



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

Secretary of Labor,
Complainant

v.

Americold Logistics, LLC,
Respondent.

OSHRC Docket No. **22-1400**

Representatives:

C. Renita Hollins, Esq.
U.S. Department of Labor, Office of the Solicitor, Atlanta, GA, for Complainant

Lucas I. Pangle, Esq. and Thomas E. Ullrich, Esq.
Wharton Aldhizer & Weaver, PLC, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

Respondent, Americold Logistics, LLC, (Americold), runs a large cold storage facility in Bloomingdale, Georgia, near Savannah. At the facility, which Americold refers to as “Savannah 2,” the company receives, stores, and ships food products, primarily fresh and frozen protein. Employees at Savannah 2 use several types of powered industrial vehicles (PIV) to accomplish the various tasks associated with this work. In July of 2022, an employee of Americold, who was neither trained nor authorized to operate a PIV at Savannah 2, was severely injured attempting to avoid hitting a bollard while driving the PIV.

Upon notification of the accident, the Occupational Safety and Health Administration initiated an inspection of the Bloomingdale facility. As a result of that inspection, the Secretary issued Americold a citation alleging two serious violations of § 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (the Act). In Item 1, Citation 1, the Secretary

alleges Americold failed to designate separate lanes of travel for pedestrians and PIV in violation of 29 C.F.R. § 1910.176(a). In Item 2, Citation 1, the Secretary alleges Americold allowed an untrained employee to operate a PIV in violation of 29 C.F.R. §1910.178(l)(1)(ii). The Secretary proposes a penalty of \$24,240 for the two alleged violations.

Americold timely contested the citation bringing the matter before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act. The court held a on April 14, 2023, in Savannah, Georgia, under the Commission’s Simplified Proceedings. 29 C.F.R. §2900.200. The parties filed post-hearing briefs on June 5, 2023.¹

For the reasons discussed below, Item 1, Citation 1, alleging a violation of 29 C.F.R. § 1910.176(a) and Item 2, Citation 1, alleging a violation of 29 C.F.R. § 1910.178(l)(1)(ii) are vacated.

JURISDICTION

Jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act. The parties stipulated that at all times relevant to this action, Americold was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). Based upon the stipulations and the record as a whole, the court finds Americold is an employer covered under the Act.

BACKGROUND

The Savannah 2 Facility and Its Operations

Savannah 2 is one of many Americold facilities. Exhibit R-5 depicts the floorplan of that facility. It comprises 36 loading bays with doors² that open to the interior loading dock; three freezers; a “deslat” room; and a blast freezer. Americold temporarily stores product and performs various operations on the loading dock, which is a large open area. In the three freezers using a racking system, Americold stores product waiting to be shipped out.

Americold operates two shifts at Savannah 2. Each shift has four floor supervisors (Tr. 240). Each supervisor is responsible for a team. Teams consist of PIV operators and laborers. Americold uses three types of PIV at Savannah 2. Fork trucks³, also called dock trucks, are used

¹ To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

² See Ex. R-6 at p. 16 and video clip 023.

³ A fork truck is depicted in Ex. P-7 at p. 13. A fork truck in operation can be seen in Ex. R-6 at video clip 024.

to load and unload product and move it around the facility. Fork trucks with blast cabs⁴ are used in the blast freezer to move product. And reach trucks⁵ are used to stack and remove product from the racking systems in the freezers.⁶

Lamar Church, a former floor supervisor at Savannah 2, testified about how work is performed at that facility. Americold receives fresh and frozen product from various domestic and international sources. Tractor trailers containing product are unloaded at the loading dock doors using fork trucks (Tr. 129). Product is stacked on the loading dock floor to be checked against the manifest (Tr. 132). If the product is fresh, laborers next restack the product placing spacers or “slats” between the layers of product to allow for airflow during the blast freezing process. A PIV operator then moves that product into the blast freezer where it is flash frozen (Tr. 133). Once the product is frozen, laborers remove the slats and restack the product on pallets after which PIV operators move it to the freezers. Previously frozen product brought into the facility is unloaded, checked against the manifest, and moved directly into the freezers (Tr. 134).

Certain product brought into Savannah 2 must be inspected by the U.S. Department of Agriculture, U.S. Customs and Border Patrol, or the U.S. Food and Drug Administration before Americold moves it to storage in the freezers (Tr. 136, 146). According to Supervisor Church, each inspector has a specific product arrangement he or she prefers for inspection (Tr. 139). Product remains on the loading dock floor until it is inspected and stamped as having passed inspection. Product that does not pass inspection must be moved to a segregated area for investigation where it remains until the issue preventing its approval is resolved (Tr. 144).

Product awaiting shipment out of Savannah 2 goes through a reverse process. Warehouse employees bring product that has been ordered out of the freezer and stage it on the loading dock floor (Tr. 156). Laborers verify the order and fork truck operators load the product onto tractor trailers via the loading dock doors (Tr. 156).

Supervisor Church described the loading dock as an ever-changing environment. The amount of product in the loading dock changes daily and cannot be accurately predicted (Tr.

⁴ A fork truck with blast cab is shown in Ex. P-7 at p. 9.

⁵ Reach trucks are shown in Ex's. P-7 at pp. 2, 5, 22, and 23; and R-6 pp. 12, 13, and at video clips 020, 023, and 025.

⁶ Ex. R-6 at video clip 022 contains footage of the interior of one of the freezers. *See also* Ex. P-7 at p. 25.

162-63, 229). For that reason, Americold has no designated storage areas or paths for PIV or pedestrian travel on the loading dock floor (Tr. 161).

PIV Training and Safety at Savannah 2

Among his duties while at Savannah 2, Supervisor Church conducted new employee and PIV operator training. He testified to Americold's training procedures for PIV operators. The training comprises three parts. First, new operators are shown a 30-minute video created by Raymond, the manufacturer of the PIV in use at the facility, addressing various operating and safety topics (Ex. R-2; Tr. 188). Next, they attend a class conducted by an Americold supervisor, who presents a 76-slid Power Point presentation on PIV operation and safety (Ex. R-1; Tr. 189). Lastly, they receive hands-on training and take a proficiency test (Tr. 189, 198; Ex. R-3). Operators also receive two weeks of "shadowing" another PIV operator (Tr. 213). According to the Power Point presentation, operators must undergo recertification every three years and refresher training annually or if involved in an accident or seen operating a PIV unsafely (Ex. R-1 at pp. 10-12).

Americold has procedures and rules applicable to PIV use. To ensure only certified personnel are able to operate a PIV, Americold has installed software on the vehicles referred to as the "Telematics System." (Tr. 199) The system requires an employee to have an ID badge indicating certification to operate the PIV which he or she must swipe before starting the vehicle (Tr. 199). The system also requires operators to complete a vehicle inspection check list before the vehicle will start (Tr. 199). If the vehicle does not pass the inspection, it is taken out of service (Tr. 241). PIV at Savannah 2 also have speed governors that limit vehicle speed to five miles per hour (Tr. 195). Americold instructs operators to slow down and sound their horn when approaching pedestrians and that pedestrians have the right-of-way (Tr. 196; Ex. R-1 at pp. 35, 40).

Floor supervisors spend most of their day on the loading dock floor (Tr. 213). They are responsible for conducting three "behavior-based safety observations" per day (Tr. 206). To conduct a behavior-based safety observation the floor supervisor observes an employee conducting his assigned work for 30 minutes. The supervisor then coaches the employee on what he observed (Tr. 207).⁷ Americold also requires its floor supervisors to conduct "coaching

⁷ Ex. R-7 contains the reports of the behavior-based safety observations Americold maintains.

method observations” twice per day (Tr. 212). To conduct a coaching method observation the floor supervisor is required to observe an employee performing certain job skills (Tr. 212).

Americold has a disciplinary program that includes termination for serious safety rule violations (Tr. 201; Ex. R-8). A supervisor who observes an employee violating a serious safety rule may request that employee’s immediate termination (Tr. 202-03; Ex. R-9). The request is reviewed by a safety panel which determines the final outcome for the employee (Ex. R-8).

The OSHA Investigation

On July 7, 2022, OSHA’s Savannah Area Office received notification of an accident at Savannah 2 that resulted in an employee seriously injuring his ankle (Tr. 25-26; Ex’s. P-1 and P-2). According to the report received by OSHA, an employee who was driving a fork truck and making a left turn, stuck out his foot and caught it between a bollard and the truck, injuring his ankle (Ex. P-2 at p.2). OSHA assigned Compliance Safety and Health Officer (CSHO) Taylor Rumsey to investigate the accident (Tr. 29).

CSHO Rumsey performed a walk around inspection of the facility after holding an opening conference with Americold management (Tr. 31). During her inspection, CSHO Rumsey observed pedestrians and PIV operating in the same space (Tr. 32; Ex’s. P-7 and P-9). She observed only one designated pedestrian walkway (Tr. 64). She testified she observed PIV driving with loads close to pedestrians and that she had to step out of the way of PIV during her walk around with management (Tr. 43-44). CSHO Rumsey went to the facility a second time in October 2022 and observed the same conditions (Tr. 33-35). On this visit, she also interviewed employees and Supervisor Church (Tr. 33, 84; Ex. P-16). She had previously interviewed the injured employee in September of 2022 (Tr. 87).

Based upon her observation of PIV traveling in proximity to pedestrians and the lack of designated walkways or aisles, CSHO Rumsey recommended the Secretary issue Americold a citation for an alleged violation of § 1910.176(a). Based upon her finding the injured employee had not been trained and certified to operate the PIV involved in the accident, CSHO Rumsey recommended the Secretary issue Americold a citation alleging a violation of §1910.178(l)(1)(ii). The Secretary issued the proposed citation and Americold timely contested.

DISCUSSION

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, No. 05-1907, 2009 WL 2567337 (OSHR Aug. 11, 2009).

Both citation items allege a violation of standards falling under Subpart N, Material Handling and Storage and both address the use of PIV in Americold's Savannah 2 facility. It is undisputed Americold operates several types of PIV at that facility and both alleged violations address the use of those PIV. Americold does not dispute the applicability of the cited standards to the equipment it uses at its facility or to the facility itself. Based upon the record, the cited standards apply.

Item 1, Citation 1: Alleged Violation of 29 C.F.R. § 1910.176(a)

In Item 1, Citation 1, the Secretary alleges Americold violated the standard at § 1910.176(a) when it failed to ensure pedestrian traffic within the facility was protected from being struck by PIV by "having designated lanes of travel, free from pedestrian traffic." The standard states:

Use of mechanical equipment. Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

The Secretary alleges Americold violated the standard at its Savannah 2 facility because it "failed to ensure employees working throughout the building were protected from powered industrial truck traffic by having designated lanes of travel, free from pedestrian traffic." (Citation p. 6) The Secretary contends the standard requires "safe passage via permanent aisleways or passageways" and that Americold's failure to have "permanent passageway for pedestrians or powered industrial trucks" violated that requirement (Tr. 42, 45). Americold argues the standard does not require what the Secretary contends; the standard cannot be reasonably read to require the separation of pedestrian and PIV traffic by designated aisles. The court agrees with Americold.

Section 1910.176(a)(1) is contained in Subpart N of Title 29. It was promulgated pursuant to § 6(a) of the Act which authorized the Secretary to adopt existing national consensus standards without resort to formal rulemaking procedures. 29 U.S.C. § 655(a). In addition to its limited history, there is little binding precedent interpreting the requirements of § 1910.176(a) and no cases specifically addressing whether the standard requires an employer using PIV to create “safe passage via permanent aiseways or passageways” or designate separate lanes of travel for pedestrians and PIV. The issue is a novel one requiring the court to apply Commission precedent on standard interpretation.

When determining the meaning of a standard, the Commission first looks to its text and structure. If the wording is unambiguous, the plain language of the standard will govern, even if the Secretary posits a different interpretation. Both the courts and the Commission have rejected the Secretary’s interpretation of a standard when it strains the plain meaning of the regulatory text.

Jesco, Inc., No. 10-0265, 2010 WL 9448085, at *2 (OSHRC Mar. 26, 2013) (citations omitted).

The Secretary’s interpretation of the standard’s requirements strains the plain meaning of the text. The standard addresses “safe clearances” wherever passage must be made. The dictionary definition of the term “clearance” is the “distance by which one object clears another.” Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/clearance> (last visited July 26, 2023). To be “safe” is to be “free from harm.” Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/safe> (last visited July 26, 2023). The standard, by its terms, requires the employer to ensure space sufficient for safe passage wherever PIV are used, such as in aisles. Although the standard requires the employer to provide aisles wide enough for safe clearance, and to ensure those aisles are not obstructed, it does not require the employer to designate or demarcate aisles. The standard also requires appropriate markings for aisles but only those reasonably found to be permanent. Nowhere in the standard is there language requiring the creation or designation of separate aisles, pathways, or lanes of travel for PIV.

The Secretary did not identify language in the text supporting her interpretation. Rather, the Secretary relies on the Administrative Law Judge’s holding in *Heat Transfer Products, LLC.*, No. 16-0289, 2016 WL 5312071 (OSHRC Sept. 1, 2016) (ALJ). The ALJ’s holding in that case does not support the Secretary’s position. In *Heat Transfer Products*, the employer had demarcated separate aisles for pedestrians and PIV in a storage area of a large manufacturing

facility using lines painted on the floor. The separate aisles for PIV and pedestrians had been in place for many years and the markings had deteriorated and faded over time. The issue before the court was whether the condition of the painted lines met the requirement that permanent aisles be “appropriately marked.” The ALJ never addressed whether the standard required the creation of separate aisles because the employer had already created them, triggering the requirement for appropriate markings. Here Americold has not created separate permanent aisles such that the requirement for markings would apply.

The Commission’s decision in *General Electric Co.*, No. 2739, 1975 WL 5142 (OSHRC Apr. 21, 1975)⁸, which does discuss the need for aisles where PIV operate, provides no more support for the Secretary’s position. In that case, the Commission affirmed a violation of § 1910.176(a) where the employer had randomly stored pallets and other materials in an area used by PIV and that employees passed through to service boilers. *Id.* at *16. Although the Commission referred to the employer’s obligation to create aisles for travel, its focus was on the impediment to egress in case of emergency created by the lack of aisles. The Commission found the employer in violation of the standard because there was insufficient space to allow safe passage. The Commission found, in the terms of the standard, a requirement to create aisles where necessary to ensure “safe clearance.” The decision cannot be fairly read to require the creation and demarcation of aisles where there is no allegation of a lack of sufficient space for safe clearance or obstructions creating a hazard. Where, as here, the Secretary has neither alleged nor established a lack of space sufficient for safe clearance, the holding in *General Electric* is inapposite.

The video and photographic evidence depicting Americold’s Savannah 2 facility show an environment in which large PIV move about in the same space as laborers on foot. The Secretary contends to ensure employee safety in such an environment an employer must institute traffic controls in the form of permanent, demarcated aisles for PIV and pedestrians.⁹ In so contending, the Secretary relies on the goal of the Act to ensure safe workplaces. Although a laudatory goal, the question before the court is not how to make Americold’s worksite safer. The question before the court is whether the cited standard requires the safety measures the Secretary contends. The

⁸ On appeal, the 2nd Circuit overturned a portion of the Commission decision but did not address the violation of § 1910.176(a). 540 F.2d 67 (2nd Cir. 1978).

⁹ Americold contends its practices and procedures addressing PIV safety are sufficient to protect employees. Given the court’s holding, it need not resolve this dispute.

Secretary asks the court to read into the standard an obligation to create and designate permanent, separate aisles for travel of PIV and pedestrians absent a showing of insufficient space for safe clearance or obstructions to safe passage. The standard's plain meaning does not support such a reading.

Item 1, Citation 1, is vacated.

Item 2, Citation 1: Alleged Violation of 29 C.F.R. § 1910.178(l)(1)(ii)

The Secretary alleges Americold violated § 1910.178(l)(1)(ii) by allowing an untrained person to operate a PIV. The alleged violation relates specifically to the use of the PIV by the injured employee on July 7, 2022. The Standard requires an employer to “ensure that each operator has successfully completed the training required by this paragraph” prior to being permitted to operate a PIV.

Americold's training records establish the injured employee had not completed its training program and Americold does not dispute he was neither trained nor authorized to operate the PIV on July 7, 2022 (Ex. P-12; Tr. 75). The record establishes the injured employee was exposed to the hazards associated with untrained use of a PIV. While operating the PIV, the employee was severely injured when he drove too close to a bollard (Tr. 28). The Secretary established the first three elements of the alleged violation.

The element of the alleged violation in dispute is whether Americold had knowledge of the violative condition. To establish employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co.*, No. 82-0928, 1986 WL 53522, at *4 (OSHRC July 30, 1986). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving a supervisory employee knew of or was responsible for the violation. *Todd Shipyards Corp.*, No. 77-1598, 1984 WL 34912, at *4-5 (OSHRC Aug. 3, 1984); *see also Dun Par*, 1986 WL 53527, at *4 (the actual or constructive knowledge of an employer's foreman can be imputed to the employer); *S. Pan Servs. v. U.S. Dep't. of Labor*, 685 F. App'x 692, 698 (11th Cir. 2017) (*unpublished*).

The record is insufficient to meet the Secretary's burden to establish Americold had actual knowledge of the violation. In other words, there is insufficient evidence any supervisory

employee of Americold was aware the injured employee had accessed the PIV. The injured employee did not testify, and the Secretary presented only CSHO Rumsey's recollection¹⁰ of what was stated to her in an interview to establish how the injured employee accessed the PIV. Her testimony was as follows:

Q: Did he explain to you how he was about to get – how he was able to operate the powered industrial trucks?

A: Yes. Another powered industrial truck driver badged through the telematics system for [the injured employee]. When [the injured employee] was answering the safety questions, one of the safety questions was failed; therefore, a supervisor had to use a badge in order to bypass the system.

(Tr. 88). Left unanswered is the question of why the injured employee was operating a PIV he was neither trained nor authorized to use. Although it is undisputed the injured employee would have had to use another employee's ID badge to start the PIV, that other employee was never identified. The injured employee told CSHO Rumsey a supervisor had to override the system, but the record does not establish the identity of that supervisor. Nor does the record establish whether or how a supervisor is able to override the system. Given this paucity of detail, the court finds CSHO Rumsey's testimony insufficient to meet the Secretary's burden.¹¹

The Secretary argues Americold knew of the unauthorized use of the PIV because floor supervisors were present on the loading dock throughout the shift. Although the record establishes floor supervisors are generally present on the loading dock, the Secretary did not establish any supervisor was in a position to observe the specific incident alleged in the citation. Equally vague and unpersuasive is CSHO Rumsey's reference in her Violation Worksheet (Ex. P-10) which states unnamed employees informed her that two supervisors had observed unauthorized employees using PIV. As a result, the Secretary has failed to establish Americold had actual knowledge of the violative condition.

Although the Secretary failed to establish Americold had actual knowledge of the violation, the Secretary can still meet her burden if she establishes Americold had constructive

¹⁰ The record does not contain documentation of the interview.

¹¹ The undersigned found CSHO Rumsey a credible witness based on her demeanor and candid testimony. Despite this finding, the court gives CSHO Rumsey's testimony regarding the injured employee's statement to her no weight because the Secretary presented insufficient evidence upon which the undersigned can find the injured employee's statement credible. The injured employee would have an interest in establishing Americold management condoned the practice of allowing untrained employees to operate PIV and the record contains no evidence corroborating the injured employee's statement.

knowledge of the violation.¹² Constructive knowledge is shown where the Secretary establishes the employer could have known of the cited condition with the exercise of reasonable diligence. *Par Electrical Contractors, Inc.*, No. 99-1520, 2004 WL 334488, at *3 (OSHRC Feb. 19, 2004).

Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.

Id. citing *Precision Concrete Constr.*, No. 99-707, 2001 WL 422968, at *4 (OSHRC Apr. 25, 2001). "Reasonable diligence implies effort, attention, and action; not mere reliance upon the action of another." *N & N Contractors, Inc.*, No. 96-0606, 2000 WL 665599, at *4 (OSHRC May 18, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001). The Commission has held that "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Sw. Bell Tel. Co.*, No. 98-1748, 2000 WL 1424806, at *3 (OSHRC September 27, 2000) (citations omitted), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001).

There is no dispute Americold trained and certified its PIV operators. Americold contends it only allows certified operators to use PIV at its facility. It has a written rule prohibiting unauthorized use of PIV which is included in the training provided to all employees (Ex's. R-1 at pp. 4-5; R-8 at p. 4). Americold controls the use of PIV through its telematics system which requires an employee to have an ID badge showing training and certification. Any employee who is not certified cannot start a PIV using his own ID badge. An employee also cannot start a PIV until he has performed a safety inspection of the vehicle. Americold concedes an authorized employee can use his card to give an unauthorized employee access to a PIV but did not admit to being aware of any other similar instances and the Secretary identified none.

In addition to training and certifying its PIV operators, Americold "took reasonable steps to monitor compliance with safety requirements." *Sw. Bell*, 2000 WL 1424806, at *3. Americold's management system includes two forms of routine, documented, monitoring of employee safety and performance. As noted above, floor supervisors conduct three "behavior-based safety observations" per day which is followed by coaching (Tr. 206-07). These observations and coaching are documented (Ex. R-7). Behavior observed by supervisors includes

¹² The Secretary did not argue Americold had constructive knowledge of the violation and presented no evidence in her case in chief in support of such an argument. Nevertheless, to ensure a complete and fair decision, the court will analyze whether the record as a whole supports a finding of constructive knowledge.

PIV safety. Americold also requires its floor supervisors to conduct “coaching method observations” twice per day (Tr. 212). Where safety violations are observed, Americold disciplines employees under its “Serious Safety Rule Violation Policy” (Ex. R-8). Americold established that in the six months preceding the accident, it had terminated three employees for rule violations related to PIV operation (Ex. R-9). The Secretary has failed to establish Americold did not exercise reasonable diligence to ensure only trained individuals operate PIV at its facility.

Because the Secretary failed to establish Americold knew or could have known of the cited condition, the violation of § 1910.178(l)(1)(ii) alleged in Item 2 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Items 1 and 2, Citation 1, are **VACATED**.

SO ORDERED.

Dated: August 22, 2023
Atlanta, GA

/s/

Heather A. Joys
Administrative Law Judge, OSHRC