UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,[1] Complainant, v. MASIS STAFFING SOLUTIONS, LLC, Respondent.	Docket No. **23-1655**

DECISION AND ORDER

Appearances:

Vanessa L. Kinney, Christopher M. Smith, Attorneys, Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for Complainant

Michael Rubin, Attorney, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Phoenix, AZ, for Respondent

JUDGE: John B. Gatto, United States Administrative Law Judge

I. INTRODUCTION

A worker of Respondent Masis Staffing Solutions, LLC, ("Masis") was seriously injured when a 2,000-pound bundle of trusses fell on him in Gainesville, Florida. The United States Department of Labor, through the Occupational Safety and Health Administration ("OSHA"), investigated the accident and Masis was issued[2] a one-item citation with a proposed penalty of

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[1] On March 10, 2025, Lori Chavez-DeRemer was sworn into office as the Secretary of Labor and is automatically substituted *sub nom.* for the former Acting Secretary. *See* Fed. R. Civ. P. 25(d). "Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure." 29 U.S.C. § 661(g). The Commission has not adopted a different rule regarding substitution of parties.

[2] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated its authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA, and promulgated the Occupational Safety and Health Standards at issue. *See* Order No. 8-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020), *superseding* Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has authorized OSHA's Area Directors to issue the citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

$15,625.00 under the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. § 651 *et seq.*, for allegedly violating an OSHA materials handling and storage standard, 29 C.F.R. § 1910.176(b). After Masis timely contested the citation, the Secretary filed a formal complaint[3] with the Occupational Safety and Health Review Commission (the "Court") seeking an order affirming the citation and proposed penalty. The complaint and citation were subsequently amended to add an additional citation item alleging, in the alternative, a violation of section 5(a)(1) of the Act, commonly known as the "general duty clause," 29 U.S.C. § 654(a)(1).[4] A bench trial was held in Jacksonville, Florida.

There is no dispute that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c). J. Prehr'g State., ¶ E. The Court also finds, and the parties have stipulated, that Masis was engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5).[5] *Ibid*. Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 12(j) of the Act, 29 U.S.C. § 661(j).[6] For the reasons indicated *infra*, the Court **AFFIRMS** the citation and **ASSESSES** a penalty of $10,938.00.

II. BACKGROUND

Masis is a Massachusetts staffing agency providing temporary workers to host employers. (J. Prehr'g State. ¶ D; *see also* Tr. 12; Ex. R-7. On September 3, 2021, Masis entered into an agreement with Ridgway Roof Truss Company ("Ridgway") to provide Ridgway with temporary workers at its worksite in Gainesville, Florida (the "worksite"). (*Ibid.*) Ridgway manufactures trusses, which are the structures that support roofs. Tr. 13, 118-20.

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[3] Attached to the complaint and adopted by reference is the citation at issue, which, as mentioned *supra*, was later amended to add an alternative legal basis for the citation. Compl., Ex. A. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[4] The general duty clause requires each 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).

[5] Masis denies it was an employer within the meaning of section 3(3) of the Act, 29 U.S.C. § 652(3). However, for reasons indicated *infra*, the Court finds that it was.

[6] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so. All arguments not expressly addressed have nevertheless been considered and rejected.

Trusses are built onsite, banded or bundled together into groups or packages, and then moved to the yard where they are stored prior to being loaded onto trucks and shipped to their final destinations. Tr. 13, 150-154; *see also* Ex. C-14. Banded groups of trusses can weigh between several hundreds to many thousands of pounds. Tr. 36, 151-52. As part of this process, trusses for an entire building would be broken down into smaller sections that could then be stacked and shipped on trucks. Tr. 131, 152-53. To maximize shipping efficiency, workers would stack as many as 32 trusses into packages that were nailed and banded together and then loaded onto trucks. Tr. 152-53. These packages would vary in size from several hundred to several thousand pounds and up to 60 feet long. Tr. 152.

A. Worksite Management

On June 10, 2023, the worksite management consisted of Nevada Gellermann, Ridgway's Director of Operations, and Alejandro "Alex" Alvarado Jose, Masis's onsite production manager. Tr. 26-27, 35-36, 117-19, Tr. 131-32, 145, 148, 166. As Director of Operations, Gellermann's duties involved overseeing shipments and deliveries. Tr. 121-22. Gellermann was also involved in employee safety, hiring, training, and discipline. Tr. 121-22. Initially, Jose began working for Ridgway as a truss builder approximately ten years prior and was later promoted to foreman. Tr. 131-32, 144, 201-02. Approximately two or three years before the accident, Jose was hired by Masis to continue working at the worksite. Tr. 201-02, 216-17. Jose continued in his role as foreman and was promoted to production manager three months prior to the accident. Tr. 131-32, 145, 148, 166.

In his role as foreman, for both Ridgway and Masis, Jose supervised production and ensured workers followed safety guidelines and held disciplinary authority over them if they did not comply. Tr. 126-29. When he was promoted to production manager, Jose's supervisory duties included additional responsibilities involving worker staffing, discipline, safety, and quality control. Tr. 127-35, 141, 144. Both Jose and Gellermann shared safety responsibilities at the worksite, which included safety walk-throughs and discussions related to the potential hazards of falling truss packages. Tr. 150-55. Prior to the accident, both Jose and Gellermann observed employees standing truss packages up vertically throughout the worksite yard. Tr. 149-55; Exs. C-6 at 1-2, C-7 at 2. When a truss package is standing vertically it generally is pyramid shaped with the top of the pyramid pointing upwards. Tr. 27-29. The employees were told they could stand truss packages vertically if they were stable. Tr. 155; Ex. C-6 at 1-2. After Jose and Gellermann

observed too many "near-miss close calls" with truss packages falling over, a policy was loosely implemented to only permit vertical storage of truss packages against buildings or the worksite fence. Tr. 149-55. Both Jose and Gellermann had "multiple meetings with the workers in the shipping department to get them to change their habits of the way that they stored the trusses." Tr. 150-51. Yellow lines were painted in the middle of the yard where truss packages were supposed to be stored horizontally. Tr. 194. However, the workers ignored the lines and continued to store truss packages in vertical and unsafe ways. Tr. 149-55, 194.

B. Accident and OSHA Inspection

On June 10, 2023, a forklift operator stood Truss Package 1,[7] which had ten to twelve trusses bundled together and weighed approximately 2,000 pounds, up vertically in the middle of the worksite yard. Tr. 26-27, 33-34, 35-36, 152-53; Ex. C-1. The forklift operator positioned Truss Package 1 vertically to make room to load a trailer in the yard with Truss Package 2. Tr. 26-27, 158. Truss Package 2, which was "about as high as the forklift" even when it was laying horizontally, was very large and required four forklifts to lift onto the trailer. Tr. 26-27, 33. Once loaded onto the trailer, employees began securing Truss Package 2. Tr. 32-33. Truss Package 1, which had been left vertically, remained standing for approximately ten minutes before falling over on a Masis worker that was securing Truss Package 2 to the trailer, resulting in serious injuries. Tr. 32-36, 156; Ex. C-1. The accident was captured on video by a camera overlooking the worksite yard. Tr. 23; *see also* Ex. C-1.

The video begins with a view of various truss packages lying scattered throughout the worksite yard. Tr. 26-27, Ex. C-1. Approximately five truss packages can be seen stored in vertically standing positions around the perimeter of the yard. Tr. 28, 60-61; Ex. C-1, Ex. C-5 at 5. In the video, a forklift picks up Truss Package 1 in the center of the yard from a horizontally lying position to a vertically standing position. Tr. 26-27; Ex. C-1 at 0:30 to 1:18. Four forklifts then lift Truss Package 2 while a truck backs a trailer underneath it. C-1 at 1:30 to 2:45. The forklifts place Truss Package 2 onto the trailer and employees begin securing it to the trailer. Tr. 32-33; Ex. C-1 at 2:45.

Several employees can be seen standing, walking, riding a bicycle, and maneuvering forklifts around the vertically standing Truss Package 1 throughout the video. Tr. 29-32; Ex. C-1

[7] There were two relevant truss packages. For clarity, the Court refers to them as Truss Package 1 and Truss Package 2.

at 2:58, 4:25, 5:08, 5:25 7:45, 8:28, 9:25, 10:10, 11:15, 11:50. While vertically standing, Truss Package 1 was several times taller than the employees and completely overshadowed them as they walked by it. Tr. 31; Ex. C-1 at 8:25 to 8:30. At approximately 11:09, two employees can be seen walking around the trailer as they secure Truss Package 2 to it. Tr. 32-33; Ex. C-1 at 11:55.

At 11:55, the vertically standing Truss Package 1 falls over onto a Masis worker while he is in the process of securing Truss Package 2 to the trailer. Tr. 33; Ex. C-1 at 11:55. Three employees try to lift Truss Package 1 off the worker but are unable to. Tr. 33-34; Ex. C-1 at 12:00. A forklift returns to the area and lifts Truss Package 1 off the Masis worker. Tr. 33; Ex. C-1 at 12:20. The worker was taken to the hospital with serious injuries. Tr. 13, 156-57.

Following the accident, OSHA Compliance Safety and Health Officer[8] Christopher Stitcher inspected the worksite. Tr. 12-13. As part of the walkaround inspection, Stitcher took photographs, obtained the video of the accident, and conducted various employee interviews. Tr. 12-14, 17-23, 35; Exs. C-1, C-2. Following the accident, Jose also conducted and signed the Accident Investigation Form as "supervisor." Tr. 159-60; Ex. C-15 at 2. As a result of the inspection, OSHA issued Masis the citation at issue. Tr. 36.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety & Health Review Comm'n* (*CF & I Steel Corp.*), 499 U.S. 144, 147 (1991) (*quoting* 29 U.S.C. § 651(b)). "To implement its statutory purpose, Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013). "They also have a 'special duty' to comply with all mandatory health and safety standards." *Id.* citing 29 U.S.C. § 654(a)(2).

"With respect to the latter, Congress provided for the promulgation and enforcement of the mandatory standards through a regulatory scheme that divides responsibilities between two federal agencies." *ComTran*, 722 F.3d at1307. "The Secretary establishes these standards through the

[8] "Compliance Safety and Health Officer" means "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d). Christopher Stitcher worked in OSHA's Jacksonville Area Office.

exercise of rulemaking powers." *CF & I Steel Corp.*, 499 U.S. at 147; *see also* 29 U.S.C. § 665. Pursuant to that authority, the standard at issue here was promulgated. Meanwhile, the Commission is assigned to carry out adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam).

In the Eleventh Circuit where this case arose,[9] the Secretary will make out a *prima facie* case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer "knowingly disregarded" the Act's requirements. *ComTran*, 722 F.3d at 1307; *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014). If the Secretary establishes a *prima facie* case with respect to all four elements, Masis "may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *ComTran*, 722 F.3d at1308.

A. Citation 1, Item 1

The Secretary alleges in Citation 1, Item 1 that Masis committed a serious violation of 29 C.F.R. § 1910.176(b) by "exposing employees, securing the trusses onto a trailer, to a struck-by hazard, in that trusses were not secured to prevent them from sliding and or falling." Compl., Ex A at 1. The cited standard mandates that "[b]ags, 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." 29 C.F.R. § 1910.176(b).

1. Cited Standard Applied

The Secretary contends the cited standard is applicable to the manufacturing and storage of trusses because multiple trusses were bundled together and stored at the worksite yard prior to shipping. Sec'y's Br. at 9-10. Masis's claims the cited standard is not applicable because Truss

[9] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Gainesville, Florida, in the Eleventh Circuit, and Masis's principal place of business is in Massachusetts, in the First Circuit. *See* 29 U.S.C. § 660(b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, No. 96-1719, 2000 WL 294514, at *4 (OSHRC Mar. 16, 2000). The Court applies the Eleventh Circuit precedent, where it is highly probable that a case will be appealed to.

Package 1 was not stored and was only "temporarily positioned for mere minutes." Resp't's Br. at 11. Masis's argues Truss Package 1 was a "load in process" as the forklift operator had placed the truss vertically and "had planned to move the bound trusses right back to their original position." Resp't's Br. at 11. Masis's contends, as a "load in process," Truss Package 1 cannot reasonably be deemed to have been stored at the time of the accident. Resp't's Br. at 11. Masis's argues that rather than the cited standard, Truss Package 1 is subject to four powered industrial trucks standards.[10] Resp't's Br. at 1. The Court finds no merit in Masis's arguments.

"Courts construing a regulation 'start—and often end—with the text.'" *Int'l Fire Prot., Inc. v. Sec'y of Lab.*, 824 F. App'x 951, 954 (11th Cir. 2020) (citation omitted). "[A] regulation should be construed to give effect to the natural and plain meaning of its words." *Ibid* (alteration in original) (quotations omitted)). The regulatory language is considered ambiguous where the meaning is "not free from doubt." *CF&I*, 499 U.S. at 150-51. The Court concludes that the plain text of the cited standard supports the Secretary's interpretation that Truss Package 1 was being stored at the worksite yard prior to the accident.

The language of 29 C.F.R. § 1910.176(b) plainly states that it applies to the "storage of material" against sliding or collapsing. And this case involves bundles of trusses packaged together and stored prior to shipping to various jobsites before Truss Package 1 fell over when left vertically standing without any support. Tr. 13, 110-13, 151, 152-53; Ex. C-1 at 11:54. The Court finds no merit in Masis's argument that Truss Package 1 was not covered by the cited standard because it was recently moved and therefore was a "load in process. The evidence shows Truss Package 1 was temporarily placed standing vertically and unstable giving way under its own weight.

In a line of cases dealing with such diverse regulations as those governing excavations, explosives and blasting agents, and construction materials handling, the Commission has uniformly held that "stored" is synonymous with "placed" or "deposited;" and that temporary placement of materials constitutes "storage." *See Whitcomb Logging Co.*, 2 BNA OSHC 1419 (No. 1323, 1974); *Perini Corp.*, 5 BNA OSHC 1343 (No. 12589, 1977); *Perini Corp.*, 6 BNA OSHC 1609 (No. 13029, 1978); *Sierra Constr. Corp.*, 6 BNA OSHC 1278 (No. 13638, 1978); *Gerard Leone & Sons*, 6 BNA OSHC 1512 (No. 14157, 1978). The Court concludes the standard applied to the cited condition.

[10] The four standards cited by Masis were 29 C.F.R. §§ 1910.178(o)(1), 178(l)(3)(ii)(C), 178(l)(3)(ii)(E), and 178(l)(3)(ii)(I).

2. Standard Was Violated

Video evidence of the accident clearly shows Truss Package 1 left standing vertically without any support. The Court concludes the cited standard was violated.

3. Employee Exposure to Hazardous Conditions

"The Secretary can establish that the employees had access to the violative condition by showing that the employee was actually exposed to the cited condition or that access to the condition was reasonably predictable." *Latite Roofing & Sheet Metal*, No. 20-14793, 2021 WL 4912479, at *3 (11th Cir. Oct. 21, 2021) (citing *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). To establish exposure, the Secretary "must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Ibid.* (quoting *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)).[11]

Here, there is no dispute that at the time of the accident, Masis's employees were walking in and around the area where the vertically standing Truss Package 1 could have, and did in fact, fall. Video evidence shows several employees entering into and out of the area where Truss Package 1 eventually falls. Further, the risk of injury is not theoretical in this instance, as Masis's employee was severely injured when Truss Package 1 fell on him. Actual exposure to hazardous conditions with resulting injuries establishes exposure. *See S & G Packaging, Co., LLC* (*S&G*), 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (employee injury resulting from violative condition establishes actual exposure to that condition). The Court concludes employees were exposed to the hazardous condition.

4. Masis Knowingly Disregarded the Act's Requirements

"To satisfy the fourth element of a prima facie case, the Secretary must prove the employer had knowledge of the violation." *Quinlan v. Sec'y of Lab.*, 812 F.3d 832, 837 (11th Cir. 2016). "The knowledge element of the prima facie case can be shown in one of two ways." *Eller-Ito*, 567 F. App'x at 803 (citation omitted). "First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the

[11] The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (citing *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)).

employer[.]" *Comtran*, 722 F.3d at 1307 (citations omitted).[12] "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program . . . with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Ibid.*

An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *Access Equip. Sys.*, 18 BNA OSHC 1718, 1727 (No. 95-1449, 1999); *M.C. Dean, Inc.*, 505 F. App'x. 929, 934 (11th Cir. 2013). Most importantly, it is the "substance of the delegation of authority that is controlling, not the formal title of the employee having this authority." *Ibid.* (quoting *Access*, *supra*).

The Secretary argues knowledge of the violation is imputed to Masis through its supervisor at the worksite. Sec'y's Br. at 11. Masis argues it was not aware that one of its employees held a supervisory role at the worksite and with no knowledge of a supervisor on site, Masis argues there is no way to impute knowledge. Resp't's Br. at 11-12. The Court agrees with the Secretary.

The Court does not find Masis's argument credible. The record shows that at the time of the accident, Jose was Masis's production manager at the worksite, and prior to that, had been Masis's foreman at the worksite. As foreman, Jose supervised the production area to ensure workers followed safety guidelines and held disciplinary authority over them if they failed to comply. And as a production manager, Jose held a variety of supervisory responsibilities involving staffing decisions, hiring, discipline, and safety concerns. Following the accident, Jose also conducted and signed the Accident Investigation Form as "supervisor."

When Rachel Beaubrun, Masis Staffing's on-site recruiter, submitted potential candidates for employment at the Ridgway worksite, Jose would take part in their interview process and provide input on who would ultimately be hired. Tr. 135-38, 143-45. At least two to three times a week, Beaubrun provided potential Masis candidates for employment at the Ridgway worksite and would be present during their interviews. Tr. 135-37. New hires, including Beaubrun, would be provided with, among other paperwork, a health and safety plan identifying Jose as the "Shop Foreman" and a member of the safety committee responsible for conducting safety meetings. Tr.

[12] "An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct." *Id.* at 1380 "An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have." *Ibid.*

148-49; Ex. C-17 at 8. Beaubrun would also regularly drop off paychecks to Jose for distribution to the other Masis temporary workers at the Ridgway worksite. Tr. 139-42.[13] Jose was also responsible for communicating and enforcing safety rules among the other employees at the worksite. Tr. 126-29, 163-64. Jose's authority over the other employees clearly shows he had supervisory authority.

Although Jose did not see Truss Package 1 fall the day of the accident, he knew that standing truss packages vertically without support was dangerous. And during the months prior to the accident, Gellermann testified that he and Jose would routinely see employees standing truss packages vertically on the worksite's cameras and during their safety walkthroughs. Tr. 154-55; Ex. C-6. In his written statement to Stitcher, Jose stated that he "monitor[ed] the cameras very often," Ex. C-6 at 3, and when he saw employees standing truss packages vertically before the accident, he would tell them "to put trusses laying down." C-6 at 1. In his written statement, Jose also stated, "I told everyone that we can't stand trusses up like that because its dangerous." C-6 at 1. "I have no idea why they put [Truss Package 1] like that… maybe he was trying to be in a rush or lazy I don't know." C-6 at 1-2. "We had trusses standing up before but changed it with the accident." C-6 at 2.

Thus, the record shows Jose knew employees were frequently storing truss packages vertically and that it was dangerous to do so. The Court concludes Jose had actual knowledge of the hazard condition and that knowledge is imputed to Masis.[14]

Serious Classification

The Secretary classified Citation 1, Item 1 as a serious violation of the Act. A violation is serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). The Secretary need not show there was a substantial probability an accident would occur, only that if an accident did occur, death or serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Wal-Mart Stores, Inc., v. Sec'y's of Labor*, 406 F.3d 731, 735 (D.C. Cir. 2005); *Brock v. L.R. Willson & Sons, Inc.*,

[13] Masis provided payroll services for the temporary workers it provided to Ridgway. Tr. 206-10; Ex. R-7. Masis had actual knowledge that Jose was its highest paid worker at the Ridgway worksite but claims ignorance as to why. Resp't's Br. at 8; Tr. 225-27; Ex. C-12.

[14] Having concluded that Masis had actual knowledge, the Court declines to address whether it had constructive knowledge. *See Phoenix Roofing*, 1995 WL 82313, at *4 ("Given that the record establishes actual knowledge, we need not address the question of constructive knowledge.").

773 F.2d 1377, 1388 (D.C. Cir. 1985).

Hazardous conditions existed at the worksite on the day of the accident which could, and did, result in serious physical harm to one of Masis's employees. Truss packages left standing at the worksite weighed anywhere from a few hundred to several thousands of pounds. Truss Package 1 that fell on and injured Masis's employee weighed approximately 2,000 pounds. Three employees were unable to lift Truss Package 1 off the injured employee until a forklift arrived to help. The record establishes that being struck by a falling truss package could, and did, result in serious injuries. Additionally, evidence shows employees were routinely exposed to struck-by hazards and "near-miss close calls" from unstable truss packages. The video evidence provided also shows several employees standing, walking, riding a bicycle, and maneuvering forklifts around the vertically standing Truss Package 1. The Court concludes Citation 1, Item 1 was properly characterized as a serious violation of the Act.[15]

B. Unpreventable Employee Misconduct ("UEM")

In order to prevail on a claim of unpreventable employee misconduct, Masis must establish the affirmative defense by showing: (1) it established work rules designed to prevent the violation; (2) it adequately communicated those rules to its employees; (3) it took steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Packers Sanitation Servs.*, 795 F. App'x 814, 821 (11th Cir. 2020) (quoting *S. Hens*, 930 F.3d 667, 678 (5th Cir. 2019)). Masis argues all the elements required for a showing of unpreventable employee misconduct were established in this case. Resp't's Br. at 13-15. The Court does not agree.

Masis asserts it is not responsible for the violation of the cited standard because the forklift operator involved in the accident had violated an unwritten work rule[16] prohibiting the placement

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[15] Because the Court concluded the Secretary established a violation of the cited standard, the Court declines to reach the alternative general duty clause allegation. *See Austal, U.S.A., L.L.C. v. Dep't of Lab.*, 799 F. App'x 760, 762 (11th Cir. 2018) (citing *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1199 & n.7 (5th Cir. 1997) ("standards are the preferred enforcement mechanism and ... the general duty clause serves as an enforcement tool of last resort.").

[16] Although employers are not required to have written safety rules, their unwritten rules must be clearly and effectively communicated. *See GEM Indus, Inc.*, No. 93-1122, 1996 WL 710982, at *2 n.5 (OSHRC Dec. 6, 1996), *aff'd*, 149 F.3d 1183 (6th Cir. 1998). Here, even if the Court could find Masis had a verbal work rule to stay clear of pressurized equipment, as indicated *infra*, there is no evidence Masis clearly and effectively communicated it either through trainings or on the day of the accident, or that it was enforced in any manner. *See Capform, Inc.*, No. 91-1613, 1994 WL 530815, at *4 (OSHRC Sept. 29, 1994) (rejecting

of any trusses vertically in the center of the worksite's yard. Resp't's Br. at 13-14. However, Masis has failed to show the unwritten work rule was "adequately communicated to its employees" or sufficiently implemented or enforced.

Rather, the record reveals Masis did not have an established work rule designed to prevent the struck-by violation. Instead, there was a vague understanding amongst employees that truss packages should not be stood up in the central yard area but were allowed to be stored vertically as long as they were leaning against a building or fence line. This vague policy was not always followed or uniformly enforced. Forklift operators frequently stored truss packages in an unstable manner. And Gellermann testified, "we had seen some real -- like near-miss close calls from people not really judging the stability of a truss package…"

Only after the accident occurred was the policy changed to prevent any and all truss packages from being stored in a vertical position. And only after the accident was an employee disciplined with a write-up and suspension for vertically standing a truss package in an unstable manner.

Prior to the accident, even though employees were found to have left truss packages standing vertically, they were not uniformly or effectively disciplined. In an attempt to change employees' habits, yellow lines were also painted on the worksite yard to designate areas where storing truss packages vertically was prohibited. However, violations of these yellow line designations were not effectively enforced. Further, although employees were occasionally given verbal warnings, it was ineffective as they were still seen storing truss packages vertically and in unsafe ways. The Court concludes Masis has failed to establish an unpreventable employee misconduct affirmative defense.

IV. PENALTY DETERMINATION

Under the Act, the Secretary has the authority to propose a penalty. *See* 29 U.S.C. §§ 659(a). Here, the Secretary proposes a $15,625 penalty for a serious violation. However, Congress

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unpreventable employee misconduct defense and affirming violation where employer failed to show it had a sufficiently communicated and enforced work rule). And even if the Court were to find Masis had safety measures or gave adequate instructions to its employees to address the struck-by hazard, as indicated *infra*, the company did not implement them. *See Nelson Tree Servs., Inc. v. Occupational Safety & Health Rev. Comm'n*, 60 F.3d 1207,1211 (6th Cir. 1995) (finding although employer incorporated industry safety standard into its own safety manual, it failed to abate the hazard where that standard was neither followed nor enforced).

vested the Commission with the final "authority to assess all civil penalties provided in [the Act]," which it determines de novo. 29 U.S.C. § 666(j). Section 17(j) requires that when assessing penalties, "due consideration" must be given "to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j).

These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (citation omitted). But "the gravity of the violation is the primary element in the penalty assessment." *Trinity Indus., Inc.*, 20 BNA OSHC 1051, at *21 (No. 95-1597, 2003), *aff'd*, 107 F. App'x 387 (5th Cir. 2004) (unpublished); *see also Natkin & Co. Mech. Contractors*, 1 BNA OSHC 1204, at *2 n.3 (No. 401, 1973) ("Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors.").

"The gravity of a particular violation can range from *de minimis*, where there is very low potential for injury or occupational illness, to severe, where death or serious physical injury would be likely." *Nacirema Operating Co., Inc.*, No. 4, 1972 WL 4040, at *2 (OSHRC Feb. 7, 1972). The gravity assessment "depends on: (1) the number of employees exposed; (2) the duration of the exposure; (3) whether any precautions were taken against injury; and (4) the probability that an accident would occur." *Trinity*, 20 BNA OSHC at *21.

With respect to the gravity of the violation here, the Secretary determined, and the Court agrees, the gravity was "high." Three of Masis's employees were continually and routinely exposed to struck-by hazards and "near-miss, close calls" from unstable truss packages. There is no evidence Masis took any protective measures against exposure to the hazard the day of the accident. Thus, the probability that an accident would occur was high. *See Capform, Inc.*, No. 99-0322, 2001 WL 300582, at *4 (OSHRC Mar. 26, 2002) (citation omitted) (finding precautions did not reduce the gravity to employees who must work in the area), *aff'd*, No. 01-60417, 2002 WL 35650276 (5th Cir. Mar. 20, 2002) (unpublished).

And the severe injury demonstrates "the consequences of employee exposure" to the hazard was "death or severe injury." *Cf & T Available Concrete Pumping Inc.*, No. 90-329, 1993 WL 44415, at *5 (OSHRC Feb. 5, 1993) (weighing brief and unlikely exposure due to protective measures taken by the employer against severity of the potential injury from the hazard). *See also,*

Nat'l Eng'g & Contracting Co., No. 94-2787, 1997 WL 603013, at *6 (OSHRC Sept. 30, 1997) ("The gravity here is severe because the violation directly resulted in the death of one employee and the serious injury to another."), *aff'd*, 181 F.3d 715 (6th Cir. 1999). The Court therefore concludes the gravity of the violation was severe.

With regard to good faith, it "should be determined by a review of the employer's own occupational safety and health program, its commitment to the objective of assuring safe and healthful working conditions, and its cooperation with other persons and organizations (including the Department of Labor) seeking to achieve that objective." *Nacirema*, 1972 WL 4040, at *2. The Secretary did not propose a reduction for good faith and the Court agrees with that determination. Masis did not have a safety program Addressing the struck-by hazard, and, even if it did, there is no evidence it took consistent measures to enforce it. *See Capform*, 2001 WL 300582, at *5 (finding no reduction for good faith where employer's program and toolbox meetings failed to address work performed and hazards). Masis also did not take precautions against injury the day of the accident. Based upon these factors, the Court concludes Masis is not entitled to a reduction for good faith.

The Secretary also did not propose any adjustments for history since Masis did not have an inspection in the preceding five years which resulted in violations. The Court agrees with that determination. As to size, the Secretary did not offer any evidence of the total number of Masis's employees but only established that at the worksite Masis had roughly 67 workers. (Tr. 124). Based upon this evidence, the Court concludes Masis was entitled to a 30% reduction for size.

Therefore, giving due consideration to the size of Masis's business, the gravity of the violation, and lack of reduction for good faith or prior history, the Court concludes the appropriate civil penalty in this case is $10,938.00. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Item 1 is **AFFIRMED** and a penalty of $10,938.00 is **ASSESSED.**

SO ORDERED.

/s/
John B. Gatto, Judge

Dated: May 12, 2025
Atlanta, GA