

Some personal identifiers have been redacted for privacy purposes.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

JRD, LLC dba MASLONKA POWERLINE
SERVICES,

Respondent.

DOCKET NO. 19-1937

Appearances:

Josh Bernstein, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Robert G. Chadwick, Esq., Seltzer, Chadwick, Soefje & Ladik, PLLC, Plano, Texas
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On June 1, 2019, the Austin Area Office of the Occupational Safety and Health Administration (“OSHA”) received a report that two employees of Respondent, JRD, LLC d/b/a Maslonka Powerline Services, LLC (“Maslonka”), were killed while unloading utility poles on a jobsite located in rural Texas. (Tr. 137-38, 182-83, 570-73;¹ Ex. C-49). That same day, OSHA Assistant Area Director (“AAD”) Michael Jarvis traveled to the worksite to conduct an inspection and investigate the accident. (Tr. 571). He later assigned Compliance Safety and Health Officer

¹ After the post-trial briefs were filed, a page numbering error in the transcript was discovered, affecting page number 534 and forward. The designated court reporter corrected this error, and a revised transcript was issued. All citations to the transcript are to the corrected version.

(“CSHO”) Darren Beck to complete the investigation. OSHA determined that two employees had been struck by a multi-ton utility pole when it fell off a forklift attachment on a Caterpillar 966G Loader (the “Loader”). (Tr. 98-99, 141-43, 280, 622-23; Exs. C-31, C-47 p.2). At the time of the accident, the operator of the Loader, [redacted], had lifted a section of utility pole onto the Loader’s forks to remove it from a flatbed semi-truck trailer. (Tr. 95-97; Ex. C-47 p.2). Mr. [redacted] was backing up the Loader to move it away from the trailer when the two employees, Employee 1 and Employee 2,² moved between the Loader and the trailer, presumably to start rolling up the straps that had been used to secure the pole section to the trailer’s surface. (Tr. 97-98; Ex. C-47 p.2). Something caused the Loader to become unstable, which in turn caused the pole section to fall off the forks of the Loader, striking Employee 1 and Employee 2, killing them both. (Tr. 98-99; Ex. C-47 pp.1-4). OSHA determined that the utility pole section was not cradled against the mast of the forklift attachment on the Loader and that, due to a bent carriage, the forks on the forklift attachment were slightly misaligned at the time [redacted] was operating the Loader. (Tr. 582-86; Exs. C-34 p.3, C-37 p.67, C-53).

Following this investigation, OSHA issued, a one-item *Citation and Notification of Penalty* (“Citation”), alleging a serious violation of 29 C.F.R. § 1926.602(c)(1)(vi) with total proposed penalties of \$13,260. Respondent filed a *Notice of Contest*, which brought this case before the Occupational Safety and Health Review Commission (“Commission”). On April 2, 2020, the Court granted *Complainant’s Motion for Leave to Amend the Complaint and Citation* to instead allege a violation of 29 C.F.R. § 1926.959(c), which prohibits operating mechanical equipment outside design limitations, or, in the alternative, a violation of Section 5(a)(1) of the Occupational

² The names of the deceased employees have been redacted for privacy purposes.

Safety and Health Act of 1970 (“the OSH Act”), commonly referred to as the “general duty clause.”

A trial was conducted on August 18-20, 2021, in Dallas, Texas. Five witnesses testified at trial: (1) Clint Couvillion, a superintendent for Maslonka; (2) Justin Mulligan, the Director of Fleet Operations for Maslonka; (3) Michael Henderson, the Director of Project Management Operations for Maslonka; (4) AAD Michael Jarvis; and (5) James Lloyd Vaughn, Jr., Respondent’s expert witness.³ Additionally, deposition testimony of eight additional witnesses was entered into the record at the trial: (1) [redacted], the operator of the Loader at the time of the accident; (2) Alfredo “Freddy” Tanguma, a lineman for Maslonka; (3) Trevor Leaker, a foreman for Maslonka; (4) Herschel Goodson, another superintendent for Maslonka; (5) Ray Gelinias, a safety director for Maslonka; (6) David Courson, another lineman for Maslonka; (7) Walter Hancock, another superintendent for Maslonka; and (8) CSHO Darren Beck.⁴ The parties filed post-trial briefs for the Court’s consideration.

In accordance with Commission Rule 90(a)(1), 29 C.F.R. § 2200.90(a)(1), the Court now issues this *Decision and Order* setting forth its findings of fact and conclusions of law. For the following reasons, the Court finds Complainant has failed to carry its burden on two elements of his *prima facie* case. Therefore, the Court will VACATE the *Citation*.

Jurisdiction & Stipulations

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant

³ Mr. Vaughn demonstrated ample qualifications and was certified as an expert witness on the topics of “powerline industry safe practices for pole unloading,” “safe use and condition of Cat[erpillar] 966 Loaders in the powerline industry for unloading poles,” and “supervisory practices in the powerline industry when that same action being done, *i.e.*, unloading poles and use of a Cat[erpillar] 966 Loader.” (Tr. 753-64, 767-68).

⁴ Although the Court expressed its disfavor of deposition testimony *in lieu* of live witness testimony, the Court allowed the parties to proceed in light of their stipulation to allow these witnesses to “appear” by deposition. (Tr. 20-22); *see U.S. Util. Contractor Co.*, 25 BNA OSHC 1292, 2014 WL 7644310 at *6-7 (No. 14-0744, 2014) (discussing the benefits of in-person testimony). For every witness except Mr. Hancock, the attorneys read the deposition testimony into the record. Mr. Hancock’s testimony was entered as a video deposition. (Tr. 663).

to Section 10(c) of the OSH Act and that Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 23-24); *see Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties also stipulated that 29 C.F.R. § 1926.959(c) applied to the work Maslonka employees were performing at the time of the accident, a stipulation the Court discusses in greater detail, *infra*. (Tr. 42–46).

Factual Background

I. Maslonka’s Utility Pole Operations

Maslonka is a company engaged in the business of public utility contracting. (Tr. 182-84; Exs. C-48, C-49). As part of its regular business, Maslonka contracts with electric companies to install new powerline utility poles. (Tr. 137-38, 182-84; Exs. C-48, C-49, C-59 to 62).

At the time relevant to this case, Maslonka’s process for installing a new utility pole involved at least two crews of workers, comprised of two or three employees each. One crew operated a drill rig, which created the holes in which the poles were to be installed. (Tr. 139-40, 158-59, 709; Ex. C-37 p.46). The other crew worked as pole unloaders, responsible for unloading the new utility pole sections at the location they would be set and erected. (Tr. 95-96, 139, 290, 344-45; Ex. C-36). The poles were driven to their installation sites on a flatbed semi-truck trailer. (Tr. 97, 370-71, 726, 833; Exs. C-34 p.3, C-36 pp. 1-4, C-37 pp. 18 & 19). The poles were secured to the bed of the trailer with straps, which needed to be unfastened or “busted” before the pole could be unloaded. (Tr. 94-95, 120, 673-74, 796-97; Exs. C-36 p.2, C-37 p.55).

When the truck and trailer reached the pole’s installation location, one member of the Maslonka unloading crew would bust all but one of the straps securing the pole to the truck. (Tr. 94, 120, 267, 796-97). Another crewmember, operating a Loader with a forklift attachment,⁵

⁵ The Caterpillar 966G Loader involved in this incident had several possible attachments for the arm on the front of the vehicle, including the forklift attachment connected to it at the time of the accident. (Tr. 225, 399-400, 757; Exs.

would then locate the gravitational center⁶ of the pole and move under it with the forks of the Loader.⁷ (Tr. 94, 120, 268, 395, 796-97; Ex. C-34 pp. 2 & 3). Once the pole was stable on the forks of the Loader, the last strap would be detached. (Tr. 94-95, 120, 796-97). After they had positioned themselves away from the Loader and pole, one crewmember then acted as a “spotter” for the Loader operator. (Tr. 88-89, 127, 130, 797-99). The spotter was trained to signal to the Loader operator during the pole unloading process, which includes alerting the Loader operator of any hazards the operator might not be able to see. (Tr. 90-91, 101-02, 127, 130, 479-80, 673). With the aid of the spotter, the Loader operator would slowly lift the pole and reverse the Loader to move the pole section off the bed of the trailer. (Tr. 268). Once the pole was clear of the trailer, the Loader operator would lower the pole section to the ground, or, in some instances, onto wooden cribbing that had been placed on the ground. (Tr. 268, 673; Ex. C-36).

The powerline utility poles installed by Maslonka are large and heavy; indeed, the pole section involved in this case was 41-foot long and weighed nearly 7,000 pounds. (Tr. 141-43, 835; Exs. C-31, C-34 p.3, C-36 pp. 1-4, C-37 pp. 68 & 69). The pole sections are not perfectly round. They are octagonal, with eight flat sections circumventing the pole. (Tr. 270, 279, 284; Ex. C-36). The pole sections are also not the same width at each end. They are tapered, wider at the base and narrower at the top. (Tr. 286). As a result, the main safety hazards posed during the unloading process were the crush or pinch hazards associated with the pole potentially rolling or falling off the forks. (Tr. 115, 132-33, 333-34, 673). Maslonka employees commonly referred to these

C-34 pp. 2 & 3, C-36 p.3, C-37 p.50, R-28, R-30).

⁶ The poles were marked with a “CG” to indicate the poles “center of gravity,” and the Loader operator was trained to center the pole based on this marking, or else work with the spotter to do so if the marking was on the opposite side of the pole. (Tr. 87-88, 143-44, 329-30; Ex. C-31).

⁷ The poles were often arranged two-deep on the bed of the truck. (Tr. 285-86, 325, 484-86). With such an arrangement, the Loader operator was prevented from loading a single pole on the back of the forks, against the carriage of the Loader, because doing so would place the forks underneath both poles. (Tr. 285-86, 325, 484-486). Thus, as can be seen in the reenactment videos played at trial, the poles were often moved while positioned near the front of the forks. (Exs. C-52, C-53, C-55, R-32).

potential hazards as “the bite” and going “into the bite” to refer to putting oneself in a situation where injury could potentially occur from a rolling or falling section of pole.⁸ (Tr. 347, 372-74, 489, 673, 685-86, 711, 788-89). Also due to the extreme weight of the poles, the Loader operator could not cradle or “roll” the pole to the back of the forks or against the carriage of the forklift attachment on the Loader, as doing so could cause damage to the Loader or cause it to become unstable, thereby endangering the Loader operator.⁹ (Tr. 286-87, 311-13, 786-87; Ex. C-8 p.1).

II. The Accident

At the time of the accident giving rise to the Citation, Maslonka had contracted with a company called Pedernales Electric Cooperative (“PEC”) to tear down old utility lines and poles and install new ones along an approximately 25-mile stretch of a utility easement located in rural Texas, west of Austin.¹⁰ (Tr. 137-38, 182-84; Exs. 48 & 49). The actual site of the accident was referred to as “Structure 31,” where Maslonka intended to drill a hole and install a new utility pole. (Tr. 139-43, 182, 320-21, 835; Exs. C-31, C-34 p.3, C-36 pp. 1-4, C-37 pp. 68 & 69).

The accident occurred on June 1, 2019. As is relevant here, Superintendent Couvillion, Superintendent Hancock, [redacted], Courson, Employee 1, and Employee 2 were onsite that day.¹¹ (Tr. 74, 137, 139-40, 664, 709). Following the morning safety meeting, [redacted], Courson, Employee 1, and Employee 2 were split into two crews: [redacted] and Employee 1 were assigned to pole spotting and unloading under the supervision of Hancock and Courson and

⁸ “The bite,” as used by Maslonka employees, was actually broader than just the hazards associated with pole unloading. As described by the witnesses at trial, “the bite” essentially referred to any of the hazards associated with Maslonka’s operations. (*E.g.*, Tr. 132-33, 333-34, 371-72, 713-14). For purposes of this decision, the Court will use “the bite” to refer to the hazards associated with pole loading and unloading.

⁹ However, as the poles are being unloaded, gravity can cause the poles to bend the forks the opposite direction, i.e., toward the ground, and operators sometimes tilted the forks toward the Loader to counteract this effect. (Tr. 327-29, 490-91, 781).

¹⁰ The site was approximately half of a mile off of Texas State Highway 71, with the nearest town being a small town called Round Mountain. (Tr. 571).

¹¹ Couvillion indicated there were six crews of Maslonka workers on Job 118 on June 1, though they were apparently not implicated in the events surrounding the accident. (Tr. 344).

Employee 2 were assigned to drilling and rigging under the supervision of Supt. Couvillion. (Tr. 95, 138-40, 158-59, 666-68, 709-10; Ex. R-26). Couvillion and Hancock were the only superintendents on site that day, and Hancock was only on site for the morning safety meeting. (Tr. 153, 667; Exs. C-11 p.1). Until after the accident occurred, Supt. Couvillion never visited Structure 31 on June 1. (Tr. 153).

At some point after the morning meeting, [redacted] and Employee 1 began the process of unloading the pole from the flatbed truck at Structure 31.¹² (Tr. 95; Ex. C-47 p. 2). [redacted] was operating the Loader with a forklift attachment, and Employee 1 was acting as [redacted]’s spotter. (Tr. 96, 130, 518; Ex. C-47 p. 2). Employee 1 disconnected the last strap, and [redacted] moved the forks under the pole section. (Tr. 96; Ex. C-47 p. 2). By this point, Employee 2 had walked over to Structure 31.¹³ (Tr. 97-98; Ex. C-47 pp. 1 & 2). As [redacted] began reversing the Loader away from the trailer, Employee 1 and Employee 2 apparently went in between the Loader and the trailer (i.e., into “the bite”) and began rolling up the loose straps that had previously secured the pole to the truck bed. (Tr. 98, 271; Ex. C-47 p.2). [redacted] then felt something cause the Loader to jolt, either a “surge” or “hit[ting] a rock.”¹⁴ (Tr. 98; Ex. C-47 p.2). This in turn caused the pole section to start rolling off the forks of the Loader. (Tr. 98; Ex. C-47 p.2). Although [redacted] attempted to quickly tilt the forks backward to stop the movement of the pole, he could not do so in time. (Tr. 98-99; Ex. C-47 p.2). The pole section fell off the forks of the Loader, striking

¹² [redacted] was the only witness to the accident. Although Couvillion and Courson were on the Job 118 site on June 1, neither was at Structure 31 when the accident occurred. (Tr. 153, 419; Ex. C-47 pp. 1, 3-4). The Court therefore largely draws the account of the actual accident from [redacted]’s deposition testimony entered at trial.

¹³ Although it is not entirely clear from the record why Employee 2 went to Structure 31 when he was assigned to work elsewhere, according to Courson’s written statement, he and Employee 2 had been drilling and rigging on “Structure 32” and at some point Courson told Employee 2 to “track the drill rig to Str[ucture] 31.” (Ex. C-47 p.1).

¹⁴ Exactly what caused the Loader to become unstable was the subject of some speculation at trial. (E.g., Tr. 98, 279-80, 623, 839-41). However, “[d]etermining whether the standard was violated is not dependent on the cause of the accident.” *Ceco Concrete Constr., LLC*, No. 17-0483, 2021 WL 2311867, at *8 n.4 (O.S.H.R.C. Feb. 26, 2021), quoting *Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1707-08 n.4 (No. 96-1330, 2001).

Employee 1 and Employee 2, killing them both. (Tr. 99, 279-80, 322-24; Exs. C-34 p.3, C-47 pp. 1-3;). [redacted] ran to Courson, who had been operating a drill rig somewhere in the vicinity of Structure 31, and alerted him of the accident. (Tr. 419; Ex. C-47 p.1). Courson called 911 and also called Supt. Couvillion, who came to Structure 31. (Tr. 153; Ex. C-47 p.1).

III. OSHA's Investigation and Citation

OSHA received a hotline telephone call about the accident the same day, June 1, 2019. (Tr. 571). In response, AAD Jarvis traveled to the worksite approximately one hour after receiving the call. (Tr. 571). After accessing Structure 31, AAD Jarvis spoke with several people on site including Mr. Couvillion, Mr. [redacted], police officers, and investigators sent by PEC. (Tr. 571-74). AAD Jarvis also took photographs. (Tr. 574-75; Ex. C-37). After leaving the site on June 1, AAD Jarvis turned the investigation over to CSHO Beck, who took additional witness statements and attended an accident reenactment conducted by Maslonka on June 3, 2019.¹⁵ (Tr. 576-78, 580, 723-25; Exs. C-7 to 13, 38, 52, 53, 55, R-32).

Based on the investigation conducted by AAD Jarvis and CSHO Beck, OSHA issued a *Citation* for one serious alleged violation of the Act with a proposed total penalty of \$13,260.

Discussion

The amended *Citation* alleges a violation of an OSHA standard as well as an alternative violation of the general duty clause. To establish a violation of an OSHA standard pursuant to 5(a)(2), Complainant must prove: (1) the standard applied to the work being performed; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the

¹⁵ As part of its investigation into the cause of the accident, Maslonka conducted a “re-enactment” of loading and unloading the pole at Structure 31 using the same Loader [redacted] was operating at the time of the accident. (Tr. 399, 670-71, 723-25, 758-59, 778-80; C-52, 53, 55, R-32).

violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

To prove a violation of the general duty clause, Complainant must show: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *K.E.R. Enters.*, 23 BNA OSHC 2241, 2242 (No. 08-1225, 2013); *Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005). Complainant must also prove the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Cranesville Block Co., Inc.*, 23 BNA OSHC 1977, 1985 (No. 08-0316, 2012) (consolidated); *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the Evidence, BLACK'S LAW DICTIONARY (10th ed. 2014).

Amended Citation 1, Item 1

As amended, Citation 1, Item 1 alleges a violation of 29 C.F.R. § 1926.959(c) as follows:

29 C.F.R. § 1926.959(c) Applied loads. Mechanical equipment used to do lift or move lines or other material shall be used within its maximum load rating and other design limitations for the conditions under which the mechanical equipment is being used.

On or about June 1, 2019, and at times prior thereto, the employer unloaded power pole segments without ensuring design limitations were followed. The employer

did not ensure the load was stable and safely racked against the mast of the Caterpillar 9660 Loader. The employer did not ensure the Loader was taken out of service when damage resulted in a bent carriage and misaligned fork tines. The conditions exposed employees to being crushed by the unstable load (41 foot long, 3-ton, steel power pole).

Mot. to Amend 2-3.

Alternatively, as amended, the Citation alleges a violation of Section 5(a)(1) of the OSH Act, the general duty clause,¹⁶ as follows:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees.

On or about June 1, 2019, and at times prior thereto, the employer unloaded power pole segments using a Caterpillar 966G Loader without ensuring the load was stable, without ensuring the Loader was taken out of service when damage resulted in a bent carriage and misaligned forks, and without ensuring the employees remained out of the danger zone. The hazardous conditions exposed employees to being crushed by the unstable load (41 foot long, 3-ton, steel power pole).

Feasible and acceptable abatement methods to correct this hazard include, but are not limited to:

1. Follow the Operation and Maintenance Manual for the Caterpillar 966G Loader, which states in relevant part:

Note: any needed repairs during machine operation. Report any needed repairs (page 28); Avoid any conditions that can lead to tipping the machine (page 28); Maintain control of the machine. Do not overload the machine beyond the machine capacity (page 28); and

2. Follow JRD's safety manual, which states in relevant part:

Inspecting each vehicle to verify that it is safe to operate, prior to operating it (page 37); Properly securing all loads using adequate straps/binders (page 38); Not standing or passing beneath the elevated forks whether loaded or empty (page 39); Only handling loads which are securely loaded and within the rated capacity of the truck (page 39); and,

¹⁶ The general duty clause reads: "Each employer ... shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees"

3. Follow JRD's Job Hazard Analysis prevention measures for unloading poles, including but not limited to, staying out of drop/fall zone, and staying out of the bite.

Id. at 3.

29 C.F.R. § 1926.959(c) Applies and the General Duty Clause Violation is Moot

29 C.F.R § 1926.959(c) states: “Applied loads. Mechanical equipment used to lift or move lines or other material shall be used within its maximum load rating and other design limitations for the conditions under which the mechanical equipment is being used.”

The parties stipulated that 29 C.F.R. § 1926.959(c) applied to the work Maslonka employees were performing at the time of the accident. (Tr. 42–46). The Court accepted this stipulation. *See Armstrong Utils., Inc.*, No. 18-0034, 2021 WL 4592200, at *2 n.2 (O.S.H.R.C Sept. 24, 2021) (finding it was “plain error” to not accept the parties’ stipulation); *CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 2199 (No. 90-329, 1993) (the Commission accepted the parties’ stipulation that the alleged violation, if any, was serious). Accordingly, the alternative violation of the general duty clause alleged in the amended Citation is moot. *See Tower Maint. Corp.*, 25 BNA OSHC 2146, 2147 (No. 13-0777, 2016) (“Where, as here, the Secretary makes an alternative allegation, only one of his allegations can prevail, *i.e.*, the alternative allegation is moot if the first provision alleged is found to apply.”). Additionally, the Court notes Complainant has not addressed the alternative general duty clause violation in his post-trial brief. The Court therefore further finds the alternative violation of the general duty clause has been abandoned by Complainant. *See, e.g., Castro v. McCord*, 259 F. App’x 664, 665-66 (5th Cir. 2007) (unpublished); *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2063 n.4 (No. 10-0551, 2014); *Altor, Inc.*, 23 BNA OSHC 1458, 1460 n.3 (No. 99-0958, 2011), *aff’d*, 498 F. App’x 145 (3d Cir. 2012) (unpublished).

Complainant Failed to Establish a Violation of the Standard

According to its plain language, Complainant can demonstrate a violation of 29 C.F.R. § 1926.959(c) by showing Respondent operated a mechanical equipment either: 1) above its maximum load rating; or 2) outside another “design limitation.” Complainant does not allege that the Loader was used above its maximum load rating; instead, Complainant argues Respondent violated 29 C.F.R. § 1926.959(c) by operating it outside another “design limitation” in three different ways: 1) the load was not stable and safely racked against the mast during unloading (Sec’y’s Br. 27-28); 2) the Loader was not taken out of service as a result of a bent carriage and misaligned fork tines (*Id.* at 28-29); and 3) the Loader was not intended to be used with bent or misaligned forks (Sec’y’s Br. 29-30).

At the outset of its discussion on whether the cited standard was violated, the Court notes the cited standard does not describe with any specificity what “design limitation” means.¹⁷ Nor has the Complainant offered a more specific definition of this term. Based on the language of the standard, the Court finds that whatever meaning “design limitation” is given, Complainant has the burden of showing the existence of a specific limitation on the specific piece of equipment that is alleged to have been used outside the limitation. *Cf. Kaspar Wire Works*, 18 BNA OSHC 2178, 2191 (No. 90-2775, 2000) (requiring evidence of the condition of the exact machine that injured the employee to determine whether a broad machine guarding standard was violated). Here, the specific piece of equipment was the Caterpillar 966G Loader which [redacted] was operating at the time of the accident. Based upon the evidence presented in this case, the Court cannot conclude

¹⁷ The term “design limitation” is not widely used throughout OSHA’s regulations, and the only Commission cases to reference the term are ALJ cases, which do so only in passing and which, in any event, have no precedential value. *See Everclear Enters., Inc.*, 24 BNA OSHC 1750, 1752 (No. 12-2212, 2013) (ALJ) (discussing in the context of memorandum put out by OSHA for fall protection systems); *Ralph Taynton d/b/a Serv. Specialty Co.*, No. 92-498, 1993 WL 316246, at *14 (O.S.H.R.C. 1993) (ALJ) (discussing in terms of calculating a crane’s maximum weight load); *Dye Constr. Co.*, No. 80-0177, 1980 WL 10549, at *10 (O.S.H.R.C. 1981) (ALJ) (using “weight bearing design limitation” as a synonym for “rated load” from the cited standard).

that Complainant met his burden of proving that Respondent was using the Loader beyond its design limitations, pursuant to the cited regulation.

A. Cradling of the Pole Against the Carriage

As to the cradling of the poles against the mast of the Loader, nothing cited by Complainant establishes this was a design limitation on the Loader. In fact, the opposite appears to be true. As Vaughn, Respondent's expert witness, explained, the Loader used here did not have a "mast" as that term is used with traditional forklifts. Such masts can be up to eight feet tall and are "designed as a rack for which you lean the equipment against." (Tr. 787). Rather, the Loader had a "carriage," which "suspends the [forklift's] tines" and is "designed to be the carriage or to run the forks on to spread them in and out" but is "not designed to rest equipment against." (Tr. 788).

In any event, both Couvillion and Vaughn, explained why in many instances the cradling of the poles against the carriage of the Loader could not be done safely. With the poles arranged two-deep on the bed of the flatbed truck, it was not always possible for the Loader operator to position a single pole on the back of the forks when first picking it up from truck. (Tr. 285-86, 325, 484-86). Once positioned on the front of the forks, there was no safe method to "roll" the pole to the back of the forks and against the carriage of the Loader; the massive weight of the pole in motion could either damage the carriage of the Loader or else cause the Loader to become unstable, thereby endangering the Loader operator. (Tr. 286-87, 311-13, 786-87; Ex. C-8 p.1).

Complainant cites to some deposition testimony from Hancock, Goodson, and Leake in support of his argument that the pole should have been cradled against the carriage of the Loader.¹⁸

¹⁸ Complainant also argues "OSHA's conclusion that Maslonka failed to ensure that the pole was safely racked back against the mast was derived from Maslonka's safety manual ..." (Sec'y's Br. 28 (citing Ex. C-26)). Complainant does not cite to a specific part of Exhibit C-26, an excerpt from the "Operation and Maintenance Manual" for the Caterpillar 966G Loader. The highlighted portions of this document are general admonitions such as "[a]void any

The Court is not persuaded by this testimony. First, in the portion of Hancock’s deposition testimony cited by Complainant, it is not at all clear that Hancock is even referring to the Loader that [redacted] was operating on June 1.¹⁹ (Tr. 702). As to Goodson’s testimony, while it appears to be referring to the subject Loader, Goodson does not discuss cradling the poles against the carriage, only “curl[ing] the forks and lower[ing] the load before ... backing up...”²⁰ (Tr. 551). Only Leake’s testimony seems to both refer to the Loader and state that the pole should have been cradled against its mast. (Tr. 539). The Court does not find this lone piece of deposition testimony outweighs the in-person testimony of both Couvillion and Vaughn about the dangers and risks of cradling poles against the mast of the Loader. Furthermore, whether a better practice in some instances or not, it was not established that failure to cradle a load against the mast constituted exceeding the design limitations of the Loader.

B. Bent Carriage and Misaligned Forks

The remainder of Complainant’s arguments relate to the bent carriage and misaligned forks on the Loader.²¹ It is true, as Complainant argues, that Respondents’ witnesses by and large

conditions that can lead to tipping the [Loader]” or “[n]ote any needed repairs during machine operation. Report any needed repairs.” (Ex. C-26 p.3). The Court does not find anything in this document specific to cradling a pole, or any other load for that matter, against the carriage of the Loader.

¹⁹ The entirety of this excerpt reads:

QUESTION: “Quote, they should tilt back the pole to the mast, close quote. Do you see that?”

ANSWER: “Yes.”

QUESTION: “Is that essentially cradling the pole?”

ANSWER: “Yes.”

QUESTION: Why do you do that?”

ANSWER: “To keep it from rolling.”

(Tr. 702).

²⁰ As noted in note 9, *supra*, operators would sometimes tilt the forks backward to counteract the effect of the weight of the pole pulling them toward the ground. (Tr. 327-29, 490-91, 781). On the limited deposition testimony cited by Complainant, the Court finds it entirely possible this is what Goodson is describing.

²¹ The Court does not find a material difference between Complainant’s argument that the Loader should have been taken out of service because of the bent carriage and misaligned forks and his argument that the Loader should not have been used with a bent carriage and misaligned forks. (Sec’y’s Br. 28-30). Moreover, the evidence establishes it was the bent carriage which caused the forks to be misaligned, making them essentially the same condition. (Tr. 383-84, 806-08). The Court therefore addresses Complainant’s remaining arguments together.

conceded the Loader had slightly misaligned forks on the date of the accident. (Tr. 76-78, 108, 383-84, 403-04, 491, 535, 550, 806). However, no witness, or any other evidence for that matter, established exactly what *degree/measurement* of fork misalignment was acceptable/unacceptable, or could constitute exceeding a “design limitation” on the Loader. (Tr. 391-93, 403-05, 491, 535, 550, 566-67, 821-22, 840). According to Mulligan, even a “true brand new unit will never be a hundred percent aligned.” (Tr. 392).

Moreover, neither of the witnesses to opine on the subject agreed that the degree of misalignment present on the subject Loader represented a “design limitation” of the Loader or even presented a safety hazard at all.²² As Complainant notes, Mulligan, Respondent’s Fleet Manager, stated he would have “red-tagged” the Loader (i.e., taken it out of service) and fixed the misaligned forks before returning it to the field. (Tr. 398-99). However, when asked whether this was because the forks were unsafe, he repeatedly stated it was not a safety issue, but rather his own personal standards for returning equipment to the field “like new.” (Tr. 398-99, 402-03). And although Vaughn agreed that operating a Loader with misaligned forks “could” be an example of not using it within a design limitation, he later clarified that, in his expert opinion, it was not the case with *this* Loader. (Tr. 821-22). The Court finds Vaughn’s summation of the matter to be illuminating:

When we look at something like a deformed fork, there is no written criteria in any standard and even the manufacturer did not have a criteria for when bending of a fork or the carriage would represent a hazard.

So different people observing the same conditions would have a different opinion about when to take it out of service or whether or not it’s serious. So in general if I saw a machine with forks that were bent, I would say take that machine out of service. But an operator who uses the machine – and I agree with this especially the whole reason we did the re-

²² The deposition testimony of Goodson and Gelinis recognize that misaligned forks *could* cause a load to become unstable. (Tr. 550, 567-68). However, neither appears to be commenting on the exact degree of misalignment present on the subject Loader and neither offers what precise degree of misalignment represents an unsafe condition.

enactment was to show that the bent fork was not a contributing cause to this – to this incident.

(Tr. 840). Vaughn went on to state that, although using a Loader with misaligned forks *could* be an example of using it not in accordance with its design limitations, he did not believe it was so with regard to the Loader in this case. (Tr. 841).

Finally, Complainant argues that the re-enactment videos show the misaligned forks caused the pole section at one point to rest on only one of the forks of the Loader and become unstable. (Sec’y’s Br. 28). Mr. Vaughn opined that any perceived movement of the pole was a result of the articulated steering system built into the Loader, which is designed to counteract the “yaw” that would occur in a normal steering system when a vehicle turns. (Tr. 780-83). The Court, however, notes the octagonal shape of the pole sides, as well as the tapered width from one end of the pole to another (wider at the base, narrower at the top). The unusual shape, contact surfaces, center of gravity, and rough terrain on which the Loader was operating appear to have all contributed to movement of the load (during the reenactment, as well as the actual accident). However, these factors focus on the unusually shaped and weighted load, not proof of exceeding the design limitation of the Loader, the standard Complainant has elected to prosecute in this case. While the accident in this case was tragic, the Court is not convinced that the facts presented by Complainant in this case were sufficient to establish a violation of the regulatory standard that was charged.

The Court finds Complainant has failed to meet its burden of showing, by a preponderance of the evidence, that Respondent was operating the Loader in a manner that exceeded its design limitations. Accordingly, the Court does not find Complainant has proven a violation of the cited standard.

Complainant Failed to Establish Employer Knowledge

Even assuming Complainant established a violation of the cited standard, the Court also

finds he has failed to establish the element of employer knowledge. To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Here, there was no employer knowledge, actual or constructive, of Employees 1 & 2 moving in between the Loader and trailer to roll up the loose straps at the moment the Loader operator began to back up. Complainant argument focuses on Respondent’s supervisors alleged knowledge of [redacted]’s failure to rack the pole against the carriage of the Loader, as well as the bent carriage and the misaligned forks on the Loader. (Sec’y’s Br. 30-34). Complainant also argues that Respondent failed to exercise reasonable diligence in enforcing its safety program, and therefore, should be deemed to have constructive knowledge of the violation. (Sec’y’s Br. 34-38).

The Court will address each of these issues in turn. However, at the outset of discussing this element of Complainant’s case, the Court notes there is a mismatch between the conditions Complainant has argued constituted the violation and what conditions Complainant argues are implicated in Respondent’s knowledge of the alleged violation. For example, Complainant argued that a violation occurred when [redacted] failed to cradle the pole against the carriage of the Loader. (Sec’y’s Br. 27-28). However, Complainant did *not* argue [redacted] committed a violation by failing to account for the terrain where he was unloading the pole or by failing to load the pole onto the forks at the pole’s center of gravity. Nonetheless, in briefing the issue of

knowledge, Complainant delves into these issues and asks the Court to find knowledge of the violation on these bases. (Sec’y’s Br. 31 (discussing supervisors’ knowledge of the center of gravity and octagonal shape of the pole); *id.* at 32 (discussing supervisors’ knowledge of the rough terrain)). The Court declines to do so. Rather, the Court will only address Complainant’s arguments regarding knowledge as they relate to how Complainant’s argued the violation occurred.²³ See *Jacobs Field Servs. N.A.*, 25 BNA OSHC at 1218 (an employer’s knowledge is based on knowledge of the conditions constituting the alleged violation). Thus, in addressing whether Complainant has established the knowledge element, the Court’s conclusions only address whether Respondent knew or should have known that [redacted] failed to cradle the pole against the mast of the Loader and operated it with a bent carriage and misaligned forks.

A. Actual Knowledge of Supervisors

In arguing for the imputation of supervisory knowledge, Complainant frames many of his arguments in terms of “knew or should have known.” (*E.g.*, Sec’y’s Br. 30). To the extent Complainant is arguing for a finding of actual knowledge, it is undisputed that no supervisors were present when the accident occurred, or at any point while [redacted] was operating the Loader at Structure 31. None of the three employees at Structure 31 when the accident occurred were supervisors for purposes of imputing knowledge to Respondent, and Complainant makes no argument to the contrary. Couvillion and Hancock were the only superintendents on Job 118 on June 1, 2019. (Tr. 153, 667). Hancock was only present for the morning safety meeting, and

²³ The specific factual basis for the alleged violation of the cited standard, at various points in this proceeding, has been difficult to pinpoint. For example, Complainant did not argue that failing to account for rough terrain was itself a violation of the standard, or even contributed to a violation of the standard. (Sec’y’s Br. 27-28). Complainant nonetheless devotes nearly an entire page of its brief to the issue of the supposedly rough terrain of Structure 31 and asks the Court to find knowledge on that basis. (Sec’y’s Br. 32). The Court will not charge Respondent with knowledge of a condition Complainant has not argued was a violation in the first place. See *Jacobs Field Servs. N.A.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015) (an employer’s knowledge is based on knowledge of the conditions constituting the violation).

Couvillion did not visit Structure 31 until after the accident had occurred. (Tr. 153, 667; Exs. C-11 p.1). Thus, there is no basis for imputing actual knowledge on Respondent based on the knowledge of its supervisory personnel. *Cf. Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082 (No. 06-1542, 2012) (finding no actual knowledge even where foreman was in the vicinity of the violative condition).

B. Constructive Knowledge of Supervisors

As to constructive knowledge of the Maslonka supervisors, Complainant argues the bent carriage and misaligned forks were immediately visible to multiple people after the accident, and therefore reasonable diligence could have discovered the condition. (Sec’y’s Br. 32-34). However, as the Court noted in rejecting Complainant’s argument regarding a violation of the standard, Complainant has not established with any particularity what degree of fork misalignment would represent a hazardous, violative condition on the Loader. (Tr. 391-93, 403-05, 491, 535, 550, 566-67, 821-22, 840). It was also unclear whether the extent of misalignment of the forks before the accident was the same after the accident. In absence of such evidence, the Court cannot determine what degree of diligence would have led a supervisor to discover a violative condition or what other measures could have been employed to meet that degree of diligence. *Cf. e.g., Armstrong Utils, Inc.*, No. 18-0034, 2021 WL 4592200, at *5 (O.S.H.R.C. Sept. 24, 2021) (finding employer exercised reasonable diligence where hazards could be determined and addressed by consulting blueprint plans for the project); *Conagra Flour Milling Co.*, 15 BNA OSHC 1817, 1823 (No. 88-2572, 1992) (finding a lack of reasonable diligence where violative condition, exposed wiring, was readily apparent to a supervisor); *Union Boiler Co.*, 11 BNA OSHC 1241, 1244 (No. 79-232, 1983), *aff’d*, 732 F.2d 151 (4th Cir. 1984) (finding a lack of reasonable diligence where physical examination would have revealed a missing bolt causing instability in the walkway).

Since it is unclear at what degree/distance misaligned forks may constitute a violation of the cited standard, it is equally unclear at what point a supervisor would, with the exercise of reasonable diligence, should be expected to have known of the condition.

C. Maslonka's Lack of Reasonable Diligence in Enforcement and Supervision

Complainant can also establish constructive knowledge on the part of an employer by demonstrating it failed to exercise reasonable diligence in the overall implementation of supervision with regard to its safety program. "In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016). Whether an employer has exercised reasonable diligence is a question of fact that will "vary with the facts of each case." *Martin v. OSHRC*, 947 F.2d 1483, 1485 (11th Cir. 1991).

Here, Complainant primarily takes aim at the lack of a Job Hazard Analysis ("JHA") report for Structure 31 on the date of the accident as well as Respondent's general supervision of the employees' activities at Structure 31. (Sec'y's Br. 34-38). The Court finds that, while Respondent's supervisory procedures may have been improved, Complainant has not established a lack of reasonable diligence sufficient to demonstrate that Respondent had constructive knowledge of any condition constituting a violation of the cited standard.

In relation to anticipating the hazards associated with Respondent's work, Respondent required its employees to complete JHA reports before starting each task in order to detail the hazards associated with the task and address those hazards. (Tr. 81, 112-15, 207, 306-07, 537-38, 563, 703-04; Exs. C-58 to 62). Based on the record evidence, Respondent's crew employees

understood the completion of the JHAs was a necessary part of their duties.²⁴ (Tr. 112-15, 537-38). The extensive number of JHAs entered into evidence in this case, including ones completed for the task of loading and unloading poles,²⁵ further suggest they were routinely used on Respondent's jobsites. *See* Exs. C-58 to 62. It is true, as Complainant has pointed out, Respondent failed to produce a JHA for the task in which [redacted] and Employee 1 were engaging at the time of the accident. (Tr. 203, 428). However, "an employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard." *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1051 (No. 91-3467, 1995) (emphasis in original). The Court does not find Respondent's failure to locate or produce the exact JHA at issue for the day of this accident is sufficient evidence that it lacked reasonable diligence in enforcing its safety program. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999) (failure to detect every instance of violation does not constitute lack of reasonable diligence provided that employer took reasonably diligent measures to inspect worksite and discover hazardous conditions).

Contrary to Complainant's contentions, the record further demonstrates that Respondent had sufficient procedures in place to supervise its crews. As Vaughn explained, the projects in the Respondent's industry are often spread out over a large area, requiring crews to be in multiple places over the course of the project. (Tr. 770). Thus, the use of "direct supervision," which is most often used when employees are in one place, according to Respondent, is not plausible. (*Id.*).

²⁴ In the portions of his deposition testimony in the record, [redacted] was first asked whether anyone from Maslonka "require[d]" him to perform a JHA on the date of the accident, to which he replied "No." (Tr. 81). However, during a more extensive line of questioning, [redacted] clearly understood a JHA was supposed to be completed before each task commenced, including the loading and unloading of poles. (Tr. 112-15). To the extent there is a conflict in these two lines of questioning, the Court credits [redacted]'s later, more detailed responses on the use of JHAs.

²⁵ *E.g.*, Exs. C-58 p.1 (completed JHA for loading and unloading poles), C-60 p.3 (same).

Instead, it is customary to implement “roaming supervision,” where supervisors visit the different crews throughout the day. (*Id.*). On the date of the accident, Couvillion was the roaming supervisor in charge of Job 118, and Hancock, who had been on site earlier in the day, as well as the other superintendents,²⁶ were available by phone if any safety issues arose. (Tr. 342-43, 772-73). While it is true, as Complainant argues, that Couvillion was not physically present at Structure 31 at the time of the accident, it is also evident from the record that he was close enough in the vicinity to immediately respond when Courson informed him of the accident. (Tr. 153). The Court does not find these circumstances, considered in totality, constituted a lack of reasonable supervision. *Cf. Stanley Roofing Co.*, 21 BNA OSHC 1462, 1464 (No. 03-0997, 2006) (finding a lack of reasonable diligence where supervisors rarely visited the jobsite and relied primarily on cell phones and employee self-monitoring for employee safety).

Complainant has failed to introduce sufficient evidence that Respondent lacked diligence in implementation of supervision of its employees, or that Respondent wholly failed to take reasonable steps to monitor compliance with safety requirements regarding the use of the Loader. *See Hackney Inc.*, 16 BNA OSHC 1806, 1810-11 (No. 91-2490, 1994) (“[W]here the employer maintains an appropriate monitoring or inspection program [to detect safety hazards], the burden is on the Secretary to demonstrate that the employer's failure to discover the violative conditions was nevertheless due to a lack of reasonable diligence.”). The Court therefore declines to make a finding in this instance of constructive knowledge of the alleged violative condition.

Conclusion

Complainant has failed to introduce sufficient evidence to prove a violation of the cited standard, and has also failed to demonstrate that Respondent had actual or constructive knowledge

²⁶ According to Couvillion, there were five superintendents assigned to Job 118: himself, Hancock, Herschel Goodson, Neal Bleasner, and Britt Robinson. (Tr. 144-45, 168-69).

of the conditions alleged to constitute a violation of the standard.²⁷ Accordingly, Citation 1, Item 1 will be VACATED.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Citation 1, Item 1 is VACATED.

Date: March 14, 2022
Denver, Colorado

/s/

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

²⁷ Because Complainant has failed to carry his burden of proof on two *prima facie* elements of a violation, the Court has no need to consider Respondent’s affirmative defense of unpreventable employee misconduct. *See Mountain States Tel & Tel. Co.*, 9 BNA OSHC 2151, 2152 (No. 13266, 1981) (“Unpreventable employee misconduct is an affirmative defense [to be considered after] . . . conclud[ing] that the Secretary has made out a prima facie case of a violation.”)