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. ELLER-ITO STEVEDORING COMPANY, LLC, Respondent.	OSHRC Docket No. 11-3010

APPEARANCES: Angela F. Donaldson, Esquire, U.S. Department of Labor
Office of the Solicitor, Atlanta, Georgia
For the Complainant.

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Coral Gables, Florida
For the Respondent.

BEFORE: Chief Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, Eller-ITO Stevedoring Company, LLC ("ESC"), in Miami, Florida, after a fatal accident on May 4, 2011. The accident occurred during the discharge of cargo from a ship at the Port of Miami, when an employee was struck as a cargo container was in the process of being unloaded. After the inspection, OSHA issued to Respondent ESC a one-item serious citation alleging a violation of 29 C.F.R. § 1918.86(n). ESC contested the citation, and the hearing in this matter was held in Miami, Florida, on August 15 and 16, 2012. Both parties have filed post-hearing briefs.

The Parties' Stipulated Facts

Respondent ESC is a stevedoring company that is incorporated in the State of Florida. On May 4, 2011, ESC assigned a "gang" of nine employees to unload cargo containers from a ship named the Seaboard Spirit at the Port of Miami. The nine employees were all members of the International Longshoremen's Association ("ILA"), Local 1416. ESC regularly uses ILA workers for its stevedoring operations, and, at the time of the accident, ESC had access to a pool of about 620 ILA workers. The work on May 4, 2011, was a "roll-on/roll-off" ("Ro-Ro") operation, in which chassis-mounted cargo containers stored on the ship were to be taken off the ship. The first container to be removed was the one involved in the accident. The container was 20 feet long and weighed about 4800 pounds. The chassis it was mounted on weighed about 6000 pounds. At the beginning of the operation, the container was in storage on the ship's access ramp and was secured to the ramp with chains. The container was to be removed by means of a tractor or "mule" backing up to the chassis and container on the ramp in order to attach the mule to the chassis. The mule operator would then drive the mule with the chassis attached to it off the ramp and onto the dock. Before the chassis and container could be driven off the ramp, the chains securing the container had to be removed. Wheel chocks in front of the chassis tires also had to be removed before the chassis and container could be taken off the ramp. *See* Amended Joint Pre-Hearing Statement ("Statement"), pp. 7-9, Stip. Facts 1-7, 14-20.

The nine-person gang consisted of four "lashers," one "lasher/striker," a "header," two mule operators, and a towmotor operator. The "lashers" were responsible for unlashing the chains that secured the cargo containers to the vessel. [redacted], the "lasher/striker," was the team leader of the lashers. (Tr. 52, 170, 393). Willie Turner, the "header," was the group leader who supervised the gang. (Tr. 35, 166, 202). Another individual, Enrique Alemany, was ESC's superintendent in charge of the operation. (Tr. 35, 56). Before the work began on May 4, 2011, Mr. Turner held a gangway safety meeting with the gang members. At about 1:00 p.m., the work commenced, and the lashers unlashed all but one rear chain from the subject container. The mule was then attached to the chassis so that it could be driven off the access ramp. Just before the accident occurred, [redacted] gave the "all clear" signal to the mule operator to proceed

to move the chassis and container off the access ramp. The container, however, remained chained to the vessel, as the rear chain had not been removed. Minutes later, [redacted] was found lying in the walkway that ran along the side of the access ramp. *See* Statement, pp. 7-9, Stip. Facts 8-13, 17-23.

The OSHA Inspection

OSHA Compliance Officer ("CO") Michael Marquez conducted the inspection in this case. OSHA learned of the accident at 2:45 p.m. on May 4, 2011, and he was at the site by 3:30 p.m. He spoke to the police when he arrived, to find out what had happened.[1] The CO learned that ESC was a stevedoring company, that it obtained its employees from the ILA, and that the work at the site was a Ro-Ro operation that involved unloading cargo containers from the ship. The employees worked in teams to unlash the chains securing the containers, and [redacted] job was to coordinate their work. His job was also to give a verbal and hand signal to the mule driver once a container was unlashed and the chocks were removed so the container could be driven down the access ramp. The CO learned the accident occurred when the mule driver tried to drive the subject container off the ramp; although [redacted]
had removed the chocks, the container's rear chain was still attached, and the container slid over towards the walkway alongside the ramp and struck [redacted]. (Tr. 30-35, 47-48, 51-53, 67).

At the hearing, the CO discussed C-9, pages 1-15, photographs taken at the site. Page 1 shows the Seaboard Spirit, the port, and a yellow mule. Page 3 shows the access ramp where the subject container had been and the walkway on the right side of the ramp.[2] Page 4 is a close-up of the ramp and walkway; the CO measured the walkway to be 20 to 23 inches wide. Page 4 also shows a hardhat on the walkway; the hardhat's location is in the area where [redacted] was struck. Page 9 shows some of the containers chained to the ship. The CO interviewed most of the gang members who had been working at the site that day, and he took written statements from Mr. Alemany and Mr.

[1] The CO learned that the decedent, [redacted], was still at the site but had been removed from where the accident had occurred. He also learned that the subject mule and container had been moved off the ramp so that the emergency personnel could get to [redacted]. (Tr. 35-36, 123).

[2] The bottom of Page 3 also shows another ramp that is part of the ship; this ramp is hinged and folds down hydraulically when the ship is in port so that cargo can be loaded or unloaded. (Tr. 42-46).

Turner.[3] Mr. Alemany drew C-6, a diagram of the back of the ship where the unloading was done. C-6 shows where the mule and the container were on the access ramp and [redacted]'s location on the walkway near the rear of the container. C-6 also shows the folding ramp and the port. Mr. Alemany put his initials on C-6 to show where he had been standing on the port; he also indicated on C-6 where the gangway safety meeting had been held. (Tr. 36-42, 46-55, 59-61, 65, 88-90, 123, 127).

CO Marquez determined that ESC had violated the cited standard; the mule was moving the chassis and container off the ramp, and [redacted] was in an area where he could have been and was in fact struck. ESC's management was aware of the cited hazard in light of C-1, ESC's lasher training course dated April 21, 2011, and another fatality that had occurred about five weeks before [redacted]'s accident. The CO testified that no one had seen the accident and that no one knew [redacted] was standing next to the chassis and container when he gave the "all clear" signal to the mule operator. He believed that management could have known of [redacted]'s location, however, as it was in plain view. The CO also testified that while there had been a safety meeting before the work began, there had been no monitoring of the work; further, while Mr. Alemany said he was monitoring the cargo leaving the ship, he could not see [redacted] from where he was standing on the port. (Tr. 67-79, 117-18, 131-35, 150).

Jurisdiction

The parties have agreed that Respondent is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act. They have also agreed that jurisdiction of this matter is conferred upon the Commission by §n 10(c) of the Act. *See* Statement, p. 10. I find, therefore, that Respondent is an employer with employees under the Act and that the Commission has jurisdiction of the parties and subject matter of this proceeding.

[3] Mr. Alemany's written statements to OSHA are C-7 and C-8; C-5 is his written report of the accident to ESC. While I have considered all of his statements, and have referenced certain parts of them in this decision, I have noted two assertions that appear contrary to the CO's testimony. In C-5, Mr. Alemany indicates that the cause of the accident was an apparent miscommunication between [redacted] and Mr. Palmer when [redacted] was trying to remove the chocks. In C-8, on page 5, Mr. Alemany indicates that the one-man striker setup was the cause of the accident, due to the striker's various duties. The CO, however, testified that based on what he learned, the accident was caused by the container sliding over towards the walkway and striking [redacted]. As Mr. Alemany did not testify, and no other witness offered testimony similar to the just-noted assertions, they are not accepted as fact.

The Secretary's Burden of Proof

To demonstrate that an employer violated an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) its terms were not met; (3) employees had access to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *See, e.g., S&G Packaging Co.*, 19 BNA OSHC 1503, 1505 (No. 98-1107, 2001) (citation omitted).

The Cited Standard

The cited standard, 29 C.F.R. § 1918.86(n), provides:

> *Vehicle stowage positioning*. Drivers shall not drive vehicles, either forward or backward, while any personnel are in positions where they could be struck.

The citation alleges a violation of the standard as follows:

> On or about 05/04/11, at Berth 164, Port of Miami FL 33167, an employee was exposed to being struck-by a truck trailer and container that was moved in the forward direction from their stowed location in a ship.

Whether the Cited Standard Applies

ESC contends that the cited standard does not apply to the circumstances of this case. It notes the title of the standard, that is, "vehicle stowage positioning," and the fact that the operation on May 4, 2011 was the discharge, not stowage, of the cargo container. R. Brief, pp. 13-14. The Secretary, on the other hand, contends the standard does apply, noting certain language in the standard's preamble. S. Brief, pp. 20-21. For the following reasons, I find that the cited standard is applicable.

First, the parties have stipulated that the work on May 4, 2011, was a Ro-Ro operation. *See* Statement, p. 7, Stip. Fact 6. Second, the title of 29 C.F.R. §1918.86, which contains the cited standard, is "Roll-on roll-off (Ro-Ro) operations." The title then refers to "§1918.2, Ro-Ro operations." Section 1918.2 contains the definitions for OSHA's Longshoring Standard and defines "Ro-Ro operations" as:

> [T]hose cargo handling and related operations, such as lashing, that occur on Ro-Ro vessels, which are vessels whose cargo is driven on or off the vessel by way of ramps and moved within the vessel by way of ramps and/or elevators.

Third, as the Secretary notes, the preamble to the Longshoring Standard states:

> Final § 1918.86, titled "Roll-on roll-off (Ro-Ro) operations," … addresses operations aboard Ro-Ro-vessels….In such operations, lashing personnel are exposed to being struck by vehicular traffic. In addition, other employees involved with loading or unloading wheeled cargo, both drivers and pedestrians, are exposed to traffic hazards. This section addresses the hazards attributable to this process, in which employees and vehicles are in closely confined and marginally illuminated space.

62 Fed. Reg. 40147, 40177 (July 25, 1997).

Neither party has mentioned the preamble's statement in regard to the specifically cited standard. That statement is as follows:

> Proposed paragraph (n) provided signaling requirements when vehicles were being maneuvered into stowage positions when other personnel are in the adjacent vicinity. OSHA received several comments on this issue suggesting that a performance-based requirement, one stating the goals to be achieved, would be more appropriate than the specifications contained in the proposed provision….Since the objective of this provision is to prevent vehicles being driven into stowage positions from striking employees who are lashing these vehicles into place, and since the proposed requirement allowed employees only one way to achieve this goal, i.e. under the direction of a signaler, OSHA has developed a more performance oriented requirement for the final rule to provide both protection and enhanced flexibility.

Id. at 40179. In view of the above, the cited standard could be interpreted as applying only to "vehicles being driven into stowage positions" when other personnel are in the adjacent vicinity. It is clear, however, that vehicles being driven during both stowage and discharge operations present a struck-by hazard to other employees in the adjacent vicinity, including those who perform lashing and unlashing work. This conclusion is supported by the language on page 40177 of the preamble, set out above. In particular, that language states that "lashing personnel are exposed to being struck by vehicular traffic" and that "other employees involved with loading or unloading wheeled cargo, both drivers and pedestrians, are exposed to traffic hazards."

The title of the cited standard is "vehicle stowage positioning." The Commission has held, however, that "reliance on a heading to determine the scope and application of a standard is inconsistent with the usual rule of statutory construction." *Continental Oil Co.*, 7 BNA OSHC 1432, 1433 (No. 13750, 1979) (citations omitted). The Commission has also held that "headings and titles … cannot be used to limit or alter the plain

meaning of the text contained in statutes and regulations." *Austin Bldg. Co.*, 8 BNA OSHC 2150, 2153 (No. 77-3878, 1980) (citations omitted). The terms of the standard prohibit driving vehicles forward or backward while any personnel are in positions where they could be struck. These terms on their face apply to the condition at the site that resulted in the accident. I have considered the language on page 40179 of the preamble. Regardless, the standard's terms, together with the language on page 40177 of the preamble, persuade me that section 1918.86(n) applies in this case. In finding that the standard applies, I am adhering to "the well-settled principle that the Act is to be construed liberally to effectuate its purpose of 'assur[ing] so far as possible … safe … working conditions.'" *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1382-83 (D.C. Cir. 1985) (citation omitted, quotations as in original). ESC's contention is rejected.

Whether the Terms of the Standard Were Not Met

Respondent ESC contends, but makes no actual argument, that the Secretary has not established this element of her burden of proof. R. Brief, p. 29. The Secretary contends she has shown the terms of the standard were not met. She notes [redacted] was positioned in the narrow walkway immediately adjacent to where the container and chassis were located on the ramp. She also notes that the standard prohibits the forward movement of vehicles when personnel are in a position where they could be struck; [redacted] was in such a position and was in fact struck when the mule driver attempted to drive forward with the chassis and container attached to the mule. S. Brief, pp. 21-22.

I agree with the Secretary that the terms of the standard were not met. First, the parties have stipulated the mule driver was attempting to drive the chassis and container off the access ramp when the accident occurred. Second, they have also stipulated that after the accident, [redacted] was found lying in the walkway that ran along the side of the access ramp. *See* Statement, p. 9, Stip. Facts 21 and 23. Third, the CO's testimony and the photographs in the record show that [redacted] was in the walkway when he was struck. C-9, pages 8-9 and ll-14, depict the walkway where the accident took place. The CO testified that he believed [redacted] had been standing in the area behind the hard hat shown in C-9, page 14; this was based on a written statement indicating that when he was

struck, [redacted] fell to his knees and then face forward such that his hard hat would have been in front of where he had been standing.[4] (Tr. 127).

In view of the evidence of record, I find that the Secretary has demonstrated the second element of her burden of proof.

Whether Employees Had Access to the Cited Condition

ESC contends, again without any supporting argument, that the Secretary has not shown this element of her burden of proof. R. Brief, p. 29. The Secretary contends she has met her burden in this regard. S. Brief, p. 22. Based on the foregoing discussion, I find that the Secretary has established employee exposure to the cited condition.

Whether the Employer Knew or Could Have Known of the Cited Condition

As the Secretary states, the "employer knowledge" element is the primary issue in this case. To meet her burden in this regard, the Secretary must show that ESC either knew, or with the exercise of reasonable diligence could have known, of the presence of the violative condition. *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-0692, 1992) (citations omitted). The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer. *Id*. S. Brief, p. 22.

Reasonable diligence requires the employer to formulate and implement adequate work rules and training programs and to adequately supervise employees. It also requires the employer to inspect the work area, anticipate hazards and take measures to prevent violations or accidents. *Id*. *See also Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997), *aff'd*, 152 F.3d 918 (2d Cir. 1998). Constructive knowledge is imputable "unless [the employer] establishes that it took all necessary precautions to prevent the violations." *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982). S. Brief, p. 23.

Reasonable diligence also "implies effort, attention, and action; not mere reliance upon another to make violations known." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2124 (No. 96-0606, 2000) (citing to *Carlisle Equip. Co.*, 24 F.3d 790, 794 (6th Cir. 1994)), *aff'd*, 255 F.3d 122 (4th Cir. 2001). *See also Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984) (foreseeability of violation is established by showing inadequacies in safety precautions, training of employees, or supervision). And, as the

[4] *See* C-5, C-6, C-7 (Mr. Alemany's statements and his diagram of back of ship and [redacted]'s location).

Commission has noted, employers cannot count on employees' common sense, experience, and training by former employers or a union to preclude the need for specific instructions. *Par Elec. Contractors, Inc.*, 20 BNA OSHC 1624, 1628 (No. 99-1520, 2004) (citations omitted). S. Brief, p. 23.

Based on what the CO learned, no one saw the accident and no one knew that [redacted] was standing next to the chassis and container when he gave the "all clear" signal to the mule operator. (Tr. 70, 117-18). ESC thus did not have actual knowledge of the violative condition in this case. The issue to resolve, therefore, is whether ESC could have known of the violative condition with the exercise of reasonable diligence. The relevant evidence in this regard is summarized below.

How ESC Obtains its Employees from the ILA

When ESC requires employees for a job, it advises the ILA's union hall how many workers it needs. The union bids out the jobs to its members, who generally get the jobs based on their seniority earned by years of service. ESC can request certain positions, such as equipment operators, for its jobs but it cannot request any particular individuals for its jobs. May 4, 2011, was a holiday and the ILA workers who obtained the jobs that day received time and a half for eight hours of work, regardless of the amount of time the job took.[5] (Tr. 32-33, 195-97, 249-52).

Testimony of CO Marquez

The CO testified that while ESC had a good Ro-Ro operation on paper, it was not relayed to the ILA workers. C-1, ESC's lasher training course, was given to him by Alfonso Johnson, ESC's risk manager. The CO learned from Mr. Johnson that no ILA laborers had received or been trained in C-1.[6] He also learned that as the striker on May 4, 2011, [redacted] was responsible for removing the wheel chocks, ensuring the chains were off, and giving a verbal and hand signal to the mule driver; [redacted] removed the wheel chocks but did not ensure the container's rear chain was unlashed, causing him to be struck. The CO said that instead of being where he was to give the "all clear," [redacted] could have stood in a small "alcove," shown in C-9, page 14; he also could

[5] The employees who worked for ESC on May 4, 2011, all held "B" cards, except for [redacted] and Mr. Turner. [redacted] held an "A" card, meaning he had at least 15 years of experience, and Mr. Turner held an "AAA" card, meaning he had at least 25 years of experience. (Tr. 164, 195-97, 205, 251; R-10).

[6] Mr. Johnson indicated that ESC had had difficulties with the ILA and the collective bargaining agreement ("CBA") in regard to getting the ILA laborers trained. (Tr. 76).

have been on the walkway, as long as he was to the rear of the subject container and to the side of the red container in C-9, page 4. (Tr. 67, 74-82, 103-04, 118-21, 138-39, 149).

The CO further testified that except for the safety meeting, the supervisors did not monitor the employees' work before the accident. He said that Mr. Alemany's location on the port, as indicated in C-6 and C-9, page 1, did not allow him to see up the ramp.[7] The CO believed Mr. Alemany could have been in a different place on the port, such as where the person circled in C-9, page 14, is standing, to monitor the cargo; from there, Mr. Alemany could have seen [redacted]. The CO also believed Mr. Alemany could have watched the unloading work from the area directly above the ramp; this area, which has guardrails around it, is shown in C-9, page 3. CO Marquez learned of no prior incidents involving employees of ESC that were like [redacted]'s; however, the fatality that occurred five weeks before was similar, *i.e.*, the wheels of a chassis on a ramp were not chocked, there was an issue with the chassis brakes, and the chassis rolled forward and struck an employee. (Tr. 77-78, 82-88, 129-42, 149-59).

Testimony of Willie Turner

Willie Turner, the header on May 4, 2011, testified he has been a longshoreman for over 25 years; for the last 12 years, he has worked as a header. He generally works with ESC but also works with other companies. He learned his job duties through on-the-job training and also has had lasher and header classes through the ILA. Other training he has had includes forklift operation and HAZMAT training, which was provided through the Southeast Florida Employers Port Association ("SEFEPA"). In addition, he attends ESC safety meetings, which are held about once a month. (Tr. 164-66, 187).

Mr. Turner has worked the Seaboard Spirit as a header in Ro-Ro operations for about three days a week for years. As header, he is responsible for his gang and for discharging and loading the ship. He also holds an approximately five-minute gangway safety meeting before the work begins. At the meeting on May 4, 2011, he covered the men's assignments, safety and equipment to use. He assigned [redacted] to be the striker that day, told him his duties, and told him, as he tells all the men, to "look out for the rest of the men, look out for yourself." After the mule driver connected the mule to the chassis, [redacted] was to remove the chocks from the chassis wheels and undo the chains

[7] Mr. Alemany's location on the port is indicated by the initials "EA" on the far right side of C-9, page 1.

in the back of the chassis; after making sure the chassis was ready to be moved and he and any others were "clear," he was to signal the driver to take the chassis down the ramp. Mr. Turner stated there is "no set thing" as to where the striker is to stand when giving the signal; he can be to the front and side or back and side of the chassis, as long as he is "safe." Mr. Turner had known [redacted] for years and had worked with him as striker and mule driver; he had had no problems with him and considered him a good worker and very experienced longshoreman. He said [redacted] was familiar with the Seaboard Spirit, as he was a "seniority man." (Tr. 166-74, 182, 191-94, 206-07).

Mr. Turner testified that when the work began, he was located on the port near the end of the rope that secured the ship to the port.[8] He said he had a good view from there, as he could see the workers and the containers as they were discharged from the ship. He could also see if the mule driver was going too fast, such that he (Mr. Turner) would have to caution the driver to slow down; he noted that driving too fast and turning too sharply could cause the chassis and container to turn over. Mr. Turner could not see [redacted] from his location, and he did not see the accident. He also did not board the ship to inspect it before the work began.[9] He stated he could see everything he needed to see from his location on the port and that he had to be there to view the work activities as the containers came off the ship. He further stated that during a shift a worker might come to him with a problem, such as a chain being too tight, in which case he (Mr. Turner) would inform the mule driver and the striker. Mr. Turner agreed that part of his job as header was to prohibit workers from standing or sitting in dangerous places, such as under suspended or moving loads, or between fixed objects and moving loads. When asked if he could recall any instances when he had monitored workers in this regard, he did not answer the question. Further, when asked if he admonished workers or threatened them with discipline if he saw something unsafe, he said he did not; rather, he would stop them and say, "look, this is how it's got to be done." (Tr. 175-83, 194-95, 198-204).

Mr. Turner's opinion was that [redacted] had been standing between the wall of the ship and the moving load. He knew of no other strikers who had stood next to the chassis when signaling the mule driver; he said strikers typically stand "to the side to the

[8] Mr. Turner's testimony indicates he was positioned on the opposite side of the port from Mr. Alemany. (Tr. 177-80). *See also* C-9, page 1.
[9] Mr. Turner indicated he sometimes boarded a ship to do an inspection before work began. (Tr. 184, 199).

back" when signaling the driver. When asked if he believed that [redacted] knew not to stand where he was when the accident occurred, he stated that he had "been researching that in [his] mind for a long time" and that he "[could not] answer that question." He did believe that [redacted] had been trained.[10] When asked what training he had personally observed as to where the striker should stand or work to be safe around moving vehicles, Mr. Turner said it was to "make sure … you're clear of all things … [a]nd … make sure the equipment is ready and look out for the men." When asked what he told the men at his gangway safety meetings, he said he instructed them to "not stand behind [the] equipment" and to "[s]tay out of the way so it can move." He also told them to "be aware." (Tr. 171-75, 184-86, 191, 203-05).

Testimony of Torrence Palmer

Torrence Palmer, the mule operator on May 4, 2011, testified he worked through the ILA and had worked the Seaboard Spirit before as a mule operator. He said he had been certified as an equipment operator for some time and that R-7, entitled "Powered Industrial Truck General Safety Awareness," looked like a manual he received when he was trained through SEFEPA years ago. That training instructed him to drive defensively and to be alert for persons on foot and other traffic when loading and unloading ships; it also instructed him to look ahead, behind and around before every move and to keep personnel clear from both sides where he was working. To maintain his certification, Mr. Palmer takes a written test and has a driving evaluation every two years. (Tr. 210-18).

Mr. Palmer further testified that on May 4, 2011, [redacted] gave him the "all clear" signal twice. He stated he looked in his mirror and then stuck his head out the window to see if [redacted] was clear before he tried to move the mule forward; to him, it had looked like [redacted] was far enough back. Mr. Palmer said he had worked with [redacted] before, when he was an operator and [redacted] was the striker, and that he had never had any problems working or communicating with him. (Tr. 215-16).

Testimony of Alfonso Johnson

Alfonso Johnson, ESC's risk manager and safety director since April 2008, testified that he is responsible for enforcing ESC's safety rules and that part of his job is

[10] Mr. Turner did not recall seeing C-1 before, but he believed he had had training classes that covered the material in C-1. He did not know if [redacted] had ever seen the procedures set out in C-1; however, he said he had gone over all of the procedures in his safety meetings ever since he was a header. (Tr. 187-90).

to observe ESC employees as they work in a ship. Further, he coordinates with SEFEPA, which trains ILA workers like Mr. Palmer to operate equipment; [redacted] was also trained in equipment operation, and he was a certified mule operator, top loader (forklift) operator and gantry crane operator. According to Mr. Johnson, [redacted] had a good reputation and was a hard worker; he had worked for ESC over 300 times, as flagman, equipment operator and striker, before May 4, 2011. (Tr. 241-43, 249-58).

Mr. Johnson further testified that while OSHA requires certification of equipment operators, no certification is required for lashing employees; thus, ESC provides training to the lashing employees who work under its supervision.[11] Mr. Johnson wrote a lashing training course ("manual") in 2009, which was revised in April 2011; R-9 and C-1 are the two manuals, respectively. The manual was provided to the ILA, and its contents were covered in the safety meetings ESC holds for ILA employees every other month.[12] These meetings are open to all ILA employees, but only ESC superintendents and ILA headers and "second men" are required to attend.[13] The gangway safety talks the header holds before work begins also address safety, and the ESC superintendents perform "walk-about" ship inspections to identify hazards. Mr. Johnson identified R-22 as a representative sample of the safety talk and inspection forms superintendents must fill out; the safety talks and inspections must be done for every operation, but the forms need only be completed four times a month. (Tr. 249-50, 258-63, 267-82, 335, 359-367).

> Mr. Johnson read into the record the following provision from C-1, page 17:
>
> Release the tractor brakes and proceed with caution, ensuring that the chassis brakes are fully released before leaving the parked location and that all pedestrians and workers are clear from the chassis/trailer.

He stated that the provision was consistent with the training and instructions given to persons who are certified to operate powered industrial equipment. He further stated that C-1 also covered other issues specifically related to lashing and unlashing on Ro-Ro vessels. (Tr. 256-58, 264-67).

[11] Mr. Johnson said lashers are often the ILA's newer, lower-level workers with less training. (Tr. 261).
[12] In the alternate months, ESC holds safety meetings for its own employees. (Tr. 259).
[13] The "second man" is a working supervisor who assists the header. The second man on the Seaboard Spirit on May 4, 2011, was Deluxe Wise; he was operating a towmotor (forklift) on the ship, but he was also responsible for watching the work and safety of the other ILA employees. (Tr. 310, 343, 352-54).

Mr. Johnson discussed the Accident Review Board ("Board"), which reviews accidents involving ILA members brought before it by the stevedoring companies operating out of the Port of Miami; the accidents primarily involve property damage.[14] The Board's review of an accident can result in the ILA employee being issued a safety letter, a warning letter, or suspension from work. Mr. Johnson identified R-13 as copies of such discipline of ILA employees.[15] (Tr. 288-92, 300-06, 337-40).

Mr. Johnson investigated the circumstances of [redacted]'s accident. He went to the accident scene, interviewed employees, and viewed the ship's videos. Based on his investigation, no one knew [redacted] was standing next to the chassis container when he gave the "all clear" signal to Mr. Palmer, and it was not plainly visible that the rear chain of the chassis had not been cut; he noted Mr. Palmer's testimony that he looked back and believed that [redacted] was clear of the container. Mr. Johnson testified that in view of his years of experience, training and certification in equipment operation, and the gangway safety meeting that day, [redacted] should have known not to stand next to the load. Mr. Johnson stated that [redacted] failed to do his job by not removing the rear chain and by not being clear of the chassis. He also stated that the best location for Mr. Turner and Mr. Alemany to observe the work was on the dock. He disagreed with the CO that Mr. Alemany could have stood on the bridge. (Tr. 283-88, 306-15).

Discussion

Upon considering the foregoing, and other evidence in the record, I find that ESC could have known of the cited condition with the exercise of reasonable diligence. Mr. Johnson believed that [redacted] should have known not to stand next to the chassis when he gave the "all clear" signal to the mule operator. The totality of the evidence, however, does not support his belief.

Whether Work Rules were Adequately Communicated and Training Programs were Adequately Implemented

Page 16 of C-1, the lashing manual Mr. Johnson developed, sets out the basic procedure for unlashing during Ro-Ro operations when a container unit is on a ramp:

[14] The Board's members consist of management and labor; the management members are from the five to six companies who operate out of the Port of Miami. Mr. Johnson is ESC's representative on the Board; he said about 90 percent of the accidents reviewed involve property damage. (Tr. 223-33, 305, 340).

[15] R-13 also shows discipline of some superintendents imposed by ESC; further, Mr. Johnson discussed instances of suspension for violations of SEFEPA's drug and alcohol policy. (Tr. 290-91, 316-19).

a. Unlash chains from front first
b. Attach the Mule to chassis/trailer
c. Unlash sides and rear of unit
d. Remove Chocks from wheels

The manual then goes on to describe the procedure in more detail. On page 17, C-1 states that once the parking brakes are applied, the remaining lashing and wheel chocks must be removed. C-1 then states, also on page 17, as follows:

> • Never position yourself under the chassis or trailer.
> • Never position yourself near or in the vicinity of a moving chassis or trailer.
> • Release the tractor brakes and proceed with caution, ensuring that the chassis brakes are fully released before leaving the parked location, and that all pedestrians and workers are clear from the chassis/trailer.

(C-1, emphasis in original). Despite these instructions, the CO testified that Mr. Johnson told him the ILA laborers had not received or been trained in C-1. (Tr. 74-77). Mr. Johnson conceded this was so. He said that before [redacted]'s accident, the procedures were covered in ESC's safety meetings but only ILA supervisors were required to attend the meetings; it was only after the accident that he was able to arrange with the ILA for all of the ILA laborers to be trained in C-1. (Tr. 259-62, 335, 367-70).

Mr. Johnson testified, as indicated above, that [redacted] should have known not to stand next to the load in light of his training in equipment operation. As the Secretary notes, the evidence ESC presented as to [redacted]'s training was the following:

- 6/13/94 written test for mule driver training by SEFEPA (R-2; Tr. 329);
- 6/13/94 driving test for mule driving by SEFEPA (R-3);
- 10/13/94 classroom exam for top loader and heavy lift truck (R-4; Tr. 329);
- 7/30/09 three-year evaluation for mule driving (R-7; Tr. 330);
- 10/27/09 hazardous materials exam by SEFEPA (R-8; Tr. 330).

Question 16 of R-2, a true/false test, states: "When a mule driver has a striker he should stand between the trailer and the tractor/mule." [redacted] correctly marked Question 16 as "false." As the Secretary points out, none of the other documents set out above specifically addresses the safe positioning of lashers or strikers during Ro-Ro

operations.[16] Thus, ESC's training records show that nearly 17 years before the date of the accident, [redacted] correctly answered a question pertaining to the positioning of a striker during Ro-Ro operations. Mr. Johnson admitted that he was not aware of any testing of [redacted]'s understanding of mule driver responsibilities since 1994. He also admitted that he was not aware of [redacted] being tested on his understanding of safe lashing or unlashing procedures at any time. (Tr. 331-32). S. Brief, pp. 11-12.

Mr. Johnson also testified that [redacted] should have known not to stand next to the load due to the gangway safety meeting held before each operation. Mr. Turner, however, testified there was "no set thing" as to where the striker is to stand when giving the "all clear" signal; he can be to the front and side or back and side of the chassis, as long as he is "safe." (Tr. 171, 174). Further, while Mr. Turner said he had gone over all of the procedures in C-1 in his meetings ever since he had been a header, his description of what he stated in those meetings was vague and unclear. (Tr. 187-90). As set out *supra*, Mr. Turner told the men to "look out for the rest of the men, look out for yourself," to "be aware," and "to make sure … you're clear of all things." (Tr. 171, 191, 205). He also said to "not stand behind [the] equipment" and to "[s]tay out of the way so it can move." (Tr. 184). In my view, these instructions are simply not specific enough to advise a lasher or striker where to stand to be safe. Even the instruction in C-1(to "<u>never</u> position yourself near or in the vicinity of a moving chassis or trailer") is more specific than Mr. Turner's stated instructions. Significantly, Mr. Turner was asked two different times if he believed [redacted] knew not to stand where he was at the time of the accident. Both times, Mr. Turner said he could not answer the question. (Tr. 171-72, 186). The second time, Mr. Turner said he had "been researching that in [his] mind for a long time" and that he "[could not] answer that question." (Tr. 186). This response, in my opinion, is key, and supports a conclusion that [redacted] did not in fact know he should not have been standing where he was at the time of the accident.[17]

[16] Question 25 of R-4, a true/false exam, states: "You must always keep a good lookout for workers on foot or drivers of other machines." [redacted] correctly marked Question 25 as "true." This question, while relevant for equipment drivers, is not specific to the training at issue here. Also, while R-21, a DVD about hazardous materials [redacted] saw in the 1990's, was viewed at the hearing, its only noteworthy part as to this case was to show that a container can fall from a chassis due to actions of the driver. (Tr. 399-401).

[17] C-6, Mr. Alemany's diagram discussed above, shows [redacted]'s location as being at the rear and side of the container. Based on Mr. Turner's testimony that a striker could be to the "back and side" of the chassis, [redacted] could have believed that his location on May 4, 2011 was safe.

Mr. Johnson additionally testified, as noted above, that [redacted] should have known not to stand where he was in view of his many years of experience. He conceded, however, that even experienced longshoremen sometimes need direction, as much as a newer longshoreman. (Tr. 380). For this reason, and all of those stated *supra*, I conclude that, at the time [redacted]'s accident, ESC's work rules were not adequately communicated and that its training programs were not adequately implemented.

Whether Employees were Adequately Supervised and Disciplined

The record shows the ILA laborers, during Ro-Ro operations, work throughout the ship and around moving chassis-held containers; at times, they encounter problems like chains with tension on them or a chassis with faulty brakes. (Tr. 342, 349-50). Mr. Turner and Mr. Johnson agreed that part of the header's job is to prohibit workers from being in dangerous places, such as under suspended or moving loads, or between fixed objects and moving loads; however, when asked, twice, if he could recall any instances of monitoring workers in this regard, Mr. Turner did not answer the question. (Tr. 202-04, 255-56; C-2, p. 7). Mr. Turner testified he inspected the Seaboard Spirit before work began on May 4, 2011, but did not board the ship; rather, he viewed it from his location on the dock.[18] He also testified he could see everything he needed to see from there, and he indicated he needed to be there to watch the unloading of the container on the ramp. (Tr. 199-200). According to Mr. Johnson, Mr. Turner met his header responsibilities without boarding the ship, as he provided "clear and understandable" safety instructions during the gangway safety meetings. (Tr. 355-58). Also according to Mr. Johnson, Deluxe Wise, the "second man" of the gang on May 4, 2011, was assisting Mr. Turner in his supervisory duties; Mr. Wise was operating a towmotor, or forklift, on board the ship that day, but he was also responsible for watching the work and safety of the other ILA laborers. (Tr. 310, 343, 352-54). Mr. Johnson conceded that Mr. Wise's ability to watch the work activities was limited to what he could see from his forklift. (Tr. 353).

The record further shows that Mr. Alemany, the ESC superintendent responsible for the operation on May 4, 2011, was also located on the dock but on the opposite side from Mr. Turner. (Tr. 56-61, 177-80; C-6; C-9, pp. 1, 5). The CO testified that Mr. Alemany's location, as indicated in C-6 and C-9, page 1, did not allow him to see up the

[18] Mr. Turner indicated he sometimes boarded a ship to inspect it before work began. (Tr. 184, 199).

ramp. The CO believed Mr. Alemany could have been in a different place on the port, such as where the person circled in C-9, page 14, is standing, to monitor the cargo; from there, Mr. Alemany could have seen [redacted]. The CO also believed Mr. Alemany could have watched the unloading from the area directly above the ramp; this area, which has guardrails around it, is shown in C-9, page 3. (Tr. 56-61, 86-87, 135-36, 139-41, 150-57). Mr. Johnson believed the positions of Mr. Turner and Mr. Alemany were appropriate, even though neither could see into the ship's interior. He indicated that there were other safe places they could have been, and he did not believe both had to be on the dock at the same time to watch the cargo leaving the ship. (Tr. 343-48, 352). He disagreed with the CO's opinion that Mr. Alemany could have been in the area directly above the ramp, which he said was the bridge. Mr. Johnson stated that longshoring employees are not allowed there unless they have the invitation of the captain; however, he did not know what the captain might have allowed, if asked, and he was unaware of ESC supervisors ever having asked for permission to access certain parts of the ship in order to have different vantage points of the work activities. (Tr. 347-49).

Mr. Johnson indicated ESC required its superintendents to perform walk-about inspections before, during and after its operations on the ships to identify hazards; these inspections and the gangway safety talks were required for every operation, but forms documenting these actions only had to be completed four times a month by each superintendent. Mr. Johnson said he could verify the inspections were being done when the forms were not turned in as he had a radio on his desk that permitted him to hear discussions of work activities by the superintendents, headers and equipment operators. He admitted, however, that he could not confirm if what he heard meant the superintendent had discovered the problem or a laborer had brought it to the attention of the superintendent. He also admitted that 90 percent of the time, it was the laborers who brought issues to the superintendents' attention. (Tr. 278-79, 359-367).

Based on the foregoing, I find that ESC did not adequately supervise employees. Although Mr. Turner sometimes boarded ships before an operation, he did not do so on May 4, 2011. And, while part of the header's job is to prevent employees from being in dangerous places, Mr. Turner did not answer the question when he was asked if he had monitored employees in this regard. Mr. Johnson noted that the "second man" is also

responsible for ensuring the work is done safely, but he agreed that Mr. Wise, the second man on May 4, 2011, was limited to what he could see from the forklift. Further, while ESC required its superintendents to inspect ships before, during and after operations to detect hazards, the record shows this was not uniformly done. In a written statement, Mr. Alemany indicated he did not board the ship on May 4, 2011, due to his many other duties; he also indicated that pre-work inspections of the Seaboard Spirit were usually not done as it was always in compliance. (C-8, pp. 1, 6). Finally, in view of the record, I find that Mr. Turner and Mr. Alemany did not both need to be monitoring the work from the port at the same time. One of them could have been watching the work on board, for example; further, Mr. Alemany could have been positioned as the CO explained.

As to discipline, I conclude discipline of employees was inadequate. Mr. Turner testified he did not admonish or threaten workers with discipline; instead, he would stop them and say, "look, this is the way it's got to be done." (Tr. 176, 195). He also claimed he had never seen workers under his supervision performing unsafe acts. (Tr. 175-76). As to the Board's disciplinary function, the record showed that the incidents the Board reviewed primarily involved accidents with property damage. The record revealed no cases of the Board reviewing possible discipline where an employee had been found doing something unsafe but there had been no accident that resulted in property damage or personal injury. (Tr. 223-24, 229-31, 339). Mr. Johnson agreed the accidents the Board reviewed did not indicate one way or the other whether supervisors were monitoring workers to discover unsafe acts. He also agreed that for every accident the employer was aware of there were about 300 "near misses." (Tr. 340-42). Finally, Mr. Johnson in essence agreed that [redacted] could have worked in the same unsafe manner previously and it was simply not detected. (Tr. 376).

The Previous Accident

As the Secretary notes, ESC had reason to be particularly diligent in regard to the training and practices of experienced longshoremen who were discharging cargo from ramps during Ro-Ro operations, in view of another fatal accident that occurred about five weeks before [redacted]'s accident. The prior accident involved a laborer with 15 years of experience. He was standing in front of a chassis, rather than to the side, to perform unlashing; the wheels of the chassis were not chocked, as they should have been, and the

mule was not yet attached to the chassis, as it should have been; the brakes of the chassis failed, and the chassis moved forward and crushed the laborer. (Tr. 380-84, 398). Mr. Johnson testified the accident was due to the lashing team's failure to follow proper procedures. (Tr. 382). Regardless, as the Secretary indicates, the prior accident took place despite the laborer's 15 years of experience and C-1, which prohibited the actions that caused in the accident. *See* C-1, pp. 16-17. As she also indicates, the prior accident put ESC on notice as to the adequacy of the training of the ILA laborers, even experienced ones, who performed unlashing work during Ro-Ro operations.[19] S. Brief, pp. 26-27. I agree with the Secretary in this regard.[20] I find that the prior accident supports a conclusion that ESC had constructive knowledge of the violation. The Secretary has, therefore, met her burden of establishing knowledge in this matter.

Whether the Accident was due to Unpreventable Employee Misconduct

ESC contends that the accident in this case was due to unpreventable employee misconduct. To prove this affirmative defense, the employer must show that it had: (1) established work rules designed to prevent the violation; (2) adequately communicated the rules to its employees; (3) taken steps to discover violations of the rules; and (4) effectively enforced the rules when violations were discovered. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1499 (No. 76-1538, 1979). For the reasons set out *supra*, I find that ESC has not met its burden of proving its affirmative defense. Its defense is rejected, and the alleged violation is affirmed as a serious violation.

Penalty Determination

The Secretary has proposed a penalty of $7,000.00 for the violation in this case. The Commission, in assessing penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *See* § 17(j) of the Act, 29 U.S.C. § 666(j). The CO recommended the proposed penalty of $7,000.00 without any adjustments for size, history or good faith, due to the large size of the employer, its recent violation history, and the high probability that the cited condition could have and did

[19] The record shows that Mr. Turner, in the safety meeting on May 4, 2011, told the gang to not unlash the container on the ramp until the mule was connected to the chassis. (Tr. 62, 66-67, 192-93; C-5; C-7, p. 1).
[20] I also agree with the Secretary that despite the potential challenges posed by the CBA and the union hiring process, ESC had the opportunity to provide its specific procedures to the ILA workers during the gangway safety meetings that took place before every operation. S. Brief, p. 27-28.

result in an accident causing death or serious injury. (Tr. 91-94). I find the proposed penalty to be appropriate. That penalty is assessed.

Findings of Fact and Conclusions of Law

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

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1918.86(n), is AFFIRMED, and a penalty of $7,000.00 is assessed.

/s/
Covette Rooney
Chief Judge

Date: January 29, 2013
Washington, D.C.