Some personal identifiers have been redacted for privacy purposes.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MAGIC VALLEY CRUSHING & EXCAVATION, LLC *dba* THE ROCK YARD, Respondent.	OSHRC DOCKET NO. 23-0819

Appearances:

Hailey R. McAllister, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California & Nisha Parekh, Esq., U.S. Department of Labor, Office of the Solicitor, Los Angeles, California

For Complainant

Travis W. Vance, Esq. & Nicholas S. Hulse, Esq., Fisher & Phillips LLP, Charlotte, North Carolina

For Respondent

Before: Judge Christopher D. Helms – U.S. Administrative Law Judge

DECISION AND ORDER

I. PROCEDURAL HISTORY

On November 14, 2022, the Twin Falls County Sheriff's Office responded to "an accident or an industrial issue" at The Rock Yard in Filer, Idaho. A worker had been pinned and was eventually killed by storage material at the worksite. After being notified about the workplace fatality, the U.S. Occupational Safety and Health Administration ("OSHA") opened an inspection of Magic Valley Crushing & Excavation, LLC *dba* The Rock Yard

("Respondent"). As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging a violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act") and proposing a total penalty of $6,250. The Citation was issued on May 12, 2023 and alleged a serious violation of OSHA's Materials Handling and Storage standard found at 29 C.F.R. § 1910.176(b).

Respondent timely contested the Citation, bringing this matter before the U.S. Occupational Safety and Health Review Commission ("Commission"). A two-day hearing was held on July 11-12, 2024, in Boise, Idaho. The following witnesses testified: (1) Twin Falls County Patrol Deputy [Redacted]; (2) OSHA Compliance Safety and Health Officer (CSHO) Joan Behrend; (3) OSHA Salt Lake Technical Center Lead Physical Scientist Daniel Crane; (4) Respondent Owner Rylan Holdeman; and (5) Dr. David Brani.

Both parties filed briefs after the hearing. Based on what follows, the Court AFFIRMS the Citation.

II. STIPULATIONS

The parties filed a Joint Stipulation Statement ("JSS") prior to the hearing. *See* JSS (Jul. 1, 2024); (Tr. 12-13.) The parties also stipulated to the admission of additional facts and evidence at the hearing. (Tr. 13-15, 94, 211, 254, 292, 419-20); *see also* Sec'y Br. 12-14; Resp't Br. 2-4. These stipulations will be addressed herein as appropriate.

III. JURISDICTION

The record establishes that Respondent is an employer within the meaning of the OSH Act, is engaged in a business affecting interstate commerce, and filed a timely notice of contest to the subject Citation. (Complaint ¶¶ II, III, VII; Answer ¶¶ II, III, VII; JSS ¶ 20.) Accordingly, as the parties stipulated, the Court has jurisdiction over this proceeding

pursuant to section 10(c) of the OSH Act. 29 U.S.C. § 659(c); JSS ¶ 19; *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 995 (5th Cir. 1975), *aff'd sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977) (describing "Enforcement Structure of OSHA").

IV. FACTUAL BACKGROUND

A. The Rock Yard

Respondent is an excavation company operating in Filer, Idaho. In addition to excavating, crushing, and hauling rock and gravel, Respondent also sells landscaping products in its small retail store called The Rock Yard. (Tr. 326.) The Rock Yard is a 5,000 square feet rectangular building (50 feet by 100 feet) – 75 percent of which is used as retail space, and the other 25 percent is used as storage space. (Ex. C-34 at 49-50.) The retail space contains landscaping related inventory such as shovels, rakes, and hardware displayed for customer perusal. (Exs. C-8 at 45; C-34 at 50.) The storage space contains overstock inventory that is stored in cardboard boxes, which are placed on stand-alone metal storage shelving units. (Tr. 152; Exs. C-2 at 2; C-34 at 90.) This case concerns the storage of boxed overstock material on one of these stand-alone shelving units.

Each shelving unit consists of four shelves and stands 5 feet high, 30 inches deep, and 5 feet long. (Tr. 90-91, 285, 339; Exs. C-2 at 1 (photo of "identical shelving" units); C-4 at 4 (measurements of "identical" storage unit); R-6 at 3 ("General Description of the Matter").) Each shelving unit can be bolted together with another unit, like "train cars," to elongate the total shelving system. (Tr. 339.) The storage shelving unit at issue in this case was bought – used – at a hardware store. (Tr. 405-406; Exs. C-13 at 2; C-34 at 91-92.) At the time of the incident, it was not anchored to the floor, and while it was situated next to two other shelving units, they were not bolted together. (Tr. 190; 337-38.)

On the shelving unit in question, and in the neighboring shelving units, Respondent stored what appear to be uniformly sized[1] cardboard boxes containing loose metal hardware such as nuts and bolts. (Tr. 116; Exs. C-4 at 3; C-21.) Boxes were stacked 1-2 boxes high on the lower shelves, and 4 boxes high on the very top shelf of the shelving units, and not in a uniform manner. (Tr. 200-04, 246; Ex. C-21.) The cardboard boxes themselves were not braced together within each stack – CSHO Behrend testified that the stacks were "off to the side," not "straight," and "there wasn't a brace or anything like that that was up there holding those boxes up." (Tr. 201-03; Ex. C-31 at 00:14-1:04.)

The record does not establish exactly how much each box weighed or how much total weight of storage was on the shelving unit.[2] Detective [Redacted] testified, however, that the boxes were "fairly heavy," and "weighed on average between 30 to 45 pounds each." (Tr. 68-69, 79-80.) The record supports a finding that the shelving unit at issue held sufficient weight that was capable of pinning and killing the decedent. (Tr. 80 (Detective [Redacted] testifying that, "[u]ltimately the weight is what caused the death.").)

B. The Rock Yard Workers

Rylan Holdeman ("Mr. Holdeman"), his father Ronald Holdeman, and his brother Nicholas Holdeman jointly own the company. (Tr. 325.) As one of Respondent's owners, Mr. Holdeman bids on jobs, maintains trucking schedules, is involved with customer relations, and oversees The Rock Yard operations. (Tr. 326.) Mr. Holdeman met with the

[1] There are no size dimensions of the boxes in the record.

[2] While CSHO Behrend estimated the weight of each box based on shipping labels attached to each box, she did not verify the weight of each box. (Resp't Br. at 13.) The record does not establish how the shipping labels on the boxes relate to the current usage of the boxes, i.e., the boxes do not appear sealed shut for shipping purposes. (*See, e.g.*, Ex. C-21.) Rather, the boxes appear pre-used because they are unsealed and open as if items are being placed into and removed from them while being in the storage rack. (*See* Ex. R-13 at 96) (noting that the overstock bolts in the boxes were removed to stock "other bins.".) Therefore, the Court assigns little weight to the information listed on the shipping labels.

decedent in The Rock Yard three to four times per week for up to an hour. (Tr. 329.) Mr. Holdeman testified that all employees who worked at The Rock Yard had access to the shelving unit that collapsed. (Tr. 352.)

The decedent was the manager of The Rock Yard. (Ex. C-34 at 36-38.) He had worked in the store for a year and a half, and was in charge of "taking care of inventory, customer orders and helping customers." (Tr. 327.) As the manager of The Rock Yard, the decedent was in charge of "how, when and who" did what inside the store, and he had the power to discipline employees; he did not have the power to hire and fire employees or set their pay. (Ex. C-34 at 42-43, 45, 54.) Mr. Holdeman testified that the decedent's work experience at NAPA Auto Parts and Kitchen Appliance Warehouse managing inventory and warehouse activities made him a good fit for employment at The Rock Yard. (Tr. 327.)

[Redacted][3] also worked at The Rock Yard three days per week. (Tr. 328.) He devoted half his time to duties inside the store and the other half "he did deliveries with the little truck and he was outside helping outside customers." (Tr. 328.) Larry Burgett was another employee of Respondent, but he did not normally work in in The Rock Yard – he worked outside "in the yard," excavating for the business. (Tr. 185.)

C. Sequence of Relevant Events

1. Respondent bought the storage shelving unit at issue in 2017, five years before the incident.[4] (Tr. 333.)

2. Respondent opened The Rock Yard in its current building in 2018, six years before the hearing.[5] (Tr. 326; Ex. C-34 at 33-34.)

3. The storage shelf was brought into The Rock Yard in 2020, two years before the

[3] [Redacted]

[4] The incident occurred on November 14, 2022.

[5] The hearing was held on July 11-12, 2024.

incident. (Tr. 334.)

4. Mr. Holdeman relocated the storage shelf himself at a certain point. (Tr. 334, 339.)

5. Respondent hired the decedent 1.5 years before the incident. (Tr. 326-27.)

6. Mr. Holdeman did not teach the decedent how to connect the shelving units together, although he thought that the decedent helped move them on previous occasions, where he "was forced to remove [the connecting bolts] to move the shelving units," and so he thought there was an "understanding" that the shelving units were to be reconnected after they were moved. (Tr. 350; Ex. C-34 at 126-27.)

7. Prior to the final location, the shelving units at issue were bolted together along the top shelves such they were a 20-foot long shelving system, not individual 5-foot long shelving units, filled with the same cardboard boxes of overstock material. (Ex. C-34 at 102-03.)

8. Mr. Holdeman directed the decedent to move the shelving units 20 feet to another location within The Rock Yard. (Tr. 334-35.)

9. Mr. Holdeman is not aware of anyone assisting the decedent with relocating the shelving units. (Tr. 335, 337.)

10. The decedent alone unloaded the cardboard boxes full of hardware from the shelving units. (Tr. 334-35, 342, 344-45.)

11. The decedent alone disassembled the storage shelving units. (Tr. 335, 339-40.)

12. Around November 8, 2022 (one week prior to the incident), the decedent alone moved the disassembled storage shelving units 20 feet to the desired location. (Tr. 334, 341-42.)

13. The decedent alone reassembled the storage shelving units. (Tr. 342.)

14. The decedent alone started reloading the same cardboard boxes full of hardware onto the newly reassembled but disconnected storage shelving units. (Tr. 337, 342, 344-45.) Mr. Holdeman was not in The Rock Yard store when the decedent was reloading the storage shelving units. (Tr. 337.)

15. Mr. Holdeman left for Arkansas on November 10, 2022. (Tr. 332-33.) Right before he left, Mr. Holdeman observed the storage shelving units, and the decedent "had just started refilling. There was about a dozen boxes on them." (Tr. 335-36.)

16. The decedent alone continued reloading the cardboard boxes full of hardware onto the storage shelving units. (Tr. 336-37, 344-45.)

17. On November 14, 2022, four days after Mr. Holdeman left for Arkansas, the decedent was working in The Rock Yard and appeared to be arranging boxes on the storage shelving units. (Ex. C-21 at 0-15:23.)

18. At one point, a shelving unit moved lengthwise (in the direction of its 5-foot length, not front-back) unexpectedly toward the decedent, and the decedent hurriedly braced it. (Ex. C-21 at 15:24.)

19. The decedent called for [Redacted] to assist him with the leaning shelving unit. (Ex. C-21 at 15:38-16:30.)

20. [Redacted] attempted to clamp two of the units together using a tool from The Rock Yard store and attempted to further brace the leaning shelving unit where the decedent was still standing. (Ex. C-21 at 18:35-19:10.)

21. The shelving unit then leaned further and pinned the decedent to a work bench. (Ex. C-21 at 19:43.)

22. The decedent remained pinned and became unconscious as [Redacted] called 911 and removed one box at a time from the shelving units over the next 10 minutes until the first responders, including Deputy [Redacted], arrived. (Ex. C-21 at 20:00-29:59; C-22 at 0-1:40.)

23. Multiple first responders helped [Redacted] remove the cardboard boxes full of hardware, one by one, in an attempt to free the decedent; however, the decedent was declared deceased before the fire department ultimately used a battery-powered saw to separate the shelving units still pinning the decedent to the work bench. (Tr. 68-69, 73-75; Ex. C-22 at 1:40-29:59.)

D. The OSHA Inspection

After being notified of the fatality that same evening, the Boise OSHA Area Office assigned the investigation of the matter to CSHO Behrend.[6] (Tr. 107.) The next day,

[6] CSHO Joan Behrend has worked out of the Boise Area Office for 20 years. (Tr. 96.) Her duties include programed and unprogrammed inspections, injury and fatality investigations, on-site inspections, writing reports, and proposing citations. (Tr. 96-97.) Before working in the Boise Area Office, CSHO Behrend

November 15, CSHO Behrend travelled to The Rock Yard in Filer, Idaho. (Tr. 98, 107.) Before entering the facility, CSHO Behrend called Respondent owner Rylan Holdeman, who was still out of town at the time, and notified him of OSHA's investigation. (Tr. 108-09.) Mr. Holdeman arranged for Respondent employee Larry Burgett to meet CSHO Behrend at The Rock Yard and accompany her during the investigation. (Tr. 110.)

During her investigation, CSHO Behrend took pictures and videos of the worksite; interviewed Larry Burgett, [Redacted], and owner Mr. Holdeman; requested documents and surveillance security video from both Respondent and the Twin Falls County sheriff's department; and removed pieces and parts of the shelving unit at issue for analysis at OSHA's Salt Lake City Technical Center. (Tr. 99-117; 254 (chain of custody stipulation); Exs. C-14 at 10 (Request To Examine/Copy Public Records), C-21 (surveillance video), C-22 (surveillance video).)

Based on her inspection, CSHO Behrend recommended that OSHA issue a citation for violating OSHA's storage of material standard.

E. Respondent's Approach to Material Storage at The Rock Yard

The shelving units at issue in this case were located in the storage area of The Rock Yard. (Ex. C-34 at 90-91.) The shelving units held boxes of overstock inventory of hardware like nuts and bolts. (Tr. 116; Exs. C-4 at 3; C-34 at 90.) Mr. Holdeman told CSHO Behrend that he estimated that each box on the shelving units at issue weighed about 40 pounds. (Tr. 115-16.) CSHO Behrend estimated 164 boxes were stacked on the shelving units at the time of the incident based on counting the boxes that Larry Burgett indicated had been removed from the shelving unit after the incident. (Tr. 192, 197-98.)

served in the Air Force for 21 years in aircraft maintenance and in the ground safety office. (Tr. 97.)

Mr. Holdeman did not know the manufacturer of the shelves. (Tr. 345.) Mr. Holdeman did not know the "weight limits" of the shelving unit. (Tr. 334.) The shelving unit did not have a weight capacity or maximum load posted on it. (Tr. 199-200, 216.)

Respondent did not have written or oral work rules regarding shelved material. (Tr. 349-50.) The Rock Yard had no written policies or procedures. (Tr. 350.) When asked whether Respondent had any rules at all, Mr. Holdeman testified:

> Well, as I stated earlier, I mean we would do a certain amount of task training and it would just be per task that day, whatever project we were working on, we would discuss the project, we would try to cover any safety concerns at that time.

(Tr. 350.)

Mr. Holdeman discussed safety rules with the decedent, but it appears that the safety rules had an eye toward safety of the customer. (Tr. 331.) Mr. Holdeman explained:

> The main [safety] concerns would have been outside the store <u>with customers around</u> and operating the equipment and different things like that, obviously being safe, <u>making sure the customers are out of the way</u>. And then inside the store, we would identify anything that <u>could be a hazard to customers</u>, such as things on the floor, tripping hazards, different things like that.

(Tr. 331) (emphasis added). Mr. Holdeman testified that he discussed no "substantial" safety concerns regarding any workplace hazards inside The Rock Store with the decedent prior to the incident.[7] (Tr. 331.)

According to Mr. Holdeman, prior to the move, the shelving unit had no issues with being unstable and material had never fallen from the unit. (Tr. 333-34.) Prior to the move,

[7] Mr. Holdeman testified that he had never had to correct the decedent for any safety issues. (Tr. 332.) The most previous discipline prior to the incident at issue in this case was for another employee operating a small front-end loader unsafely outside in the yard. (Tr. 330-31.) In that case, Mr. Holdeman himself issued the verbal discipline and retrained that employee. (Tr. 330.)

the shelving unit was bolted together, end-to-end, at the top shelf to neighboring units, so that the 5-foot long shelving unit turned into a 20-foot long unit. (Ex. C-34 at 102-03.) After directing the decedent to move the shelving units within The Rock Yard, Mr. Holdeman did not see the decedent move the shelving. (Tr. 350.) Mr. Holdeman did not see the decedent re-connect the shelving. (Tr. 350-51.)

Mr. Holdeman was aware that the shelving unit was being relocated, and that each unit needed to be disconnected from the other units before being relocated. (Ex. C-34 at 102-03.) Mr. Holdeman therefore was aware that each unit needed to be reconnected to the other units upon relocation to maintain the same stability of the unit from prior to its relocation. Ex. C-34 at 103, 127.) Based on the lack of policies and procedures at The Rock Yard, and the fact that Mr. Holdeman discussed no "substantial" safety concerns inside The Rock Store with the decedent, Mr. Holdeman – despite his "understanding" – was also aware that the decedent had not been trained or even directly advised on how to reconstruct the shelving unit safely to maintain its prior stability. (Ex. C-34 at 126-127.)

On the day of the incident, the individual shelving units at issue stood end-to-end and unattached to each other. (Tr. 71, 218, 338-39, 380-81.) Mr. Holdeman believes that the decedent did not reassemble the shelving units like they had been previously assembled, i.e., the shelving units were not bolted together with the neighboring unit. (Tr. 337.) Specifically, Mr. Holdeman testified:

> My conclusion was that when the shelves had been in their previous location before he moved them, they were bolted together at the top shelf to make them one solid unit, and when they were set back up in the new location, he did not put the bolts back in to bolt them all together as one solid unit.

(Tr. 337.) He explained:

> So you can see in the video how the shelves, when they started to move, moved individually. And if they would have been bolted solid together, that

> would not have been possible. And also I looked at the shelves that were left there, and there is no evidence that any bolts ripped out of the edge where those bolts were. I think some of those pictures were shown yesterday of the bolt holes in the edge of the shelves. There's no evidence that any of that was ripped or pulled out.

(Tr. 338; *see also* Ex. C-34 at 98-99.)

Mr. Holdeman also testified that based on the video surveillance video, he believes that, in contrast to how the cardboard boxes were stored in the shelving unit prior to its relocation within The Rock Yard, "there was more on the top shelf than what there had been previously." (Tr. 343.) There is no other evidence indicating how exactly Respondent stacked these boxes of hardware prior to the incident.

F. Expert Testimony

Daniel Crane testified as an expert in materials and engineering science. (Tr. 268; Ex. C-7 (Crane report).) Mr. Crane is the lead physical scientist at OSHA's Salt Lake Technical Center, where he oversees materials investigations and analyses and advises on regulation writing. (Tr. 257-60.) In the matter at hand, Mr. Crane analyzed connectors and pieces of the shelving unit that failed "to document the state of the screws and the shelves and any damage that was there." (Tr. 296.) Mr. Crane opined that the shelving unit at issue was at least partly made up of under-sized or damaged parts:

> Some of the Tek-head screws were under-sized and at least two cross braces appeared to have been broken prior to the incident. The shelving unit had corrosion that appeared to have been present prior to the incident.

(Ex. C-7 at 10.) Mr. Crane, however, did not know how those undersized and damaged parts contributed to the overall stability of the shelving unit at issue. (Tr. 293-95.) Mr. Crane did not conduct a structural or a failure analysis of the shelving unit on the day of the incident. (Tr. 296.)

Dr. David Brani, on the other hand, opined on the structural failure of the shelving

unit on the day of the incident. Dr. Brani is an expert in "workplace safety concerns as it relates to things physical on the site, structural failures and mechanical engineering." (Tr. 367; Ex. R-6 (Brani report).) Dr. Brani has a Ph.D. in mechanical engineering, is a professional engineer, licensed in Georgia, North Carolina, Florida and Alabama, and provides forensic engineering services. (Tr. 354.)

In the matter at hand, Dr. Brani reviewed the surveillance video of the incident, other video of elements of the shelving unit, Mr. Crane's report, and CSHO Behrend's investigative file, and arrived at two opinions. (Tr. 401-04; Ex. R-6 at 4-7.) First, Dr. Brani opined that improper relocation of the shelving unit could have contributed to the failure of the shelving unit on the day of the incident because he believed that the columns of the shelving unit "had either been out of plumb [due to improper relocation of the shelving unit] or became out of plumb [due to high loading]." (Tr. 407-08; Ex. R-6 at 5.)

Second, Dr. Brani opined that "the manner of loading, in particular a top-heavy load, increases the eccentric loading of the posts and in turn renders the shelving units more prone to failure." (Ex. R-6 at 7.) Dr. Brani explained that eccentric loading, or loading that is applied off-center, is an "unwanted force that's contributing to [the shelving unit] wanting to further fall over." (Tr. 397 (discussing Ex. R-6 at 28).) Dr. Brani further explained that a top-heavy loading would mean a higher mass and a longer moment arm, which translates to "more stress or more of a motivation for [the shelving unit] to topple over." (Tr. 397.)

Dr. Brani then testified that he believes "the same conclusion Mr. Crane made, that the strength of the shelving unit wasn't sufficient to withstand the load placed on it."[8] (Tr.

[8] Dr. Brani testified that the braces (or side brackets) that Mr. Crane analyzed were not relevant to the "particular failure mode" on the day of the incident since those brackets provided structural support in the

398.) He testified that "the weight itself, from what I can tell, ultimately led to a leaning and final tip-over of the unit." (Tr. 407.)

V. DISCUSSION

A. Applicable Law

To establish a *prima facie* violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, 1994 WL 682922, at *6 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *Hartford Roofing Co.*, 1995 WL 555498, at *5 (No. 92-3855, 1995). Preponderance of the evidence has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the Evidence, Black's Law Dictionary (10th ed. 2014).

B. Citation 1, Item 1 – Material Storage

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1910.176(b), which provides: "Secure storage. Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse." 29 C.F.R. § 1910.176(b). The

"front-back" direction of the shelving unit rather than in the "sideways" direction in which the shelving unit failed on the day of the incident. (Tr. 410 - 412.)

Secretary alleges that Respondent violated section 1910.176(b) in the following manner:

> a) On November 14, 2022, and times prior thereto employees were exposed to struck-by and crushing hazards when placing and removing boxes by hand to and from a free-standing steel industrial shelving unit. While approximately 164 boxes ranging in weight from approximately 28 to 43 pounds were stored on the shelving, the capacity of the shelving was not posted. The amount and distribution of weight, attaching hardware, insufficient bracing and lack of floor anchors affected the overall stability of the shelving.

(Citation at 6.) Respondent argues that the Secretary failed to establish applicability and non-compliance of the cited standard and failed to establish knowledge of the violative condition.

1. **The Secretary Established that the Cited Standard Applies**

The Secretary claims that the cited standard applies because the overstock material in the cardboard boxes constituted material in "bags, containers, bundles, etc.," and that Respondent stored those boxes on shelving units that were "tiers" as contemplated in the cited standard. (Sec'y Br. at 18-19.) Respondent claims that the cited standard does not apply to "the failure of a shelving unit" when "the materials on the [shelving] unit were secure." (Resp't Br. at 17-18) (emphasis in original). Respondent misunderstands the cited standard and does not address the relevant case law that has explained how the cited standard applies to the facts of this case.

In 2023, the Commission discussed—in a remand decision—the Second[9] Circuit's

[9] The Commission has held that where it is highly probable that a case will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case. *Kerns Bros. Tree Serv.,* 2000 WL 294514, at *4 (No. 96-1719, 2000). The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. 29 U.S.C. §§ 660(a) and (b). The Ninth Circuit and the D.C. Circuit – the two relevant circuits here – have not ruled on this issue. In this circumstance, the undersigned follows Commission precedent, which has ruled on this issue and binds this trier of fact.

decision on appeal regarding the applicability of the cited standard. *Walmart, Inc.*, 2023 WL 1990803, at *1 (No. 17-0949, 2023) ("*Walmart*"). The Commission noted that the Second Circuit concluded that the "the plain language of [§ 1910.176(b)] appl[ies] to material arranged one above another vertically, including on shelves, not just materials stacked directly on top of another." *Id.* (emphasis added) (quoting *Walsh v. Walmart, Inc.*, 49 F.4th 821, 829 (2d Cir. 2022). The Second Circuit also considered "a patently unstable shelving unit" to fall within the applicability of the cited standard. *Walsh v. Walmart, Inc.*, 49 F.4th at 829.

Regarding applicability, this Court follows relevant precedent which includes Commission and Circuit Court case law. Both the Commission and the Second Circuit have held that "shelves" and "a patently unstable shelving unit" are considered "tiers" as contemplated by the cited standard. *Walmart, Inc.*, 2023 WL 1990803, at *1; *Walsh*, 49 F.4th at 829. Respondent has not addressed this relevant case law except to say that since *Walmart* involved "unsecured materials" that had a history of being knocked off shelving, it is distinguishable from this case. (Resp't Br. at 18.) The Court is unpersuaded. In terms of applicability, the case facts here fall within the plain wording of the cited standard as held previously by the Commission and the Second Circuit.

Respondent argues that "there is no case law" addressing "the collapse of an unsecure shelving unit when the materials on the unit were secure." (Resp't Br. 18.) Most of the cases that Respondent relies on, however, are unreviewed administrative law judge (ALJ) decisions that predate *Walmart*. (Resp't Br. at 18-19.) For instance, Respondent claims that only unsecured materials fall under the instant standard, citing *Hamilton Fixture*, No. 88-1720, 1990 WL 122636 (OSHRCALJ, Mar. 30, 1990), *rev'd on other*

grounds, 1993 WL 127949 (OSHRC, Apr. 20, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994); *Buckeye Fabricating Co.*, Nos. 90-948 & 90-1013, 1991 WL 55324 (OSHRCALJ, Mar. 4, 1991); *Yosemite Park & Curry Co.*, No. 15952, 1976 WL 22026 (OSHRCALJ, May 12, 1976), *aff'd*, 1977 WL 7415 (OSHRC, Apr. 18, 1977) ("The [ALJ's] decision is accorded the significance of an unreviewed Judge's decision."). Respondent also claims the standard does not apply to materials that would have to have been "deliberately pushed over," citing the ALJ decisions in *Hamilton Fixture* and *Koppers Co., Inc.*, No. 402, 1973 WL 3928 (OSHRCALJ, Aug. 18, 1972). (Resp't Br. 18-19.)

Respondent's reliance on these cases is tenuous because they conflict with the holdings in *Walmart*. Additionally, the Court notes that unreviewed ALJ cases are not binding precedent within the Commission.[10] *Walmart*, 2023 WL 1990803, at *8 n.2; *Leone Constr. Co.*, 1976 WL 5912, at *2 (No. 4090, 1976) ("[A] Judge's opinion . . . lacking full Commission review does not constitute precedent binding upon us."). Even though, as Respondent points out, the facts in *Walmart* pertained to material being knocked off shelving, the holdings of the Second Circuit and the Commission apply to the shelving unit at issue here, and Respondent has not addressed those cases.

Respondent also relies on testimony from CSHO Behrend regarding what she thought the cited standard required, what certain words within the cited standard meant, and the fact that she did not know exactly the weight of the overstock material on the shelving units. (Resp't Br. 19-20.) Respondent is reminded that "the Commission is not bound by the representations or interpretations of OSHA Compliance Officers." *Kaspar*

[10] For her part, the Secretary also relies on the ALJ decisions in *Gen. Dynamics Land Sys., Inc.*, No. 17-0637, 2018 WL 3046401 (OSHRCALJ, May 4, 2018), *Sanderson Farms, Inc*., No. 07-1623, 2008 WL 5203149 (OSHRCALJ, Aug. 12, 2008), *aff'd*, 348 Fed. App'x. 53 (5th Cir. 2009), and *N. Atl. Fish. Co.*, No. 98-0848 2001 WL 1263331 (OSHRCALJ, July 9, 2001) (consolidated). (Sec'y Br. at 18-20).

Wire Works, Inc., 268 F.3d 1123, 1128 (D.C. Cir. 2001); *see also Gem Indus., Inc.*, 1995 WL 242612, at *2 n.6 (No. 93-1122, 1995) ("we note that neither the Secretary nor the Commission is bound by an erroneous interpretation of the Act made by a representative of the Secretary"). Furthermore, the exact weight of each box or the total weight that pinned the decedent is not as important as the fact that the weight was sufficient to be hazardous to the decedent. 29 C.F.R. § 1910.176(b) ("Storage of material shall not create a hazard.").

Respondent insinuates that CSHO Behrend, and thereby the Secretary, was never concerned with "the manner in which the materials themselves were stored." (Resp't Br. at 20.) The Court disagrees. Respondent takes too narrow a view of the facts of this case in light of *Walmart*. As the Secretary points out, "it is not the shelving alone that constituted the hazard or killed [the decedent] . . . Had the shelves been empty, i.e., there were no materials stored, the standard would not apply[.]" (Sec'y Br. 20.) The Court concludes that the storage of the overstock boxes on the shelving unit in The Rock Store falls within the scope of the cited standard.

The cited standard applies.

2. **The Secretary Established that Respondent Violated the Cited Standard**

The cited standard required Respondent to store material in a way that would not pose a hazard to its workers. The Secretary argues that the video evidence and even the testimony of Respondent's expert Dr. Brani establish that "material was stored improperly" at The Rock Yard. (Sec'y Br. 20.) Respondent argues that the Secretary "has no proof that the materials themselves caused the shelving unit's collapse," and therefore the Secretary failed to prove that Respondent violated the cited standard. (Resp't Br. 21.)

Here, the record establishes that the reassembled storage unit and the top-heavy loading of the boxes on that reassembled storage unit, together, were hazardous. Both Mr. Holdeman and Dr. Brani opined that the decedent reassembled the shelving unit such that it was unattached to neighboring shelving units. Dr. Brani explained how disconnecting the shelving units could reduce the stability of the shelving unit:

> So this is specific to the top shelf bolting. And what happens there is that an object has what we call inertia associated with it; it likes to stay at rest. So one way to think about it is think of a train on a train track. So if I have one train car and I were to attempt to pull that train car, to get it to initially start to move, I'm overcoming its inertia. And its inertia is tied in directly to its weight essentially. So the heavier the car, the more effort I have to get it moving. Well, if I put three train cars all the same weight and tie them together, in other words, think of three unit shelves now tied together, now when I attempt to pull, now I'm trying to pull or move three times the mass. So if everything was exactly equal, it would take three times the effort to get these to move. And that's just illustrating why connecting the top makes these three units -- what I believe to be three units at the time -- stronger and more resistant to the type of failure we had in the video where everything fell over.

(Tr. 394-95.)

In addition, Dr. Brani testified that the stacked boxes on the top shelf of the shelving units was top-heavy and created a greater tipping force on the shelving unit than if boxes were not stacked in a top-heavy manner. (Tr. 397.) Mr. Holdeman testified that he believed, based on his viewing of the surveillance video, that the decedent had stacked the boxes higher on the shelving unit than when the shelving unit was in its previous location. (Tr. 343.) As a result, the top-heavy shelving unit tipped and pinned the decedent, who was standing nearby, and killed him. The storage of the material was hazardous.

Respondent's position again relies on an unreviewed ALJ decision, *Koppers Co.*, which held that "a violation requires evidence of specific causation." (Resp't Br. 22-23.) However, the Commission has held that "[d]etermining whether the standard was violated

is not dependent on the cause of the accident[.] Nevertheless, the circumstances of an accident may provide probative evidence of whether a standard was violated." *Am. Wrecking Corp.*, 2001 WL 1668964, at *6 n.4 (No. 96-1330, 2001) (consolidated) (citations omitted), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003).

Here, the Secretary has satisfied her burden of establishing non-compliance with the cited standard. Respondent was required to stack the overstock boxes on the shelving unit in a manner that was not hazardous to its workers, and Respondent failed to do so. *See Walmart,* 2023 WL 1990803, at *3 ("a plain language reading of § 1910.176(b) does not limit an employer's compliance obligation to simply ensuring that materials are stored such that they will not give way under their own weight") (emphasis added).

3. **The Secretary Established that Respondent's Workers Had Access to the Cited Condition**

"Exposure to a violative condition may be established either by showing actual exposure *or* that access to the hazard was reasonably predictable." *Phoenix Roofing, Inc.*, 1995 WL 82313, at *3 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (emphasis added). Respondent does not dispute that the decedent was struck and pinned by the shelving unit with a hazardous amount of stored material on it. *See Walmart, Inc.*, 2023 WL 1990803 at *5 n.4 (finding violative condition of the cited standard to be "the company's failure to block merchandise to keep it from falling"). Mr. Holdeman testified that all employees who worked at The Rock Yard had access to the shelving unit that collapsed. (Tr. 352.) The Secretary has established exposure to the hazardous condition.

4. **The Secretary Established that Respondent had Knowledge of the Violative Condition**

" 'Knowledge of the violative condition, either actual or constructive, is an element

of the Secretary's burden of proving a violation: the Secretary must prove either that the employer knew of the violative condition or that it could have known with the exercise of reasonable diligence.' " *Walmart, Inc.*, 2023 WL 1990803, at *6 (citations omitted). " '[K]nowledge can be imputed to the cited employer through its supervisory employee.' " *Id.*

The Secretary claims that Respondent had both actual and constructive knowledge of the violative condition. Respondent argues that "Mr. Holdeman had no knowledge that the shelving unit, or the materials being loaded onto it, were unsafe in any way." (Resp't Br. 26.) Given the evidence of how Respondent violated the standard, the Court finds that Respondent had constructive knowledge (not actual knowledge) of the violative condition.

The violative condition in this case was an unattached storage unit loaded with stacked overstock boxes in a top-heavy manner. The record establishes that Mr. Holdeman did not observe or assist the decedent with disassembly and reassembly of the storage units. Additionally, when Mr. Holdeman left for Arkansas, he saw only a dozen boxes on the newly relocated and reassembled shelving units. Mr. Holdeman therefore did not have actual knowledge of the violative condition.

Mr. Holdeman, however, could have known with the exercise of reasonable diligence of the violative conditions. "In assessing reasonable diligence, the Commission considers several factors, including [whether the employer] . . . implement[ed] adequate work rules and training programs, adequately supervise[d] employees, anticipate[d] hazards, and [took] measures to prevent violations from occurring." *S.J. Louis Constr. of Tex.*, No. 12-1045, 2016 WL 561092, *2 (OSHRC, 2016) (*S.J. Louis*). Mr. Holdeman did not teach the decedent how to connect the shelving units together. Although Mr. Holdeman

assumed there was an "understanding" that the shelving units were to be reconnected after they were moved, there was no safety work rule in place or other safety training about reconnecting the shelving units or storage of materials. (Tr. 350; Ex. C-34 at 126-27.) Mr. Holdeman did not supervise the decedent during the entire task of unloading, disassembly, relocating, reassembly and reloading the shelving units. Despite his "understanding," Mr. Holdeman failed to anticipate that the decedent would reassemble the shelving unit differently than how it was assembled prior to the relocation. Mr. Holdeman also failed to anticipate that the decedent would stack the shelving units in a top-heavy manner. These understandings and assumptions by Mr. Holdeman are in deep contrast with an employer's obligations to protect its employees by taking reasonable steps to discover violative conditions. Under these circumstances, the Court finds that Mr. Holdeman did not exercise reasonable diligence such that he could have known of the violative condition of the stored boxes of inventory in The Rock Yard on the day of the incident.

Relying on another ALJ decision, Respondent argues that the Secretary cannot establish knowledge of the violative conditions because she "'fail[ed] to introduce evidence of a single prior instance' of materials being unstable." (Resp't Br. 24) (citing *Trinity Indus., Inc. -- Plant 22*, No. 99-1110, 2000 WL 1262874 (OSHRCALJ, Sept. 6, 2000).) The Court finds this argument unconvincing, as it is well settled that the "purpose of the Act is to prevent the first accident," especially given the facts of this case. *Lee Way Motor Freight, Inc. v. Sec'y of Labor*, 511 F.2d 864, 870 (10th Cir. 1975). As evidenced by the surveillance video, this case shows that Mr. Holdeman failed to adequately supervise the decedent, had not anticipated this storage hazard, and failed to take measures to prevent the storage hazard. *S.J. Louis*, 2016 WL 561092 at *2. Mr. Holdeman's lack of reasonable

diligence is imputed to Respondent. *Walmart, Inc.*, 2023 WL 1990803, at *6.

The Secretary has established constructive knowledge for this citation item. Citation 1, Item 1 is AFFIRMED.

C. Characterization

> [A] violation is serious if there is a substantial probability that death or serious physical harm could result. This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur.

Conagra Flour Milling Co., 1992 WL 215113, at *7 (No. 88-2572, 1992). The Secretary argues that this citation item should be classified as serious because, as this case shows, "serious physical harm tragically resulted from the hazardous storage condition at The Rock Yard." (Sec'y Br. 28.) Respondent, on the other hand, sets forth the following argument:

> Based on the Secretary's own case file and surveillance footage, it is obvious that the shelving collapse would not have killed [the decedent] had he simply moved out of the way when the collapse began. (Ex. C-21). Although the events in this case are tragic, death by a storage shelf in a family-owned store surely was not substantially probable.

(Resp't Br. at 27.) Respondent has not supported this argument with any evidence.

In *Clement Food Co.*, 1984 WL 34881, at *1 n.2 (No. 80-607, 1984), the Commission affirmed the serious characterization of a violation of 29 C.F.R. § 1910.176(b), where the 25-pound weight of boxes were stacked high and within eight feet of employee walkways. *Id*. Here, a death occurred when the overstock boxes on the shelving unit pinned the decedent into place on the day of the incident. This evidence is sufficient to characterize this affirmed citation item as serious.

D. Penalty

To determine the appropriate penalty for an OSHA citation, section 17(j) of the Act

requires the Commission to 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 Constr. Co.*, 1993 WL 61950 (No. 87-2059, 1993). 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.*, 1995 WL 139505 (No. 93-0239, 1995); *Allied Structural Steel*, 1975 WL 4613 (No. 1681, 1975).

The Secretary proposed a penalty of $6,250 for the affirmed citation item. CSHO Behrend testified as to how she calculated the proposed penalty. She testified that she considered Respondent's small size (12 employees), which accounted for a 60% reduction of the original penalty. (Tr. 208; Ex. C-4 at 1.) CSHO Behrend also testified that OSHA considered the violation in this instance as having a high severity and a greater probability, which factored into the gravity of the violation. (Tr. 206-07; Ex. C-4 at 1.) No discount was given for good faith or history. (Ex. C-4 at 1.)

Respondent does not contest OSHA's assessment of penalty factors. (Ex. C-23 at 7-8.); *L&L Painting Co.,* 2012 WL 3552925, at *2 n.5 (No. 05-0055, 2012) (item not addressed in post-hearing briefs deemed abandoned); *Midwest Masonry Inc.,* 2001 WL 1040999, at *3 n.5 (No. 00-0322, 2001) (argument not raised in post-hearing briefs deemed abandoned). Accordingly, upon consideration of the facts and statutory criteria, the proposed penalty is appropriate and will be assessed for affirmed Citation 1, Item 1.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1910.176(b), is AFFIRMED, and a penalty of $6,250 is ASSESSED.

SO ORDERED.

/s/ Christopher D. Helms

Date: April 28, 2025
Denver, Colorado

Christopher D. Helms
Judge, OSHRC