director, Ricardo Quinteros, began preparing an accident investigation report the day after the accident. (Tr. 207). The following facts are derived from that report:

On February 12, 2020, a concrete pump truck owned by Respondent arrived on the worksite around midday to set up for concrete placement. The site was wet in most areas due to heavy rain the day before. Upon arrival, the pump truck operator spoke to our foreman to know the location to set up the concrete pump truck. [The] foreman indicated that the superintendent, representing the general contractor, told him to set up in the area where the accident would occur later that day. Next, the operator visually checked the area designated to set up the concrete pump.

The truck was set up with all four outriggers fully extended, and the manufacturer provided outrigger pads positioned under each front outrigger.

The outriggers were set on the pads to distribute the anticipated loads. The operator started pumping concrete while [redacted] was holding the hose of the concrete pump. One of the outriggers and its mat was sitting directly above the underground pipe, which could not resist the weight and sunk into the ground.

As a result of the outrigger sinking into the ground, the boom lowered and swung to the right. The hose located on the end of the boom contacted and injured [redacted] who lost consciousness. Nearby employees helped him stay put while

² GX denotes Complainant's Exhibit; and RX denotes Respondent's Exhibit.

the foreman called 911 and notified the General Contractor.

(RX-3, at 1 & 3). According to Safety Director Quinteros, Roy Rock owned the concrete pump truck involved in the accident and its operator, [redacted], was an employee of Roy Rock. (Tr. 179). Two Roy Rock foremen were on site on the day of the accident: Charlie Andrade and Rich Van Olden. (Tr. 29). Foreman Andrade left the worksite around 10:00 a.m. and returned approximately 10 minutes after the accident. (Tr. 164). When [redacted] arrived at the worksite on the day of the accident, he reported to Rich Van Olden who was the foreman responsible for set up of the concrete pump truck.³ (Tr. 180). Over a period of approximately one week prior to the accident, there was a lot of rain in the area. (Tr. 30).

Secretary's Burden of Proof

Here, the Secretary alleges that Respondent violated section 5(a)(1) of the OSH Act, the general duty clause, which requires that each employer “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). To prove a violation, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The Secretary must also show that the employer knew or, with the exercise of reasonable diligence, could have known that the hazardous condition existed at its worksite. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-0469, 1992).

To prevail, the Secretary must prove an alleged violation of the Act by a preponderance of

³ Foreman Van Olden did not testify at the hearing.

the evidence which 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).

Discussion

Hazard

As described in the Citation at issue, the hazardous condition at this worksite was created when:

[t]he employer did not ensure the operator of the concrete pump truck set the outriggers on stable ground and used sufficient cribbing for the outriggers, as not to exceed the allowable bearing capacity of the underlying material, thereby exposing employees to a struck-by and crushing hazards when the truck tipped over.

To determine if a hazard existed at this worksite, the Court must examine practices, procedures or conditions that increased the likelihood the concrete pump truck would tip over and strike or crush an employee. *See Pelron Corp.*, 12 BNA OSHC 1833, 1836 (No. 82-388, 1986) (defining hazard as “practices, procedures, or conditions which increase the likelihood of an explosion...”).

Based on his investigation into the February 12, 2020, accident at the worksite, CO Pelton concluded that a proper soil assessment was not conducted to evaluate the pressure that would have been exerted, determine the location of the detention drain system (also referenced as detention drain field), and that different gripping could/should have been used under the outriggers. (Tr. 42-43).

CO Pelton concluded that a proper assessment of the soil was not conducted prior to the set-up of the concrete pump truck. (Tr. 42). He testified that, prior to the accident, it had been

raining over a one-week timeframe in the area of the worksite. (Tr. 30). Foreman Charlie Andrade confirmed that it had been raining a few days before the accident. (GX-9, at 3). According to him, the area where the concrete pump truck set up was muddy.

Question: On the day of the accident, was the site so muddy that it was too dangerous for pump trucks to be onsite?

Answer: The job, that job was muddy, but there was (sic) areas that were solid with DGA.⁴ So, when we do flatten out the area for a pump truck to come in, and this is just a normal procedure, if there is DGA, there is compaction being done at the job, and no mark-outs is being done for any danger, we set up the pump truck based on what we see.

(Tr. 163).

Mr. [redacted] stated that the ground was wet but seemed stable enough to set up the truck. (GX-10, at 5). Before setting up his truck, Mr. [redacted] stated that he typically conducted a visual check of the site to look for signs of excavations, drainages, fissures, or cracks; however, he does not have tools to do soil testing. (*Id.*, at 3-4). On the day of the accident, he conducted a visual inspection of the ground and determined that it was stable enough to set-up the concrete pump truck. (*Id.*, at 4). When asked about the “dense grade aggregate” in the area where the truck was set up, Mr. [redacted] stated that he was aware of it, and it is commonly used for soil erosion control and helps to retain sediment. (*Id.*, at 5). According to the American Concrete Pumping Association (ACPA) Safety Manual (Ver. 7.0.1), checking ground conditions involves the application of a mathematical formula to determine the “load bearing capacity” of a surface. Specifically, the formula requires the person conducting the soil evaluation to “calculate the surface pressure, divide the force imposed on the surface by the outrigger leg (shown on a decal on the outrigger) by the number of square inches in contact with the surface.” (GX-6, at 3). This

⁴ DGA refers to dense grade aggregate. (Tr. 53).

formula doesn't appear to require the use of tools. The Court finds that, on the day of the accident, the truck operator followed his normal practice and did a visual inspection of the set-up site to check for cracks, fissures, drainages, excavations etc. However, given the wet ground conditions, the visual check was insufficient to help the truck operator determine if additional cribbing was needed to enhance ground support. The Court also finds no evidence that the industry recommended practice to check the soil to determine its load bearing capacity, prior to set up, was followed despite evidence that they always have a compaction inspector on site, and they know where not to dig because of the DGA. (GX-9, at 3).

CO Pelton's investigation revealed that the right front outrigger was placed over one of the drainpipes for the detention drain system and the ground wasn't capable of supporting the weight that was exerted by lifting the truck. (Tr. 31). Respondent's Incident Review Report concluded that "the leading cause was the location of the outrigger directly sitting above the underground pipe." (RX-3, at 6). According to the ACPA Safety Bulletin, *Setting Outriggers To Prevent Accidents* (Jan. 22, 2010), one of the contractor's responsibilities is to inform the operator of the concrete pumping truck of "backfilled areas, soft or muddy areas, or underground obstructions. (GX-7, at 4). Here, all could see the wet ground conditions resulting from days of rain prior to the accident. Additionally, according to Foreman Charlie Andrade, everyone knew there was a detention drain field on site, but no one knew where it was located. He also testified that, prior to the accident, neither he nor Foreman Rich Van Olden asked the GC, March Assoc. where the detention drain field was located. (Tr. 147). According to [redacted]⁵, who was the concrete pump truck operator on the day of the accident, Charlie and Rich were responsible for providing him

⁵ [redacted] speaks Spanish as his first language. His interview questions and answers were interpreted by CO Wilson Robles-Gonzalez who works in the Avenel, NJ Area Office and speaks Spanish and English. Mr. Gonzalez read Mr. [redacted]'s answers back to him and Mr. [redacted] confirmed that they were correct. (Tr. 130-31).

with an adequate area to set up the concrete pump truck. (GX-10, at 3). He stated that Rich Van Olden chose the set-up site on the day of the accident. (*Id.*, at 4). He further stated that no one communicated to him that a 30-inch concrete pipe was buried 3 feet below grade and there were no underground utility markings. Additionally, Mr. [redacted] stated that if he knew about the pipe underground, he would definitely have chosen a different location at least 5-6 feet away from the buried pipe to set up. (*Id.*, at 4-5). Based on the evidence, the Court finds that the failure to communicate regarding the location of the detention drain field helped create the hazard that the concrete pump truck would tip over and ultimately lead to a “struck by” accident that injured an employee.

During his investigation, CO Pelton learned that standard 2x2 foot pads (also referenced as “cribbing”) that were with the truck were also used on the day of the accident. (Tr. 30.) However, Foreman Andrade testified that 30x30 inch pads were used on the day of the accident. In fact, Andrade actually measured the pads to determine their size. (Tr. 152). [redacted]’s statement supports the contention that the pads used on the day of the accident were 30x30 inches and were the standard pads. (GX-10, at 4). The Court accepts Respondent’s assertion that the pads used measured 30x30 inches. However, the size of the pads is not dispositive of the issue related to the appropriate gripping for the concrete pump truck given the soil conditions. CO Pelton concluded that the cribbing/pads used were insufficient to hold the concrete pump truck where it was placed over an area that had been previously disturbed and/or backfilled. (Tr. 46). Mr. Quinteros testified that additional cribbing was used under the pad to make it safer. . (Tr. 215). However, this statement is contradicted by truck operator, [redacted], who stated that additional wood cribbing (also referenced as “dunnage”) was not used, and he set up the truck using only the standard 30x30 inch pads (also referenced as “stabilizers”). (GX-10, at 4). Notably, Respondent’s Incident

Review Report mentions the use of “pads” but not additional wood cribbing. (GX-11, at 3). According to the American Society of Mechanical Engineers, *Material Placement Systems* (B 30.27-2014):

Material placement systems shall, among other things:

(k) only be set up when a combination of supplied outrigger pads, and, if needed, timbers, cribbing, or other structural members distribute the load of the outriggers so as not to exceed the allowable bearing capacity of the underlying material.

(GX-8, at 7).

The ACPA Safety Bulletin encourages the use of wood dunnage/cribbing, when needed, for the prevention of tipping accidents and acknowledges that it is commonly used and works well on well compacted, flat soil. (GX-7, at 2, 4). The Court finds that additional wood dunnage/cribbing was not used on the day of the accident.

CO Pelton determined that four Roy Rock employees were exposed in the zone of danger which he defined as anywhere near the concrete pump truck and anywhere under the length of the extended 150-foot boom. (Tr. 41; GX-4, at 2).

The Secretary established that the practices (visual check of the soil without load bearing calculation) and conditions (wet/muddy ground with detention drainpipes located under one of the outrigger feet) on the day of the accident set the stage for the concrete pump truck to tip over thereby causing or creating the “crushing or struck by” hazard cited by OSHA, by a preponderance of the evidence.

Recognized Hazard

To constitute a cognizable hazard under the general duty clause, a worksite condition must pose more than the mere possibility of harm. *See, e.g., Pelron* 12 BNA OSHC at 1835 (“Defining the hazard as the ‘possibility’ that a condition will occur defines not a hazard but a potential

hazard.”); *Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57, 64 (2d Cir. 1983) (“[T]he Secretary must show more than the mere possibility of injury; he must show that the potential hazard presents a significant risk of harm.”) Hazard recognition “may be shown by proof that ‘a hazard . . . is recognized as such by the employer’ or by ‘general understanding in the [employer’s] industry.’ ” *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) (quoting *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996)); see *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984) (“Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry.”).

According to CO Pelton, recognition of the hazard of a concrete pump truck tipping and causing “crushing or struck by” injuries in this case are established by the following: 1) The concrete pump truck operator, [redacted], was experienced. Also, Mr. Andrade was experienced enough to explain how to set up a truck and he understood the associated hazards such as what could cause a truck like this to tip and how to evaluate the ground conditions; 2) Tipping hazards are recognized by the American Society for Mechanical Engineers and the Concrete Pumper’s Association of America Safety Manual. Both list warnings about the placement of the outriggers in areas where soil has been disturbed or backfilled. They also include information on how to properly set up outriggers, how to properly evaluate soil conditions, and when to use cribbing under the outriggers to prevent tipping. (Tr. 51-52).

CO Pelton testified that Foreman Andrade had six years of experience as a concrete pump truck operator. Additionally, Mr. Andrade was familiar with the operations such as set up of the truck and how to do an evaluation of the area where the truck would be set up. According to Safety Director Quinteros it rained the day before the accident and there were wet spots on the ground.

(Tr. 187). When asked about the decision regarding the location of the concrete pump truck set-up on the day of the accident, Andrade said:

Question: And is that something that either Mr. Andrade or Mr. Van Olden should have taken into consideration in setting up the concrete foundation -- the concrete pump truck?

Answer: Yes, yes. I mean, they know if it's raining if there were dangerous spots, they know that they shouldn't place -- they shouldn't send out -- they know that if the weather -- the weather is not in good condition, they know that they should not allow people to work.

(Tr. 187-88).

According to the ACPA Safety Manual, tipping hazards exist when extending a boom, and may be avoided by checking ground conditions “before jacking the outriggers.” (GX-6, at 3). Concrete pump truck operator [redacted] received training from the ACPA that included how to stabilize the concrete pump truck and the dangers present when attempting to stabilize the truck. (GX-10, at 2). He also stated that he is familiar with the operator’s manual for the concrete pump truck. (*Id.*, at 3). Safety Director, Ricardo Quinteros testified that he was Respondent’s “competent person” on the worksite and supervised Foremen Van Olden and Andrade with regard to everything involving safety. (Tr. 178-79). Before the accident, he received a copy of the ACPA manual and skimmed it. (Tr. 189).

The Truck Mounted Concrete Pump Operator Manual makes clear that the truck must be supported in accordance with the load bearing capacity of the supporting ground. (GX-14, at 12). It further indicates that the supporting ground should be free from “voids or other irregularities of the ground under the support feet. (*Id.*, at 11).

According to the ACPA Safety Bulletin:

Tipping accidents have occurred as a result of:

- **Inadequate cribbing**
 - **Misjudging the soil**

- Soil not compacted
- **Setting up too close to excavations or backfilled areas**
- Hidden voids
 - Wash outs
 - Natural or man-made voids

(GX-7, at 1). (emphasis added.)

The Secretary has established that the tipping of the concrete pump truck which did cause an employee to be struck by the hose on the end of the boom is a recognized hazard by a preponderance of the evidence.

Employer Knowledge

The knowledge element may be satisfied by proof either that the employer actually knew, or had constructive knowledge because “with the exercise of reasonable diligence, [it] could have known of the presence of the violative condition.” *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Regarding employer knowledge, CO Pelton concluded that Respondent knew or could have known about the violative conditions because Foreman Andrade admitted knowledge of the detention drain system on the worksite and he had six years of experience as a concrete pump supervisor, he was familiar with the operations such as the setup of the truck, and how to do an evaluation of the area where the truck was set up. (Tr. 50-51).

Here, Foreman, Andrade testified that, before the accident, “everyone” knew there was a detention drain system on the property; however, none of them knew the exact location and neither he nor Foreman Van Olden bothered to find out. (Tr. 147). Andrade further testified that every large construction site has a detention drain field. (Tr. 169). Although Andrade was not at the worksite when the accident occurred, he was there when the concrete pump truck arrived and started setting up. (GX-9, at 1). Safety Director Quinteros testified that he interviewed Rich Van

Olden after the accident to get information for the Incident Review Report. The Report indicates that neither the truck operator nor Van Olden knew the location of the detention drain system pipes. (GX-11, at 3; RX-3, at 3). However, CO Pelton testified that Andrade and Quinteros explained to him that the dense grade aggregate present at the accident site is used to backfill areas in a drainage system and stone is used after pipe installation underneath and around a pipe to withstand pressure placed upon it. (Tr. 54-55). So, the presence of the DGA should have given Quinteros, Andrade and Van Olden a clue that the area had been backfilled and that pipe may be in the area underground. Moreover, Foreman Andrade observed that the ground conditions on the day of the accident were wet and muddy. The Commission has held that an employer is chargeable with knowledge of conditions, which are plainly visible to its supervisory personnel. *A.L. Baumgartner Constr. Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994). The Court finds that the wet/muddy ground conditions were plainly visible as was the presence of dense grade aggregate which should have put Foreman Van Olden on notice that the area where the accident occurred had been backfilled.

Although Foreman Van Olden was in charge of the concrete pour on the day of the accident, Andrade could and should have warned him about the dangers of setting up the concrete pump truck in an area previously backfilled with dense grade aggregate under such conditions. Either Foreman Van Olden or Andrade should have insisted that truck operator, [redacted], use additional cribbing given the known and unknown ground conditions.

The contract between Respondent and GC, March Assoc., states in relevant part:

The contract consists of the following: (1) All the Exhibits referenced herein, receipt of which is hereby acknowledged by the Subcontractor, and which are made a part hereof; (ii) The Drawings, Specifications and other documents prepared by the Owner, Architect and/or other Project consultants identified herein (“Construction Documents”) identified in Exhibit B hereto.

(RX-2). CO Pelton testified that Dimitri showed him a copy of the blueprints/architectural drawings during his investigation. (Tr. 82). The drawings showed where the detention drain field was and where the pipes were located in the area where the concrete footings were to be installed. (Tr. 84). Yet, astoundingly, Respondent's Safety Director, Ricardo Quinteros testified that post-accident, he took no steps to learn the location of the detention drain field. (Tr. 186). Finally, the evidence reveals that March Assoc.'s Site Superintendent, Dimitri, was on site on the day of the accident. So, the GC had a representative on-site who could have showed Andrade and/or Van Olden the exact location of the detention drain system underground pipes.

Based on the facts in this case, the Court finds that Respondent, through Foreman Andrade and the drawings provided as part of the contract had actual knowledge of the existence of the detention drain field at the worksite. Additionally, the Court finds that, even if Respondent didn't have actual knowledge, it had constructive knowledge by the presence of the dense grade aggregate at the accident site which should have signaled to Foreman Van Olden and others that the area where the accident occurred had previously been backfilled, and pipes may be located somewhere in the area based on what they told CO Pelton about the purpose of DGA. Last, with the exercise of reasonable diligence, Respondent could have learned the exact location of the detention drain system underground pipes from GC March Assoc.'s Site Superintendent.

Likely to Cause Death/Serious Injury

“[T]he criteria for determining whether a hazard is “causing or likely to cause death or serious physical harm” is not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious harm.” *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1060 (No. 89- 3097, 1993).

The Citation at issue in this case is 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. The only thing left to consider is whether death or serious injury would likely occur as a result of an accident caused by the hazards present at this worksite.

CO Pelton testified that an employee could have been crushed or struck by the extended boom and the injury from either would likely have been death. (Tr. 43-44). According to Respondent’s incident review, an employee was struck by the hose at the end of the boom, lost consciousness, and required medical treatment.

The Secretary has established that the cited hazard is likely to cause death or serious physical injury and the Citation is properly characterized as “serious” by a preponderance of the evidence,.

Feasible/Effective Abatement

To establish the feasibility and efficacy of a proposed abatement measure, the Secretary must “demonstrate both that the measure[] [is] capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard.” *Arcadian Corp.*, 20 BNA OSHC at 2011 (citations omitted). The Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard. *Id.* (citing *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993)). Where an employer has undertaken measures to address the cited hazard, the Secretary, in establishing

efficacy, must also show that such measures were inadequate. *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006).

The OSHA Citation at issue in this case indicates that feasible abatement includes, but is not limited to:

1. Abide by paragraph 6.24 Warning, of the American Concrete Pumping Association Safety Manual (v 7.0.1, dated February 2015) by ensuring ground conditions are properly evaluated before jacking the concrete pumper truck and use "cribbing or suitable pads under the outrigger legs to increase the area of contact".
2. Comply with ASME B30.27-2014 Material Placement Systems, Paragraph 27-3.1.5 (k) Operating Practices "only be set up when a combination of supplied outrigger pads and, if needed, timbers, cribbing, or other structural members to distribute the load of the outriggers so as not to exceed the allowable bearing capacity of the underlying material."

When asked how Respondent could have eliminated or materially reduced tipping hazards of its equipment, CO Pelton testified that Respondent could conduct proper soil evaluations, identify the location of the detention drain system, and use different/larger cribbing to disperse the pressures exerted on the outriggers. (Tr. 52-53). The Truck Mounted Concrete Pump Operation Manual advises operators to familiarize themselves with the working environment before commencing work to include ground bearing capacity. (GX-14, at 7). The evidence reveals that [redacted] conducted a visual inspection of the site prior to setting the outriggers; however, there is no evidence that he, Foreman Van Olden, or anyone else conducted a check to determine the load bearing capacity of the soil. The ACPA Safety Manual warning for "tipping hazards" makes clear that doing a load bearing calculation before set-up will allow the operator to determine how much cribbing is needed to support the outrigger and prevent it from sinking. (GX-6, at 3).

According to CO Pelton, Foreman Andrade told him that "they" were aware of the detention drain system on the worksite. (Tr. 29). At the hearing, Mr. Andrade testified that neither he nor Mr. Van Olden asked the GC where the system was located. (Tr. 147). Notably, March

Assoc.'s Site Superintendent, Dimitri, was present, on-site, when the accident occurred. (Tr. 89). Therefore, Respondent could have simply asked Dimitri to confirm the exact location of the detention drain system pipes before set-up. Safety Director Quinteros testified that even after the accident he has taken no steps to learn the location of the detention drain system. (Tr. 186). Concrete pump truck operator, [redacted], stated that he would have set up in another location at least 5-6 feet away from the drainpipe had he known its location before the accident. The Court reasonably infers from Mr. [redacted]'s statement that knowing the location of the detention drain system would have allowed him to set up safely in another location and avoid tipping the concrete pump truck and thereby avoid a "crushing or struck by" injury.

Regarding the use of cribbing or "suitable" pads to increase the area of contact, Foreman Andrade stated that, since the accident, Roy Rock uses 4x4 foot pads "to increase the safety factor." (GX-9, at 2). Pump truck operator, [redacted] also confirmed the use of 4x4 foot stabilizers after the accident. (GX-10, at 4). The fact that, post-accident, Respondent increased the size of the pads used on the concrete pump truck outriggers from 30x30 inch to 4x4 foot is evidence of feasibility of the Secretary's proposed abatement requiring the use of cribbing or "suitable" pads. *FMC Corp.*, 12 BNA OSHC 2008, 2012 (Nos. 83-488 & 83-489, 1986) (holding that evidence of subsequent abatement actions establish feasibility but not utility). With respect to utility, the ACPA Safety Bulletin states:

Tip-over accidents can be avoided if people take precautions when the unit is set up. ...If the contractor remembers to offer additional cribbing and if the operator remembers to ask for it when it isn't offered, the problem can be minimized even before the boom is extended.

(GX-7, at. 4).

According to the ACPA Safety Manual, cribbing and pads both increase the area of contact. So, the use of cribbing or, in this case, larger pads used by the operator following the accident should materially reduce a tipping hazard.

In its defense, Respondent argues that the GC, March Assoc., bears responsibility for: (i) providing a safe set-up area for concrete pumps used on their job site; (ii) having a place prepared for the pump before it arrives on the job; (iii) informing the operator of backfilled areas, soft or muddy areas, or underground obstructions; (iv) clearly marking any hidden voids and excavations such as septic tanks, backfilled areas, and sprinkler installation; and (v) ensuring that the ground is capable of holding the maximum force exerted by the outriggers or that enough cribbing is available to spread the load for the ground conditions. (Resp't's Br. 27).

The widely regarded treatise, *Occupational Safety and Health Law*, notes that the Act places responsibility for providing a safe and healthful workplace on the employer except in a case of a multi-employer worksite where the exposing employer did not and could not with the exercise of reasonable diligence know of the hazard. Mark A. Rothstein, *Occupational Safety and Health Law* §7.7 (2022) Here, Respondent could and should have conducted not just a visual inspection of the set-up area, but also a load bearing assessment to determine if additional cribbing/dunnage was needed to avoid tipping the concrete pump truck. Further, despite Respondent's claims that the exact location of the detention drain system pipes was not known, it could have checked the blueprints provided along with the contract or simply asked Site Superintendent, Dimitri, to show them the location at any point prior to set up since he was on site. Instead, Respondent chose to remain ignorant regarding the location of the pipe and it led to the tipping of the concrete pump truck and caused the hose on the end of the boom to strike and injure an employee. It has been held that "[a]n employer has a general obligation to inform itself of the hazards present at the

worksite and cannot claim lack of knowledge resulting from its own failure to make use of the sources of information readily available to it.” *Wiley Organics, Inc. d/b/a Organic Tech.*, 17 BNA OSHC 1586, 1597 (No. 91-3275, 1996) *aff’d*, 124 F.3d 201 (6th Cir. 1997). The evidence is clear that, in this case, Respondent had sources of information readily available and chose not to avail itself of them.

Respondent’s overall attitude toward the safety of its employees at this worksite is best revealed by Safety Director Quinteros’ admission that, even after the accident that injured one of his employees, he chose not to learn more about the location of the detention drain system pipes. Moreover, Quinteros admitted that he did not even address hazards associated with pouring concrete in the job safety analysis he did for this worksite. (Tr. 227). The Court finds that Respondent abdicated its role as primary protector of its employees with the assumption that GC March Assoc. should and would be primarily responsible for their health and safety at this worksite. However, in a recent decision, the Commission reaffirmed its position that the controlling employer has a “secondary safety role” at the worksite. *Summit Contracting Grp.*, No. 18-1451, 2022 WL 1572848, at *7 (O.S.H.R.C., May 10, 2022) (citing *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 WL 654129, at *6-7 (O.S.H.R.C., Feb. 1, 2019)).

The Secretary has established the feasibility of abatement measures by a preponderance of the evidence.

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.

Penalty Calculation

Regarding the proposed penalty for this violation, the severity is rated “high” because the CO concluded that the hazard could have caused death. (Tr. 85). The probability is rated as “greater”, and the gravity is rated “high”. No reduction was made for size or good faith; however, the penalty was increased by 10% based on a prior case that was settled. (GX-4, at 2). In any case, Respondent chose not to dispute the characterization of the violation or 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

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 § 5(a)(1) of the Act, is AFFIRMED, and a penalty of \$13,494.00 is assessed.

DATED: June 14, 2022
Washington, D.C.

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