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**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

AMERICAN CIVIL CONSTRUCTORS, LLC,
d/b/a AMERICAN CIVIL CONSTRUCTORS
MOUNTAIN WEST,

Respondent.

DOCKET NO. 22-0300

Appearances:

Bryan Kaufman, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO,
For Complainant

Travis Vance, Esq., Nicholas Hulse, Esq., Kristin White, Esq., Fischer & Phillips, LLP,
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On August 23, 2021, an excavator bucket detached from a John Deere 350G excavator and struck one of Respondent American Civil Constructors, LCC's (ACC) employees, who was killed. The next day, the OSHA Assistant Area Director (AAD) for the Denver office and a Compliance Safety and Health Officer (CSHO) conducted an inspection of the jobsite located at 64th Avenue and Denali Street (64th and Denali project). On February 14, 2022, Complainant issued a *Citation and Notification of Penalty*, alleging that ACC had committed a serious violation of 29 U.S.C. § 654(a)(1), also referred to as the general duty clause, with a proposed penalty of \$11,747. ACC

timely filed a notice of contest, which brought the matter before the Occupational Safety and Health Review Commission pursuant to section 10(c) of the OSH Act.

A trial was held on May 22-23 and June 29, 2023. The following individuals testified: (1) George Trehal, Foreman; (2) Joshua Shorley, Safety Director for ACC; (3) Sean Fabela, Construction Superintendent; (4) Lisa Bennett, OSHA AAD for the Denver Office; (5) CSHO Bradley Mercil; and (6) David Danaher, Expert Witness for ACC. Both parties timely submitted post-trial briefs for consideration.

Jurisdiction & Stipulations

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, ACC was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) & (5). (Tr. 26). *See Slingsluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Factual Background

1. The Accident

ACC was hired to install new roadways and underground utilities at a worksite known as the 64th and Denali project. (Tr. 250). Sean Fabela was the project's superintendent who supervised all of ACC's crews at the worksite. (Tr. 405, 407). George Trehal was the foreman of the crew working at the accident location that was responsible for installing freshwater pipe. (Tr. 54-55). At all relevant times, Foreman Trehal's crew consisted of [redacted] (mainline hoe operator), [redacted] (head pipelayer), Cade Pihl (laborer), and Samuael "Sosa" Samano-Ortega (laborer). (Tr. 89).

On August 23, 2021—the date of the accident—the crew was preparing to connect a water pipe section to a fire hydrant, and Foreman Trehal directed [redacted] and [redacted] to “clean the hole” before the installation. (Tr. 58). “Cleaning the hole” meant using the excavator to widen and deepen the trench. (Tr. 149). [redacted] was in the trench and yelled out for someone to pass him the pipe plug, which weighed five pounds. (Tr. 149; 194). Foreman Trehal heard [redacted] call for the pipe plug. (Tr. 150). [redacted] intended to install the pipe plug on the bell of the pipe to protect it from dirt. (Tr. 58, 194). While [redacted] was in the trench awaiting the pipe plug, Foreman Trehal walked about 50 to 100 feet away, on the other side of the excavator, to perform another job task. (Tr. 150, 189-90). There was no bucket attached to the excavator when Foreman Trehal walked around to the other side of the excavator, so Foreman Trehal understood [redacted] would need to connect a bucket before cleaning the hole. (Tr. 150, 169, 190). The record establishes that for this type of work, excavator operators change buckets and attachments frequently, sometimes 50 times per day. (Tr. 199). [redacted] connected the bucket and used it to deliver the pipe plug to [redacted] inside the trench. (Tr. 306-07; Ex. C-20 at 13). When [redacted] approached the excavator bucket to reach in and retrieve the pipe plug, the bucket suddenly detached from the coupler and struck [redacted] in his torso and shoulder. (Tr. 602-03; Ex. J-7). It is unclear whether the bucket was suspended in the air at that moment or resting on the curved surface of the horizontal pipe. (Ex. C-10; Ex. C-17 at 2). The bucket was 54 inches wide and weighed approximately 2,500 pounds.¹ (Tr. 475; Ex. C-19 at 3; Ex. R-10). [redacted] died as a result of his injuries. (Tr. 26; Ex. J-7). He was underneath the detached bucket when first responders arrived at the scene. (Tr. 589).

¹ Witnesses at trial testified that the bucket weighed anywhere between 2,500 and 6,000 pounds, and the coroner’s report listed the bucket as weighing 6,800 pounds. (Tr. 475, 577-78; Ex. J-7 at 2). For the purposes of this decision, the Court concludes an approximate weight of 2,500 pounds.

[redacted] appears to have been the only witness to the accident but was not called by either party to testify at trial. (Tr. 678). Mr. Pihl and Mr. Samano-Ortega were cutting a pipe near the edge of the trench but did not actually see the bucket detach and fall on [redacted]. (Tr. 148; Ex. C-11; Ex. C-17). As stated previously, Foreman Trehal was completing another job task on the other side of the excavator when the accident occurred, and he could not see the trench from his position approximately 50 to 100 feet away. (Tr. 219).

Shortly thereafter, the police arrived at the scene and investigated the accident. (Tr. 318-19). The next day, AAD Bennett and CSHO Miguel Demelli conducted an inspection of the worksite.² (Tr. 530-31). They took videos and photos and completed interviews with various ACC employees. (Tr. 532). They later returned to the worksite when the excavator was moved to be placed in storage. (Tr. 532, 699). In October 2021, the investigation was reassigned to CSHO Mercil, who handled the matter until the Citation in this case was issued. (Tr. 633; 639-40).

David Danaher, a forensic engineer with a background in mechanical engineering, was retained by ACC to determine whether the excavator and coupler were operating properly at the time of the accident. (Tr. 698, 720; Ex. R-8). The hydraulic coupler used to quickly connect and disconnect various excavator attachments, like buckets, works as follows. The excavator has two pins, a front pin and a back pin. (Ex. C-4 at ACC000153; Ex. R-18). The operator first attaches the front hook of the excavator on the front pin of the bucket. (Tr. 461; Ex. C-4 at ACC000153; Ex. R-18). The operator then rotates the bucket to the full curl position and pushes a switch to the lock position. (Ex. C-4 at ACC000153; Ex. R-18). This activates the hydraulic locking mechanism and locks the back pin of the bucket. (Tr. 517-18; Ex. C-4 at 113). If one of the pins is not properly

² Although ACC notified OSHA of the accident on the date it occurred, OSHA arrived at the worksite after it had closed for the day. (Tr. 531).

engaged, the bucket will swing and give the operator a visual cue that the bucket is not properly attached. (Tr. 462; Ex. R-18).

In addition to visual verification, excavator operators also perform a “ground test” after connecting a new attachment to ensure it is secure. (Tr. 213-14; Ex. R-18 at 2). When conducting a ground test, the operator curls the bucket and hits the bucket on the ground. (Tr. 201). This confirms there is no movement and that the front and back pins have locked. (Tr. 198). Ground tests take approximately 10 to 15 seconds to complete. (Tr. 201).

In April 2022,³ Mr. Danaher tested the excavator and coupler. (Tr. 700). He concluded both were operating properly at the time of the accident and the hydraulic coupler was functional. (Tr. 720-21). In other words, if the operator had ensured the coupler was properly attached to both pins of the bucket, verified by a ground test, the bucket could not have unexpectedly detached. (Tr. 721). OSHA did not test the excavator or coupler. (Tr. 625).

Complainant ultimately determined that ACC violated section 5(a)(1) of the OSH Act when it exposed employees to struck-by and crushing hazards from the unexpected release of a 54-inch excavation bucket from a quick coupler device. (Citation, Ex. J-1 at 6).

2. ACC’s Safety Program

ACC had a written Safety Management Program in place at the time of the accident. (Tr. 131; J-5). It required its employees to undergo various types of safety training, site supervisors to conduct safety meetings, and foremen to conduct weekly “toolbox talks” (Ex. J-5; Tr. 339; Ex. R-1; Ex. R-4). Site supervisors also completed daily job safety analyses (JSAs), which identified specific work hazards present on a specific day based on the tasks to be completed and other factors, like weather or traffic. (Tr. 339, 343; Ex. R-2). In addition, each worksite—including the

³ It is unclear why there was an eight-month delay to conduct post-accident testing of the equipment involved.

64th and Denali worksite—had a site-specific safety plan prepared, which was intended to reiterate important portions of ACC’s safety program and set forth an emergency action plan. (Tr. 344; Ex. J-4).

In addition to its Safety Management Program, ACC submits that it had a number of work rules it communicated to its employees. For example, employees were generally told to stay out of the “line of fire” and were prohibited from entering the swing zone of heavy machinery. (Tr. 211, 235, 280). If a work task required an employee to be within the swing zone, ACC required the employee to make eye contact with the machine operator before entering the swing zone and maintain eye contact while in the swing zone. (Tr. 279, 350, 419-20). This practice ensured the machine operator’s awareness of the employee’s presence in the swing zone. (Tr. 420).

ACC also had a work rule against standing under suspended loads. (Tr. 191, 204, 212, 330). Management understood the rule to include excavator buckets. (Tr. 330). The record did not establish that employees also understood this rule to include excavator buckets. OSHA did not consider the term suspended load to include excavator buckets. (Tr. 634). In its section on excavation and training, the Safety Management Program prohibited employees from standing “underneath loads handled by lifting or digging equipment.” (Ex. J-5 at 130).

In addition, ACC had a work rule that required excavator operators to conduct a “ground test” (explained earlier) to ensure an attachment was properly connected and locked. (Tr. 198). This practice was in line with other construction companies, as well as the manufacturer’s instructions for operating the quick connect coupler. (Tr. 214; Ex. R-18).

In addition to written policies and work rules, ACC’s safety program also included routine inspections and audits of worksites. (Tr. 241). As ACC’s Safety Director, Mr. Shorley conducted these inspections and attended toolbox talks, conducted trainings, and advised employees on safety

hazards. (Tr. 241, 246). Formal inspections were documented. (Tr. 242). Mr. Shorley conducted several safety inspections at the 64th and Denali Project, and any corrective actions were completed under his supervision. (Tr. 248-49, 381; Ex. R-3). As site superintendent, Mr. Fabela inspected the 64th and Denali worksite daily for safety and quality control. (Tr. 409).

Foreman Trehal completed daily JSAs with his crew, alerting them to safety issues ranging from proper trench sloping to staying out of the line of fire. (Tr. 235-36; Ex. C-7). The JSA for the day of the accident identified hazards such as “human equipment interface” and blind spots. (Ex. C-7 at 48). Corrective measures included communications with operators, avoiding standing in the line of fire, watching the swing radius of equipment, and maintaining eye contact with operators. (Ex. C-7 at 48). The JSA dated a few days before the accident included a warning against standing under a suspended load, referring to rigging. (Ex. C-7 at 43).

3. ACC’s Disciplinary Policy

ACC had a progressive disciplinary action policy in effect at the time of the accident. (Ex. J-5 at 43-44; Tr. 283). The policy required an employee’s supervisor to give the employee a verbal warning at the first violation, a written warning at the second violation, and discharge at the third violation. (Ex. J-5 at 43-44). Although the immediate supervisor was responsible for initiating discipline, the division general superintendent had to be advised prior to all disciplinary actions. (Ex. J-5 at 43). The policy required all warnings and proposed solutions to be documented and placed in the personnel file of the employee. (Ex. J-5 at 43; Ex. J-6; Tr. 284-85).

A handful of documented disciplinary actions were entered into the record. (Ex. J-6). The discipline ranged from a verbal warning for improper lane usage to termination for working under the influence of alcohol. (Ex. J-6 at 1, 3). None of the disciplinary actions involved an employee being in the line of fire, failing to perform a ground test, or working near or underneath the bucket

of an excavator. None of the disciplinary actions involved [redacted] or [redacted]. Foreman Trehal, the supervisor present at the accident site, admitted during the trial that he did not follow the progressive disciplinary policy set forth in ACC's Safety Management Program. (Tr. 132-33). He never documented violations and was unaware of the requirement to do so. (Tr. 132). Instead, if he saw a safety violation, he would yell at the employee to correct the behavior. (Tr. 130, 136, 140, 199). On other jobs prior to the accident, he recalled yelling at [redacted] for being in the swing zone of heavy machinery without the operator seeing him. (Tr. 130-31). Foreman Trehal also recalled yelling at [redacted] (the excavator operator) on two previous occasions for operating a tailhoe excavator with an improperly attached bucket after [redacted] failed to conduct a ground test to ensure the bucket was fully engaged. (Tr. 116-17, 196-97). Foreman Trehal never documented these safety violations or administered any formal discipline for the violations to [redacted] or [redacted]. (Tr. 117-18).

Discussion

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

OSH ACT of 1970 Section (5)(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employee(s) were exposed to a struck-by hazards:

(a) American Civil Constructors LLC located at 23614 E. 64th Avenue: On August 23, 2021 and at times prior, employees were exposed to struck-by and crushing hazards from the unexpected release of a Paladin 54 inch excavator bucket from a Paladin JRB PowerLatch EX Coupler. An employee was fatally injured when he was struck by an excavator bucket that became detached from a quick coupler device.

Among other methods, feasible and acceptable abatement methods to correct this hazard include ensuring that employees do not stand under suspended machine components such as the boom, arm, or bucket, such as stated in the NIOSH document, "Preventing Injuries When Working with Hydraulic Excavators and Backhoe Loaders" and as the employer implemented in its revised policy following the accident.

(Citation and Notification of Penalty at 6).

“To prove a violation of the general duty clause, the Secretary must establish that: (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; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard.” *UHS of Westwood Pembroke, Inc.*, No. 17-0737, 2022 WL 774272, at *2 (OSHRC, Mar. 3, 2022), *aff’d*, No. 22-1845, 2023 WL 3243988, at *1 (3d Cir. May 4, 2023). The Secretary must also establish that “the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition.” *Id.*

Complainant alleges ACC violated the general duty clause because ACC failed to implement work rules or provide proper supervision to avoid a known and foreseeable hazard: employees working under improperly connected excavator buckets. ACC argues in response that it had work rules in place that prohibited employees from standing under suspended excavator attachments and implemented a progressive disciplinary policy to enforce its safety rules. ACC contends the accident was the result of unpreventable employee misconduct because the decision to use an excavator bucket to deliver a five-pound pipe plug to an employee in a trench, who then approached the suspended bucket, was unforeseeable.

The Conditions Created a Hazard for Employees

As the first element in establishing a section 5(a)(1) violation, a “hazard” is defined in terms of conditions or practices deemed unsafe over which an employer can reasonably be expected to exercise control. *Morrison-Knudson Co./Yonkers Contracting Co., A Joint Venture*, No. 88-572, 1993 WL 127946, at *19 (OSHRC, Apr. 20, 1993). The hazard advanced by Complainant in this case is the unexpected detachment of an excavator bucket from the quick

coupling device. The Court notes that whether an excavator bucket presents a hazard to employees depends on whether anyone is within striking distance of the bucket should it detach. *See Baroid Div. of NL Indust., Inc.*, 660 F.2d 439, 444 (10th Cir. 1981) (noting a hazard is a “condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur.”). There is no hazard if an operator was, for example, prairie digging, which is the practice of operating an excavator in an open area without utilities or traffic during training, with no employees in the vicinity. (Tr. 465).

Here, Complainant has established a hazard. If a detached bucket strikes a nearby worker, it could and did result in death or serious bodily harm. In addition, an employer can reasonably control the hazard by implementing work rules to mitigate the unexpected detachment itself by requiring operators to conduct a ground test each time an excavator attachment is changed out and prohibit employees from standing under or approaching suspended buckets. In fact, ACC maintains these work rules were in place at the time the accident occurred. Thus, the hazard was within the employer’s reasonable control to prevent.

In addition, the Court notes that the unexpected detachment of an excavator bucket has caused fatalities in other cases before this Commission. *See, e.g. Reynolds, Inc.*, No. 05-0023, 2006 WL 1302527, at *1 (OSHR CALJ, Mar. 20, 2006); *Performance Site Mgmt.*, No. 01-0956, 2002 WL 1869651, at *3 (OSHR CALJ, Aug. 8, 2002). This hazard is not one that is the result of “a freakish or utterly implausible concurrence of circumstances.” *See Nat’l Realty & Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973).

Respondent and Its Industry Recognized the Hazard

A hazard is recognized when either the cited employer or its industry recognizes the risk of harm from the cited conditions. *Arcadian Corp.*, No. 93-0628, 2004 WL 2218388, at *14

(OSHRC, Sept. 30, 2004). Precautions taken by an employer can establish hazard recognition in conjunction with other evidence, such as management's understanding of the hazard. *Beverly Enters., Inc.*, No. 91-3144, 2000 WL 34012177, at *28 (OSHRC, Oct. 27, 2000) (consolidated) (finding persuasive evidence that the employer's managers specifically knew about and warned personnel of the lifting hazard at issue). Probative evidence of industry recognition includes, among other things, voluntary industry standards published by organizations like ANSI and NIOSH. *See, e.g., The Duriron Co., Inc.*, No. 77-2847, 1983 WL 23869, at *5 n.2 (OSHRC, Apr. 27, 1983) (relying on NIOSH standards for corroboration of industry recognition of a hazard).

Complainant presented evidence of employer and industry recognition of the cited hazard.⁴ Foreman Trehal, Mr. Shorley, and Mr. Fabela all testified that an improperly attached bucket could cause serious injury and there existed work rules against standing under suspended loads to avoid that hazard. (Tr. 108, 252, 330, 423-24). Foreman Trehal had on several previous occasions seen improperly attached buckets, and in some instances, he observed an improperly attached bucket fall off. (Tr. 100-01). In addition, Foreman Trehal observed—on multiple occasions—an improperly attached bucket while [redacted] was operating an excavator. (Tr. 116-17). In addition, ACC's work rule requiring excavator operators to conduct ground tests after connecting an attachment demonstrates employer recognition of the hazard. The knowledge of ACC's management supports a finding that the hazard was recognized by ACC. *See Mo. Basin Well Svc., Inc.*, No. 13-1817, 2018 WL 1309482 (OSHRC, Mar. 1, 2018) (finding supervisor's recognition of the hazard was imputable to his employer).

⁴ In its post-trial brief, ACC argues there is no evidence that the release of an excavator bucket from a fully engaged coupler is recognized by ACC or the industry. However, that mischaracterizes the hazard identified by Complainant, which is the unexpected release of an *improperly* attached excavator bucket.

Additionally, the Court finds the industry recognized the hazard at issue. Complainant introduced into evidence a NIOSH publication titled “Preventing Injuries when Working with Hydraulic Excavators and Backhoe Loaders.” (Ex. C-1). The publication identifies the two most common causes of injury associated with excavators or backhoe loads, one of them being a worker struck by excavator buckets that unexpectedly detach. (Ex. C-1, Description of Exposure). In addition, the excavator’s operating manual itself warned “Never lift, move, or swing a load or attachment over anyone.” (Ex. C-5 at 9). And, the excavator had a sticker clearly warning that workers could be exposed to a crush hazard if a bucket is improperly attached and drops unexpectedly. (Ex. C-4 at ACC000096; Tr. 423). Complainant presented sufficient evidence that ACC and the industry recognized the cited hazard of an improperly connected bucket becoming detached from an excavator coupler.

The Hazard Caused Serious Injury and Death

Complainant must show that ACC’s employees were “exposed to a hazard likely to cause death or serious physical harm.” *Peacock Eng’g, Inc.*, No. 11-2780, 2017 WL 3864205 (OSHRC, Apr. 27, 2017). ACC argues Complainant did not show the hazard was likely to cause serious injury or death because there were no work tasks that required an employee to be under a suspended excavator bucket such that an injury might occur. However, the appropriate standard for assessing this element is “not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious harm.” *Waldon Health Care Ctr.*, No. 89-3097, 1993 WL 119662, at *11 (OSHRC, Apr. 2, 1993). On this point, the Court need not speculate. An employee was killed when a 2,500-pound excavator bucket unexpectedly detached and struck him. Complainant established this element.

Complainant Established Feasible Means to Abate the Hazard

To prove this element, Complainant must “specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard.” *Arcadian Corp.*, No. 93-0628, 2004 WL 2218388, at *13 (OSHRC, Sept. 30, 2004) (internal citation and quotation omitted). Where an employer has taken steps to abate the recognized hazard, Complainant must show those measures were inadequate. *Ala. Power Co.*, No. 84-357, 1987 WL 89119, at * 4, (OSHRC, Apr. 17, 1987) (citing *Cerro Metal Prods. Div., Marmon Grp., Inc.*, No. 78-5159, 1986 WL 53476, at *2 (OSHRC, May 7, 1986)).

Complainant submitted sufficient evidence to support a feasible means of abatement including implementing and enforcing a policy prohibiting employees from standing under suspended machine components, “such as the boom, arm, or bucket.” *See A.H. Sturgill Roofing, Inc.*, No. 13-0224, 2019 WL 1099857, at *9 (OSHRC, Feb. 28, 2019) (implementing any one of alternative means would constitute abatement of the alleged violation). Foreman Trehal, Mr. Shorley, and Mr. Fabela testified that no work task required an employee to be under a suspended bucket, which weighs in favor of the feasibility of Complainant’s proposed rule. (Tr. 191, 203, 212, 455, 330, 358). The operator’s manual itself warns “Never lift, move, or swing a load or attachment over anyone” (Ex. C-5 at 9), which also weighs in favor of finding feasible the proposed rule. In addition, the NIOSH publication directly addresses the circumstances present here and recommends a work rule of: “Do not allow workers to stand under suspended loads or suspended machine components, such as the boom, arm, or bucket.” (Ex. C-1 at 3). *See Mo. Basin Well Serv., Inc.*, No. 20-0562, 2018 WL 1309482, at *6 (OSHRC, July 12, 2022) (industry standard offered by Secretary should address the same circumstances at issue in the case).

Although ACC believes the bucket was resting on the bell of the pipe, it does not argue in its post-trial brief that this meant the bucket was not at least partially suspended as opposed to fully and firmly resting on the ground. Therefore, the Court finds the preponderance of the evidence establishes the bucket was suspended, i.e., not resting on the ground, at the time of the accident. And, although ACC argues it had a rule against standing under suspended loads, it was not clear that employees understood that a bucket attached to a mainline hoe should be treated as a suspended load. The Court finds that Complainant established a feasible means to abate the identified hazard.

Respondent's Employees Were Exposed to a Hazard

“Implicit in the above elements [of proof for general duty clause violations] is the necessity for establishing employee exposure to the cited hazardous condition.” *Peacock Engineering, Inc.*, 2017 WL 3864205, at *5 (OSHRC, Apr. 27, 2017) (citation omitted). “The Secretary establishes exposure either by showing actual exposure or that access to the hazard was reasonably predictable.” *Id.* (citation omitted). ACC argues there was no employee exposure because no work tasks required an employee to be under a suspended excavator bucket. However, this ignores the fact that [redacted] was in the trench completing a task specifically assigned by Foreman Trehal when [redacted] used the bucket to deliver a pipe plug to [redacted]. [redacted] was clearly exposed to the hazard, as the detached bucket fell on him. Complainant established employee exposure to the cited hazard.

Respondent Had Knowledge of the Violation

“[I]n addition to establishing the four elements of a general duty clause violation, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition.” *Peacock Eng'g*, 2017 WL 3864205, at *2. The key factor

here is whether ACC was aware of the conditions constituting a violation, not whether it understood the conditions violated the OSH Act. *Phoenix Roofing, Inc.*, No. 90-2148, 1995 WL 82313, at * 3 (OSHRC, Feb. 24, 1995). Complainant can prove employer knowledge through the actual or constructive knowledge of its supervisory employees. *Dover Elevator Co.*, No. 91-862, 1993 WL 275823, at *7 (OSHRC, July 16, 1993). If a supervisor is, or should be, aware of a hazardous condition, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980). The Secretary may also prove constructive knowledge by showing that the employer failed to establish an adequate program to promote compliance with relevant safety standards. *PSP Monotech Industries*, No. 06-1201, 2007 WL 5432286, at *3 (OSHRC, Aug. 14, 2008).

1. Supervisor Knowledge is Imputed to ACC

Here, Foreman Trehal knew or could have known of the violative condition and the circumstances giving rise to it. He was only 50 to 100 feet away, just on the other side of the excavator, when the accident occurred. He testified at trial that he could observe an improperly attached bucket from a distance of 50 feet. (Tr. 119). Therefore, if in the moments before the accident Foreman Trehal was 50 feet away from the trench, he could have seen that the bucket was improperly attached, and that [redacted] was retrieving the pipe plug from it. And, even if Foreman Trehal was 100 feet away and could not have observed the bucket from that distance, his presence at the worksite favors a finding of constructive knowledge. *See PAR Elec. Contractors Inc.*, No. 99-1520, 2004 WL 334488, at * 3 (OSHRC, Feb. 19, 2004) (foreman's presence at worksite establishes that violation could have been found with reasonable diligence). In addition, Foreman Trehal, only moments before the accident, gave [redacted] instructions to get ready to dig the trench (which required the bucket to be attached) and for [redacted] to enter the trench, get the

pipe plug, and install it.

ACC management also knew [redacted] was an inexperienced mainline hoe operator. The bulk of his experience was operating the tailhoe.⁵ (Tr. 108-09). However, ACC's management elevated him to the mainline hoe only two weeks before the accident. (Tr. 116, 198). Foreman Trehal watched [redacted] more carefully after he was assigned to the mainline hoe because he had concerns about [redacted]'s level of experience, and Foreman Trehal knew that significantly more work activities, with workers nearby on the ground, took place around a mainline hoe versus a tailhoe. (Tr. 110, 201). Foreman Trehal also specifically knew [redacted] had on multiple occasions in the past failed to conduct a ground test after attaching a bucket. (Tr. 116-117).

On the day of the accident, Foreman Trehal specifically assigned [redacted] and [redacted] to take the necessary next steps to "clean the hole," and he knew that task required the use of the mainline hoe. Foreman Trehal knew [redacted] was in the trench, and he heard [redacted] ask for someone to give him the pipe plug. Foreman Trehal also knew an excavator bucket would have to be attached because it was unattached at the time he walked around to the other side of the excavator. And, he knew excavator buckets could unexpectedly detach if improperly attached and not ground tested by the operator. Thus, it was foreseeable to Foreman Trehal that [redacted]—through inexperience or otherwise—may improperly attach the bucket and fail to conduct a ground test before moving the bucket within proximity of a crew member. And Foreman Trehal could have known about the improperly attached bucket had he stayed near the trench and supervised the junior members of his team carry out its work and his instructions. The Court finds that the

⁵ Tailhoe excavator operators are responsible for performing "backhoe operations," such as digging the initial trench at the beginning of the project and later backfilling the trench with dirt after the job is complete. (Tr. 410). Mainline hoe operators perform tasks like "cleaning the hole," which requires operation of the machine around people on foot. (Tr. 411). Operating a mainline hoe involves hazards like swing radius, blind spots, and controlled access. (Tr. 411-12). For this reason, mainline hoe operators typically have more experience than tailhoe operators. (Tr. 411).

preponderance of the evidence in the record supports imputing Foreman Trehal's knowledge to ACC.

2. ACC Failed to Establish an Adequate Program to Promote Compliance with Safety Standards

The reasonableness of imputing knowledge to an employer is also influenced by the adequacy of any employer's safety program.⁶ "In determining whether a safety program is adequate, the Commission considers whether the employer has established work rules designed to prevent the hazards from occurring, has adequately communicated the work rules to the employees, has taken steps to discover noncompliance with the rules, and has effectively enforced the rules in the event of noncompliance." *PSP Monotech Indus.*, 2007 WL 5432286, at *3 (citation omitted). Here, ACC had in place various work rules designed to avoid hazards associated with suspended loads – though it was not clear that employees were trained to include excavator buckets in that category. Excavator operators were required to conduct ground tests to ensure a bucket was properly attached. Workers were required to maintain eye contact with excavator operators when entering the swing radius of an excavator.

The record establishes that work rules requiring excavator operators to perform ground tests, that employees do not work underneath suspended loads, and that employees stay out of the swing radius of heavy machinery existed and were communicated to employees. The Court declines to find that ACC had a rule that suspended loads included bucket excavators.

⁶ The factors to consider in assessing the adequacy of an employer's safety program are similar to the elements of proof for the affirmative defense of unpreventable employee misconduct. *See PSP Monotech Indus.*, 2007 WL 5432286, at *4 n.4 ("[W]e note that the Secretary's burden of proving constructive knowledge and [the employer's] burden of showing unpreventable employee misconduct rest upon an overlapping issue-whether [the employer] had an adequate safety program.").

The JSA from the date of the accident documented a warning against lingering in the blind spots of heavy machinery, and the JSA dated a few days before the accident documented a warning against standing under a suspended load. In addition, Foreman Trehal and Mr. Fabela trained excavator operators to conduct ground tests after attaching a bucket to ensure it did not unexpectedly detach. However, the record is unclear whether ACC's supervisors communicated to workers that the prohibition against standing under suspended loads applied to excavator buckets. Mr. Shorley admitted that while he personally believed buckets constituted suspended loads, OSHA might not. (Tr. 358). Indeed, Ms. Bennett testified that an excavator bucket is not considered a suspended load in the construction industry as the attached bucket is part of the machinery, and the NIOSH publication introduced by Complainant indicates a suspended load is different from a suspended machine component, such as the boom, arm, or bucket. (Tr. 634; Ex. C-1).

Next, the Court evaluates whether ACC took steps to discover noncompliance with the rules. Mr. Shorley regularly inspected worksites, including the 64th and Denali project worksite, and any safety issues were immediately corrected. Mr. Fabela daily visited each of ACC's work crews at the worksite. (Tr. 408). During those visits, he inspected the quality of work and ensured proper safety precautions were being taken. (Tr. 409). Foreman Trehal routinely noted to his crew any rules violations he observed, such as when a crew member was in the swing zone or using a cell phone. ACC took steps to discover certain rules violations.

However, Complainant proved ACC failed to effectively enforce its rules when violations were detected. Foreman Trehal observed [redacted] failing to conduct a ground test more than once but did not formally or progressively discipline him. Instead, he only yelled at [redacted] and did not document the events in [redacted]'s employment file. Foreman Trehal admitted he only issued

verbal reprimands, and he was entirely unaware of ACC's policy requiring documentation of all disciplinary actions, including verbal warnings. Mr. Shorley also admitted that although ACC had a progressive disciplinary policy, discipline could be left to the discretion of management, and not every mistake would result in the employee being written up. (Tr. 341). Failure to progressively discipline [redacted] for repeated failures to perform ground tests after attaching an excavator bucket, and failure to clearly communicate to employees that elevated excavator buckets should be avoided as suspended loads, may have directly contributed to this hazardous condition and accident.

Respondent Failed to Prove the Affirmative Defense of
Unpreventable Employee Misconduct

ACC maintains the cited violation was unforeseeable and the result of unpreventable employee misconduct. To establish the defense, ACC must prove: (1) it had established work rules designed to prevent the violation; (2) it had adequately communicated those rules to its employees; (3) it had taken steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng'g & Dev. Corp.*, No. 10-0359, 2012 WL 3875599, at *3 (OSHRC, Aug. 27, 2012). In other words, it is incumbent upon ACC to "demonstrate that the actions of the employee were a departure from a uniformly and effectively communicated and enforced workrule [sic]." *Archer-W. Contractors Ltd.*, No. 87-1067, 1991 WL 81020, at *5 (OSHRC, Apr. 30, 1991).

As discussed previously, ACC's safety program was inadequate because ACC did not adequately communicate to its employees that the prohibition against standing under suspended loads should also apply to excavator buckets. In addition, ACC's supervisory employees did not follow the progressive disciplinary policy when [redacted]'s repeated failure to perform ground tests on newly attached excavator buckets was discovered. Under these circumstances, ACC did

not meet its burden of establishing the violative condition was the result of unpreventable misconduct. *See Danis Shook Joint Venture XXV*, No. 98-1192, 2001 WL 881247, at *6 (OSHRC, Aug 2, 2001) (finding that employer’s affirmative defense of unpreventable employee misconduct failed “for largely the same reasons upon which [the Commission] base[d] [its] finding of constructive knowledge of the violation at issue”). ACC’s affirmative defense fails.

Conclusion

Complainant established by a preponderance of the evidence that on August 23, 2021, at the 64th and Denali Project in Aurora, Colorado, there was a condition or activity in the workplace which presented a hazard to an employee; that Respondent and its industry recognized the hazard; that the hazard was likely to cause, and did cause, the death of an employee; that a feasible and effective means existed to eliminate or materially reduce the hazard; and that Respondent knew, or with the exercise of reasonable diligence, could have known of the hazardous condition. Respondent failed to establish that the violative condition resulted from unpreventable employee misconduct. Accordingly, Citation 1, Item 1 will be AFFIRMED.

Penalty

In calculating appropriate penalties for affirmed violations, section 17(j) of the OSH Act requires the Commission give due consideration to four criteria: (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer’s prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Const. Co.*, No. 87-2059, 1993 WL 61950 (OSHRC. Feb. 19, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the

applicable statutory criteria. *Valdak Corp.*, No. 93-0239, 1995 WL 139505 (OSHRC, Mar. 29, 1995); *Allied Structural Steel*, No. 1681, 1975 WL 4613 (OSHRC, Jan. 7, 1975).

Complainant proposed a penalty of \$11,747. Complainant first assessed the maximum penalty allowed by Congress then reduced the penalty by 10% based on ACC's small size and another 10% based on ACC's lack of violation history. (Tr. 585). Complainant determined the severity was high because the injury that could occur would be permanently disabling or result in death. (Tr. 583). The probability of injury was assessed as greater because the accident occurred, and death resulted. (Tr. 584). Based on the totality of circumstances discussed above, the Court agrees with Complainant's application of penalty factors and will assess a penalty of \$11,747 for Citation 1, Item 1.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1 is AFFIRMED as a SERIOUS violation of the Act, and a penalty of \$11,747 is ASSESSED.

/s/ Brian A. Duncan

Judge Brian A. Duncan

U.S. Occupational Safety and Health Review Commission

Date: February 6, 2024
Denver, Colorado