



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.

C&S TECHNICAL RESOURCES, INC.,

Respondent.

OSHRC DOCKET No. 21-0509

DECISION AND ORDER

APPEARANCES:

For the Complainant:

Matthew M. Sullivan, Esq.
Office of the Solicitor
U.S. Department of Labor
New York, New York

For the Respondent:

Michael Rubin, Esq.
Jefferson Whisenant, Esq.
Ogletree, Deakins, Nash, Smoak, Stewart, P.C.
Raleigh, North Carolina

BEFORE: William S. Coleman
Administrative Law Judge

INTRODUCTION

An employee of the Respondent, C&S Technical Resources, Inc. (C&S), was killed on November 5, 2020, while performing work under C&S's contract with a company called National Grid. National Grid had engaged C&S to torch-cut decommissioned steel power transmission poles at National Grid's outdoor storage yard in Liverpool, New York, and then to load the cut pole segments onto flatbed trailers operated by a third-party scrap metal company for transport

offsite. Just before he was killed, the decedent had been standing on a flatbed trailer onto which an all-terrain forklift (called a telehandler) was loading a pole segment. The decedent was standing next to a triangular stack of three pole segments that occupied the front half of the flatbed. He was positioned there to spot for the telehandler operator in the loading of a pole segment onto two pole segments that were on the back half of the flatbed. When the pole segment landed on top of the bottom two pole segments, both stacks of poles, back and front, collapsed nearly simultaneously. The decedent was knocked from the flatbed to the ground by a pole segment that dislodged from the front stack, and he was killed when a second pole segment from the front stack fell to the ground and struck him.

The work-related fatality precipitated an inspection and investigation by the Occupational Safety and Health Administration (OSHA), which ultimately issued to C&S a Citation and Notification of Penalty (Citation) that alleged two serious violations of OSHA's powered industrial truck standard, which is codified at 29 C.F.R. § 1910.178.

C&S timely contested the Citation, thereby bringing the matter before the independent Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (Act). 29 U.S.C. § 659(c). The matter was then assigned to the undersigned Commission judge for adjudication.

The hearing on the merits had been scheduled for May 2022, but it was later rescheduled to November 2022 because about three weeks before the start of the scheduled May 2022 hearing the Secretary was permitted to amend one of the originally alleged violations of § 1910.178 to an alleged violation of section 5(a)(1) of the Act. Section 5(a)(1), which is commonly known as the general duty clause, requires a covered employer to "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.” 29 U.S.C. § 654(a)(1). The Secretary’s amended complaint alleges that on the day of the fatality C&S violated section 5(a)(1) in the following manner: ¹

[T]wo employees, one operator and one spotter, were using a JCB 512-56 Tele-handler all terrain forklift to load and stack 20 ft. sections of monopole towers, weighing approximately 8,000 lbs. each, onto a flatbed trailer. The tower sections were not uniform in size or shape, and when the operator placed an additional tower section onto the stack, the stack collapsed. The spotter was standing on the flatbed trailer, adjacent to the stack of tower sections and in the danger zone of the forklift’s stacking operations and was struck by multiple tower sections when the stack collapsed.

The section 5(a)(1) claim avers further that “one feasible and acceptable method of abatement to correct the hazard” would be as follows:

Comply with the JCB Operators Manual for the 512-56 Telehandler which states:

“The danger zone is any zone within and/or around the machinery in which a person is subject to a risk to their health or safety . . . [including] the area into which debris, from use of an attachment or working tool, could be projected and any area into which debris could fall from the machine. During the operation of the machine, keep all persons out of the danger zone. Persons in the danger zone could be injured.”

"Worksites can be hazardous. Examine the site before working on it. You could be killed or injured if the ground gives way under your machine or if piled material collapses onto it.["]

Methods of positioning the spotter outside the danger zone of the stacking operation include:

- Have the signal employee communicate with the operator using hand signals or a radio, or;

¹ The Secretary was later permitted to file a second amended complaint dated October 22, 2022. The second amended complaint did not alter the section 5(a)(1) set forth in the amended complaint.

- Have the signal employee use a stand-off device such as a drone for visual examination of the stacking operation and having direct communications with the rough terrain forklift operator.

In addition to the alleged violation of section 5(a)(1), C&S is alleged to have violated 29 C.F.R. § 1910.178(l)(6) for failing to maintain written certification that the performance of a powered industrial truck operator has been satisfactorily evaluated within the preceding three years.

The parties have zealously advocated for their respective positions in their post-hearing briefs. Upon a review of the arguments and the whole of the record, two salient issues emerge:

- Does a preponderance of the evidence show that the spotter for the telehandler operator was ever positioned within any employer or industry recognized “danger zone” of the telehandler’s stacking operations? [Citation 1, item 1, as amended; OSH Act sec. 5(a)(1)].

Decision: No.

- Was it a “serious” violation under section 17(k) of the Act for C&S to have failed to maintain written certification that the performance of the telehandler operator had been evaluated in the preceding three years? [Citation 1, Item 2; § 1910.178(l)(6)].

Decision: Yes.

As set forth below, the alleged violation of section 5(a)(1) is vacated. The alleged serious violation of § 1910.178(l)(6) is affirmed, and a penalty of \$5,461 is assessed.

FINDINGS OF FACT

Except where the following numbered paragraphs expressly state that evidence respecting a matter of fact was not presented or was not preponderant, the following facts were established by at least a preponderance of the evidence:

1. C&S maintains its principal office in Syracuse, New York, and is engaged in the business of offering multiple disciplines relating to planning and designing construction projects. (T. 12).

Section 5(a)(1) Claim

2. A company called National Grid hired C&S to torch-cut decommissioned steel power transmission poles that were between 60 and 80 feet long into segments about twenty feet long and then to load the pole segments onto a flatbed trailer for transport by a third-party scrap metal company. All the work that C&S was to do under the contract was to be performed at National Grid's outdoor storage yard in Liverpool, New York. (T. 11-13, 112-13, 150, 246; Exs. J-28, J-29, J-30 at 4-5).

3. The uncut steel poles were hollow. Their exterior surface had the shape of a regular dodecagon (having twelve equal-sized facets), which gave them a cylindrical appearance. (T. 324). The uncut poles were also gently tapered and had a baseplate at the wider end. Some uncut poles had baseplates that were square shaped and others had baseplates that had an irregular hexagonal shape. (T. 255, 277-78; Exs. J-6, J-7, J-9, J-11, J-12, J-18, J-20). The baseplates were wider than the pole to which they were attached, so that if a pole were to be laid horizontally on a flat surface, one of the straight sides of the baseplate would bear the weight of the pole at that end, in the manner depicted in Exhibit J-18. (T. 254).

4. The tapered shape of the 20-foot-long pole segments permitted C&S to insert a smaller diameter pole segment inside the hollow interior of a larger diameter pole segment, in the manner depicted in Exhibit J-14. (T. 276-77; Exs. J-7, J-35 at 4). Many of the pole segments that C&S loaded onto the flatbed consisted of at least two pole segments, one pole segment inserted inside the other. (T. 276-77, 323).

5. C&S estimated the weight of the pole segments loaded onto the flatbed to be between 4,000 and 8,000 pounds. The variation in weight reflected the different size of some pole segments and also whether a smaller pole segment had been inserted inside the hollow interior of a larger pole segment. (T. 83-84, 152-53, 156-58).

6. C&S did not supply and did not control the flatbed trailers onto which it was to load the cut pole segments. Rather, the scrap metal company that was buying the poles from National Grid would supply and control the flatbed trailers and would haul the loaded trailers from National Grid's storage yard. (T. 112-13; Ex. J-29).

7. C&S identified two specific employees to perform all the work under the contract with National Grid. One was the designated foreman, and the other was the decedent. The foreman would operate the telehandler to handle the poles, and the decedent would be available to spot when the foreman operated the telehandler. (T. 101, 117, 271-72; Ex. J-35 at 3-4). (Henceforth, the foreman and the decedent are referred to respectively as Operator and Spotter.)

8. C&S's first day of work on the project was October 22, about two weeks before the Spotter was killed. Before work started on that first day, C&S's health and safety manager conducted a pre-job meeting with both the Operator and the Spotter. (Ex. J-35 at 2). The only plan for loading flatbed trailers that was discussed in the meeting was to array four pole segments side-by-side and end-to-end on the bed of the flatbed itself, with no poles being stacked on top of others. (T. 202-03, 206, 212). There was no discussion about loading the flatbed in any other configuration. (T. 209, 212-13, 228).

9. The day that the Spotter was killed was the tenth day of work on the project. (Ex. J-35 at 4). During the previous nine workdays, the Operator had loaded five or six complete trailer loads. (T. 213, 249).

10. Before loading the first trailer load, the Operator asked the driver of the semi-truck how the driver wanted the pole segments loaded on the flatbed. The driver asked that six pole segments be loaded (not only four, as C&S had planned) in two triangular stacks of three pole segments each. Each stack would be comprised of two pole segments aligned side by side on the

flatbed with a third pole segment on top in the valley-like space between the two. One three-pole stack would occupy the front half of the flatbed and the other three-pole stack would occupy the back half. The Operator acceded to the driver's request and loaded the first and all subsequent trailer loads in that configuration. (T. 143-46, 249).

11. The C&S employees did not utilize any means to physically secure the pole segments to the flatbed trailer. The Operator regarded the straight sides of the baseplates that rested on the flatbed to inhibit movement of the poles on the flatbed. (T. 254).

12. On the day the Spotter was killed, the scrap metal company had pre-positioned an empty flatbed trailer for the C&S employees to load. The trailer was not connected to a semi-truck and no truck driver was present. (T. 248-49, 266; Exs. J-12, J-18, J-35 at 4). The C&S employees started loading the flatbed with pole segments that they had torch cut the day before. (Ex. J-35 at 4 & 10).

13. The Operator operated the telehandler and loaded the flatbed from the flatbed's left side. He successfully loaded a triangular stack of three pole segments (as previously described) onto the front half of the flatbed. (This front stack would soon collapse, and the top pole from this stack would strike and kill the Spotter.) Both ends of the front stack's bottom right pole segment had a baseplate on both ends that bore the collective weight of the pole segment on both ends. This front right pole segment did not fall off the flatbed when the front stack later collapsed. (Ex. J-18). The other two pole segments in the front stack (the segment on the bottom left and the segment on the top, both of which fell off the flatbed) each had a baseplate on only one end; the opposite end of these two pole segments had a cylindrical (dodecagon) shape. (Exs. J-11, J-35 at 12-14, C-41 at 3).

14. After creating the stack on the front half of the flatbed, the Operator began to load a similarly configured stack on the back half of the flatbed. (Ex. J-35 at 4). The Operator first loaded two pole segments side-by-side on the back half of the flatbed. Both ends of the pole segment on the bottom left had a baseplate with straight sides; this pole segment did not fall off the flatbed when the stack later collapsed. (Ex. J-35 at 13). The pole segment on the bottom right had a baseplate on its forward end, but its opposite end had a cylindrical (dodecagon) shape. (Ex. J-12; Ex. J-35 at 4, 11 & 15). The height of the pole segment on the back left side of the flatbed obstructed the Operator's view of the landing area for the top pole segment. The Spotter climbed onto the flatbed and stood next to the front stack where he could see the landing area for the back stack and use hand signals to guide the Operator in unloading the top (third) pole segment on the back half of the flatbed. (T. 250-52; Exs. J-35 at 4, J-36 at 5).

15. The third pole segment to be loaded onto the back half of the flatbed was smaller in diameter than the two bottom pole segments. This third pole segment had a circular flange at one end, whose diameter was greater than the cylindrical (dodecagon) pole segment itself, and the other end of this pole segment was simply a hollow dodecagon shape. (T. 273-74; Exs. J-4, J-7, J-18, J-20).

16. The Spotter stood on the left side of the flatbed at about the mid-point of the front stack as the Operator positioned the telehandler's fork holding the third pole segment over the landing area on the back half of the flatbed. (T. 150, 170-72, 254-55; 265-67; Ex. J-36 at 5). The Spotter was about ten feet from the nearest point of the pole segment in the telehandler's fork and about eighteen feet from the nearest part of the telehandler. (T. 350-51, 366; Ex. R-1 at 2). The Operator tilted the fork forward and the pole segment rolled off the fork and dropped about two inches onto the two pole segments below. (T. 171-72, 212-14, 253-54, 275-76; Ex. J-35 at 4). The

force of the pole segment's landing caused the bottom right pole segment (which had a baseplate on only one end) to move and fall off the flatbed to the ground to the right side of the flatbed (opposite from the telehandler). The pole segment that the telehandler had just landed fell to the ground after it. No one was near to where these two pole segments landed and came to rest on the ground on the right side of the flatbed. The pole segment on the back left side of the flatbed, which had a baseplate at both ends, remained on the flatbed. (T. 264-65, 273-74; Exs. J-4, J-35 at 4).

17. This collapse of the back stack precipitated the near simultaneous collapse of the front stack. The Operator saw the front left bottom pole segment fall off the left side of the flatbed and in the process knock the Spotter off the flatbed to the ground on the left side. The Operator then saw the pole segment that had been on the top of the front stack fall from the flatbed to the ground and strike the Spotter. (T. 266-69; Ex. J-12; Ex. J-35 at 4, 10-11; Ex. J-36 at 5, 15, 26-27).

18. The stacks of poles on both the front and back halves of the flatbed posed an instability hazard regardless of any telehandler loading or stacking operations occurring on or around the flatbed. (T. 340-41).

*Section 1910.178(l)(6) Claim
(Written Certification of Triennial Evaluation of Operator Performance)*

19. The Operator received formal training on the operation of powered industrial trucks in the year 2000. The Operator has decades of experience operating powered industrial trucks. (Ex. J-32; T. 118-19, 270-71).

20. C&S did not maintain any written certification that the Operator's performance in operating powered industrial trucks had been evaluated within the previous three years. Consequently, C&S had no written record that reflected the date that any such evaluation had been conducted or the identity of the person who had performed any such evaluation. (T. 118-19, 132-34, 185).

DISCUSSION

The Commission obtained jurisdiction under section 10(c) of the Act upon the Secretary's forwarding to the Commission C&S's timely filed notice of intent to contest. (T. 12). 29 U.S.C. § 659(c); 29 C.F.R. §§ 1903.17(a) & 2200.33. C&S is an "employer" as defined in section 3(5) of the Act and is thus subject to the compliance provisions of section 5(a). 29 U.S.C. §§ 652(5) & 654(a). (T. 12-13).

Amended Citation 1, Item 1 [Section 5(a)(1) claim]

Preemption of Section 5(a)(1) Claim by a Specific Standard

The Respondent contends the section 5(a)(1) claim cannot stand because 29 C.F.R. § 1910.178(o) addresses the particular hazard that the section 5(a)(1) claim describes and thus preempts the section 5(a)(1) claim.² (Resp't Br. 10-13). See *Healy Tibbitts Builders, Inc.*, No. 15-1069, 2020 WL 5934209, at *2 (OSHRC, Sept. 30, 2020) ("[A]n applicable standard preempts application of the general duty clause where the standard is addressed to the particular hazard for which the employer has been cited" under section 5(a)(1)); 29 C.F.R. § 1910.5(f) ("An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard").

Whether an alleged section 5(a)(1) violation is preempted by a specific standard is an affirmative defense that must be raised in the employer's answer. *Healy Tibbitts Builders*, 2020 WL 5934209 at *2, n. 3. C&S has raised and asserted this affirmative defense for the first time in its post-hearing brief-in-chief. C&S did not plead preemption of the section 5(a)(1) claim in its

² Item 1 of the Citation had originally alleged a violation of § 1910.178(o)(1), and the Secretary's original complaint had adopted that alleged violation. As previously noted, the Secretary was permitted to amend that citation item to allege in its place the section 5(a)(1) claim.

answer to the amended complaint dated May 27, 2022.³ Nor did C&S identify in the joint prehearing statement (filed on November 9, 2022) that preemption of the section 5(a)(1) claim was an issue of law to be litigated at the hearing. Nor did the parties at any time expressly or impliedly consent to litigate that affirmative defense. *Cf. Bill C. Carroll Co.*, 7 BNA OSHC 1806, 1810 (No. 76-2748, 1979) (“Unpleaded affirmative defenses . . . may be tried by the express or implied consent of the parties and treated as if actually raised by the pleadings”); *accord Healy Tibbitts Builders*, 2020 WL 5934209, at *2, n. 3.

C&S has thus waived this affirmative defense by failing to interpose it at any time before first asserting it in its post-hearing brief-in-chief. *Mansfield Indus., Inc.*, No. 17-1214, 2020 WL 8871368, at *2 (OSHRC, Dec. 31, 2020) (finding regulatory preemption defense that was raised for the first time in post-hearing brief to have been waived).

Even if C&S had timely raised the preemption defense, it would fail on its merits because the standard that C&S argues has preemptive effect, § 1910.178(o)(1) & (6), does not address the particular hazard alleged in the section 5(a)(1) claim, which is that the “spotter was standing . . . in the danger zone of the forklift’s stacking operations.” Subparagraphs (1) and (6) of 1910.178(o) provide:

(o) *Loading*. (1) Only stable or safely arranged loads shall be handled. Caution shall be exercised when handling off-center loads which cannot be centered.

* * * *

(6) Extreme care shall be used when tilting the load forward or backward, particularly when high tiering. Tilting forward with load engaging means elevated shall be prohibited except to pick up a load. An elevated load shall not be tilted forward except when the load is in a deposit position over a rack or stack. When stacking or tiering, only enough backward tilt to stabilize the load shall be used.

³ By order dated November 7, 2022, C&S’s answer to the first amended complaint was deemed its answer to the second amended complaint.

Neither of these subparagraphs address the hazard alleged in the section 5(a)(1) claim, and thus neither has preemptive effect over that claim.⁴

Merits of Section 5(a)(1) Claim

A violation of section 5(a)(1) is proven when the preponderant evidence establishes: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; (4) a feasible and effective means existed to eliminate or materially reduce the hazard; and (5) the employer knew or, with the exercise of reasonable diligence could have known of the hazardous

⁴ A closer preemption argument might have been that § 1910.176(b) had preemptive effect. Section 1910.176(b) provides: “*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.” See *Walmart, Inc.*, No. 17-0949, 2023 WL 1990803, at *3 (OSHRC, Feb. 8, 2023) (stating that “§ 1910.176(b) requires stored materials to withstand outside forces”); cf. *Noranda Aluminum Inc. v. OSHRC*, 593 F.2d 811, 814 (8th Cir. 1979) (affirming Commission judge’s decision that rejected the employer’s argument that § 1910.176(b) “is limited to the stacking and securing of materials after they have reached a point of more or less permanent storage and not to an essentially preliminary operation,” and deciding that the standard is “not limited to stacking operations in areas of permanent storage”); *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051 (No. 86–1087, 1991) (applicability of § 1910.176(b) not contested where six different-sized concrete pilings had been moved and then stacked in preparation for being transported to a jobsite, and the stack collapsed and killed an employee). Section 1910.176(b) arguably would address the hazard of the instability of the two stacks of poles on the flatbed, about which both the CO and the Secretary’s expert witness testified. (T. 122, 312-14).

Neither party has addressed whether § 1910.176(b) applies to the stacked pole segments on the flatbed, or if so, whether C&S complied with that standard. Regardless of whether the Secretary could have appropriately cited C&S for violating § 1910.176(b) for the way the poles had been stacked on the flatbed, the resolution of the section 5(a)(1) claim here remains whether the preponderant evidence established the described hazard of the Spotter “standing ... in the danger zone of the forklift’s stacking operations.” Cf. *Henkels & McCoy, Inc.*, No. 18-1864, 2022 WL 3012701, *2 (OSHRC, July 21, 2022) (finding that Commission judge “plainly erred by redefining the alleged [section 5(a)(1)] hazard in terms of what may have caused the fatal incident”) *appeal docketed*, No. 22-13133 (11th Cir. Sept. 9, 2022).

condition or activity. *Peacock Eng'g, Inc.*, 26 BNA OSHC 1588, 1589 (No. 11-2780, 2017); *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1305 (No. 06-1201, 2008).

At the heart of any section 5(a)(1) claim is the “hazard” that the claim alleges. *Cf. Arcadian Corp.*, 20 BNA OSHC 2001, 2008 (No. 93-0628, 2004) (“[I]t is the hazard, not the specific incident that resulted in injury or might have resulted in injury, that is the relevant consideration in determining the existence of a recognized hazard”). The hazard that the section 5(a)(1) claim here identifies is that the Spotter “was standing ... in the danger zone of the forklift’s stacking operations.” The section 5(a)(1) claim objectively alleges that the Spotter stood “on the flatbed trailer, adjacent to the stack of tower sections” onto which the Operator “placed an additional tower section.” The claim further objectively alleges that the Spotter was struck by a pole segment that came from the stack onto which the Operator had just placed another pole segment. And so, the gist of the section 5(a)(1) claim as drafted is that the Spotter had been standing next to the stack of poles onto which the Operator was then loading another pole segment.

That factual allegation palpably misstates what happened.⁵ There is no dispute that when the Operator was loading the top pole segment onto the bottom two pole segments on the back half of the flatbed, the Spotter was standing next to the previously loaded stack of pole segments that occupied the front half of the flatbed. And the greater weight of the evidence is that the Spotter was then positioned about ten feet from the stack on the back half of the flatbed (and about the same distance from the pole segment being held in the telehandler’s fork), and about 18 feet away from the nearest point of the telehandler. (Finding of Fact ¶ 16).

⁵ If the Spotter truly had been standing on the flatbed trailer next to the stack of poles that the Operator was then actively loading, then by all accounts he would have been positioned “in the danger zone of the forklift’s stacking operations.”

Notwithstanding the disconnect between the allegations of the section 5(a)(1) claim and the true facts, the Secretary contends the preponderant evidence established that the Spotter's location next to the front stack of pole segments was within the "danger zone of the forklift's stacking operations" as the amended complaint alleges. (Sec'y Br. 23-36).

Resolution of the section 5(a)(1) claim thus hinges on whether a preponderance of the evidence established that the Spotter's position next to the stack on the front half of the flatbed during the loading of the top pole on the stack on the back half was recognized by either C&S or the industry to have been "in the danger zone of the stacking operations" in the manner that the section 5(a)(1) claim alleges. The parties of course hold opposite views on this dispositive issue of fact.

The Secretary can establish that a hazard was recognized by "either the actual knowledge of the employer or the standard of knowledge in the employer's industry—an objective test." *Kokosing Constr.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996).

The Secretary, in arguing that the Spotter's position was in the "danger zone of the stacking operations," relies in part on two separate warnings contained in the telehandler's operator's manual (both of which the Secretary quoted in the section 5(a)(1) claim itself) to establish employer or industry recognition of the alleged hazard. One of those two warnings states that the "danger zone is any zone within and/or around the machinery in which a person is subject to a risk to their health or safety." (Ex. C-46 at 10 of 19; T. 381-86). The complete paragraph in the operator's manual containing that sentence is as follows:

DANGER ZONE

The danger zone is any zone within and/or around the machinery in which a person is subject to a risk to their health or safety. The danger zone includes the area in immediate proximity to any hazardous moving parts, areas into which working equipment and attachments can be moved to quickly, the machine normal stopping

distances and also areas into which the machine can quickly turn under normal conditions of use. Depending on the application at the time, the danger zone could also include the area into which debris, from use of an attachment or working tool, could be projected and any area into which debris could fall from the machine. During the operation of the machine, keep all persons out of the danger zone. Persons in the danger zone could be injured.

(Ex. C-46 at 10). The other warning in the operator's manual on which the Secretary relies (and which the Secretary also quotes in part in the section 5(a)(1) claim) is as follows:

Worksites

Worksites can be hazardous. Examine the site before working on it. You could be killed or injured if the ground gives way under your machine or if piled material collapses onto it. Check for potholes and hidden debris, logs, ironwork etc. Any of these could cause you to lose control of your machine. Check for utilities such as electric cables (overhead and underground), gas and water pipes etc. Mark the positions of the underground cables and pipes. Make sure that you have enough clearance beneath overhead cables and structures.

(Ex. C-46 at 13 of 19; T. 381-86).

These excerpts from the operator's manual are probative evidence on the matter of whether the employer or its industry recognized the alleged hazard. *K.E.R. Enters., Inc.*, 23 BNA OSHC 2241, 2242 (No. 08-1225, 2013) ("Manufacturers' instructions and voluntary industry standards that contain explicit safety warnings regarding compliance may be probative evidence in establishing a general duty clause violation").

The Secretary also relies on the testimony of the OSHA Compliance Safety and Health Officer (CO) who led the OSHA inspection and who assisted the Secretary's attorney in drafting the section 5(a)(1) claim. (T. 137). The CO has worked as an OSHA CO since 2009. He has completed over 120 formal OSHA training courses, of which more than 20 pertained to forklifts. (T. 78). He has conducted over 850 workplace inspections, about five of which had involved material collapses during forklift operations. (T. 78-79).

The CO, upon being asked to explain his “understanding of [what] the danger zone in this forklift operation ... consisted of,” testified:

[O]n these specific conditions, [the danger zone] would have been anywhere in the fall shadow of the material, which was elevated and stacked in a manner that could become unstable, and so we can anticipate a direction of travel for this material, and it fell in much the same way as one might have anticipated, and the danger zone would have been anywhere in that -- anywhere you could be struck by that material.

(T. 122). The CO was not offered or qualified to provide expert opinion testimony, but his testimony as to his view of the “danger zone” is probative on that issue of fact. *Cf. Falcon Steel Co.*, 16 BNA OSHC 1179, 1191 (No. 89-2883, 1993) (consolidated) (noting that an “experienced compliance officer’s reasonable suggestion” on a technical matter may be sufficient for the Secretary to make out a prima facie case without having to present expert testimony on the matter).

The Secretary also relies on the testimony of another OSHA employee who is a registered professional engineer (RPE) and who was qualified to provide expert opinion testimony in the field of “civil engineering with a specialization in structural engineering and material collapse.”

(T. 288-89, 298-99). The RPE testified to the following two opinions from his written report:

- (1) C&S’s forklift operation, which involved dropping a pole on top of unsecured poles, created an obvious instability hazard of unplanned movement of the poles on the surface of the flatbed where the victim was standing.
- (2) It was essential to keep employees out of the danger zone especially considering the obvious instability hazard introduced by C&S’s forklift operation and the configuration of the poles on the flatbed.

(Ex. C-41 at 8; T. 286-87).

The RPE reliably and credibly testified that the unsecured front stack was susceptible to moving because the pole on the top of the stack exerted horizontal force against the two poles on

the bottom, creating the “obvious instability hazard” that he referred to in his two formally expressed opinions. (T. 337). The RPE regarded the area around the front stack to be a “danger zone” regardless of whether any stacking operation was in progress, “because the poles are not in a stable condition” and “the top poles always exerts ... [horizontal] force on the bottom poles.” (T. 340-41). In other words, the RPE opined that the stack on the front half of the flatbed was a hazard in and of itself.

The RPE was not qualified as an expert as to safe practices in forklift operation. While some of his work at OSHA relates to the operation of forklifts, the RPE allowed that “the safety aspects of the forklift usually is done by the [OSHA] area office.” (T. 319-320). Nevertheless, his view of the danger zone of the telehandler’s stacking operation aligned with the CO’s view that the danger zone was anywhere in the “fall shadow” of the unsecured stack of cylindrical-shaped (dodecagon) pole segments on the front half of the flatbed. The RPE testified that “to me, standing near the pole [on the front half of the] flatbed trailer is within the danger zone,” because “there the pole can fall down or the pole can move ... unless it is very secured on the trailer.” (T. 314-15).

In contrast to evidence relied on by the Secretary, C&S presented the testimony of a witness who was qualified to provide expert opinion testimony as a “construction safety expert.” (T. 349). This witness had worked as a safety professional for OSHA for 26 years, the final eleven years as the director of an OSHA area office. In his work as an OSHA CO, the witness had conducted inspections and investigations involving forklift accidents. In his work as both an assistant area director and then as an area director for OSHA, he reviewed the results of investigations and inspections involving forklift accidents. (T. 347). After retiring from OSHA in 2013, he personally trained over 100 workers on rough terrain forklifts. (T. 346-48).

This safety expert testified that the “common industry practice” is that a forklift’s “danger zone” is regarded to be ten feet from the machine. The safety expert testified that when he trains workers in the operation of rough terrain forklifts, he describes the danger zone in those terms. He recognized, however, there is potential for elasticity in the physical extent of the danger zone, and he noted that at least one large company identifies the danger zone to be less than ten feet. (T. 345, 351-52, 364-65; Ex. R-1).

Applying this described industry recognized understanding of the telehandler’s danger zone, the expert testified that the Spotter had not been positioned within the danger zone of the telehandler’s stacking operation. (T. 345, 351-52; Ex. R-1). The witness explained that the only stacking operation in progress when both stacks collapsed was the stacking of the pole segments on the back half of the flatbed, and that the stacking operation respecting the front stack had been completed. (T. 356, 367-70). The expert ventured no opinion on whether the Spotter’s position near the front stack was within any recognized danger zone other than the industry recognized danger zone of the telehandler’s stacking operation on the back stack. (T. 356, 367-70).

Employer Recognition of the Hazard

There is no probative evidence that C&S recognized the Spotter to be within the danger zone of the telehandler’s stacking operation.⁶

⁶ The Secretary argues that Operator testified to having recognized that the stack on the front half of the flatbed was susceptible to movement. (Sec’y Br. 36; T. 255, lines 11-15). However, contrary to the Secretary’s assertion, that testimony does not pertain to the potential for the pole segments to move after being loaded on the flatbed. Rather, in that testimony the Operator described his concern that the cut pole segments could move while being cut into smaller 20-foot-long segments with an acetylene torch. The poles were cut before the pole segments were loaded onto the flatbed.

Industry Recognition of the Hazard

The evidence that the industry recognized that the Spotter was positioned within the danger zone of the telehandler's stacking operation may be summarized as follows:

- A sentence in the telehandler's operator's manual that the "danger zone is any zone within and/or around the machinery in which a person is subject to a risk to their health or safety." (The Secretary aptly characterizes this as an "expansive definition of the danger zone." [Sec'y Br. 14].)
- The somewhat prosaic observation in the operator's manual that "[w]orksites can be hazardous" along with the admonition to examine worksites before starting work.
- The CO's testimony that the danger zone of the stacking operation extended to the "fall shadow" of the stack of poles on the front half of the flatbed, and also the acknowledgement of C&S's safety expert witness that there could be elasticity in the scope of the danger zone that he testified was industry custom.
- The opinion of the OSHA RPE that the stack on the front half of the flatbed presented an "obvious instability hazard" in itself, regardless of the telehandler's operation. The RPE's testimony was consistent with the CO's testimony that the danger zone of the stacking operation of the flatbed trailer encompassed the "fall zone" of any of the poles on the flatbed by dint of the inherent instability of the stacks.

A close reading of the first warning from the operator's manual (which the section 5(a)(1) claim quotes in part) reveals that following the topic sentence's expansive description of the danger zone, the remainder of the paragraph fleshes out the meaning of that sentence by providing examples of areas that are within the telehandler's danger zone. Those articulated examples are: (1) the area in the "immediate proximity to any hazardous moving parts" of the telehandler, (2) "areas into which working equipment and attachments can be moved to quickly," (3) the

telehandler’s “normal stopping distances,” (4) “areas into which the [telehandler] can quickly turn under normal conditions of use,” and (5) “the area into which debris, from use of an attachment or working tool, could be projected and any area into which debris could fall from the machine.”

After the topic sentence of the second warning from the operator’s manual (quoted above and which the section 5(a)(1) claim also quotes in part), the remainder of that paragraph gives the following examples of the ways in which “[w]orksites can be hazardous” with respect to the operation of the telehandler: (1) the ground giving way underneath the telehandler, (2) piled material collapsing onto the telehandler, (3) the presence of “potholes and hidden debris, logs, ironwork etc.” that could cause loss of control of the telehandler, (4) underground utility cables and pipes, and (5) low clearance overhead utility cables and structures.

The whole of the evidence is insufficient to establish by a preponderance that the Spotter was positioned in the industry recognized danger zone of the stacking operation. The focus of the “danger zone” concept articulated in the operator’s manual is consistent with the testimony of C&S’s safety expert witness that the industry defines the danger zone by assessing whether there is a risk of being struck by the telehandler, its load, or material falling from any attachment or working tool such as the fork. There is no evidence here that the Spotter was at risk of being struck by the telehandler itself, its load, or material projected or falling from it. There is thus no evidence that the Spotter was within an industry recognized “danger zone of the telehandler’s stacking operations” as alleged in the section 5(a)(1) claim.

The preponderant evidence fails to establish that either C&S or its industry recognized that the position of the Spotter was within the danger zone of the telehandler’s stacking operation and thus the evidence fails to establish an element of the alleged section 5(a)(1) claim. Citation 1, Item 1, as amended to allege that claim, must therefore be vacated.

Citation 1, Item 2
[§ 1910.178(l)(6)]

Item 2 of the Citation, which the second amended complaint adopts, alleges a serious violation of § 1910.178(l), which prescribes training requirements for operators of powered industrial trucks. The Secretary alleges that C&S violated subparagraph (6) of that training standard, which provides as follows:

Certification. The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

One of the “evaluations” required by paragraph (l) is prescribed in its subparagraph (4)(iii), which provides: “An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years.” The citation item specifically alleges C&S to have violated § 1910.178(l)(6) for having failed to certify that this triennial evaluation had been performed for the Operator:

On or about 11/5/2020, a foreman used a JCB 512-56 Tele handler all-terrain forklift to stack twenty-foot sections of decommissioned monopole towers, each weighing approximately 8,000 lbs., in tiers onto a flatbed trailer in preparation for transport the following day. The employer did not certify that the foreman’s performance operating the forklift was evaluated at least once every three years.

To establish liability for the alleged violation of a specific OSHA standard such as alleged here, the preponderant evidence must show: (1) the standard applies; (2) there was noncompliance with its terms; (3) employees were exposed to, or had access to, the violative condition; and (4) the cited employer had actual or constructive knowledge of the violative condition. *Donahue Indus. Inc.*, 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003); *D.A. Collins Constr. Co. v. Sec’y of Labor*, 117 F.3d 691, 694 (2d Cir. 1997).

All elements of the alleged violation of § 1910.178(l)(6) have been plainly established, and C&S advances no argument to the contrary. The telehandler that the Operator was operating is a type of powered industrial truck covered by the standard, and so the standard applies. *See* Powered Industrial Truck Operator Training (Final Rule), 63 Fed. Reg. 66238, 66241 (to be codified at 29 C.F.R. parts 1910, 1915, 1917, 1918 and 1926) (describing “rough terrain forklift trucks” as a type of industrial truck to which training requirements of § 1910.178(l) apply). C&S did not comply with the standard because it had not maintained a written record of the Operator’s performance having been evaluated in the manner required by § 1910.178(l)(4)(iii) within the preceding three years. The Operator and Spotter were exposed to this violation in that the Operator was operating the telehandler in the absence of a written record that the formal triennial evaluation had been conducted. C&S had actual knowledge that it had not maintained a written record of the Operator’s performance having been formally evaluated in the preceding three years. *See Lane Constr. Corp.*, 23 BNA OSHC 1097 (No. 09-0348, 2009) (ALJ) (“As the employer, Lane had actual knowledge of its training program”).

While C&S does not dispute having violated the standard, it disputes the Secretary’s characterization of the violation as “serious,” asserting rather that the violation is *de minimus*.

A violation is *de minimis* if it has “no direct or immediate relationship to safety or health.” 29 U.S.C. § 658(a); *Star Brite Constr. Co.*, 19 BNA OSHC 1687, 1691 (No. 95-0343, 2001). A *de minimus* classification “is limited to situations in which the hazard is so trifling that an abatement order would not significantly promote the objectives of the Act.” *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-1642, 1991).

C&S’s failure to maintain a written certification of the required triennial evaluation of an operator’s performance is not *de minimus*. Compliance with the written certification requirement

has a direct and immediate relationship to safety in that the failure to conform with the requirement heightens the risk that the required evaluation would be overlooked and not properly conducted, thereby increasing the risk of serious injury or death in the operation of a powered industrial truck by an operator who was no longer qualified. *See* 63 Fed. Reg. at 66261 (stating that OSHA “believes that the final rule's certification requirements will provide the assurance necessary that the operator has been trained and evaluated, as required by the standard”).

Section 17(k) of the Act defines a “serious” violation to be one for which “a substantial probability that death or serious physical harm could result from a [violative] condition which exists, or from one or more [violative] practices, means, methods, operations, or processes which have been adopted or are in use.” 29 U.S.C. § 666(k); *Mosser Constr. Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010). It need not be shown that there is a substantial probability death or serious physical harm would be the consequence of a violation, but rather that death or serious physical harm could result from non-compliance. *Mosser Constr.*; *Wal-Mart Stores, Inc., v. Sec’y of Labor*, 406 F.3d 731, 735 (D.C. Cir. 2005).

As previously noted, the standard requires employers to maintain a certification record of the required triennial operator evaluation in order to “provide the assurance necessary that the operator has been ... evaluated” in the manner required by the standard. 63 Fed. Reg. at 66261. “The required evaluation does not have to be a formal, structured exercise,” and could be as simple as having a person with the requisite skills, knowledge, and experience observe the operator performing several typical operations to ensure that the powered industrial truck is being operated safely and asking the operator a few questions related to the safe operation of the vehicle.” *Id.* at 66260.

The violation here is “serious” for the same reason that it is not *de minimus*: the failure to comply with the written certification requirement heightened the risk that the required evaluations would be overlooked and not properly conducted, which increases the risk of serious injury or death from an unqualified employee operating a forklift. *Cf. Home Rubber Co., LP*, No. 17-0138, 2021 WL 3929735, at *8 (OSHRC, Aug. 26, 2021) (stating that the triennial evaluation required by § 1910.178(l)(4)(iii) “clearly contemplates an intentional and specifically directed evaluation of a forklift operator's performance that is in addition to the ongoing, casual observations that occur in most workplaces”). Moreover, the absence of any evidence that the Operator’s performance had been formally evaluated within the preceding three years suggests that no such evaluation had been conducted. In contending that the violation was *de minimus* and not serious, C&S could reasonably have been expected to present evidence that the required formal evaluation had been conducted but simply had not been documented in the manner that the cited standard requires. *Cf. Pharmasol Corp.*, No. 16-1172, 2018 WL 5013447, at *29 (OSHRC ALJ, Sept. 4, 2018) (finding violation of § 1910.178(l)(6) to be other-than-serious where the employer had presented evidence that the required training had been provided but had failed to document the training in the manner that § 1910.178(l)(6) requires).

Penalty

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (“The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission’s authority to raise or lower penalties within those limits”), *aff’d*, 73 F.3d 1466 (8th Cir. 1996).

“[T]he Commission has the authority to ensure that a penalty is not unduly burdensome or excessive by evaluating the penalty assessment criteria set forth in the Act and determining a

reasonable and appropriate penalty based on that evaluation.” *S.A. Healy Co.*, 17 BNA OSHC 1145, 1151 (No. 89-1508, 1995), *aff’d on other grounds*, 138 F.3d 686 (7th Cir. 1998). Section 17(j) of the Act requires the Commission, in assessing an appropriate penalty, to give “due consideration” to the “gravity of the violation,” the “size of the business of the employer,” the “good faith of the employer,” and the employer’s “history of previous violations.” 29 U.S.C. § 666(j). Of these factors, gravity is the principal factor “and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The maximum penalty for the serious violation proven here is \$13,653. 29 C.F.R. § 1903.15(d)(3) (2021). The Secretary has proposed that this maximum penalty be assessed. The Secretary considered the violation to have been of “high” gravity on the rationale that the Operator “hadn’t been evaluated by his employer for well over 20 years” and that the death of the Spotter was “associated” with this perceived failure to evaluate. (T. 134-35). This articulated rationale in support of the maximum permissible penalty conflates the proven violation (failure to maintain a written certification of the required triennial evaluation) with the requirement § 1910.178(l)(4)(iii) to perform the triennial evaluation. There is no positive evidence that the Operator’s performance either had or had not been evaluated within the preceding three years. Rather, the record is silent on that issue of fact. The Secretary’s proposed maximum penalty is thus grounded in the presumption that the Respondent had failed to comply with a standard that C&S was neither alleged nor proven to have violated.

The violative conduct proven was that C&S failed to maintain a written certification of the required triennial performance evaluation of the Operator. This records violation is low gravity, not high gravity as the CO assessed.

With respect to the statutory penalty factors relating to the size of the employer, good faith, and history of previous violations, the undersigned concurs in the Secretary's assessment that no adjustments to a gravity-based penalty for the serious violation are in order. (T. 131-32). A penalty of 40% of the maximum permissible penalty for the low-gravity serious violation is assessed to assure that the penalty achieves the necessary deterrent effect. *See Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001) ("OSHA penalties are meant to inflict pocket-book deterrence"). Accordingly, a penalty of \$5,461 is assessed for the low gravity serious violation of § 1910.178(l)(6).⁷

ORDER

The foregoing decision constitutes findings of fact and conclusions of law on all material issues of fact, law, or discretion in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, Item 1, as amended, alleging a violation of section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), is VACATED.
2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1910.178(l)(6), is AFFIRMED as a serious violation and a penalty of \$5,461 is ASSESSED.

s/ William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: May 28, 2024

⁷ The undersigned notes that if the violation had been determined to have been other-than-serious rather than serious, the penalty calculus would have yielded the same penalty amount in order to impart the necessary deterrent effect. The maximum penalty for an other-than-serious violation is the same as for a serious violation. 29 C.F.R. § 1903.15(d)(3) (2021).