United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AEROTEK, Respondent.	OSHRC Docket No. 16-0618

Appearances:

Jennifer A. Casey, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado,
For Complainant

Thomas B. Huggett, Esq., Littler Mendelson, P.C., Philadelphia, Pennsylvania
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

Respondent, a temporary staffing agency, contracted with Coorstek, Inc. to provide experienced employees to the Coorstek manufacturing facility in Golden, Colorado. (Tr. 46, 96; Ex. C-5, C-8). On July 30, 2015, one of Respondent's employees was riding a conveyance system known as a belt manlift when it jerked, causing him to lose his balance and fall through the floor into the basement. (Stip. No. 8; Tr. 42). As a result, the employee suffered serious injuries. (Tr. 50).

Respondent called Complainant at the Englewood Area Office to report the incident. (Tr. 29, 35). OSHA dispatched Compliance Safety and Health Officer Mitch Phillips to conduct an inspection of the Coorstek facility the same day. (Stip. No. 8). Based on CSHO Phillips'

findings, Complainant issued a *Citation and Notification of Penalty* to Respondent, alleging Respondent's employees were exposed to a fall hazard while accessing the belt manlift. The Citation alleged a single serious violation of the OSH Act and proposed a penalty of $3,400.00. Respondent timely contested the Citation. (Stip. No. 5).

CSHO Phillips initially determined Respondent violated 29 C.F.R. § 1910.68(b)(8)(i), because the manlift access points were not a protected by a guardrail in an off-set maze configuration or by a self-closing gate. (Tr. 48; Ex. R-1). After Respondent contested the Citation, CHSO Phillips learned the manlift in question might be exempted from the cited standard because it was installed prior to the effective date of the applicable regulations.[1] (Tr. 134). *See also* 29 C.F.R. § 1910.68(b)(3). In its *Complaint*, Complainant amended the citation to allege a violation of the general duty clause, section 5(a)(1) of the Act.[2] (Tr. 127; Ex. C-1 at 1). Respondent filed its *Answer*, claiming the amendment to section 5(a)(1) was barred by application of a more specific standard; namely, the standard originally cited in the Citation. *See Answer* at ¶ 3. The Court granted the amendment on October 24, 2016. *See Pretrial Conference Report and Order* (October 24, 2016).

The trial took place on January 24, 2017, in Denver, Colorado. The only witness to testify was CSHO Mitch Phillips. Both parties timely submitted post-trial briefs. After

1. The exact installation date of the manlift is uncertain. In the opening conference, CSHO Phillips was told Coorstek did not know who originally manufactured and installed the belt manlift but knew the manlift was at least 50 years old at that point in time. (Tr. 51). At trial, Respondent produced an invoice sent to Coorstek by The J.B. Ehrsam & Sons Manufacturing Co. The invoice listed blueprints and associated parts for a belt manlift. (Tr. 134; Ex. R-7). The invoice is dated March 3, 1954. (Ex. R-7).

2. In its Complaint, Complainant amended the citation to delete reference to the regulatory standard and instead, alleged a violation of section 5(a)(1) of the Act. *See Complaint* at ¶ 3. In its Answer, Respondent objected to the modification of the Citation claiming that the Citation was barred by a more specific standard. *See Answer* at ¶ 3. By Order dated October 24, 2016, the Court accepted the amendment of the Citation. *See Pretrial Conference Report and Order*, dated October 24, 2016.

reviewing the parties' arguments and the record, the Court issues the following Decision and Order and finds that Complainant failed to establish the violation alleged in the Citation.

II. Stipulations[3]

The parties stipulated to the following:

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act.

2. The Administrative Law Judge has subject matter and personal jurisdiction over the dispute in this case.

3. At all relevant times, Respondent was engaged in business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and was an employer within the meaning of section 3(5) of the Act.

4. The Secretary timely issued the citations at issue herein pursuant to section 9(c) of the Act.

5. Respondent timely contested the citations at issue herein and the penalties proposed, pursuant to the provisions of section 10(c) of the Act.

6. The Secretary employs Mitch Phillips as a Compliance Safety and Health Officer for the Occupational Safety and Health Administration ("OSHA"), assigned to OSHA's Englewood, Colorado Area Office. He served in that position and was an authorized representative of the Secretary at all pertinent times.

3. The parties' stipulations can be found in the parties' *Joint Stipulation Statement*, which was filed with the Court on January 24, 2017. (Tr. 14). The parties broke the agreement into two sections—Proposed Stipulations and Undisputed Facts—with two separately numbered lists. For ease of reference, the Court renumbered the agreed upon facts and law to be one continuous list, which is reproduced above, and shall refer to stipulations in the record as "Stip. No. __".

7. At all times relevant to this litigation, Respondent was under contract to provide staffing services to Coorstek, Inc. at its manufacturing facility located at 600 9th Avenue, Golden, Colorado.

8. On July 30, 2015, Mr. Phillips initiated an inspection at Coorstek's facility located at 600 9th Avenue, Golden, Colorado 80401 after an employee of Aerotek was seriously injured while riding a manlift.

9. At all times relevant to this litigation, approximately 30 to 35 Aerotek employees were assigned to the Coorstek facility at 600 9th Avenue, Golden, Colorado.

10. Aerotek employs an On-Premise Manager at the Golden, Colorado facility.

11. At all times relevant to this litigation, Aerotek and Coorstek employees utilized a belt manlift to access various floors of the facility.

12. Employees accessed the belt manlift through an enclosed room, measuring 11 feet x 12 ½ feet.

13. The belt manlift circulated through floor openings, measuring 30 inches x 34 ½ inches in diameter.

III. Jurisdiction

As noted in Section II, *supra*, the parties have stipulated the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c). Further, the parties also stipulated Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

IV. Factual Background

A. Respondent's Relationship to Coorstek

Coorstek hired Respondent to provide skilled laborers to supplement its workforce at Coorstek's ceramics manufacturing facility in Golden, Colorado. According to the agreement, Coorstek was responsible for managing and supervising the contract employees supplied by Respondent. (Ex. C-8 at 1). Such supervision included providing a safe, clean work environment; site-specific training; and proper orientation to the worksite. (Ex. C-8 at 4). Per the agreement, Respondent's obligations regarding safety were minimal—it agreed to provide safety glasses and ensure that employees wore appropriate safety shoes—however, it nonetheless agreed "that it will comply with applicable federal, state, and local laws", including those involving health and safety. (Ex. C-8 at 3–4).

In addition to providing contract employees, Respondent also supplied Coorstek with an On Premise Manager, Yarie Ortiz, whose primary responsibility was serving as a liaison between contract employees, Coorstek, and Respondent. (Tr. 94–95, Ex. C-5 at 1). This included enforcing discipline when safety rules were violated by contract employees; performing screening of those employees for qualifications, background checks, and references; attending production and staff meetings; and reporting injuries suffered by contract employees. (Tr. 99; Ex. C-5 at 1). In addition, Ms. Ortiz walked the production floor with new contractor employees as part of their orientation to the Coorstek facility.

B. The Coorstek Manlift

The Coorstek facility has five floors, including a basement level, three production floors, and an attic.[4] (Tr. 43). In order to move employees between the various production floors, the

4. According to CSHO Phillips, the attic is primarily accessed by Coorstek maintenance workers. There was no evidence Respondent's employees accessed that area. (Tr. 43).

facility has two belt manlifts, which function like self-propelled ladders. (Tr. 38, 50). According to CSHO Phillips, the manlifts were used infrequently, in most cases no more than once per shift per employee. (Tr. 65).

The manlift has a continuously moving belt, which is powered by two drive motors: one located in the attic and one in the basement. (Tr. 42). The drive motors cause the belt to go up on one side of the manlift and down the other through adjacent floor openings. (Tr. 50; Ex. C-2). To accommodate upward and downward travel, there are two openings per floor, each of which measures 30 inches by 34 ½ inches in diameter. (Stip. No. 13). Although the belt travels on a continuous loop, there is a rope next to the manlift that stops the manlift when pulled, but it is designed only for emergency stops. (Tr. 51).

In order to access the manlift on the production floors, an employee must enter an enclosed room, which is used solely for housing and accessing the lift. (Tr. 145). The door to each enclosure contains two signs: a warning that reads "Authorized Personnel Only" and a safety poster reminding employees training is required to use the lift and of key safety principles related to the lift. (Ex. C-2 at 3:55). The doors are also self-closing to prevent accidental entry into the enclosure. (Tr. 65, 143; Ex. C-2). Once inside the enclosure, which measures roughly 12 ½ feet by 11 feet, employees are immediately confronted with a guardrail that blocks access to the moving parts of the belt and the floor opening through which it travels.[5] (Tr. 64; Ex. C-2 at 1:55, 2:09). An employee must turn right from the doorway to get past the guardrail and turn left yet again before they actually reach the access point for the manlift. (Tr. 144; Ex. C-2). Once at the access point, the employee is presented with the running belt, which has footsteps and handholds attached at regular intervals. (Tr. 50; Ex. C-2). As shown in the Humphrey video,

5. The floor opening and manlift are protected on both sides by guardrails; it is only at the point of access where there is a gap in the guardrail. (Ex. C-2).

manlift belts travel at a slow rate of speed so employees can grab the handhold and step onto the footstep while it is still moving. (Ex. C-3).

The basement entry is not enclosed in the same manner as the production floors. The manlift and floor opening are guarded by guardrails and a swing gate at the point of entry onto the lift. (Tr. 60; Ex. C-2 at 0:45).

C. CSHO Phillips' Inspection

The inspection was precipitated by an injury at the Coorstek manufacturing facility, which required hospitalization. One of Respondent's employees was injured when he fell from the manlift, got caught between the floor opening and manlift, and then fell through the opening to the basement below. (Tr. 42). In his interview with CSHO Phillips, the employee stated that he was riding the manlift when it jerked and caused him to lose his balance. (Tr. 42). According to employee statements gathered by CSHO Phillips, the top drive motor of the manlift had stripped gearing, which caused the manlift to jerk approximately five inches. (Tr. 42).

Upon his arrival at Coorstek, CSHO Phillips met with Yarie Ortiz, Respondent's On Premise Manager, and Shawn Arbuckle, Coorstek's corporate environment, safety, and health manager. (Tr. 36). CSHO Phillips held an opening conference with Ms. Ortiz and Mr. Arbuckle, interviewed employees, and performed a walk-around accompanied by Ms. Ortiz, Mr. Arbuckle, and other representatives of Coorstek's safety department. (Tr. 37–39, 167). The inspection began in the basement near the manlift where the employee was found. (Tr. 38; Ex. C-2). CSHO Phillips then proceeded to the attic and worked his way down through each of the production floors. (Tr. 39, 48). At each floor, CSHO Phillips inspected the area surrounding the manlift, including any safety measures. (Tr. 39, 48). The manlift was not in operation at the time of the inspection because Coorstek had shut it down and locked it out for a third party to perform a safety inspection. (Tr. 48–49).

At the close of the inspection, CSHO Phillips determined the floor openings at the manlift were not properly protected and recommended the issuance of a Citation, the merits of which are discussed below.

V. Discussion

As recounted above, Respondent contracted with Coorstek to provide skilled laborers for its ceramics manufacturing facility. Although Coorstek is primarily responsible for managing the contract employees, providing training, and overseeing their day-to-day work responsibilities, Respondent still maintains some level of control over the those employees. For example, Respondent maintained a continuous management presence at the Coorstek facility through the On Premise Manager, Ms. Ortiz, who was responsible for disciplining contract employees, performing pre-employment screening, reporting injuries suffered by contract employees, and participating in production/staff meetings.

Respondent stipulated it is an employer under the Act. (Stip. No. 3). This is consistent with Commission case law holding temporary staffing agencies liable under the Act insofar as they maintain a sufficient degree of control over their employees. *See The Barbosa Group, Inc., d/b/a Executive Security*, 21 BNA OSHC 1865 (No. 02-0865, 2007) ("Thus, regardless of whether the INS had any sort of employment relationship with the security personnel supplied by Barbosa, the degree of control Barbosa retained over its contract security personnel compels the conclusion that Barbosa remained their employer in these circumstances and was properly cited as such under the OSH Act."). In this case, the Court is called upon to determine whether and to what extent a staffing agency, such as Respondent, should be held liable for alleged hazards present at a host employer's worksite.

Even though it is a temporary agency, Respondent nonetheless has a statutory obligation to ensure the safety of its employees. In this context, that obligation extends at least as far as

informing Coorstek of a hazard, requesting it be abated, and ensuring steps are taken by Coorstek to protect employees from the hazard. *See id.* (finding Respondent staffing agency should have been aware, with the exercise of reasonable diligence, of deficiencies in training provided by host employer). However, as will be shown, the Court finds Complainant failed to show the method Coorstek used to abate the alleged hazard was so woefully deficient that Respondent should have taken additional actions to ensure that its employees were safe.

A. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> OSH Act of 1970 Section (5)(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees:
>
> 1) On July 30, 2015, and at prior times, the employer did not ensure that employees were protected from falling and crushing hazards while standing near a floor hole at the manlift in Building 2.
>
> Among other methods, one feasible and acceptable method to abate the hazard would be to ensure that a guardrail system, such as described and recommended by the Humphrey Manlift Company, is installed. Another feasible and acceptable method is to ensure that a guardrail system to protect from falls into entry/exit ways is installed per the recommendations of a self-closing swing gate guardrail manufacturer, such as Garlock Safety Systems.

(Ex. C-1).

To establish a *prima facie* violation of section 5(a)(1) of the Act, Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co.*, 17 BNA OSHC 1869 (No. 92-2596, 1996); *see also* 29 U.S.C. § 654(a)(1). The evidence must also show that the employer knew or, with the exercise of reasonable diligence, could have known of the violative

condition. *Regina Constr. Co.*, 15 BNA OSHC 1044 (No. 87-1309, 1991); *see also S.J. Louis Constr. of Texas*, 25 BNA OSHC 1892 (No. 12-1045, 2016).

i. Citation to the General Duty Clause Was Proper

Respondent contends Complainant's amendment of the Citation to allege a violation of the general duty clause was improper.[6] In its *Answer*, Respondent claimed the specific standard originally cited by Complainant was the proper standard, notwithstanding language indicating that the originally cited standard, 1910.68(b)(8), exempts manlifts installed prior to August 27, 1971. *See* 29 C.F.R. § 1910.68(b)(3) ("All new manlift installations and equipment installed after the effective date of these regulations shall meet the designed requirements of . . . ANSI A90.1-1969, which is incorporated by reference as specified in § 1910.6, and the requirements of this section."); *see also* Part 1910—Occupational Safety and Health Standards, 36 Fed. Reg. 10466, 10466 (April 27, 1971) ("The occupational safety and health standards in new Part 1910 shall become effective on August 27, 1971 . . . ."). Complainant has interpreted this language to mean that manlifts installed prior to the effective date of the regulations are exempt from the requirements listed therein. Coincident with that interpretation, Complainant issued a directive that citing the general duty clause is proper when confronted with a hazard on a manlift installed prior to the effective date of the regulation. (Ex. C-10). Under the facts presented in this case, the Court finds citation to the general duty clause was appropriate.

"It is well established that a citation alleging a violation of section 5(a)(1) is inappropriate when a specific standard applies to the facts." *Mississippi Power & Light Co.*, 7 BNA OSHC 2036 (No. 76-2044, 1979) (citation omitted). The burden of proving the applicability of a

6. Respondent did not specifically object to the amendment itself through a motion (though it was invited to do so by the Court). Instead, in its *Answer*, Respondent merely claimed that a specific standard applied, rendering citation to the general duty clause improper. *See Answer* at 2. Though it was not specifically identified as an affirmative defense, the Court shall treat it as such.

specific standard, however, belongs to Respondent. *See Safeway, Inc. v OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004); *see also* 29 C.F.R. § 1910.5(f) ("An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirements of the [general duty clause], but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.").

Respondent identified 29 C.F.R. § 1910.68(b)(8) as the specific standard that preempts citation to the general duty clause. According to Complainant's interpretation, though, section 1910.68(b) does not apply to manlifts installed prior to 1971.[7] *See* 29 C.F.R. § 1910.68(b)(3). Nevertheless, Respondent contends that because section 1910.68(b) is a specific standard that applies to manlifts as a general proposition, it still technically "applies" to the grandfathered, pre-1971 manlift at Coorstek. As such, Respondent argues it was in "compliance" with the standard even though it also argues it was not required to comply with its terms. *See Resp't Br.* at 8. In other words, Respondent argues that it complied with the standard because, by the terms of 1910.68(b)(3), it did not have to comply with the standard.[8]

The practical effect of Respondent's argument would be a location at Coorstek's facility—the manlift—exempt from regulation through either specific standards or the general

7. As an aside, the Court notes the provision that purportedly exempts older manlifts does not appear as definitive as suggested by the parties in this case. The provision, 1910.68(b)(3), entitled "Design Requirements" is merely a short, isolated paragraph under the larger heading, entitled "General Requirements", found at 1910.68(b). The first paragraph, (b)(1), indicates the standard generally applies to all manlifts that meet the characteristics described therein. Paragraph (b)(3), on the other hand, lays out a two-prong requirement for a specific subset of manlifts; namely, those installed after the effective date of the regulation. As the Court reads it, the standard requires that any lift installed after the effective date of the regulations shall (1) meet the design requirements of ANSI A90.1-1969, and (2) meet the requirements of this section. In other words, it appears that the intent of the standard is to require more of manlifts installed after a date certain, as opposed to requiring nothing at all of lifts installed prior to that date. However, the Court grants that it is unclear how (b)(3) applies to the standard as a whole. Given this ambiguity, the Court finds Complainant's interpretation of (b)(3) is not unreasonable.

8. This absurdity apparently escaped Respondent when it repeatedly characterized 29 C.F.R. § 1910.68(b)(8) as "inapplicable" or "not applicable". *See Resp't Br.* at 10 ("The Secretary's attempt to cite Respondent under the General Duty Clause in this case is particularly troublesome because the Secretary candidly admits he is attempting to enforce *an inapplicable regulation* through the General Duty Clause.").

duty clause. Notwithstanding its assertion that it is exempt from its requirements, Respondent argues it complied with the standard. The problem? While the manlift may be exempt from the specific design requirements listed in the standard and in ANSI A90.1-1969, as referred to therein, it is not exempt from all safety requirements. Indeed, the purpose of the general duty clause is to fill such unintentional gaps in the Act's coverage. *Con Agra, Inc., McMillan Co. Div.*, 11 BNA OSHC 1141 (No 79-1146, 1983) ("We note that the purpose of the general duty clause is to provide protection against recognized hazards where no duty under a specific standard exists . . . .")

When confronted with a similar question regarding the preemptive effect compliance with a specific standard has on the government's ability to cite the general duty clause, the D.C. Circuit focused on the role of section 5(a)(1) and its interplay with the duties imposed on employers under section 5(a)(2). *See Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. General Dynamics Land Systs. Div.*, 815 F.2d 1570, 1577 (D.C. Cir. 1987). First, applying plain meaning to section 5(a)(1), the Court held:

> Section 5(a)(1) clearly and unambiguously imposes on an employer a general duty to provide for the safety of his employees that is distinct and separate from the employer's duty, under section 5(a)(2), to comply with administrative safety standards promulgated under section 6 of the Act. Therefore, unless we find this interpretation in conflict with another source of statutory law, we are bound to reject any agency interpretation that is inconsistent with what we find to be the plain meaning of section 5(a).

Id. at 1575–76. Finding no such statutory conflict, the court held "the Act does not empower the Secretary . . . to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause." *Id.* at 1576. Clarifying this point, the court noted that any apparent conflict between an employer's competing duties under 5(a)(1) and 5(a)(2) can be resolved by focusing on the words "recognized hazard" in section 5(a)(1). *Id.* (citing *Con Agra, Inc., McMillan Co. Div.*, 1983–84 O.S.H. Dec. (CCH) ¶ 26,420 at 33,523 (1983)

(discussing elements necessary to prove violation of general duty clause)). According to the court:

> This analysis emphasizes the fact that the duty to protect employees is imposed on the employer, and the hazards against which he has the obligation to protect necessarily include those of which he has specific knowledge. Therefore if (as is alleged in this case) an employer knows a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which his employees are exposed, he has a duty under section 5(a)(1) to take whatever measures may be required by the Act, over and above those mandated by the safety standard, to safeguard his workers. In sum, if an employer knows that a specific standard will not protect his workers against a particular hazard, his duty under section 5(a)(1) will not be discharged no matter how faithfully he observes that standard. Scienter is the key.

Id. at 1577. This statement clarifies the operative effect of the general duty clause in the face of a closely related specific standard: if the specific obligations imposed by 5(a)(2) are somehow insufficient, an employer has a corresponding obligation to account for and protect against hazards the specific standard does not reach.

As a defense to the general duty clause violation, Respondent asserts that a specific standard applies; a specific standard that, according to Complainant's interpretation, exempts Respondent from compliance with specific requirements. Thus, as distinct from the holding in *General Dynamics*, there was not merely a deficiency in the coverage of the standard, but a gaping hole. To accept Respondent's argument would be to permit such a gap in coverage, which the Court declines to do. Insofar as 1910.68(b) imposes no requirements to address hazards associated with Coorstek's manlift, the Court finds it is proper to impose an obligation to protect employees through the general duty clause.

ii. The Floor Opening is a Recognized Hazard

To uphold a violation of the general duty clause, Complainant must define the hazard "in a way that apprises the employer of its obligations, and identifies conditions and practices over

which the employer can reasonably be expected to exercise control." *Arcadian Corp.*, 20 BNA OSHC 2001 (No. 93-0628, 2004). Hazards cannot be defined by the absence of appropriate abatement measures. *See Cargill, Inc.*, 10 BNA OSHC 1398 (No. 78-5707, 1982); *see also Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1121 (No. 88-0572, 1993) ("The hazard is not the absence of the abatement method.").

In the Citation narrative, Complainant alleged Respondent's employees were exposed to falling and crushing hazards due to the presence of inadequately protected floor openings at the manlift's point of access. (Ex. C-1 at 1). Respondent contends Complainant failed to prove the existence of such a hazard because Coorstek had taken adequate steps to abate it through the use of enclosures, guardrails, and training. *See Resp't Br.* at 14. What Respondent fails to see is that a floor opening remains a hazard irrespective of the measures taken to prevent exposure to it. *See Peacock Eng'g Inc.*, 26 BNA OSHC 1588 (No. 11-2780, 2017) ("The efficacy of [respondent's] work methods in avoiding injury, however, is a separate inquiry from whether an alleged hazard was present."). The operative question in this case, as will be discussed later regarding abatement, is whether those methods were adequate in light of the hazards imposed by the floor opening. *See id.*

In the words of the Commission, a floor opening is a condition over which an employer can reasonably be expected to exercise control. In this case, the floor opening was large enough that someone could (and did) fall through, and exposed employees to a fall of at least 10 feet to the next level. Without consideration of the means by which Coorstek attempted to abate it, the Court finds Complainant established the existence of a hazard.

The Court also finds the hazard was recognized. Respondent went to great lengths to show how Complainant failed to prove that Respondent or the manufacturing industry

recognized the hazard imposed by the floor openings. Again, the Court finds Respondent's arguments are premised on a mistaken assumption about the law. According to the Fifth Circuit, "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." *Kelly Springfield Tire Co., Inc. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984). That said, "[w]here a hazard is obvious and glaring, the Commission may determine that the hazard is recognized for purposes of the general duty clause, 29 U.S.C. § 654(a)(1), without reference to industry practice or safety expert testimony." *Tri-State Roofing & Sheet Metal Inc.*, 685 F.2d 878 (4th Cir. 1982) (finding recognized hazard when "work situation was patently dangerous since the laborers were working without protective equipment on an unguarded platform in excess of 40 feet above a concrete floor").

Though Respondent takes issue with Complainant's use of ANSI literature and Humphrey Manlift's company safety documents in order to prove hazard recognition in the manufacturing industry, the Court finds such evidence unnecessary in light of the hazard at issue. Instead, the Court is persuaded by two factors: (1) the presence of Respondent's On Premise Manager; and (2) the obvious nature of the hazard. As recounted above, Ms. Ortiz was familiar with the Coorstek facility in general and with the manlift specifically. Although CSHO Phillips testified that Ms. Ortiz did not use the manlift, she was nonetheless aware of its existence and had seen it in operation. (Tr. 92). Thus, she had knowledge of the condition that Complainant claims is hazardous. Further, though Respondent claims there was no evidence to suggest Ms. Ortiz recognized the floor opening as a hazard *per se*, the Court finds Complainant did not need to establish whether Ms. Ortiz subjectively believed the floor opening to be hazardous. *See Kelly Springfield*, 729 F.2d at 321 ("A finding of industry recognition does not require direct evidence

of the subjective beliefs of those working in the relevant industry. Courts have, in various circumstances, found a hazard to be recognized absent direct evidence of subjective belief."). Rather, as recognized by the Fourth and Fifth Circuits, a hazard can be so obvious and glaring that any reasonable person would recognize it as such. *Id.*

The Court finds the floor openings on each level of the manlift were an obvious and glaring hazard. The openings, which measure roughly three feet in diameter, presented the possibility of a fall ranging anywhere from ten to as much as forty feet, depending on what floor an employee happened to be standing on. It does not take industry expertise or on-the-job experience at Coorstek to recognize that a hole large enough to fit at least one full-grown man with a corresponding potential for a forty-foot fall is hazardous. Due to its obvious nature, the Court finds both Respondent and the manufacturing industry recognize floor openings, such as those found at Coorstek, are hazardous.

iii. The Hazard Was Likely to Cause Death or Serious Physical Harm

"[T]he Commission has made clear [that] the criteri[on] . . . [in this regard] 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." *Peacock*, 26 BNA OSHC 1588 at *5 (quoting *Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1059 (No. 89-2804, 1993)). As previously discussed, falling through one of the manlift floor openings exposed employees to a substantial fall, ranging anywhere from ten to forty feet. (Tr. 43). In fact, such a fall precipitated CSHO Phillips' inspection. Though it was unclear how far he fell, CSHO Phillips testified the employee suffered broken bones and head trauma. (Tr. 112). These are clearly serious injuries. Although the employee fell through the opening due to a problem with the manlift, the fall nonetheless illustrated the potential injuries an employee could suffer as a result of his exposure to the hazard. Accordingly, the Court finds the hazard was likely to cause death or serious physical harm.

iv. Complainant Failed to Establish Existing Abatement Measures Were Insufficient

In addition to establishing the existence of a recognized hazard, Complainant must "'specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard.'" *Arcadian Corp.*, 20 BNA OSHC 2001 (quoting *Beverly Enters., Inc.*, 19 BNA OSHC 1161 (No. 91-3144 *et al.*, 2000)). "Feasible means of abatement are established if 'conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Id.* (quoting *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993)). It is not enough, however, for Complainant to prove the existence of a hazard and show Respondent failed to use the methods of abatement Complainant prefers. If an employer has taken steps to abate the hazard, Complainant must show those measures are inadequate. *See Alabama Power Co.*, 13 BNA OSHC 1240 (citing *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986)); *see also National Realty & Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973) ("The question is whether National Realty rendered its construction site 'free' of the hazard.").

To start, it is easy to conclude Complainant's proposed methods of abatement are feasible. As shown in exhibit C-2, one of Complainant's proposals—a self-closing swing gate—was already in place on the basement level of the Coorstek facility. In addition, Complainant proposed a guardrail maze, which was illustrated in the Humphrey Manlift video though not in place at the Coorstek facility. (Ex. C-3). There was no testimony or evidence to illustrate that the implementation of either of these abatement measures was infeasible or would otherwise be ineffective. The question, however, is whether such abatement methods were necessary in light of the manner in which Coorstek, and by extension, Respondent, had already addressed the

hazard.[9] In order to answer that question, Complainant must first show the existing abatement measures were inadequate. *See Alabama Power Co.*, 12 BNA OSHC 1821, 1822, *supra*. The Court finds Complainant failed to meet that burden.

Aside from the basement entry, access to the manlift was the same on all production floors. On each floor the manlift was in an enclosed room, separate from the rest of the production floor. (Tr. 64). In order to access the room, employees had to pass through a self-closing door. (Tr. 64–65, 143). Tacked onto the door were two signs, including a warning prohibiting access to all but authorized personnel and a series of reminders about properly using the manlift. (Tr. 65; Ex. C-2). After walking through the door, an employee is immediately confronted with a guardrail that prevents access to the moving parts of the manlift, as well as to the floor opening through which the manlift belt passes. In order to reach the point of access, an employee has to turn right from the doorway and walk alongside the guardrail until it ends. From there, the employee must turn left around the end of the guardrail to reach the point of access.

In support of Complainant's claim that Respondent's employees were exposed to a fall hazard due to inadequate protection around the floor openings of the manlift, CSHO Phillips repeatedly expressed concern that the configuration of the enclosure, self-closing door, and guardrails were insufficient to protect against inadvertent exposure to the hazard. (Tr. 66, 87, 89, 92, 94, 104, 106, 119). Conversely, according to CSHO Phillips, the swing gate and guardrail maze are designed to prevent an employee from inadvertently falling into the floor opening "up until a point where they're solely focused on getting on the manlift." (Tr. 55, 60, 62, 63, 79,

9. This is somewhat of a unique case considering Respondent does not have authority to make changes to the host employer's facility. Insofar as it is or should be aware of a hazard, Respondent has the obligation to bring it to Coorstek's attention. But, before we get to the question of Respondent's obligations under this set of circumstances, there must be a triggering event, i.e., a recognized and improperly abated hazard, to determine whether Respondent fulfilled those obligations. As discussed further herein, the Court finds Respondent had nothing to report to Coorstek.

104). In his estimation, the protection around the manlift floor opening was incomplete because there was no gate or maze configuration directly connected to the point of access to prevent someone from inadvertently falling or stepping into the opening. (Tr. 66).

The Court is unconvinced that the combination of an enclosed location, blatant warnings, a self-closing door, and a set of guardrails that must be navigated around in order to reach the point of access was inadequate to protect against inadvertent exposure to the floor opening. As recounted above, an employee has to take a series of intentional steps before they even approach the point of access on the manlift, i.e., opening the self-closing door and walking around the guardrail. The floor openings at issue were not just holes in the middle of a wide-open manufacturing floor with only partial openings to protect against accidentally tripping or walking into them. Rather, the first layer of protection was the enclosure that housed the manlift entry on each floor (except the basement). That first layer of protection was adorned with two separate warnings about the manlift inside the enclosure. Much like the self-closing gate, the door to each enclosure was also self-closing, thus preventing unwitting employees from entering the enclosure. Once inside the enclosure, an employee is not immediately confronted with a floor opening; rather, the opening is protected by a guardrail on both sides, which an employee must walk around before getting to the point of access.

CSHO Phillips' concern about inadvertent exposure to the hazard is inconsistent with the manner in which the manlift is accessed. Although the protective measures implemented at the Coorstek facility do not conform to the letter of Complainant's proposed abatement, the Court finds the abatement measures used at Coorstek's facility were the functional equivalent. There is no sense in which one of Respondent's employees could just accidentally walk or trip into the floor opening without taking very specific and intentional actions to get to the point of access in

the first place. Not only that, but prior to entering the enclosure specifically designed for the manlift, employees are confronted with warnings about what was located within the enclosure and the requirements for using it. As such, the Court finds Complainant failed to show the measures implemented by Coorstek (and tacitly approved by Respondent) were insufficient to address the hazard of inadvertent exposure to the floor opening.[10] Thus, Respondent did not have an obligation to report the hazard or take alternative measures to prevent its employees' exposure to the hazard.

The Court finds Complainant failed to prove the existing abatement measures were insufficient to address the identified hazard. Accordingly, Citation 1, Item 1 shall be VACATED.

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, it is ORDERED that:

1. Citation 1, Item 1 is VACATED.

SO ORDERED

/s/
Judge Peggy S. Ball
Occupational Safety and Health Review Commission

Date: March 23, 2018
Denver, Colorado

10. At one point, CSHO Phillips expressed concern about maintenance activities inside the manlift enclosure. (Tr. 89–90). There was no evidence to suggest Respondent's employees ever performed maintenance, nor was there any evidence to suggest how maintenance is carried out or in what manner such employees would be exposed. Due to the lack of evidence on the topic, the Court gives CSHO Phillips' testimony on this topic no weight.