United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. WALMART, INC., Respondent.	OSHRC Docket No. 17-0949

ON BRIEFS:

Juan C. Lopez, Appellate Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund Baird, Acting Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Ronald W. Taylor, Esq., Thomas H. Strong, Esq.; Venable LLP, Baltimore, MD.
For the Respondent

DECISION

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued a citation to Walmart, Inc., alleging that pallets of merchandise kept on racks at its Johnstown, New York, distribution center were "stored in tiers" but not "blocked . . . so that they [were] stable and secure against sliding or collapse" as required by 29 C.F.R. § 1910.176(b). Following a hearing, Administrative Law Judge Keith E. Bell affirmed the citation and assessed the proposed $10,864 penalty. We conclude that the pallets of merchandise were not "stored in tiers" within the meaning of § 1910.176(b). Accordingly, we find that the cited provision does not apply to the alleged violative condition, and we therefore reverse the judge and vacate the citation.

BACKGROUND

The Johnstown distribution center processes between 45,000 and 50,000 pallets of merchandise per week for distribution to approximately 120 Walmart and 25 Sam's Club stores. Pallets of merchandise at the distribution center are stored on an industry-standard "selective racking" system,[1] with one pallet per rack level and racks positioned back-to-back, such that pallets are accessible by forklift only from aisles at the fronts of the racks. On each rack level, a pallet rests on a front and back rail that are 42 inches apart. Each pallet is an industry-standard 48 inches long and 40 inches wide, so it overhangs the front and back rail by three inches. A space of four to five inches separates pallets on back-to-back racks.

Photographs in the record show that the selective racking has seven or eight levels. The lowest level (on the distribution center floor) is a "pick slot," from which employees retrieve items necessary to complete merchandise orders from stores. The level just above the pick slot is the "20-slot," which has an additional front-to-back rail to allow employees to manually remove empty pallets, each weighing in excess of 60 pounds, without them falling into the space between the front and back rail. The remaining levels above the pick slot and 20-slot, where pallets containing excess merchandise are placed, are known as the "reserve" locations. When a pick slot runs out of merchandise, the pallet in the pick slot is removed, and a forklift then replaces it with one from a reserve location above.

On February 25, 2017, J.S., an order filler at the distribution center, was struck from above by an unknown number of crescent roll containers while retrieving items for an order from a pick slot. J.S. did not witness the containers fall, nor did she see what led to the incident, but afterward she noticed that there were crescent roll containers on the lower pallet as well as on the floor. Following the incident, Walmart investigated and found that a forklift, while removing a pallet of merchandise from a reserve location of a rack immediately behind the one from which J.S. was filling orders, bumped a pallet of crescent roll containers stored in a reserve location above J.S.

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[1] The distribution center's general manager testified that Walmart's racking system is standard in the warehousing industry, and this testimony was unrebutted.

This caused some of the containers to spill out, with most falling into the area between the racks and a few falling into the aisle where J.S. was working.[2]

DISCUSSION

The Secretary alleges a violation of § 1910.176(b), which provides as follows:

> *Secure storage.* Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.

To prove a violation, the Secretary must establish that: (1) the standard applies; (2) the terms of the standard were violated; (3) at least one employee had access to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). The judge found that each of these elements was proven and therefore affirmed the citation. On review, Walmart contests all four elements and also challenges the abatement date set in the citation.[3] Because we find that the cited standard does not apply, we vacate the citation on that ground and do not reach Walmart's other arguments on review.

To determine whether the cited provision applies to the cited condition, we first "consider the text and structure of the standard at issue." *Superior Masonry Builders, Inc*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003). *See Pettey Oil Fields Servs., Inc.*, 21 BNA OSHC 1638, 1639 (No. 05-1039, 2006) ("[T]he judge's order does address the applicability of the logging standard *to the cited conditions* . . . .") (emphasis added). The standard's plain language will govern so long as the wording is unambiguous. *Superior Masonry Builders*, 20 BNA OSHC at 1184; *see also Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) (noting well-established principle that a "regulation should be construed to give effect to the natural and plain meaning of its words").

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[2] The record does not show the total number of crescent roll containers that fell from the pallet, the number that struck J.S., or how many fell in the aisle as opposed to the middle of the racks. J.S., who testified that the pallet would not have fallen unless it was pushed by the forklift, is the only employee known to Walmart to have been struck by falling merchandise and to have suffered an injury due to a pallet tipping in the selective racking system at the distribution center.

[3] The judge did not address the abatement date issue because he found that it was "not litigated."

Here, the Secretary relies on the first sentence of § 1910.176(b)—"[s]torage of material shall not create a hazard"—and asserts that the standard applies to material stored "in any manner." We disagree. Reading § 1910.176(b) as a whole, it is clear that the first sentence is merely a precatory or hortatory introduction to the second sentence, which contains the operative, specific requirements of the provision. *Cf. Dist. of Columbia v. Heller*, 554 U.S. 570, 578 (2008) ("[A]part from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."). Indeed, the Secretary's reading of § 1910.176(b)'s first sentence effectively renders the second sentence a nullity—if "[b]ags, containers, bundles, etc." are not "stable and secure against sliding or collapse," then they surely "create a hazard." *See Gen. Motors Corp., Delco Chassis Div.*, 17 BNA OSHC 1217, 1220 (No. 91-2973, 1995) (consolidated) ("Regulations are to be read so as to give effect to all their terms, if possible."), *aff'd*, 89 F.3d 313 (6th Cir. 1996). Moreover, the sheer breadth and generality of the first sentence's language, were it to be interpreted as imposing a separate obligation, could raise serious vagueness concerns, particularly in light of the present citation's bare-bones allegation that Walmart's use of industry-standard racking posed "struck-by hazards from unstable material storage." *See Ga. Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005 (11th Cir. 1994) ("A . . . regulation is considered unconstitutionally vague . . . if it 'forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' ") (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Accordingly, we decline to read § 1910.176(b) so broadly and find that it applies only if the material at issue is "stored in tiers."

This means that the applicability inquiry here turns on whether the pallets in the distribution center were "stored in tiers," as that term is used in 29 C.F.R § 1910.176(b).[4] "Tier," which the standard does not define, means "a row, rank, or layer of articles," and "one of two or more rows

[4] We note that the judge did not address this issue, focusing instead on Walmart's argument that the items that fell on J.S. were "not covered by this standard because [they were] in the process of being placed into storage." In fairness, Walmart did not raise the issue of the definition of "tier" not encompassing the pallets themselves before the judge—indeed, the company explicitly argued this point only in its reply brief on review. Nevertheless, the Secretary did not move for leave to file an additional brief to directly address this line of argument or move to strike Walmart's brief as raising an issue not properly before us. *See* Commission Rule 93(b)(3), 29 C.F.R. § 2200.93(b)(3) ("The party that filed the first brief may file a reply brief, or, if briefs are to be filed simultaneously, both parties may file a reply brief. Additional briefs are otherwise not allowed except by leave of the Commission.").

arranged one above another." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2391 (1971); *see Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term "carries its ordinary meaning"); *In re WorldCom, Inc.*, 723 F.3d 346, 354 (2d Cir. 2013) (consulting "dictionaries contemporaneous to the enactment of the . . . relevant . . . provision").[5] The definition's reference to a "layer," along with its example of "tier upon tier of huge casks," plainly narrows the meaning of the term to articles stacked one on top of another with nothing in between. *Id.* Additionally, the 1971 dictionary defines "tierable" as "suitable for stacking," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2391 (1971), which further supports the notion that "tier," as used in this provision, applies only to material stacked directly one upon another. Indeed, a "tiered" wedding cake consists of individual layers that sit directly upon the layer below.

Here, there is simply no evidence that the pallets at issue were ever stacked one upon another. While photographic evidence shows that the industry-standard selective racking levels in Walmart's distribution center were themselves arranged one above another, there is no dispute that each rack level held one pallet, with space between the top of the merchandise on each pallet and the bottom of the next rack level. Moreover, the Secretary has never alleged that the racking was itself unstable. Accordingly, we find the cited standard does not apply and therefore reverse the judge's decision and vacate the citation.[6]

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[5] The cited provision was originally promulgated in May 1969 under the Walsh-Healey Public Contracts Act of 1936. *See* Part 50-204—Safety and Health Standards for Federal Supply Contracts, 34 Fed. Reg. 7946, 7947 (May 20, 1969) (codified at 41 C.F.R. § 50-204.3(b)). It was then adopted as an OSHA standard in May 1971 under § 6(a) of the Occupational Safety and Health Act of 1970, which permitted the Secretary to "promulgate as an occupational safety or health standard any . . . established Federal standard," without notice-and-comment rulemaking, "during the period beginning with the effective date of this Act and ending two years" later. 29 U.S.C. § 655(a); *see* National Consensus Standards and Established Federal Standards, 36 Fed. Reg. 10,465, 10,612 (May 29, 1971).

[6] This is not to say that the standard would not apply if the pallets themselves had been stored in tiers. A tower of used pallets, for example, would presumably be covered by the cited provision, and would therefore need to be "stacked, blocked, interlocked and limited in height" so that they would not fall over. 29 C.F.R. § 1910.176(b). In such a scenario, pallets may be stacked so high as to become unstable, resulting in "sliding or collapse." *Id.*

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Dated: December 31, 2020 Amanda Wood Laihow
Commissioner

ATTWOOD, Commissioner, dissenting:

The applicability issue here is really quite simple, though my colleagues do their best to complicate it. "It is axiomatic that OSHA standards must be interpreted in accordance with the natural and plain meaning of their words." *Bunge Corp.*, 12 BNA OSHC 1785, 1791 (No. 77-1622, 1986) (consolidated). The provision cited here, part of the general industry materials handling and storage standard, applies when "[b]ags, containers, bundles, etc." are "stored in tiers."[1] 29 C.F.R. § 1910.176(b). The pallets in Walmart's distribution center hold assorted merchandise that is often wrapped or bound together; they are therefore "containers" or "bundles." The rack levels on which the pallets rest are arranged one above another; they are therefore "tiers." Accordingly, I would conclude that § 1910.176(b) applies.

As for the remaining elements of the Secretary's case, the cited provision requires that containers and bundles stored in tiers be "stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse." 29 C.F.R. § 1910.176(b). Walmart's pallets were not blocked to prevent them from sliding off the racks. Indeed, the record shows they were regularly dislodged by forklifts, and our precedent holds that compliance with § 1910.176(b) includes ensuring that materials are secure against an outside force. As such, I would conclude that Walmart failed to comply. Actual employee exposure is established by J.S.'s injuries here, and employer knowledge of the violative condition is shown by testimony from the distribution center's general manager that he was aware of stored pallets being tipped and merchandise falling a few times per month. I would therefore affirm the citation.

I. Applicability

My colleagues—echoing one of Walmart's arguments on review—conclude that the cited provision does not apply to the company's pallets stored on racks, because § 1910.176(b) is limited to materials stacked directly on top of one another.[2] This limitation, however, does not appear in

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[1] I am inclined to agree with my colleagues that the first sentence of § 1910.176(b), providing that "[s]torage of material shall not create a hazard," is simply an introduction to the substantive requirements in the second sentence, and does not stand alone as its own obligation. That said, given my conclusion that the second sentence applies, I decline to analyze this issue.

[2] As the majority notes, Walmart did not make this argument until its reply brief to the Commission—its argument before the judge was, as articulated in the company's post-hearing brief, that the alleged hazard "involves the method by which pallets were *placed into* storage," not materials that were already stored. (Emphasis added.) I therefore question my colleagues' willingness to address the "stored in tiers" question when the judge "did not have the opportunity

the standard, nor does it comport with the provision's plain language. "It is well settled that the test for the applicability of any . . . regulatory provision looks first to the text and structure of the . . . regulations whose applicability is questioned." *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993). As noted, the cited provision applies to "[b]ags, containers, bundles, etc., stored in tiers." 29 C.F.R. § 1910.176(b). The standard defines neither "container" nor "bundle." Nevertheless, "container" means "one that contains" and "a receptacle (as a box or jar) or a formed or flexible covering for the packing or shipment of articles, goods or commodities." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 491 (1971); *see Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term "carries its ordinary meaning"). "Bundle" means "a number of things fastened together into a mass or bunch convenient for handling or conveyance," "package," and "a number or group of things considered as a unit." *Id.* at 296. Walmart's pallets fit these definitions, given that they are, as the judge found, "loaded with various merchandise," with "some shrink wrapped" together. At the very least, the pallets are "of the same general kind" of items as containers and bundles, thereby fitting under the "etc." portion of § 1910.176(b). *See Kehm Constr. Co.*, 1 BNA OSHC 1392, 1393 (No. 1209, 1973) (consolidated) (applying doctrine of *ejusdem generis*, which states that when general words follow words of a particular or specific meaning, the general words are construed to embrace only things of the same general kind as those listed).

"Tier" is also undefined in the standard, but it means—as my colleagues note—"a row, rank, or layer of articles," and "one of two or more rows arranged one above another." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2391 (1971). While "layer" may support the majority's idea of materials stacked directly on top of one another, this definition does not exclude Walmart's use of racks, which themselves created the "tiers" at issue. Indeed, the definition broadly describes "rows" of items being "arranged"—not stacked or piled—"one above another," and therefore accords with the pallets in the various slots of Walmart's racking system.[3] Indeed, as described by the Secretary's counsel in his opening

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to pass upon" the issue first. Commission Rule 92(c), 29 C.F.R. § 2200.92(c). Nonetheless, given their treatment of the issue, I do likewise.

[3] J.S. testified that the "upper slots" on the storage racks were referred to as "T1, T2, T3." She did not explain what the "T" stands for, but one wonders.

statement, the violative condition alleged here is unstable material storage in "pallets . . . rest[ing] on two parallel beams [with] . . . nothing supporting the pallet in that space between the beams and nothing to prevent the pallets from sliding and falling through that open space." In short, nothing in the standard's use of the phrase "stored in tiers" excludes items stored on racks "arranged one above the other."[4]

In fact, OSHA has given notice to employers that § 1910.176 is not so limited. Walmart selectively quotes from OSHA guidance in asserting that "the [standard's] phrase refers to the stacking of material on the top of other material," and "not to the placing of pallets on racking," but the very guidance Walmart cites refers specifically to racks and shows that § 1910.176(b) contemplates their use for storage purposes. Walmart points to a portion of the guidance stating that "[d]uring materials stacking activities, workers must . . . [p]lace planks, sheets of plywood dunnage, or pallets between each tier of drums, barrels, and kegs . . . ." *Materials Handling and Storage*, OSHA Publication No. 2236, at 6 (2002 Revised). While this part of the guidance addresses how to safely stack materials on top of one another, it is not limited to that context. Rather, the guidance also states that "to avoid storage hazards," workers "should consider placing bound material *on racks*, and secure it by stacking, blocking, or interlocking to prevent it from sliding, falling, or collapsing." *Id.* at 5 (emphasis added). As such, contrary to Walmart's contention, OSHA has both contemplated and communicated to employers that materials (and, more specifically, bound materials like the pallets of merchandise in this case) stored on racks are covered by the standard and therefore must be secured.

Walmart also contends that § 1910.176(b) applies only where stored material creates a hazard "as it sits," and here there was no inherent instability to the pallets on the racks, given that

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[4] The majority attempts to draw a distinction between Walmart's racks and the tiers of a wedding cake. To my knowledge, however, the tiers of any cake—wedding or otherwise—rarely have, as the majority asserts, "nothing in between" them. Cake tiers are usually separated by a layer of frosting, and wedding cakes often have decorative pillars between each layer or use dowels to create height and lend support for what might otherwise be an unstable stack. Under the majority's reasoning, it would be a misnomer for any baker to use the term "tier" to refer to the layers of such cakes. And if I were inclined to resort to such analogies, I might point out that the tiers of a sports stadium are structures built at varying levels to hold seats and spectators, much like the levels of Walmart's racking system are designed to hold pallets and merchandise. Similarly, the levels of the Kennedy Center Opera House are denoted "Box Tier," "1st Tier," and "2nd Tier." *See* Opera House Seating Chart, http://www.kennedy-center.org/visit/exploring-our-spaces/opera-house (last visited Nov. 19, 2020).

they fell only when dislodged by a forklift. This argument is relevant, however, to whether the company complied with the cited provision—that is, whether the manner in which Walmart stored the pallets rendered them "stable and secure against sliding or collapse." 29 C.F.R. § 1910.176(b). It has no bearing on whether the provision applies in the first place. As such, the cases Walmart cites are properly considered in analyzing the noncompliance element of the Secretary's case, which I take up next. *See Clement Food Co.*, 11 BNA OSHC 2120, 2122 (No. 80-0607, 1984) ("The judge correctly found that the boxes were not stable and secure against sliding and collapse within the meaning of the standard [and the] . . . item is therefore affirmed."); *Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1668 (No. 13401, 1981) ("The Commission agrees with the judge that the evidence referred to above is sufficient to find that [the employer] failed to comply with the cited standard.").

II. Noncompliance

Given its conclusion that the cited provision does not apply here, the majority does not reach the issue of whether Walmart failed to comply with § 1910.176(b). The judge found that noncompliance was proven by the Secretary, but Walmart contends that this was error because the company's racking system is widely used in the warehousing industry, and the pallets stored on it become problematic only when dislodged. The cited provision requires materials stored in tiers to be "stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse." 29 C.F.R. § 1910.176(b). Given that Walmart stored only one pallet per tier, the stacking, interlocking and height limitation requirements are not at issue. Indeed, the Secretary has asserted only that the pallets were not "blocked," and that installation of a front-to-back rail in each reserve location would have prevented a bumped pallet from sliding and falling through the gap between the front and back beams.[5] The noncompliance question, then, is whether this lack of blocking made it such that the pallets were not "stable and secure against sliding or collapse." *Id. See Clement Food*, 11 BNA OSHC at 2122 (affirming § 1910.176(b) violation where "stack of boxes was not interlocked or blocked," *and* "boxes were not stable and secure against sliding and collapse").

[5] While the "limited in height" requirement may apply to the tiers themselves (in this case, how many levels are in the racking), the Secretary focuses on the lack of blocking, so my analysis likewise focuses on that requirement.

To begin, the language of § 1910.176(b) requires stored materials to withstand outside forces. The standard defines none of the provision's key terms as relevant here, but: (1) "secure" means "free from danger" and "affording safety"; (2) "slide" means "to change position or become dislocated"; and (3) "collapse" includes in its definition to "fall into a jumbled or flattened mass *through the force of external pressure*." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 443, 2053, 2142 (1971) (emphasis added). Putting these three terms together, § 1910.176(b) does not limit an employer's obligation to simply ensuring that materials are stored such that they will not give way under their own weight.

In fact, the Commission has consistently held as much. In *Pratt & Whitney*, the Commission affirmed a violation of § 1910.176(b) based on "three pallets of metal barrels" that could be toppled by "mechanical handling equipment used in the area." 9 BNA OSHC at 1667. The Commission found that "the Secretary need not prove that the barrels could fall off by themselves"; rather, "[p]roof that the barrels were on pallets in areas used by mechanical handling equipment [was] sufficient." *Id.* at 1668. Three years later in *Clement Food*, the Commission specifically stated that § 1910.176(b) "is not limited by its words to stacks so unstable that they might collapse of their own weight," and thus affirmed a § 1910.176(b) violation based on "a tiered stack of boxes fifteen feet high" that three separate witnesses testified could be knocked over by "any shock or vibrations from forklift trucks and machinery in the area." 11 BNA OSHC at 2122. Walmart attempts to distinguish these cases by pointing out the instability of the materials there—"some of the metal barrels had been removed from the bottom two pallets" in *Pratt & Whitney*, and the "top tier of the boxes was leaning" in *Clement Food*. 9 BNA OSHC at 1667; 11 BNA OSHC at 2122. While these materials were perhaps less inherently stable than Walmart's pallets, the decisions in *Pratt & Whitney* and *Clement Food* were nonetheless based on the hazard of materials being dislodged by an outside force. In other words, the Commission found that § 1910.176(b) requires materials to be stored such that they could withstand such a force.[6]

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[6] Walmart also attempts to distinguish two judges' decisions on the ground that both cases involved inherently unstable storage. Unreviewed decisions by Commission judges are not binding precedent. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) ("[A] Judge's opinion . . . lacking full Commission review does not constitute precedent binding upon us."). In any event, one judge simply followed *Clement Food* in finding that "stacked material must be stable and secure *even when struck by forklifts*." *Sanderson Farms, Inc.*, No. 07-1623, 2008 WL 5203149, at *5 (O.S.H.R.C.A.L.J. Aug. 12, 2008), *aff'd*, 348 F. App'x 53 (5th Cir. 2009) (unpublished) (emphasis added). The other followed both *Clement Food* and the Fifth Circuit's

Notably, the Commission in both *Pratt & Whitney* and *Clement Food* affirmed violations without direct evidence of an outside force actually dislodging stored materials. Here, by contrast, the record shows that forklifts regularly tipped pallets stored on racks, causing materials to spill as far as 30 feet down to the distribution center floor. J.S. testified that "[r]oughly, during my work week, which consists of three days, Friday, Saturday and Sunday," items would fall from racks after being dislodged "three to four times during that [time]." The OSHA compliance officer testified that a Walmart employee told him that "material falling through the rack . . . was a problem and something that needs to be fixed to avoid somebody getting hurt." Thomas Rimmer, the asset protection manager for the distribution center, testified that "[w]e would have, probably, an incident in the racking, we call it a tipped pallet, because frequently it will tip, but not fall, maybe a couple of times a month." And while the record shows that few employees at the distribution center have in fact been struck by falling merchandise, Paul Lund, the distribution center's general manager, testified that items fall from pallets dislodged by forklifts "a few times a month."[7] This evidence shows that the manner in which Walmart stored its pallets—overhanging the front and back rails of the racking by only 3 inches, with back-to-back racks only 4 to 5 inches from one another—was not "stable and secure against sliding and collapse" caused by a known and frequently occurring outside force. 29 C.F.R. § 1910.176(b); *see also Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2119 (No. 07-1578, 2012) (noting "the well-established principle that the purpose of the [OSH] Act is to prevent the first accident") (internal citations omitted).

As to Walmart's assertion that its racking is widely used in the industry, the Secretary responds that industry practice is relevant only when interpreting a performance standard, and § 1910.176(b) is a specification standard because it identifies the means of compliance. I agree with the Secretary that § 1910.176(b) is a specification standard. *See, e.g., Cleveland Wrecking Co.*, 24 BNA OSHC 1103, 1106 (No. 07-0437, 2013) ("Although § 1926.501(c) grants the employer the discretion to select a method to protect employees from falling objects, it is a

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decision in *Sanderson Farms* in declaring that "[i]t is enough . . . [that] the record establishes the stack [of stored materials] was capable of sliding or collapsing *when struck or disturbed*." *Gen. Dynamics Land Sys., Inc.*, No. 17-0637, 2018 WL 3046401, at *5 (O.S.H.R.C.A.L.J. May 4, 2018) (emphasis added). I therefore find Walmart's argument unpersuasive.

[7] The majority notes that J.S. is the only employee known to Walmart to have been struck by falling merchandise in the distribution center. Nevertheless, J.S. testified that she "heard from other employees that there was an incident where a gentleman was hit with what I believe was barbecue sauce."

specification standard because it requires that the employer choose from a list of specific enumerated methods."). Nevertheless, industry practice is not entirely irrelevant—while § 1910.176(b) specifies that materials stored in tiers must be "blocked," it does not provide blocking specifications, so industry practice could shed light on what type of blocking might suffice. That being said, "[w]hatever the practice of an industry, . . . members of it are required to take into account all available, factual information relating to whether hazardous conditions exist, or reasonably could exist, where work is being performed." *Bland Constr. Co.*, 15 BNA OSHC 1031, 1036 (No. 87-0992, 1991). As such, even if Walmart's racks are configured and used in accordance with industry standards and manufacturer recommendations, and even if the front-to-back rails proposed by the Secretary are neither industry-standard nor manufacturer-recommended, the undisputed awareness of two managerial employees that pallets tip and spill merchandise at least a few times a month establishes a known hazard with regard to Walmart's storage of pallets.[8] *See Wiley Organics, Inc.*, 17 BNA OSHC 1586, 1597 (No. 91-3275, 1996) ("An 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 reasonably available to it."), *aff'd*, 124 F.3d 201 (6th Cir. 1997). In all, I would find that the Secretary has established a failure to comply with § 1910.176(b).

III. Exposure

To satisfy the employee exposure element of his prima facie case, the Secretary must show "that employees were actually exposed to the hazard, or that it was reasonably predictable that during the course of their normal work duties, employees might be in the 'zone of danger' posed by the condition." *Field & Assocs., Inc.*, 19 BNA OSHC 1379, 1383 (No. 97-1585, 2001). The judge found that evidence of J.S.'s injuries established actual exposure here. Walmart attempts to sidestep the incident involving J.S. by contending that the injured employee's exposure to falling merchandise resulted from her violation of the company's twenty-foot work rule, pursuant to

[8] The Secretary asserts that Walmart offers no evidence on this issue other than its general manager's testimony that the company's pallets and racking system were "standard in the industry" and that front-to-back rails are not "standard" parts for the racks. Walmart appears to concede that its general manager's testimony stands alone in this regard, responding only that the testimony was uncontradicted and unimpeached at the hearing. Given Walmart's own experience with tipping pallets, which the company does not dispute, I find no need to resolve what industry practice is in this regard.

which employees are to stay at least twenty feet from a forklift with its forks raised.[9] Walmart further argues that, in any event, the citation here was not based upon J.S.'s exposure, but rather on that of employees generally, and that the existence of its work rule shows that such exposure was not reasonably predictable.

Walmart's argument misapprehends our exposure jurisprudence. As noted, "[e]xposure to a violative condition may be established either by showing actual exposure *or* that access to the hazard was reasonably predictable." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Indeed, the Commission in *Phoenix Roofing* analyzed reasonable predictability as merely an alternative rationale. *See id.* ("Actual exposure to the fall hazard involved in this case is unquestioned," but "even if we were to ignore this evidence of actual exposure, . . . the evidentiary record still establishes that access to the violative condition was reasonably predictable."). Walmart does not dispute that J.S. was struck by falling merchandise at the company's facility, so actual exposure has been established, regardless of whether the company's twenty-foot rule was violated.[10] *See Am. Luggage Works, Inc.*, 10 BNA OSHC 1678, 1682 (No. 77-0893, 1982) (finding actual exposure based on machine operators' hands being one inch from point of operation and rejecting argument that "employees were not exposed . . . because they were instructed in safe operating procedures and were required to remove their hands from the point of operation during the operating cycle"); *Wayne Farms, LLC*, No. 17-1174, 2020 WL 5815506, at *3 n.2 (OSHRC Sept. 22, 2020) ("[T]he injury sustained by Employee #1 here is . . . relevant to assessing actual exposure and would likely satisfy that element of the case if we were to reach that issue . . . ."). To the extent that a citation alleges hazards affecting

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[9] The distribution center's general manager testified that this work rule shows that Walmart "take[s] safety very seriously." A more discerning observer might note that such a rule is a sign of the company's awareness that falling merchandise is a serious safety problem.

[10] Walmart's argument resembles an unpreventable employee misconduct defense, but it is not, nor can it be one. Such a "defense is predicated on the notion that an employer should not be held responsible when *the cited violative condition* was caused by an employee's misconduct if that misconduct was not reasonably foreseeable." *Calpine Corp.*, 27 BNA OSHC 1014, 1020 (No. 11-1734, 2018), *aff'd*, 774 F. App'x 879 (5th Cir. 2019) (unpublished). The violative condition here is the company's failure to block materials to keep them from falling, not a failure to keep employees away from forklifts. *See id.* (rejecting UEM claim because "the violative condition was the absence of either railings or an attendant at a temporary floor opening on the platform," and so employer's "rule requiring employees to use personal fall protection . . . is not equivalent to the cited standard").

multiple employees, the "[e]xposure of only a single employee to a zone of danger has been universally accepted by the courts and the Commission to satisfy the element." *Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). Given J.S.'s undisputed injuries caused by falling merchandise, I would find that the Secretary established employee exposure here.

IV. Knowledge

"Knowledge of the violative condition, either actual or constructive, is an element of the Secretary's burden of proving a violation: the Secretary must prove either that the employer knew of the violative condition or that it could have known with the exercise of reasonable diligence." *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1939 (No. 97-1676, 1999). "[K]nowledge can be imputed to the cited employer through its supervisory employee." *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). The judge found actual knowledge based on testimony from J.S., who personally informed managers of concerns regarding falling items, as well as testimony from the distribution center's general manager that merchandise occasionally falls from racks when pallets are struck by a forklift, that he received reports regarding tipped pallets, and that he was aware that it happens at least a few times per month. Walmart contends that this evidence fails to satisfy the knowledge element because "[w]hile the testimony demonstrated that [Walmart] was aware that pallets were partially displaced from racking a few times per month, there was no indication that the [company] had knowledge that this was a violative condition."

Walmart misstates the test for proving knowledge. "The knowledge element of a violation does not require a showing that the employer was actually aware that it was in violation of an OSHA standard; rather it is established if the record shows that the employer knew . . . *of the conditions constituting a violation*." *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1199 (No. 90-2304, 1993) (emphasis added) (citing *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1823 (No. 88-2572, 1992)), *aff'd*, 26 F.3d 573 (5th Cir. 1994). Here, the evidence cited by the judge shows that Walmart was aware the pallets stored on the racks were not blocked and therefore were not "stable and secure against sliding or collapse." 29 C.F.R. § 1910.176(b).

Accordingly, I would find that the Secretary has established employer knowledge here, in addition to the other three elements of his prima facie case, and therefore I would affirm Citation 1, Item 1.[11]

/s/
Cynthia L. Attwood
Commissioner

Dated: December 31, 2020

[11] The abatement period set by the citation is 19 days. On review, Walmart contends the abatement period is unreasonable because the installation of front-to-back rails on the racking would take up to six months. The judge declined to address this issue, finding that it was not litigated. I would find this was error. Walmart contested the "abatement requirements associated with the citation" in its notice of contest, and counsel for the company questioned the distribution center's general manager at the hearing regarding how long it would take to install front-to-back rails. The general manager's testimony that it would take six months is unrebutted. *See Druth Packaging Co.*, 8 BNA OSHC 1999, 2003 (No. 77-3266, 1980) ("When an employer contests a citation, it may place in issue the reasonableness of the abatement date specified in the citation," and when the employer does so, "the burden of proving reasonableness lies with the Secretary."). Accordingly, I would extend the abatement period to six months.

Some personal identifiers have been redacted for privacy purposes.

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor

Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. WALMART, INC., Respondent.	OSHRC DOCKET No. 17-0949

Appearances:

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

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

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

Jurisdiction

The record establishes, and the parties stipulated, that at all times relevant to this case, Respondent was an "employer" engaged in a "business affecting commerce" within the meaning of section 3(5) of the Act, 29 U.S.C. § 625(5). JX-1.[1]

Factual Background

The Accident

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

[redacted] is an employee of Respondent, Walmart, at distribution center #6096 in Johnstown, NY (worksite). Tr. 22. On February 25, 2017, she was struck on her head, shoulders and back by items that fell from a pallet.[2] As a result of her accident, she suffered injury to her spine. Tr. 23 – 27. At the time of her accident, [redacted] was filling orders which required her to go up and down the aisles to remove items from the rack. Although she did not see the items fall, she later learned that a pallet was tipped by another employee causing the items on the pallet to fall. Tr. 26.

Storage Racks

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

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

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

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

Inspection

Walmart's Distribution Center #6096 was inspected on March 28, 2017, by OSHA Compliance Officer (CO), Charles Harvey, based on a complaint concerning an employee injury and an unsafe condition. Tr. 70. CO Harvey began his inspection with an opening conference conducted with General Manager (GM) Paul Lund and other Walmart managers. As part of his inspection, CO Harvey walked through the worksite, conducted employee interviews, took photographs, and held a closeout conference before leaving. Tr. 75. Following his inspection, CO Harvey recommended that a citation be issued for a violation of 29 C.F.R. §1910.176(b). Tr. 91. Based on the information gathered during his inspection, CO Harvey determined that the citation should be characterized as "serious" with a proposed penalty in the amount of $10, 864.00. Tr. 92-93.

Stipulated Facts and Issues of Law (JX-1)

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

were shipped from outside the State of New York and Respondent was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and is an employer within the meaning of section 3(5) of the Act.

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

Secretary's Burden of Proof

The Secretary has the burden of establishing that the employer violated the cited standard.

To prove a violation of an OSHA safety or health standard promulgated under § 5(a)(2) of the Act, the Secretary must establish, by a preponderance of the evidence, that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980). A preponderance of the evidence is "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Astra Pharma.* at 2131, n. 17.

Discussion

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

Applicability

The language of 29 C.F.R. §1910.176(b) plainly states that it applies to "storage of materials" and requires them to be maintained secure and stable to prevent sliding or collapsing. The violation at issue in this case resulted from an accident at the worksite, Walmart Distribution Center #6069, where pallets of inventory were stored on racks until used to fill orders. Tr. 26, 75-78, 138-39. Specifically, a pallet slid, when bumped, causing its contents (cans of crescent rolls) to fall through the racking system and strike [redacted]. Respondent argues that the "material" that fell on [redacted] is not covered by this standard because it was in the process of being placed into storage. Resp't Br. 8-9. However, this contention is not supported by the evidence. On the contrary, the evidence reveals that [redacted] was in the process of removing materials from the racks to fill an order when a pallet of crescent rolls, already in place, was dislodged by another pallet being placed on (or removed from) an adjacent rack. Tr. 26-27, 77-78, 138-39. Respondents argument is unconvincing given its concession that the crescent rolls fell through the rack before striking [redacted] which is a clear indication that they were on the rack prior to the accident. Tr. 139. The cited standard applies.

Standard Violated

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

[3] Respondent also argues that [redacted] violated the company's "20-foot" rule when she entered the aisle while a lift was moving pallets on an adjacent aisle thereby placing herself in harm's way. Tr. 139. Respondent's "20-foot rule" requires order fillers to stay 20 feet back when a driver honks their horn and yells "20 feet" while placing items in or removing them from a pick-slot or T-slot. Tr. 52. This argument fails for two reasons: (1) it attempts to place blame

when struck by forklifts. *Clement Food Co.*, 11 BNA OSHC 2120, 2122 (No. 80-607, 1984) (holding that §1910.176(b) is not limited by its own words to stacks so unstable that they might collapse under their own weight). Here, Walmart uses 46" pallets on a 42" (measured from front beam to back beam) span selective racking system. Tr. 124. That means that a perfectly placed pallet only has 2" of overhang on each beam to keep it in place. The General Manager (GM) of Walmart Distribution Center #6096, Paul Lund, testified that merchandise occasionally falls from the racking system due to "operator error" that pushes a pallet on an adjacent rack and causes it to fall. Tr. 133-34. Given the dynamic atmosphere of this distribution center where pallets and their contents are constantly being placed and pulled from the racks, it is clear to see why these 46" pallets resting on 42" span racks become unstable when struck by moving equipment. The evidence supports a finding that Respondent violated 29 C.F.R. § 1910.176(b).

Employee Access

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

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

on [redacted] which goes to an "unpreventable employee misconduct" defense not properly raised prior to the hearing; and (2) it has no bearing on whether the pallet of crescent rolls was stored in compliance with the cited standard. Respondent's 20-foot rule is referenced in RX-5; however, it states "[p]edestrians must maintain a safe distance around operating forklifts and/or power equipment…".

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

Employer Knowledge

The knowledge requirement may be satisfied by proof either that the employer actually knew, or had constructive knowledge and "with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Pride Oil Well Serv.,* 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). Although the Secretary has the burden to establish employer knowledge of the violative conditions, when a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program. *Dover Elevator Co. Inc.*, 16 BNA OSHC 1286-87 (No. 91-862, 1993) quoting *Baytown Constr. Co*., 15 BNA OSHC 1705, 1710 (No. 88–2912S, 1992), *aff'd*, 983 F.2d 282 (5th Cir. 1993) (unpublished).

According to [redacted], prior to her accident, items would fall 3-4 times during her work week (Friday, Saturday, and Sunday). Tr. 28. [redacted] testified that she personally informed a couple of managers of her concerns regarding items falling off the T-slots. In particular, [redacted] recalled telling a manager named Dean who no longer works at the distribution center. However, [redacted] testified that her concerns were "brushed off". Tr. 30. CO Harvey interviewed an unnamed male employee who told him that material falls through the racks frequently. Tr. 85. CO Harvey testified that GM Lund stated he was aware of material falling through the racks but had not received funding from the corporation to put "fixes" in place such as intermediate/perpendicular bars as seen in CX-4a.[4] Tr. 86-87. Thomas Rimmer who is an Asset Protection Manager at this worksite testified that material falls off the reserve level of the selective racking system when hit by an associate thereby causing a pallet to tip. Tr. 161. He further testified that pallets frequently tip but only fall a couple of times a month. Tr. 162. GM Lund testified that merchandise occasionally falls from the racking when struck by a lift driver. Tr. 133-34. Although he never saw a pallet fall, Mr. Lund stated that he received reports regarding tipped pallets and is aware that it happens at least a few times per month. Tr. 134, 136-37. The evidence supports a finding that Respondent's managers had actual knowledge of the hazard and that knowledge may be imputed to Respondent. However, Respondent is still entitled to rebut a prima facie showing of supervisor knowledge and avoid imputation of that knowledge by coming forward to show that it had work rules addressing the cited hazard that were adequately communicated to supervisors and effectively enforced. *Pride Oil Well Serv.*, 15 BNA OSHC at 1815. The work rule referenced repeatedly in relation to this violation is Respondent's "20-foot" rule. However, the record reveals that the 20-foot rule was not always followed, nor was it effectively enforced. Employer knowledge is established.

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

Penalty Determination

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

Serious Characterization

The penalty proposed in this case was based on a violation characterized as "serious". To demonstrate that a violation was "serious" under section 17(d) of the Act, the Secretary must show that there is a substantial probability of death or serious physical harm that could result from the cited condition and that the employer knew or should have known of the violation. The Secretary need not show the likelihood of an accident occurring. *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991). Knowledge has already been established. So, the only determination left to make is whether death or serious physical harm could result from the cited condition. In this case, [redacted] was struck by cans of crescent rolls that fell from a pallet. 27. CO Harvey testified that the resulting injury was "bruising". Tr. 105. Respondent argues that this violation should be characterized as "other-than-serious" because "bruising" does not constitute serious physical harm. Resp't Br. 16. If bruising had been the extent of [redacted]'s injuries from the accident, Respondent would be correct that this violation should be characterized as "other-than-serious". *See Lisbon Contractors, Inc.,* 5 BNA OSHC 1741 (No. 11097, 1977) (holding that the violation at issue was "non-serious" because bruises or contusions could have resulted from the hazard). However, the evidence reveals that "bruises" were not the extent of [redacted]'s

injuries. [redacted] gave uncontroverted testimony that, according to her doctor and chiropractor, she has spacing between her T3 and T4 spinal vertebrae and has lost curvature of the spine. Tr. 27. In weighing the difference between CO Harvey's description and that of [redacted] regarding her injuries, the undersigned finds that the two are not inconsistent, but [redacted] offers a more detailed explanation of her condition after the accident. [redacted] further testified that, because of her injuries from the accident, she had to transfer to a different department. Interestingly, CO Harvey's testimony regarding the nature of [redacted]'s injuries seems to belie OSHA's characterization of this violation as "serious". However, [redacted] is clearly in the better position to know the true nature and extent of her injuries. Since the Secretary is not required to show that an accident did occur, an analysis of whether this violation is properly characterized as "serious" requires a look at not just the physical harm that occurred in this case, but also the physical harm that **could** occur. The evidence reflects that the T-slots where the pallets are stored are up to 40 or 50 feet high. Tr. 36, 79. The testimonial evidence and photographs show that the pallets at this worksite are loaded with various merchandise consisting of cans, jars, and boxes --- some shrink wrapped and others not. CX-1, 3 & 4. Given the height of the T-slots on Respondent's racking system, the size of the pallets, and the bulk items stored on each pallet, it is reasonable to infer that death or serious injury would likely occur to an employee working in the adjacent aisle when a pallet is dislodged. *See A.G. Mazzocchi, Inc.*, 22 BNA OSHC 1377, 1387 (No. 98-1696, 2008) (Commission held that reasonable inferences may be drawn from circumstantial evidence) (citing 1 Clifford S. Fishman, Jones on Evidence §§ 1.5, 4.2 (7th ed. 1972)). The violation is properly characterized as "serious".

Penalty Calculation

Regarding the proposed penalty for this violation, CO Harvey testified that the gravity was rated as "medium to high" because there was an injury that wasn't disabling. He further testified that probability was rated as "greater" because of the likelihood that this could happen again. Tr. 91-92. No good faith adjustment was given because CO Harvey never received a full safety and health plan to

evaluate. Tr. 94. Also, Counsel for Respondent stipulated that the company is not entitled to a good-faith adjustment. Tr. 93. No evidence was adduced regarding the size; however, it is well-known that Walmart is a large company. In any case, Respondent only disputes the characterization of the violation not the penalty calculation. The evidence supports a finding that the proposed penalty is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER[5]

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

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

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

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

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