United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. The Home Depot #8954, Respondent.	OSHRC Docket No. **14-0423**

Appearances:

Amy R. Walker, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Matthew T. Deffebach, Esquire and Punam Kaji, Esquire, Haynes and Boone, LLP, Houston, Texas
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). Respondent, Home Depot #8954 (hereinafter Home Depot), is one of a national chain of retail stores. On November 6, 2013, Occupational Safety and Health Administration Compliance Officer (CSHO) Sarah Allmaras conducted an inspection of Home Depot at 1833 Veterans Highway in Dublin, Georgia. Based upon CSHO Allmaras's inspection, the Secretary of Labor, on February 10, 2014, issued a Citation and Notification of Penalty with one item to Home Depot alleging a repeat violation of 29 C.F.R. § 1910.178(p)(1) for failing to take out of service an industrial truck with inoperable headlights. The Secretary proposed a penalty of $20,000.00 for the Citation. Home Depot timely contested the Citation. Both the Citation and penalty are at issue.

I held a hearing in this matter on December 2, 2014, in Macon, Georgia. The parties filed

post-hearing briefs on February 24 and 25, 2015.[1]

For the reasons discussed below, the citation is affirmed as a serious violation and a penalty of $2,500.00 is assessed.

Jurisdiction

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 13). The parties also stipulated at the hearing that at all times relevant to this action, Home Depot was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 13).

Background

Home Depot is a well-known national chain of retail stores. It is a large employer. The store at issue in this proceeding is located at 1833 Veterans Highway in Dublin, Georgia (Tr. 12). The alleged violation at issue occurred in the store's receiving area and involved a powered industrial truck used in that area to load and unload merchandise from tractor trailers.

CSHO Allmaras initiated her inspection of the Dublin store on November 6, 2013, pursuant to a two item complaint filed with the Savannah OSHA Area Office (Tr. 12-13, 23-24; Exh. J-16). The complaint alleged employees working in the receiving area loading and unloading trucks were not provided adequate lighting and a powered industrial truck operating in the area did not have functioning headlights (Tr. 12, 23-24; Exh. J-16). CSHO Allmaras's inspection was limited to the two allegations in the complaint. Although at the time of her inspection, the headlights of the truck were operational, CSHO Allmaras's investigation revealed the truck had been used for some time while the headlights were not operational (Tr. 24; Exhs. J-15, R-4).

The powered industrial truck at issue is a Crown Pro 300 series reach truck (Exhs. J-14, J-24, J-25, J-26, R-2, and R-9). It is referred to in company documents (and herein) as a "slip truck" (Tr. 35; Exh. J-8). The truck is electric powered and used in the facility primarily to

[1] The Office of the Solicitor and the OSHRC Judge's Office in Atlanta, Georgia, were unexpectedly closed on February 24, 2015. Counsel for the Secretary did not have access to her files on that day. Therefore, the Secretary's brief was filed on February 25, 2015. Counsel for the Secretary attests she did not read the brief of the Respondent, which was filed on February 24, 2015, prior to filing her brief. Respondent did not object to this delay in filing. Therefore, I accept the Secretary's brief filed on February 25, 2015.

remove palletized product from tractor trailers and transport the pallets to various storage areas. The slip truck is operated by a single operator who stands in the cab (Tr. 140). The operator is not belted in while operating (Tr. 140). The cab is padded and covered (Tr. 140). The slip truck is equipped with two headlights mounted on the front (Exh. J-25). According to the parts listing for the slip truck, these headlights are optional equipment (Exh. R-21).

The receiving area in which the slip truck operated has three bays (Tr. 37; Exh. R-9). Tractor trailers back up to a bay to be unloaded. Each bay has a dock light (Tr. 37; Exh. J-27). This dock light is mounted on an articulating arm and can be positioned to shine into the tractor trailer (Tr. 37). There is also lighting from overhead fluorescent lights in the area of the bays (Exh. R-9). The trailers are typically 53 feet long and have no other lighting, although some have semi-transparent roofs that allow sunlight in (Tr. 139; Exhs. R-9, R-21, and R-22).

The manager of the receiving area for the Home Depot store is Jason Lumley (Tr. 165). Mr. Lumley testified at the hearing. He had been manager of the receiving area since 2005 (Tr. 165). He testified his duties included supervising the receiving associates but he also loaded and unloaded trailers and drove the slip truck as needed (Tr. 137-138). He testified the receiving department unloaded five to six trailers per day using the slip truck (Tr. 139).

Home Depot does not dispute the slip truck was without operating headlights for some period of time in 2013. Mr. Lumley testified Valerie Smith, a receiving associate whom he supervised, first notified him the headlights on the slip truck were not operational one week before the lights were repaired (Tr. 168). Mr. Lumley then notified William Sweat, his supervisor (Tr. 175). Mr. Lumley testified he did so because Mr. Sweat would need to place the work order for the slip truck to be repaired (Tr. 175). Although notified of the inoperable headlights, Mr. Lumley admitted he did not take the slip truck out of service. Mr. Lumley testified neither he nor Mr. Sweat took the slip truck out of service because neither felt the need to do so (Tr. 176).

The slip truck continued to be operated for at least this one week without operational headlights until October 31, 2013, when Mr. Lumley received a second complaint from Ms. Smith. On that same day, Ms. Smith had been operating the slip truck when the back wheel broke through a weakened area of the floor of the trailer she had been unloading (Tr. 177-78). According to both Mr. Lumley and Ms. Smith, when Ms. Smith notified Mr. Lumley of her

accident she also told him she did not feel safe operating the slip truck and refused to continue (Tr. 177). Mr. Lumley then completed the task of unloading the trailer (Tr. 177). Mr. Lumley testified Ms. Smith complained at that time about both the inoperable headlights on the slip truck and that the dock lights were not working (Tr. 179). Mr. Lumley testified he used the dock light to complete the task, but noted that light was not at full strength. Mr. Lumley testified he, nevertheless, did not feel the lighting was inadequate.

On that same day, Mr. Lumley notified Emmie Bowers, the store manager, the headlights of the slip truck were still not operational and checked whether Mr. Sweat had completed a work order for repair of the headlights (Tr. 148). He had not. Ms. Bowers then put in a work order for the repair and ordered the slip truck be taken out of service (Tr. 148). The repair was made the next day (Tr. 180). Mr. Lumley also replaced the bulb in the dock light (Tr. 182). Ultimately, the dock lights were changed from "high pressure sodium" lights to LED spotlights (Exh. J-19 p. 2).

Although he admitted he was aware of the inoperable headlights the week before Home Deport repaired them, Mr. Lumley testified no employee had previously expressed a concern with either the lighting in the receiving area or the inoperable headlights on the slip truck (Tr. 180).[2] Mr. Lumley testified he did not typically use the dock lights when he unloaded trailers (Tr. 142). Mr. Lumley testified use of the dock lights was not required and he had observed associates loading and unloading trailers without the use of the dock lights (Tr. 148). He stated he felt there was sufficient light in the trailers for unloading even without the use of the dock lights or the slip truck's headlights.

Both the Secretary and Home Depot conducted readings of the light levels in the receiving area. CSHO D'Andre Boston of the Savannah OSHA Area Office conducted light readings in November of 2014, using a light meter that provided measurements of the illumination of a tested area in foot candles (Tr. 129-30). CSHO Boston testified foot candles and lumens/sq. ft. are roughly equivalent (Tr. 130). He testified he conducted 20 measurements,

[2] Contrary to this testimony, Ms. Smith testified she told Mr. Lumley on several occasions she felt unsafe operating the slip truck because of the inoperable headlights. On this I did not find Mr. Smith's testimony credible. Mr. Smith's testimony regarding when she notified management about the inadequate lighting was vague and inconsistent. She also appeared defensive when testifying, changing her testimony to cast a more negative light on store management when pressed.

all inside a trailer without use of the dock light (Tr. 130). He performed 10 measurements with the slip truck inside the trailer and 10 without (Tr. 130-31). The majority of CSHO Boston's readings were 0 foot candles, with his highest reading being 0.2 foot candles (Tr. 131).

Home Depot's light readings were presented in the written report of Dominick Zackeo and Edward Hirshenson (Exhs. J-21 and J-22). Mr. Hirshenson took the measurements on two occasions – on October 22, 2014, and November 7, 2014 (Exh. J-22). His field notes containing the recorded results are contained in Exh. J-19. Mr. Hirshenson used a Fischer Scientific portable light meter (Exh. J-22, p. 2). He took measurements of light levels throughout the facility including in two trailers in the receiving department. One trailer was partially full with a slip truck inside. This trailer also had a semi-transparent roof. Mr. Hirshenson's light measurements inside were taken with the dock light on, but "poorly positioned" to replicate conditions on the day of Ms. Smith's accident (Tr. 220; Exh. J-22, p. 2). These measurements ranged from 2.0 to 3.8 lumens/sq. foot (Exh. J-22). The measurements taken on the later date were taken in a trailer without a semi-transparent roof to prevent outdoor light and with the dock light on, but positioned to "better illuminate the trailer." (Exh. J-22, p. 3). These measurements ranged from 2.1 to 3.6 lumens/sq. foot (Exh. J-22, p. 3). Mr. Zackeo testified at the hearing. He testified it was reasonable to assume light measurements would be less than 2 lumens/sq. foot in the trailer if the dock lights were not in use, given these results (Tr. 225).

Based upon her initial inspection, CSHO Allmaras recommended Home Depot be issued a citation for a violation of 29 C.F.R. § 1910.178(p)(1) for failing to take the slip truck out of service while the headlights were not operational. CSHO Allmaras recommended the citation be classified as repeat because the same Home Depot store had received a citation for a violation of the same standard alleging a forktruck with inoperable brakes was not taken out of service. Home Depot timely contested the citation.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited

employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The Secretary alleges Home Depot violated 29 C.F.R. § 1910.178(p)(1) by failing to remove the slip truck from service "while [the] headlights were not operational, exposing employees to struck-by and crushed-by hazards." The cited standard requires

> If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

The Secretary contends the conditions inside the trailers in which the slip truck operated required headlights on the slip truck be operational in order for it to be safe to operate. Home Depot contends the headlights are optional equipment and operation of the slip truck without use of the headlights was safe under the circumstances.

DISCUSSION

Applicability of the Standard

The regulations at 29 C.F.R. § 1910.178 apply to all industrial trucks powered by electric or internal combustion engines. 29 C.F.R. § 1910.178(a). The slip truck is an electric powered industrial truck used for material handling (Tr. 24). The standards at 29 C.F.R. § 1910.178 apply to the slip truck.

In its post-hearing brief, Home Depot raised for the first time the argument that a more specific standard applies. Home Depot argues the more specific standard at § 1910.178(h)(2) which requires auxiliary lighting where forktrucks operate in less than 2 lumens/sq. ft. of light, should have been cited. Under Commission precedent, preemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer. 29 C.F.R. § 1910.5(c)(1); *see* Commission Rules 34(b)(3) and(4), 29 C.F.R. § 2200.34(b)(3) and (4); *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004); *Vicon Corp*., 10 BNA OSHC 1153, 1157 (No. 78-2923,1981) (describing a claim that a general standard was preempted by a more specific standard as an affirmative defense). Home Depot did not raise this affirmative defense in its Answer, nor seek to amend its Answer to do so. Home Depot has waived that defense.

Failure to Comply with the Standard

To establish a violation of 29 C.F.R. § 1910.178(p), the Secretary must establish the slip truck was "in need of repair, defective, or in any way unsafe" such that it needed to be removed from service. The Secretary contends the slip truck met all three of the conditions necessitating removing it from service. The Secretary argues it has the burden only to show something on the slip truck was not working in order to meet the definition of either "in need of repair" or "defective." Home Depot counters the Secretary must establish the inoperable headlights rendered the slip truck unsafe in order to establish it was in violation of the standard, which the Secretary failed to do. The Secretary responds he has met that burden as well because the standard at 29 C.F.R. § 1910.178(h)(2) presumes a hazard where a forktruck operates in less than 2 lumens/sq. ft. of light and he has established the slip truck was operating in less than 2 lumens/sq. ft. of light. Based upon the language of the standard, I conclude to show a violation of the cited standard the Secretary has the burden to establish the inoperable headlights rendered the slip truck unsafe. The Secretary has met that burden.

Although the Commission has not addressed the issue, several Administrative Law Judges (ALJs) have found the Secretary has the burden to establish a cited powered industrial truck is rendered unsafe to operate due to the defect or item in need of repair to establish an employer violated § 1910.178(p)(1). As Judge Ditore held in *Airco, Inc*., 9 BNA OSHC 1202 (No. 79-7185, 1980), "The purpose of the standard is to prevent the operation of a powered industrial truck that is unsafe to operate, until the needed repairs are made, or the defects or unsafe condition eliminated. Conversely, repairs, defects and conditions which do not render the truck unsafe to operate, are not encompassed by the standard." *See also Barwick Furniture, LTD*, 3 BNA OSHC 1428 (No. 10440, 1975); and *Royal Gorge Publishing*, 18 BNA OSHC 1383 (No. 97-0748, 1998). I find the reasoning of these prior ALJ decisions persuasive. The language of the standard requires the powered industrial truck remain out of service only until it is "restored to safe operating condition." To establish a violation of § 1910.178(p)(1), the Secretary must show the powered industrial truck remained in service during a period it was not in "safe operating condition."

It is within common knowledge and ordinary experience that operating a motorized vehicle in a poorly lit area is unsafe. The standard at 29 C.F.R. § 1910.178(h)(1) requires

powered industrial trucks be equipped with auxiliary lighting if operated in an area in which lighting is 2 lumens/sq. ft. or less. The standard presumes a hazard where a powered industrial truck is operating under such conditions.[3] The standard establishes an objective standard for illumination below which operation of a powered industrial truck is unsafe without auxiliary lighting on the truck. Both the Secretary and Home Depot presented results of testing of the light levels within the trailers in which the slip truck operated. Based upon the totality of the objective evidence, I find the trailers had less than 2 lumens/sq. ft. of illumination. The Secretary has established the slip trucks were unsafe to operate in the trailers without headlights.

The Secretary presented the light readings of CSHO Boston taken in November of 2014, (Tr. 129-30). All of CSHO Boston's readings were taken inside a trailer without use of the dock light (Tr. 130). He testified all other lighting was functional that the time (Tr. 135). He performed 10 measurements with the slip truck inside the trailer and 10 without (Tr. 130-31). All were taken 13 feet from the front of the trailer (Tr. 131). The majority of CSHO Boston's readings were 0 foot candles, with his highest reading being 0.2 foot candles (Tr. 131).

Home Depot's light readings were presented in the written report of Mr. Zackeo and Mr. Hirshenson (Exhs. J-21 and J-22). Like CSHO Boston's measurements, Mr. Hirshenson's measurements were taken nearly one year after the violation at issue - on October 22, 2014, and November 7, 2014 (Exh. J-22). He took measurements of light levels throughout the facility including in two trailers in the receiving department. One trailer was partially full with a slip truck inside. This trailer also had a semi-transparent roof. Mr. Hirshenson's light measurements inside were taken with the dock light on, but "poorly positioned" to replicate conditions on the day of Ms. Smith's accident (Tr. 220; Exh. J-22, p. 2). These measurements ranged from 2.0 to 3.8 lumens/sq. foot (Exh. J-22). The measurements taken on the later date were taken in a trailer without a semi-transparent roof to prevent outdoor light and with the dock light on, but positioned to "better illuminate the trailer." (Exh. J-22, p. 3). According the field notes, the dock lights had been replaced with LED lights in October of 2014, prior to this second set of measurements being taken. These measurements ranged from 2.1 to 3.6 lumens/sq. foot (Exh. J-

[3] Where a standard requires a specific condition or practice and does not incorporate the existence of a hazard as a violative element, the hazard is presumed. *Kasper Electroplating Corp.*, 16 BNA OSHC 1517, 1523 (No. 90-2866, 1993).

22, p. 3).

Neither party explained the difference in the measurements. The record establishes the measurements were taken under different conditions and I find the Secretary's measurements more accurately represent conditions at the time of the violation. Specifically, it is undisputed employees did not use the dock lights. Mr. Lumley testified there was no requirement for employees to do so, and he did not use them. Home Depot's measurements were all taken with the use of dock lights. Mr. Zackeo, Home Depot's expert, conceded it was reasonable to assume light measurements would be less than 2 lumens/sq. ft. in the trailer if the dock lights were not in use, given his measurements (Tr. 225).[4] The preponderance of the evidence establishes the slip truck was being operated in trailers with less than 2 lumens/sq. ft. of light and was, therefore, unsafe without operational headlights.

Home Depot argues the slip truck was not rendered unsafe by the inoperable headlights because a determination of whether lighting is adequate is a subjective determination to be made by the operator and, in this case, operators did not feel the conditions necessitated use of the headlights. Mr. Zackeo testified, "Adequate lighting is up to the driver really. It's up to the power industrial truck operator whether they can see well enough or not. It's up to them to decide whether the situation is safe for them to do their operations, whether they need to turn on additional lights or not." (Tr. 213-14). He went on to state in response to the question whether 2 lumens/sq. ft. is the level of illumination at which operators need to use additional lighting, "No, again it's a subjective thing." (Tr. 215). I find Home Depot's argument unpersuasive because it is contrary to the purposes of the Act. The legislative history of the Act states "final responsibility for compliance with the requirements of this Act remains with the employer." S. Rep. No. 91-1282, 91st Cong. 2d Sess. at 10-11 (1970). Where the regulations set an objective standard for the level of illumination below which auxiliary lighting is required, an employer may not leave the determination of whether that objective standard is met to the subjective assessment of its employees.[5]

Even if a subjective standard applied, Mr. Lumley's testimony regarding whether he felt the headlights were needed was not entirely consistent. Mr. Lumley testified he did not take the

[4] It is also reasonable to assume light readings would also be affected the transparency of the roofs of the trailers.

[5] Based upon this conclusion, I give no weight to the testimony of Mr. Zackeo.

slip truck out of service because he did not feel it was unsafe to operate (Tr. 170). He later testified, when pallets are stacked, he chose to use the headlights because it was difficult to see (Tr. 157).

It is undisputed Home Depot did not remove the slip truck from operation while it had inoperable headlights. The Secretary has met his burden to establish Home Depot violated the requirements of § 1910.178(p)(1).

Employee Exposure to the Hazard

It is undisputed employees operated the slip truck for at least one week while the headlights were inoperable (Tr. 97-98, 137-39). The Secretary has established employee exposure to the hazard created by operating the slip truck in inadequate lighting. CSHO Allmaras testified in inadequate lighting, the slip truck driver could run over or into something inside the trailer (Tr. 43-44). She also testified the operator may improperly lift the load, causing it to become unbalanced (Tr. 44-45). Home Depot's training materials for powered industrial truck drivers recognize the potential for such vehicles to tip over (Exh. J-5, p. 2). Conditions that make trucks unstable include breaking abruptly, running over potholes, and overhead obstructions (Exh. J-5, pp. 9, 17). For this reason, drivers are admonished to always look in the direction of travel and to avoid sudden stops (Exh. J-6, p. 7). It is within common knowledge and ordinary experience that poor lighting limits a driver's ability to see obstructions. Mr. Lumley testified he used the headlights when unloading stacked pallets because, "it's difficult to see the slits on there if you don't have the lights on." (Tr. 157). Should the slip truck run into something or become unstable and tip, the operator could be injured within the cab or by being struck by the tipping slip truck itself. The Secretary has established employee exposure to the hazards associated with operating the slip truck with inoperable headlights.

Home Depot contends employees operating the slip truck or in the same area as the slip truck were not exposed to a hazard. Home Depot argues the nature of the unloading operation is so rote "even a dark trailer" is a "predictable and safe environment." Home Depot also argues the pallets are shrink-wrapped in such a way there is no possibility of material falling and the operator is protected by the mast and the cab in the unlikely event material does fall. Home Depot argues employees are trained to manage situations such as poor lighting and to avoid

hazards. Finally, Home Depot argues employees other than the operator are protected by the company policy known as the "zone of safety" which prohibits employees from being within 4 feet of the slip truck while it is being operated. I find these arguments unpersuasive.

To establish exposure to the hazard, the Secretary must show employees had access to the "zone of danger." *Donovan v. Adams Steel Erection, Inc*., 766 F.2d 804, 811 (3d Cir. 1985); and *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). In the instant case, the trailers in which lighting falls below the objective standard set out in §1910.178(h)(1) of 2 lumens/sq. ft. comprise the zone of danger. Home Depot does not dispute the slip truck was operated in the trailers. Slip truck operators were exposed to the zone of danger. The Commission's holdings in *Trinity Marine Products, Inc*., 21 BNA OSHC 1819 (No. 05-0302, 2006) and *Fabricated Metal Products, Inc*., 18 BNA OSHC 1072 (93-1853, 1997), relied upon by Home Depot, do not require a contrary finding. Both cases involved citations alleging violations 29 C.F.R. §1910.212(a) which requires protection of employees from the point of operation and other hazardous parts of a machine. The Commission found the Secretary had failed to establish employee exposure to either the point of operation or a rotating shaft because, in the course of normal operations of the machine, the employee never entered the zone of danger and accidental entry into the point of operation or contact with a rotating shaft was too speculative. In the instant case, access to the zone of danger was neither speculative nor unpredictable. Home Depot has not rebutted the Secretary's evidence of exposure of the slip truck operator to the hazard addressed by the cited standard.

Employer Knowledge

The Secretary has the burden to establish Home Depot was aware of the violative condition. To establish employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving a supervisory employee knew of or was responsible for the violation. *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-

1598, 1984); *see also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman can be imputed to the employer). Actual knowledge refers to an awareness of the existence of the conditions allegedly in noncompliance. *Omaha Paper Stock Co.*, 19 OSHC 2039 (No. 01-3968, 2002). The preponderance of the evidence establishes Home Depot was aware of the violative condition. Mr. Lumley admitted he received a complaint about the headlights not operating at least one week prior to the repair being made (Tr. 145). He then notified Mr. Sweat in order to have the repair made (Tr. 146). Neither took the slip truck out of service and both were aware the slip truck was continuing to be used.

Home Depot argues because Mr. Lumley was not aware the dock light was not operational and because no employee told him he or she felt unsafe operating the slip truck, the Secretary cannot establish employer knowledge. Home Depot misconstrues the Secretary's burden. The Secretary need not show Home Depot was aware the slip truck was unsafe; rather, he need only show the slip truck was in need of repair. *See East Texas Motor Freight, Inc. v. OSHRC*, 671 F.2d 845, 849 (5th Cir. 1982); *Peterson Brothers Steel Erection Co.*, 16 BNA OSHC 1196 (No. 90-2304, 1993, *aff'd* 26 F.3d 573 (5th Cir. 1994); *N & N Contractors, Inc*., 18 BNA OSHC 2121 (No. 96-0606, 2000). Both Mr. Lumley and Mr. Sweat had actual knowledge the slip truck was in need of repair.

The evidence establishes Home Depot had constructive knowledge the slip truck was unsafe. To establish constructive knowledge, the Secretary must show Home Depot could have discovered the condition with the exercise of reasonable diligence. "Reasonable diligence" includes the employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). To determine whether an employer acted with reasonable diligence, consideration must be given to "several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Precision Concrete Construction*, 19 BNA OSHC 1404 (No. 99-0701, 2001). The Commission has held that "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell*

Tel. Co., 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000 (citations omitted), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001).

Mr. Lumley admitted he was made aware of the inoperable headlights by Ms. Smith. Daily inspection sheets completed by another slip truck operator during that same period contain a notation suggesting a light on the slip truck was inoperable (Exh. J-8). Although not entirely clear on this record to which light these notations refer[6], this notation appears on 12 of the daily inspection sheets during a one month period (Exh. J-8). Mr. Lumley admitted he did not review these daily inspection sheets; but rather expected employees to bring problems to his attention (Tr. 197). He also admitted he did nothing to clarify the issue with the employee (Tr. 197). At no time during this period, or after Ms. Smith notified him the headlights on the slip truck did not function, did Mr. Lumley determine whether there was adequate lighting in the trailers without the use of the headlights (Tr. 51). Mr. Lumley admitted there were occasions for which headlights were necessary when unloading trailers (Tr. 157). I find Home Depot failed to act with reasonable diligence to ensure the slip truck could be operated safely once notified the headlights were inoperable. The Secretary established Home Depot had constructive knowledge the slip truck was unsafe to operate.

Home Depot argues the failure of Mr. Lumley and Mr. Sweat to take the slip truck out of service cannot be imputed to it under the 11th Circuit's decision in *ComTran Group, Inc., v. U.S. Dept. of Labor,* 722 F.3d 1304 (11th Cir. 2013). In *ComTran* the court held "if the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the conduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct." *Id.* at 1318. The 11th Circuit held, however, its decision in *ComTran* did not apply to the ordinary case in which knowledge is established because the supervisory employee knew or should have known through reasonable diligence of the exposure of his subordinates to the hazardous conditions. *ComTran*, 722 F.3d at 1308, n. 2. Regardless of whether the supervisor himself engages in unsafe behavior, he remains responsible for the safety of his subordinates. *See Caterpillar, Inc.*, 17 BNA OSHC 1731, 1732 (No. 93-373, 1996). Such is the case here. Mr. Lumley's and Mr. Sweat's knowledge of the violative condition resulting in

[6] CSHO Allmaras testified the employee told her the notation was for the inoperable headlights although the document itself refers to a rotating light (Tr. 32-33). Mr. Lumley testified the entry refers to the rotating light on the back of the slip truck (Tr. 173).

exposure of their subordinates to the hazard is imputed to Home Depot. The Secretary has established employer knowledge.

Affirmative Defenses

Home Depot alleged in its Answer the affirmative defense of employee misconduct. It did not brief that issue. Therefore, I deem the affirmative defense of employee misconduct waived by Home Depot.

Classification

The Secretary alleges that the violation was a repeat violation. A violation is considered a repeat violation "if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). "A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996). As the basis for the repeat classification of the citation at issue, the Secretary contends a prior citation for a violation of the same standard was issued to the same Home Depot facility and became a final order of the Commission on December 12, 2013.

The only evidence of record of the prior citation presented by the Secretary was the testimony of CSHO Allmaras and the worksheet for the prior citation (Tr. 52-56; Exh. J-17).[7] I find this evidence insufficient to meet the Secretary's burden to establish a repeat violation. A violation worksheet does not establish a citation has become a final order of the Commission. It does not even establish the citation was issued. CSHO Allmaras was not involved in issuance of the prior citation and could not state the date upon which the original citation had been issued (Tr. 54). She was able to testify to the date the original citation allegedly became a final order, but did so only by looking at the citation at issue in this proceeding (Tr. 56). She did not testify as to how she obtained that date when drafting the citation. As such, CSHO Allmaras's

[7] In his brief, the Secretary also referenced the OSHA website which contains a record of the prior citation and the final order date. This document was not made part of the record; rather the Secretary requests I take judicial notice of the final order date as verified by the OSHA website, presumably pursuant to Fed. R. Civ. P. 201. I decline to do so because the Secretary has not presented sufficient facts to establish the OSHA website is a source "whose accuracy cannot be reasonably questioned" as required under Rule 201.

testimony is not reliable and the Secretary has not met his burden to establish the violation was a repeat violation.

I find the violation is properly classified as serious. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. As the Third Circuit has explained:

> It is well-settled that, pursuant to § 666(k), when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible*, the employer has committed a serious violation of the regulation. The "substantial probability" portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur.

Secretary of Labor v. Trinity Industries, 504 F.3d 397, 401 (3d Cir. 2007) (internal quotation marks and citations omitted); *See also, Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Mosser Construction*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2087-2088 (No. 88-0523, 1993). The likelihood of an accident goes to the gravity of the violation, which is a factor in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214.

The Secretary alleges, should an accident occur, an employee operating the slip truck could sustain scrapes, bruises, or fractures from hitting the inside of the cab (Tr. 44, 62). Home Depot's training materials indicate a forktruck can weigh up to 12,000 lbs. and do as much damage at 5 miles/hour as a car moving at 30 miles/hour (Exh. J-6, p. 2). Should the slip truck become unbalanced or hit an obstruction, even going at a slow speed, bruises or fractures are the likely result. The Secretary has established a serious violation.

Penalty Determination

The Secretary proposed a penalty of $20,000.00 in this case. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* § 17(j) of the Act. The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962,

1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Because I have found Item 1 of Citation 1 was a serious, and not a repeat, violation, the maximum penalty under the Act is $7,000.00. At least three employees were exposed to the hazard associated with operating the slip truck without operational headlights. The record establishes employees were exposed for approximately one week. Although used daily, the slip truck was operated at a slow speed, in a limited area, and only when in the trailers were employees exposed to the inadequate lighting. Given these considerations, a moderate gravity based penalty is warranted. Home Depot is a large employer, but the Secretary did not present evidence of a history of violations. Home Depot also has an extensive safety program for forktruck operators which I find a mitigating factor. Taking all of these factors into consideration, a penalty of $2,500.00, is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of Citation 1, alleging a violation of 29 C.F.R. § 1910.178(p)(1) is affirmed as a serious violation, and a penalty of $2,500.00 is assessed.

/s/ *Heather Joys*
HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia

Date: March 30, 2015