



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.

HUEN ELECTRIC, INC.,

Respondent.

OSHRC Docket No. 20-0134

FINAL ORDER

On September 13, 2022, the parties submitted a Joint Notification of Full Settlement pursuant to Commission Rule 100, 29 C.F.R. § 2200.100, stating that they have resolved all the contested citation items in this case.¹ Since the parties have agreed to terminate the proceeding, the case is hereby DISMISSED.

SO ORDERED.

BY DIRECTION OF THE COMMISSION

Dated: October 3, 2022

/s/

John X. Cerveny
Executive Secretary

¹ The judge's decision in this case was docketed on August 29, 2022, and, if not directed for review, would have become a final order of the Commission on September 28, 2022. *See* 29 U.S.C. § 661(j).

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

HUEN ELECTRIC, INC.,

Respondent.

DOCKET NO. 20-0134

Appearances:

Travis Gosselin, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois
For Complainant

Matthew W. Horn, Esq. & Michael F. Cocciemiglio, Smith Amundsen LLC, Chicago, Illinois
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On September 30, 2019, Respondent was removing an electrical splice box from a vault approximately three feet below the floor at the Chicago Museum of Science and Industry in Chicago, Illinois. (Tr. 54; Exs. J-17, 20, 22). During the process of removing the splice box, the stacker truck Respondent used to lift it moved towards the vault, and the splice box and stacker truck fell in. (Ex. J-5). One of Respondent's employees was pinned against the wall of the vault and suffered serious injuries as a result of the incident. (Tr. 99, 100, 124).

Respondent reported the incident to OSHA, and Compliance Safety and Health Officer (CSHO) Anton Stephens traveled to the accident site the same day to begin an investigation.¹ (Tr. 52). Over the course of three days, CSHO Stephens reviewed the site of the accident, conducted interviews, inspected the stacker truck, took measurements of the truck and vault, and reviewed surveillance video of the accident. (Tr. 52, 55-57; Ex. C-5). As a result of his inspection, CSHO Stephens recommended, and Complainant issued, a *Citation and Notification of Penalty*. (Ex. J-1). In the *Citation*, Complainant alleged Respondent committed two serious violations of the Occupational Safety and Health Act and proposed a combined total penalty of \$23,868. Respondent filed a timely *Notice of Contest*.

A trial was held in Chicago, Illinois over the course of two days, starting on November 30, 2022. The following individuals testified: (1) CSHO Anton Stephens; (2) John Johnson, Complainant's expert; (3) Anthony Bond, Respondent's expert; and (4) John Kane, the stacker truck operator and general foreman for the Chicago Museum project. Both parties submitted post-trial briefs for the Court's review. Based on its review of the testimony, record evidence, and applicable law, the Court issues the following *Decision and Order*.

Jurisdiction & Stipulations

The parties agreed to multiple factual and jurisdictional stipulations, including 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, Respondent 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

1. In the time since the events of this incident, Mr. Stephens was promoted to Assistant Area Director of OSHA's Chicago South Office. (Tr. 49-50). For the purposes of this case, however, the Court will refer to him as CSHO Stephens.

U.S.C. § 652(5). *See Slingsluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties' stipulations are reproduced below:

1. The Occupational Safety and Health Review Commission has jurisdiction over this matter.
2. Respondent is, and was at all relevant times, a corporation with an office and place of business at 801 W. 16th Street, Broadview, Illinois 60155.
3. At all times relevant to this matter, Respondent had a workplace at 5700 S. Lake Shore Drive, Chicago, Illinois 60637.
4. Respondent is, and was at all relevant times, engaged in the electrical contracting industry.
5. At all relevant times, Respondent engaged in a business affecting commerce by handling goods or materials that had been moved in commerce.
6. On September 30, 2019, employees of Respondent were removing and replacing a splice box from below grade at the Museum of Science and Industry at 5700 S. Lake Shore Drives, Chicago, Illinois (the "Project").
7. John Kane was the General Foreman for the Project.
8. As General Foreman for the Project, Mr. Kane had oversight of the Project and directed the crew involved in the Project.
9. The crew on the Project consisted of John Kane, General Foreman; Todd Scott, Journeyman; Tony Rebellato, Jr., Journeyman; and James Conerty, Electrician. All members of the crew were employees of Huen Electric, Inc., as of September 30, 2019.
10. On September 30, 2019, John Kane operated a Toyota 6BWC15 Electric Counter Balanced Stacker Truck (hereinafter the "stacker" or "stacker truck").
11. The splice box weighed 1,370 pounds.
12. The stacker truck itself—less the battery—weighed 5,465 pounds.
13. The stacker truck battery weighed between 950 and 1375 pounds.

(Tr. 17-18).

Factual Background

Respondent's Work at the Museum

Respondent is an electrical contractor who was hired to upgrade the electrical system at the Chicago Museum of Science and Industry. (Jt. Stip. Nos. 4, 6; Tr. 54). According to John Kane, some of the electrical cables and equipment had been in place for over 100 years. (Tr. 396). Among the items that needed to be removed were splice boxes located below the floor of the museum. (Tr. 396). Kane testified the plan was to disconnect the existing cables from the splice boxes, remove the splice boxes, temporarily re-connect the existing cables, and then, ultimately, replace the old cables with new ones. (Tr. 396-97). This required shutting off power at locations throughout the museum. (Tr. 402). To minimize interruptions, Respondent's crew worked at night when the museum was closed. (Tr. 402). Prior to the incident described briefly above, Respondent's crew removed four splice boxes from the vaults below the floor of the museum at a rate of approximately one splice box every one or two months. (Tr. 403). The incident resulting in the *Citation* occurred during the removal of the fifth, and largest, of the splice boxes.

Removing the Splice Boxes

The first four splice boxes were about half the size of the splice box they attempted to remove on September 30, 2019. (Tr. 360). According to Kane, he estimated the smaller boxes each weighed approximately 500-600 pounds, and the larger box he estimated weighed about 1,000 pounds.² (Tr. 359). Kane and his crew used virtually the same process to remove the smaller boxes as they did with the larger splice box. To access the below-ground vaults where the splice boxes were located, Respondent had to remove two-foot by three-foot concrete floor panels. Initially, Respondent removed the panels by hand, but, after observing museum personnel use their own

2. In reality, the larger splice box weight 1,370 pounds. (Jt. Stip. No. 11).

pallet stacker to remove the covers from the vaults, Kane followed suit and removed the covers with a pallet stacker Respondent had rented for the job.³ (Tr. 336). Once the cover was removed, the crew wrapped straps around the splice boxes and removed them from the vaults, which were approximately 3.5 feet deep, using the rented stacker forklift. (Tr. 335-336).

The process to remove the larger splice box was, in general, the same as the process Kane and his crew used to remove the smaller splice boxes; however, there were some notable differences. First, Kane did not have the rental stacker at his disposal, so, with the permission of the museum's project manager, he borrowed the museum's Toyota stacker truck. (Tr. 337). Second, Kane testified he and his crew engaged in a fair amount of planning due to the difference in size and limited space. (Tr. 343). According to Kane, the planning started a couple of weeks in advance, and included measurements of the vault, the splice box, and available head room for the lift; reviewing the different stacker truck's manual; and comparing the capacity of the stacker (2750 pounds) to the approximate value of the splice box, which he estimated to be around 1000 pounds. (Tr. 343-344, 359-360, 411). In addition, Kane testified he removed the top of the splice box to observe its contents and determine the location of the load center. (Tr. 399). Third, because he had to borrow the museum's stacker truck, he had to retrieve it from its charging station on the second floor, take it down the freight elevator, and drive it to where the splice box was located. (Tr. 410-411). Third, due to the size of the box, the limited space available, and the placement of a center brace in the vault, Kane needed to lift the box on its edge before it could be lifted out of the vault. (Tr. 349).

3. At trial there was some confusion over how the first four boxes were removed, because CSHO Stephens initially testified the boxes themselves had been removed by hand. (Tr. 133-134). Later in his testimony, CSHO Stephens testified Respondent used a rented pallet stacker. (Tr. 136). The discrepancy in CSHO Stephens' testimony is likely due to statements made about how the crew initially removed the vault covers, or, as Kane testified at one point, how they unsuccessfully attempted to remove one of the splice boxes by hand. (Tr. 404).

Prior to the lift, Kane and his crew discussed how the lift would be accomplished. (Tr. 422). The first step in the process required the crew to get into the open sub-floor vault and use pry bars to lift each side of the splice box so the straps could be wrapped around it in a choker configuration. (Tr. 340; Ex. J-5, J-25). Once the straps were in place, the loops at the end of the straps were attached to the lefthand fork, which Kane slowly raised until the box was resting on its side.⁴ (Tr. 425; Ex. J-5). Once the box was on its side, Kane directed the crew, who stayed in the vault during the entirety of the lift, to place one of the lifting strap loops on the other fork. (Tr. 426, 436). This required Kane to back up the stacker so one loop could be removed from the left fork and slipped onto the right fork. (Tr. 436; Ex. J-5; J-25). In its lifting configuration, one loop was against the carriage of the stacker, while the other loop sat roughly 12 inches from the end of the opposite fork. (Tr. 426; Ex. J-25). Kane angled the forks upward to their maximum of 10 degrees to prevent slippage and centered them over the top of the box, which placed the stacker roughly one foot away from the edge of the vault. (Tr. 350, 438). Based on Kane's observation, he determined the load was centered and stable. (Tr. 427-28).

Prior to beginning the lift, Kane had the parking brake engaged and checked both sides of the forks to make sure "everything's set up and lined up the way I want[ed] it to be." (Tr. 439). When Kane began to raise the box, two of the crew members had a hand on the box to keep the box steady in the event it started to sway,⁵ but, according to Kane and the surveillance video, the box never moved nor does the stacker show any signs of instability. (Tr. 440-41; Ex. J-5 at 05:20). Once Kane had raised the box above the threshold of the vault, Kane briefly paused before he released the parking brake by pressing down on the handle of the stacker. (Tr. 443; Ex. J-5 at

4. The crew members also used pry bars to push the splice box as Kane was lifting with the forks. (Tr. 424-25).

5. The other crew member was not visible in the video, but, according to Kane, he was standing roughly 4-5 feet away from the box, against the far wall of the vault. (Tr. 344-45).

05:25). To that point, the stacker truck did not show any sign of instability. (Tr. 377, 418; Ex. J-5 at 5:20-5:25). After he release the brake, Kane testified, he rotated the throttle to move the stacker truck away from the vault when he felt the stacker go forward instead (toward the open vault pit) and tumble into the vault. (Tr. 444; Ex. J-5 at 05:25). As a result, one of the crew members was pinned to the opposite end of the vault. (Tr. 100; Ex. J-5). The crew member suffered serious injuries resulting in hospitalization and multiple surgeries. (Tr. 99). Kane testified he does not know what caused the stacker moved forward toward the vault but believes it was the result of a malfunction. (Tr. 446).

Kane's Training

According to Kane, he has operated Powered Industrial Trucks, such as forklifts and stacker trucks, for close to 30 years. (Tr. 420). In that time, he testified, he had never been in an accident until the night of September 30, 2019. (Tr. 446). In each of his jobs, Kane received some form of formal training, mostly on forklifts where the operator sits in a cab. Kane also received training on walk-behind stacker trucks in one of his previous jobs. The following is brief recap of Kane's training in Powered Industrial Trucks up until the night of September 30, 2019.

Kane's first job was with a garage door company called Overdoors, where he worked from 1987 to 1989. (Tr. 380). During that time, he operated pallet stackers and forklifts "on a daily basis." (Tr. 379-80). While there, he received hands-on training from the shop foreman, which included how to safely operate the machines and maneuver around the warehouse and was followed by a written quiz at the end of the training. (Tr. 380). He classified the training as "pretty extensive". (Tr. 380). Following his job at Overdoors, Kane started his electrical apprenticeship with Divan Brothers Electric in 1989, where he stayed until 2012. (Tr. 381). Eventually, Kane became a journeyman electrician and was promoted to foreman. (Tr. 381). During his time with

Divan Brothers, he received classroom and hands-on training in forklift and stacker truck operation. (Tr. 384-85). Following his time at Divan, Kane went to Meade Electric for a period of two years, where he received training in, and operated, sit-down forklifts as part of his job; however, he did not operate pallet stackers during that time. (Tr. 387).

After his time at Meade, Kane started at Huen Electric (Respondent) in 2014, where he was made a general foreman after working there for a year. (Tr. 387). Respondent provided Kane with training in forklift operation in November 2017. (Tr. 388; Ex. J-3). The training included web-based training, as well as a driving course evaluation. (Ex. J-3). Kane testified Respondent did not provide similar training with respect to pallet stackers. (Tr. 367). Respondent's counsel elicited testimony about numerous similarities between forklifts and pallet stackers, such as capacity, load handling, and pre-inspection; however, Kane testified, on both direct- and cross-examination, the "biggest difference" is the steering, braking, and throttle. (Tr. 367-68, 389). These differences were also noted by CSHO Stephens. (Tr. 102, 106). Though there is no evidence of formal training, Kane testified he had operated pallet stackers in his previous jobs, as well as during his employment with Respondent. According to Kane, in 2017, he was observed operating a pallet stacker during the construction of an Amazon fulfillment center by John Kovach, who performed Kane's forklift Driving Course evaluation. (Tr. 394; Ex. J-3).

With respect to the Toyota pallet stacker Kane used on the night of September 30, 2019, Kane testified he spent about an hour reviewing the operator's manual on the Friday prior to the lift. (Tr. 411). Prior to the night of the lift, however, he had never operated the Toyota pallet stacker. (Tr. 405-406). Instead, on the night of the lift, Kane went to the second floor of the museum, conducted a visual inspection of the stacker, operated the controls to ensure it was working properly, and then drove it from its charging station down to the location of the splice

box. (Tr. 410-411). According to Kane this involved maneuvering the stacker around some obstacles on the second floor, loading it onto the freight elevator 100 yards away, and driving it another 50-60 feet from the elevator to the location of the splice box. (Tr. 412). Kane testified this involved operating the stacker in both the fork-forward and fork-trailing positions. (Tr. 445).

Discussion

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

Citation 1, Item 1

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

29 CFR 1910.178(l)(1)(i): The employer did not ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l):

- a. On or about September 30, 2019, at the above addressed jobsite, an employee was operating a Toyota 6BWC15 Electric Counter Balanced Stacker Truck and had not been provided with training, including but not limited to formal instruction, practical training and an evaluation of the operators [sic] performance, thereby exposing employees to struck by and crushing hazards.

Citation and Notification of Penalty at 6.

The Standard Applied

The powered industrial truck standard found at 29 C.F.R. § 1910.178 “contains safety requirements relating to fire protection, design, maintenance and use of fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by

electric motors or internal combustion engines.” 29 C.F.R. § 1910.178(a)(1). The stacker truck discussed above was a Toyota 6BWC15 Electric Counter Balanced Stacker Truck, which is a hand-operated truck with an electric motor. The parties do not dispute Respondent was engaged in construction work at the museum. *See id.* § 1910.12 (defining construction work as work for “construction, alteration, and/or repair”). Section 1926.602(d), entitled *Powered industrial truck operator training*, includes a note, which states, “The requirements applicable to construction work under this paragraph are identical to those set forth at § 1910.178(l) of this chapter.” *Id.* § 1910.602(d). Thus, the Court finds the cited standard applied.

The Terms of the Standard Were Violated

The cited standard requires Respondent to “ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).” *Id.* § 1910.178(l)(1)(i). Complainant contends Respondent failed to provide Kane training specific to the walk-behind stacker truck and, thus, failed to ensure he was competent to operate the Toyota stacker truck safely.⁶ Respondent, on the other hand, contends Complainant failed to prove a violation of the standard because (1) Kane had extensive, prior experience operating both sit-down forklifts and walk-behind stacker trucks; (2) Respondent provided Kane with training on sit-down forklifts that complied with § 1910.178(l)(2)(B)(ii); (3) Kane’s operation of a walk-behind stacker truck was “observed and evaluated” by Respondent’s safety director, John Kovach, during the

6. Complainant engaged in a lengthy discussion regarding the Court’s obligation to defer to its reasonable interpretation of the standard. First, Complainant cites to *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984), for this proposition. This is incorrect, as *Chevron’s* analysis is limited to interpretation of *statutes*, not regulations. Second, as the Supreme Court’s recent holding in *Kisor v. Wilkie* indicates, deference is only due to the Secretary’s interpretation when the court finds the regulation is truly ambiguous after a review of the text, structure, history, and purpose of a regulation. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Based on this analysis, the plain language of the cited standard is clear. Thus, the Court need not rely on the Secretary’s interpretation of the standard.

Amazon construction project; and (4) Complainant cited the wrong standard, because only refresher training was required under § 1910.178(l)(4)(ii)(D). Ultimately, the Court finds Complainant proved a violation of the standard because Respondent failed to provide training compliant with the standard or otherwise evaluate and find Kane competent to operate the Toyota stacker truck. *See id.* §§ 1910.178(l)(2)(B)(ii), (l)(5).

The cited standard places the onus on Respondent to ensure its operators are competent to operate a particular powered industrial truck (PIT), which is satisfied through the completion of training and evaluation pursuant to the requirements of paragraph (l). *See id.* § 1910.178(l)(1)(i). This training must occur prior to permitting an employee to operate a PIT. *Id.* § 1910.178(l)(1)(ii). Regardless of whether the training at issue is an employee's initial training on a PIT or refresher training on a related, yet different, PIT, such training must meet certain minimum requirements, including a combination of: (1) formal instruction, such as lecture, discussion, interactive computer learning, video tape, or written material; (2) practical training, such as demonstrations by the trainer and practical exercises by the trainee, and (3) an evaluation of the trainee's performance in the workplace. *See id.* § 1910.178(l)(2)(ii). The cited standard lays out who may provide such training, the content of such training, and the conditions under which additional training is/is not necessary. *See id.* §§ 1910.178(l)(2)-(5). Finally, an employer, such as Respondent, is required to certify the operator has been trained and evaluated. *Id.* § 1910.178(l)(6).

As noted above, Kane received some training on some models of forklifts and stacker trucks prior to his employment with Respondent, but the only documented training he received while working for Respondent was for Class IV Forklift operation. (Ex. J-3). According to Kane, this training only addressed sit-down forklifts and did not include a discussion of, or practical exercises on, a stacker truck like the Toyota used on September 30, 2019. Kane also testified there

were distinct differences in the operation of the stacker truck vis-à-vis the forklift, such as the steering, braking, and throttle. Respondent contends Kane was “observed and evaluated” operating a stacker truck during previous work at an Amazon construction project; however, a review of Kane’s testimony only indicates he was “observed” operating the vehicle. (Tr. 394).

There was no evidence to indicate Kane received pallet stacker training that complied with the structure or substance of paragraph (l). Though Kane received training in the operation of both forklifts and pallet stackers from prior employers,⁷ Respondent was still obliged to “ensure” Kane was competent to operate the Toyota pallet stacker safely “as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).” 29 C.F.R. § 1910.178(l)(1)(i). Respondent could have fulfilled its obligation in several ways, depending on Kane’s prior experience and the training Respondent, itself, has provided. *See id.* §§ 1910.178(l)(4)(ii)(D), (l)(5). There is no dispute Respondent provided Class IV Forklift training that was compliant with paragraph (l). Kane testified to the content of the training, and the parties submitted certification of both an electronic learning component and an evaluation of Kane’s practical skills, which comply with the content requirements found in paragraph (l)(3). But, Kane also testified there were notable differences in how the two machines operated, which means, at the very least, Respondent was required to provide training on those topics listed under paragraph (l)(3)(i) where Class IV forklifts and pallet stackers differ, such as those related to throttle, steering, and braking. *See id.* § 1910.178(l)(3)(i)(A), (C), (D), (E), (M); *see also id.* § 1910.178(l)(5) (indicating additional training in duplicative topics is not necessary “if operator has been evaluated and found competent to operate the truck safely”). There is no evidence Respondent provided

7. In support of this proposition, Respondent cites to *Trinity Industries*, 15 BNA OSHC 1788 (No. 89-1791, 1992). However, *Trinity* was decided prior to the amendment of § 1910.178, wherein OSHA substantially changed an employer’s obligations with respect to powered industrial truck training. *See Powered Industrial Truck Operator Training*, 63 Fed. Reg. 66,238 (December 1, 1998).

formal training, practical training, or observation and evaluation on the Toyota stacker truck consistent with the requirements of paragraph (1). Simply because he was observed operating a different model stacker truck at a previous job does not necessarily mean Respondent fulfilled its obligation to ensure Kane was competent “as demonstrated by the successful completion of the training and evaluation specified in this paragraph (1).” *Id.* § 1910.178(l)(1)(i). Cementing this fact is that Respondent certified Kane’s training in Class IV forklifts, in compliance with paragraph (1)(6), but did not do so with respect to pallet stackers. As stated earlier, Kane felt the need to review the manual for the Toyota stacker truck for an hour before use because he was not familiar with that model. There was no evidence of any evaluation to ensure that his one hour review and inspection of the machine was sufficient to establish his competency to operate the machine.

Respondent contends Complainant cited the incorrect standard because, at most, Kane only needed refresher training on those topics not covered in his Class IV forklift training, which is covered by § 1910.178(l)(4)(D). First, Respondent did not raise in its *Answer* the claim that the general standard cited by Complainant was preempted by a more specific standard, nor did it seek to amend its *Answer* to assert such a defense. *See Resp’t Answer*, March 23, 2020. *See also Spirit Aerosystems, Inc.*, 25 BNA OSHC 1093, 2014 WL 7434582 at *5 n.7 (noting Commission precedent that preemption by a more specific standard must be raised in employer’s answer or via amendment). Second, while there are similarities between a Class IV forklift and a pallet stacker, they are fairly general. A review of the truck-related topics and workplace-related topics discussed in paragraph (1)(3)(i) & (ii) illustrate a lengthy list of items that would require additional training based on the differences between the two PITs, as well as any training required based on the worksite. Third, regardless of whether the training required was initial training or refresher training, Respondent failed to abide by the requirements of paragraph (1)(2)(ii), which is equally

applicable to initial and refresher training. The principal difference between initial and refresher training is that refresher training for a different type of truck need not duplicate training in the topics listed in paragraph (l)(3) and already received by operator in another training program. But, such differences do not excuse Respondent from ensuring the non-duplicative training it provides complies with the three-part requirement of paragraph (l)(2)(ii). Nothing in the Secretary's interpretive letters excuses an employer from complying with the training and evaluation requirements, regardless of whether the training is initial or refresher.

Based on the foregoing, the Court finds that Complainant violated the terms of 29 C.F.R. § 1910.178(l)(1)(i).

Respondent's Employees Were Exposed to the Hazard

To establish exposure under Commission precedent, the Secretary must show Respondent's employees were actually exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). In this case, the members of Kane's crew were exposed to a hazard because they were working in proximity to Kane, whom Respondent had not trained or evaluated in the operation of the Toyota pallet stacker. The fact that one of the employees was ultimately injured in this case solidifies this fact. *See, e.g., S&G Packaging Co.*, 19 BNA OSHC 1503, 2001 WL 881250, *3 (No. 98-1107, 2001).

Respondent Knew or Could Have Known of the Violation

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the

conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Respondent contends Complainant failed to prove it had actual or constructive knowledge of the violation. First, Respondent argues it did not direct Kane to use the Toyota stacker truck and, therefore, it could not have known of the necessity to provide training to Kane. While there was no explicit testimony indicating Kane had been told to use a pallet stacker to remove the splice box, such is not necessary to prove this element. Although Kane chose to use the museum’s Toyota stacker truck for the lift on September 30, 2019, Respondent rented a different model stacker truck for the four previous lifts Kane and his crew performed in the 6 months prior. The Court finds it reasonable to infer Respondent was aware—or at least should have been aware—Kane used a stacker truck on multiple occasions prior to, and likely during, the lift on September 30, 2019. *See Fluor Daniel*, 19 BNA OSHC 1529, 1531 (Nos. 96-1729 & 96-1730, 2001) (“[T]he Commission may draw reasonable inferences from the evidence[.]” (citing *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2159 (No. 90-1747, 1994))). Therefore, Respondent was also aware of its obligation to train and evaluate Kane in the operation of a pallet stacker consistent with the dictates of § 1910.178(l), which it failed to do. Respondent also contends Kane did not have knowledge of his own violative conduct, because he believed himself to be adequately experienced and trained. Even if Kane’s knowledge of his own conduct/training was the operative fact, Kane testified he was aware he had not received pallet stacker training from Respondent and that there were notable differences between the operation of different pallet stackers and forklifts. Based on these facts, Respondent’s claim regarding Kane’s knowledge of his own lack of training is rejected.

Finally, Respondent cites to Fifth Circuit precedent, which requires Complainant to prove a supervisor's actions were foreseeable when the supervisor is both the person with knowledge and the individual violating the standard. *See Resp't Br.* at 21 (citing *Angel Bros. Enterprises, Ltd. v. Walsh*, 18 F.4th 827, 831 (5th Cir. 2021) (internal citations omitted)). There are two problems with this argument. First, this case did not occur in the Fifth Circuit. The Commission generally applies the precedent of the circuit court of appeals to which it is "highly probable" that the matter will be appealed, even though that precedent may differ from the Commission's precedent. *See Dana Container, Inc.*, 25 BNA OSHC 1776, 1792 n.10 (No. 09-1184, 2015), *aff'd*, 847 F.3d 495 (7th Cir. 2017). This case occurred in Chicago, Illinois, which is in the Seventh Circuit. Second, and more important, the Seventh Circuit approved of the Commission's decision to impute a supervisor's knowledge of his own misconduct in *Dana Container v. Sec'y of Labor*, 847 F.3d 495, 499-500 (7th Cir. 2017). Thus, Respondent's argument is rejected.

The Violation Was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Complainant need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010). As noted above, Respondent's employees worked in proximity to Kane while he operated the pallet stacker, and one of them was seriously injured by the machine tumbling into the vault. Even if an injury did not occur, the failure to train an employee to "ensure [the operator] is competent to operate a powered industrial truck safely" exposes the individuals working in proximity to that employee to the possibility of serious injury. The stacker at issue in this case weighed over 6,000 pounds, and the splice box weighed an additional 1,300 pounds. If an accident

involving the machine were to occur, the Court finds it reasonable to conclude the injuries resulting therefrom would be serious.

Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

29 CFR 1926.602(c)(1)(ii): Modifications or additions which affect the capacity or safe operation of the equipment were made without the manufacturer's written approval.

- a. On or about September 30, 2019, at the above addressed jobsite, employees were exposed to struck-by hazards while lifting an electrical splice box using lifting straps placed around the forks of a Toyota 6BWC15 Electric Counter Balanced Stacker Truck. The lifting straps were an addition to and modification of the stacker truck that affected the capacity and/or safe operation of the truck. The employer did not receive written approval from the manufacturer of the stacker truck before using the lifting straps. *Citation and Notification of Penalty* at 7.⁸

The Standard Applied

Section 1926.602 governs material handling equipment generally and its subparagraphs (a), (b), and (c) cover different types. At issue in this case is subparagraph (c), which covers lifting and hauling equipment, specifically industrial trucks like "lift trucks, stackers, etc." See 29 C.F.R. § 1926.602(c)(i). The Court finds, and the parties do not dispute, the standard applies.

The Terms of the Standard Were Not Violated

The cited standard prohibits "modifications or additions which affect the capacity or safe operation of the equipment" unless the employer receives the "manufacturer's written approval." *Id.* § 1926.602(c)(ii). Thus, it is incumbent upon Complainant to prove (1) there was a modification of or addition to the equipment; (2) that affected its capacity or safe operation; and (3) Respondent failed to receive the manufacturer's approval. See, e.g., *Peacock Eng'g, Inc.*, No. 11-2780-A, 2017

8. Complainant moved to amend the Citation and Notification of Penalty on July 22, 2021. See *Complainant's Motion to Amend Complaint and Citation*, Docket No. 20-0134 (July 22, 2021). The *Motion* was granted by the Court on September 17, 2021. See *Order*, Docket No. 20-0134 (September 17, 2021).

WL 3952533 at *22. Complainant asserts the use of lifting straps, which wrapped around the splice box and looped through by the forks, constituted an “addition and/or modification” to the stacker that affected the safe operation of the pallet stacker. Respondent, on the other hand, argues the use of straps was neither an addition nor a modification, and further argues the safe operation of the stacker was not affected. Complainant, aided by the initial opinion of its expert, John Johnson, originally contended the capacity of the stacker was affected. (Tr. 153-54, 270-74). At trial, however, Complainant’s expert changed his conclusion on several points, and conceded that the capacity of the stacker was not affected by using the lifting straps. (Tr. 270-274). This concession is supported by the evidence, which shows, at a minimum, the capacity of the stacker was 2750 pounds, whereas the splice box weighed 1370 pounds. (Tr. Jt. Stip. No. 11; Tr. 414).

Thus, the focus of this discussion is whether (a) the straps constituted an addition or modification; and (b) whether the safe operation of the stacker was affected by such an addition and/or modification. The Court finds the straps were neither an addition nor a modification of the pallet stacker because Complainant’s interpretation of the terms addition and modification strain their plain meaning. Further, assuming *arguendo* the straps are an addition to or modification of the stacker, the Court nevertheless finds Complainant failed to prove the straps actually affected the safe operation of the stacker.

As noted earlier, before the Court is obligated to defer to Complainant’s interpretation of its own standards, the Court must first determine whether the terms of the standard are ambiguous. This analysis is guided by the Supreme Court’s holding in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). “[T]he possibility of deference [under *Auer*] can arise only if a regulation is truly ambiguous.” *Kisor v. Wilkie*, 139 S. Ct. at 2414. Before a court can reach such a conclusion, it must exhaust all of the “traditional tools” of construction.” *Id.* (citing *Chevron U.S.A., Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837, 843 n.9 (1984)). This requires a court to “‘carefully consider[]’ the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.” *Id.* (internal citation omitted). Only after such an analysis should a court refer to the Secretary’s interpretation, and, even then, the court must determine whether such an interpretation is reasonable.

The cited standard was adopted from the ANSI 56.1-1969 standard. *See, e.g.*, Powered Industrial Truck Operator Training, 63 Fed. Reg. 66,237 (“The construction standard for powered industrial trucks incorporates ANSI B56.1-1969 by reference and, therefore, also has the same scope as the ANSI standard.”); *see also* Safety Standard for Powered Industrial Trucks, ANSI B56.1-1969, *available at* <https://law.resource.org/pub/us/cfr/ibr/002/ansi.b56.1.1969.pdf>. Neither 1926.602 nor ANSI B56.1-1969 defines the terms “addition” or “modification”, but this does not automatically render the terms ambiguous. *See Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785 at *2 (citing *Fla. Gas Contractors, Inc.*, No. 14-0948, 2019 WL 995716, at *3 (OSHRC Feb. 21, 2019) (determining term’s meaning by first turning to dictionary in absence of definition in standard); *see also Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term “carries its ordinary meaning”)). According to the Merriam-Webster online dictionary, an addition is defined as “a part added”. *Addition*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/addition> (last visited July 25, 2022). Modification, on the other hand, is defined as “the making of a limited change in something”. *Modification*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/modification> (last visited July 25, 2022). *See Jesco, Inc.*, No. 10-0265, 2010 WL 9448085 (OSHRC, 2013) (relying on dictionary definition of term “modified”).

Although the ANSI 56.1-1969 standard does not define addition or modification, it provides texture to those terms through its definition of the term “attachment”. According to the ANSI standard, an attachment is “[a] device other than conventional forks or load backrest extension, *mounted permanently or removably* on the elevating mechanism of a truck for handling the load. Popular types are fork extension clamps, rotating devices, side shifters, load stabilizers, rams, and booms.” *See* ANSI B56.1-1969 at 47, *supra* (emphasis added). The ANSI definition of attachment, especially when read in context, is consistent with the dictionary definitions of the terms addition and modification described above. The paragraph immediately following the adopted ANSI standard regarding modifications and additions states:

If the truck is equipped with front-end attachments other than factory installed attachments, the user shall request that the truck be marked to identify the attachments, show the approximate weight of the truck and attachment combination, and the capacity of the truck and attachment combination at maximum elevation with load laterally centered.

Id. at 40. The list of attachments, as described above, are the types of implements that could be added to, or be used to modify, a forklift, such as the stacker at issue. The concern, as repeated throughout the ANSI 56.1-1969 standard, is whether the weight of the truck, its capacity, or its safe operation are impacted.⁹

The straps Complainant contends were a modification or addition do not fit into any of the categories described in the definition of “attachment”, nor do they impose the same sorts of concerns as those attachments. The straps were not added to, nor did they physically change, the forklift. *Cf. Peacock*, 2017 WL 3952533 at *2 (employer removed forks and welded a block and eyebolt to the end of the boom in a clear example of modification). Rather, they served as the lift

9. It is also interesting to note the ANSI standard appears to distinguish between additions/modifications and securing a load. *See* ANSI 56.1-1969 (“When attachments are used, particular care should be taken in securing, manipulating, positioning, and transporting the load.”).

connection point for the splice box. By way of comparison, the stacker typically lifts a load resting on a pallet, with the forks inserted through open gaps between the pallet wood. The Court is not aware of any authority deeming the pallet to be an “addition or modification” of the forklift itself; instead, the pallet facilitates the lift by providing a means to slide the forks beneath the load.¹⁰ The lifting straps in this case functioned in a similar manner. The straps were wrapped around the load, and the forks were driven through the strap loops as a means to lift the load. Because the straps were neither attached to, nor modified, the forklift, the Court finds they were not an addition or modification under the plain meaning of those terms.

Complainant relied on the testimony of CSHO Stephens; its expert, Mr. Johnson; and two letters of interpretation in support of its argument that the straps were additions or modifications. CSHO Stephens determined the straps were an addition under the standard (though he could not clearly explain the definition of either), because the straps facilitated a below-the-fork lift, which he believed was contrary to the stated purpose of the stacker. (Tr. 114-116; Ex. J-4). While the manual states it is “designed for handling pallets indoors”, the manual does not include a below-the-fork lift as one of its prohibited uses, which are: operating in dangerous atmospheres, using as a tow truck for trailers or trucks, or as a passenger lift/transport. (Ex. J-4 at 10). Further, Complainant’s own guidance indicates “free-rigging”, which is a below-the-fork lift, is a “common practice”. *See* Standard Letter of Interpretation from Richard E. Fairfax to Dennis C. Humphreys (October 22, 1999).

Mr. Johnson’s testimony on this point was equally unavailing. Initially, he distinguished an addition from a modification by way of example. He characterized a modification as “something

10. Johnson also described a similar implement called a super sack, which has loops through which the tines of the forklift are inserted. (Tr. 287, 290-291). Like the present case, a super sack allows the forklift to carry the load below the forks, but it does not modify or add to the forklift in order to facilitate that lift. There was no evidence that the use of such sacks constituted a modification or addition to the forklift.

that changes the safe operation or can change the safe operation of the lift truck”, such as a side shift carriage, which changes the location of the truck’s center of gravity. (Tr. 256). On the other hand, he identified things such as a back-up alarm or a paint job as additions, because they do not change the safe operation of the lift truck. (Tr. 256). Just a few pages later, however, Mr. Johnson conflated the terms and asserted the straps were both an addition and modification. On this topic, and others, the Court found Mr. Johnson’s testimony somewhat confusing and unhelpful despite his extensive experience in the field. Mr. Johnson admitted he did not try to calculate stability or capacity for the truck because “that’s a complex computer program”. (Tr. 273-74, 290). Further, without any such calculations, the Court is unconvinced by Mr. Johnson’s attempt to distinguish the propriety of a forklift lifting a super sack versus the under-fork lift that occurred here. (Tr. 291).

Finally, the letters of interpretation proffered by Complainant are equally unpersuasive. The Yotz letter, which, among other issues, addresses a question about what standard would be applied when an employer purchases or fabricates a boom or other lifting devices to make the forklift a mobile crane. *See* Standard Letter of Interpretation from John B. Miles to Kenneth Yotz (April 11, 1997). In response, OSHA stated, “The use of such lifting devices *usually* affects the capacity and safe operation of a powered industrial truck” *Id.* The problem, for the purposes of determining the particular issue regarding whether the straps are an addition or modification, is that the letter does not define or explore either term. It merely assumes an addition or modification has occurred. Further, to add confusion, OSHA directs parties to ANSI for “for a further request of interpretation regarding requirements for modifications and additions to trucks, which affect capacity and safe operation” *See id.* The Humphrey’s letter discussing free rigging does not reach any conclusions about whether the slings, shackles or rings are an addition or modification;

instead, the letter merely states such implements are attachments that “could” affect the safe operation of the vehicle. *See* Humphrey’s letter, *supra* p. 21. For that matter, the letter recognizes this is a common industry practice. *Id.*

Complainant has not convinced the Court it should depart from the plain meaning of the terms addition or modification to include running the forks through lifting straps to lift the splice box in this case. There was insufficient evidence to find they added to, or modified, the stacker truck. Further it is not entirely clear what Complainant’s official interpretation of these terms is. CSHO Stephens expressed confusion over the definition of either term. (Tr. 114). Mr. Johnson ultimately conflated the two and defined modification by referring to how it affected capacity or safe operation, as opposed to what happened to the machine. (Tr. 256). Neither of the letters of interpretation define the terms, and the Yotz letter, in particular, directs further inquiries into their interpretation to the ANSI 56.1 Committee. Accordingly, the Court finds Complainant has failed to establish the lifting straps were an addition or modification under the terms of the standard.

Even assuming, *arguendo*, that the straps were an addition or modification, the Court nevertheless finds the terms of the standard were not violated because Complainant failed to prove the lifting straps affected the safe operation of the stacker. Complainant makes three primary arguments in support of its claim that the stacker’s safe operation was affected. First, Complainant argues it does not need to prove the safe operation of the stacker was *actually* affected. Rather, Complainant argues the mere potential for a change in operation or capacity should prompt employers to prospectively report such additions or modifications to the manufacturer because it is in the best position to assess the effect of such changes. Second, Complainant contends the load was unstable because Respondent failed to use tag lines or some other stabilizing device. Third,

Complainant contends there was uncertainty about the load's center of gravity and, therefore, it was not stable or safely arranged.

This Court finds the rationale in *Peacock* to be quite instructive. While it may be advisable for an employer to seek approval from the manufacturer to address potential, unforeseen hazards resulting from an addition or modification, the standard creates a more stringent burden of proof for Complainant to establish a violation. The plain language of the standard does not require an employer to seek approval for additions or modifications that *might* affect safe operation or capacity; the employer is only required to seek approval for changes that *do* affect safe operation or capacity.¹¹ Further, how an employer should act in such a situation is different from what Complainant must prove to establish a violation of the standard; namely, that whatever change was made affected the safe operation of the vehicle. As discussed further below, Complainant's expert could do no more than speculate that performing a below-the-forks lift with straps *could* affect the safe operation of the stacker.

Both Mr. Johnson and CSHO Stephens claimed Respondent's should have used tag lines or some other device to prevent lateral movement of the load, but there was no explanation why tag lines were necessary when there was no evidence to show the load, as rigged by Respondent, moved laterally. (Tr. 117-119c, 440-41; Ex. J-5). Mr. Johnson testified the orientation of the forks vis-à-vis the load "introduce[ed] much higher lateral forces into the lift truck"; however, he never provided the Court with evidence showing how those forces affected the safe operation of this truck as compared to, say, a "high" load oriented above the forks, off-center loads that cannot be centered on the forks, or a super sack, which is oriented below the forks. High loads and off-center

11. Indeed, there are circumstances where an employer is not able to gain a response from the manufacturer or receives a negative response. In such circumstances, OSHA has indicated approval by a registered professional engineer would suffice for the purposes of the standard. See Humphreys Letter, *supra*.

loads are both discussed and permitted by ANSI 56.1-1969, which merely cautions the driver to “operate with caution”. *See* ANSI B56.1-1969 at 44. Without more complete evidence, the Court sees no meaningful difference between a sack with loops that supports a load below the forks and straps with loops, which do the same thing. Further complicating matters for Complainant is the testimony of Respondent’s expert, Mr. Bond, who testified the newest version of the ANSI B56.1 standard has a section that permits handling such suspended loads. (Tr. 487-89).

Notwithstanding his experience, Mr. Johnson’s testimony was, at times, contradictory, his conclusions were largely speculative, and his answers often referred to mere possibilities. (Tr. 270-74). As noted above, he determined the capacity of the stacker was exceeded only to later conclude, without amending his report, that capacity was not affected. Mr. Johnson failed to perform any meaningful calculations that would assist the Court in determining whether and how the safe operation of the stacker was affected. Instead, Mr. Johnson speculated the load could shift or sway, causing the center of gravity to change during operation; however, the video and testimonial evidence illustrate no shifting or swaying occurred until the front wheels of the stacker entered into the vault. As noted above, Mr. Johnson admitted he did not try to calculate stability or capacity for the truck. (Tr. 290). This, he claimed, was because he was unaware of the location of load center on the splice box. Mr. Johnson had the dimensions of the box, as well as the weight, capacity, and dimensions of the forklift but made no attempt to illustrate how these variables equated to an unstable load. Further, whether Respondent knew the exact location of the splice box’s center of gravity, the allocation of the load on the individual forks, or other such information is not relevant to the question of whether Complainant proved these issues affected the safe operation of the stacker.

Complainant’s argument is not aided by the letters of interpretation discussed above. The Yotz letter does not discuss the use of slings to suspend a load below the forks, but instead discusses the purchase or fabrication of booms or other lifting devices to convert a forklift into a mobile crane. *See* Yotz letter, *supra*. The Humphreys letter discusses free rigging as a “common practice” but only concludes that it *could* affect the capacity or safe operation of a powered industrial truck. *See* Humphreys letter, *supra*. Furthermore, the Humphreys letter reiterates the foregoing, plain language requirement that “[e]mployers must seek written approval from powered industrial truck manufacturers *when* modifications and additions affect the capacity and safe operation of powered industrial trucks.” *Id.* In either case, neither letter explicitly concludes the safe operation of a forklift or other powered industrial truck is *per se* affected by suspending a load below the forks.

In this matter, Complainant was obligated to show: (1) the use of slings to suspend a load below the forks of a stacker was an addition or modification; and (2) that such use affected the safe operation of the stacker. Complainant has failed to prove either. Accordingly, Citation 1, Item 2 will be VACATED.

Penalty

Under the Act, the Secretary has the authority to propose a penalty according to Section 17 of the Act. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441–42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). Ultimately, it is the province of the Commission to “assess all civil penalties provided in [Section 17]”, which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995). In determining an appropriate penalty, the Court is required to consider

“the employer’s size, the gravity of the violation, the good faith of the employer, and any prior history of violations.” *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 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*). Gravity, which is the primary focus of any penalty analysis, is a holistic measure of how hazardous a particular violation is and takes into consideration: (1) how many employees were exposed and for how long; (2) whether Respondent took precautions against injury; (3) the probability an accident will occur; and (4) the likelihood an injury will occur. *See, e.g., Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff’d*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished).

Complainant proposed a penalty of \$11,934 for Citation 1, Item 1. This penalty calculation was based on Complainant’s determination that the violation was of high severity and greater probability, because an accident actually occurred and an employee was seriously injured. Complainant offered a 10% reduction in the penalty amount because Respondent has 230 employees, which is below the threshold to be considered a large employer. (Tr. 112). The Court finds no reason to disturb Complainant’s assessment. Despite his experience, Kane had not been trained and evaluated in the use of the Toyota stacker truck during his employment with Respondent. During the lift giving rise to the present case, Kane operated the stacker truck, without proper training or evaluation, in proximity to three employees, one of whom was seriously injured when the truck was driven into the vault opening. This is exactly the type of accident the training standard seeks to avoid. Accordingly, considering the totality of the circumstances discussed above, the proposed penalty will be ASSESSED.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED

that:

1. Citation 1, Item 1 is AFFIRMED as a serious violation of the Act, and a penalty of \$11,934 is ASSESSED; and
2. Citation 1, Item 2 is VACATED.

/s/ *Brian A. Duncan*

Date: August 23, 2022
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission