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. NOVA GROUP/TUTOR-SALIBA, A JOINT VENTURE, Respondent,	OSHRC Docket No. 10-0264

ON BRIEFS:

Louise McGauley Betts, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; M. Patricia Smith, Solicitor of Labor, Washington, DC
For the Complainant

Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, CA
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Nova Group/Tutor-Saliba, a Joint Venture ("Nova") manufactured concrete and metal cylindrical poles, referred to as "pilings," at a worksite located at the Puget Sound Naval Shipyard in Bremerton, Washington. After a piling was formed and cured in a casting bed, Nova used a crane to move the piling to a temporary storage area for inspection and any necessary repairs. On November 23, 2009, Nova's crane operator removed a piling from the casting bed and placed it on top of four other pilings. Shortly thereafter, two pilings rolled, pinning a Nova employee against the casting bed and causing serious injuries.

As a result of the accident, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of the Bremerton worksite and subsequently issued Nova a citation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, alleging a serious

violation of 29 C.F.R. § 1926.250(a)(1), for the improper stacking of concrete pilings.[1] Nova timely contested the citation and, after a hearing, Administrative Law Judge Sidney J. Goldstein issued a decision affirming the citation and assessing the proposed penalty of $3,500.[2]

On review, Nova does not directly challenge the judge's factual findings or legal conclusions. Rather, it contends that it did not receive a fair hearing because, it claims, the judge inappropriately ruled on several of its objections, and either did not hear or did not sufficiently understand the proceedings. As a result, Nova requests that the case be remanded for reassignment to a new judge and set for rehearing. The Secretary responds that Nova's request is untimely and meritless, and that the judge's decision is well supported by the record. For the reasons that follow, we deny Nova's request and affirm the judge's decision.

DISCUSSION

The concerns Nova has raised here warrant close scrutiny. Indeed, the Commission takes allegations regarding judicial bias or qualification seriously. *See* 5 U.S.C. § 556(b) (decision makers must preside in an "impartial manner"). Although Nova did not raise its fairness challenge within the timeframe provided by the Commission's rules,[3] we have carefully

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[1] OSHA has jurisdiction over this worksite as Nova was a private contractor engaged in construction at a naval base located in a state-plan state. *See* 29 C.F.R. § 1952.122(a)(7). Nova also consented to the inspection and has not contested OSHA's jurisdiction over this matter.

[2] Judge Goldstein has since retired from the Commission and currently serves as a senior judge on a limited appointment.

[3] As the Secretary argues, Nova's rehearing request is untimely. Under Commission Rule 68(b), a party seeking to disqualify a judge is required to submit an affidavit to the judge that details the grounds for such an action and to do so before the judge files his or her decision. 29 C.F.R. § 2200.68(b). Here, Nova's claims fall within the ambit of this rule, but it failed to comply with the rule's explicit timing requirements by waiting until after the judge issued his opinion to challenge his qualification and seek reassignment. *Id. See RGM Constr. Co.*, 17 BNA OSHC 1229, 1231, 1993-95 CCH OSHD ¶ 30,309, p. 41,767 (No. 91-2107, 1995); *see also Marcus v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 548 F.2d 1044, 1050-51 (D.C. Cir. 1976) (finding petitioner's post-decision judicial bias claim untimely, court explained that "[i]t will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor"); *Gibson v. Fed. Trade Comm'n*, 682 F.2d 554, 566 (5th Cir. 1982) (finding policies supporting timely request to disqualify judges "equally applicable to administrative law judges"). Although Nova asks for its request to be considered "consistent with the intent of the existing rules," as evident from our discussion of the merits of its claims *infra*, it has identified no "good cause" for waiving the timing requirement. *See* Commission Rule 107, 29 C.F.R. § 2200.107 (setting forth procedure for waiver of Commission rules).

reviewed the hearing record in light of Nova's claims and find that it has failed to identify any legal error in the judge's rulings. In addition, the record reveals no lack of impartiality, and shows that the judge understood the evidence presented and rendered a reasoned decision.

I. Judge's Evidentiary Rulings and Understanding of the Evidence

Nova challenges several of the judge's evidentiary rulings, most of which relate to objections it raised during the direct examination of the compliance officer ("CO") and Nova's crane operator. As to the former, Nova questions the judge's decision to overrule its hearsay objection to the Secretary asking the CO what employees told him about how the accident occurred. But as noted by the Secretary's counsel during the hearing, such statements are admissions by a party opponent, and therefore are admissible. Fed. R. Evid. 801(d)(2); *MVM Contracting Corp*., 23 BNA OSHC 1164, 1166, 2010 CCH OSHD ¶ 33,073, p. 54,655 (No. 07-1350, 2010); *Regina Constr. Co*., 15 BNA OSHC 1044, 1047, 1991-93 CCH OSHD ¶ 29,354, p. 39,467 (No. 87-1309, 1991). There is also no merit to Nova's argument that this testimony was cumulative, as there was no prior testimony detailing what the supervisor told the CO. *See* Fed. R. Evid. 401, 403.

With regard to the crane operator's testimony, Nova points to the judge's rejection of two relevancy objections: one relating to a question regarding changes to workplace procedures after the accident[4] and the other concerning a supervisor's statements about production. However, Nova does not describe how the challenged testimony resulted in prejudice and we find none, particularly as the judge did not rely on this testimony in his opinion. *See Woolston Constr. Co., Inc*., 15 BNA OSHC 1114, 1119, 1991-93 CCH OSHD ¶ 29,394, p. 39,569 (No. 88-1877, 1991) (finding no error when judge did not rely on witness's testimony), *aff'd without published opinion*, No. 91-1413, 1992 WL 117669 [15 BNA OSHC 1634] (D.C. Cir. May 22, 1992). Further, as both questions were appropriately framed to elicit potentially relevant testimony, the judge's rulings do not warrant rehearing. *See* 5 U.S.C. § 556(d) ("Any oral or documentary evidence may be received . . . .").

In another instance, Nova's counsel moved to strike a statement by the crane operator as not responsive to the question asked. The judge did not rule directly on that objection; instead,

[4] Nova does not invoke Fed. R. Evid. 407, which limits the admission of subsequent remedial measures. Moreover, at the time the objection was raised, it was unclear if Nova intended to contest the feasibility of stacking the pilings in a different manner.

he directed the Secretary's counsel to "rephrase" the question, which counsel did. Nova does not contend that the question itself was inappropriate, that the witness's statement was unduly prejudicial, or that it was not relevant to the subject matter of the hearing. Further, by not objecting to the reformulated question, Nova waived the issue.[5] *See Power Fuels, Inc.*, 14 BNA OSHC 2209, 2214, 1991-93 CCH OSHD ¶ 29,304, p. 39,347 (No. 85-166, 1991); *MVM Contracting Corp*., 23 BNA OSHC at 1166, 2010 CCH OSHD at p. 54,655.

Nova also argues that the judge erred by allowing the Secretary's counsel to ask the crane operator leading questions. But all four times that Nova objected to leading questions, the Secretary's counsel, either on his own or at the direction of the judge, rephrased the question to address the issue. Nova did not object to the rephrased questions and has failed to identify how any of them resulted in prejudice. *See United States v. Brown*, 720 F.2d 1059, 1076 (9th Cir. 1983, amended Apr. 10, 1984) (holding court did not abuse discretion in allowing leading questions); *Lanzo Constr. Co*., 20 BNA OSHC 1641, 1647 n.7, 2002-04 CCH OSHD ¶ 32,732, p. 51914 n.7 (No. 97-1821, 2004) (noting Commission may assess diminished weight to responses to leading questions), *aff'd without published opinion*, No. 04-11965, 2005 WL 2649122 [21 BNA OSHC 1432] (11th Cir. Oct. 18, 2005).

Nova's remaining evidentiary challenges relate to the judge's handling of some of the Secretary's exhibits—DVDs and a large worksite illustration. Nova objected to two DVDs depicting the worksite on three grounds: relevancy, concerns about the Commission's ability to review the DVDs, and the fact that filming occurred the day after the accident. We find Nova's objections unavailing. The DVDs have assisted in our understanding of the CO's testimony, and we discern no error in their admission. Fed. R. Evid. 401; 5 U.S.C. § 556(d); Commission Rule 70, 29 C.F.R. § 2200.70 (admission and handling of exhibits). By adequately identifying the scenes the CO referenced, along with providing copies of the DVDs to the court reporter, the Secretary's counsel effectively preserved the DVDs for review. With respect to Nova's concerns about the timing of the filming, according to the CO's undisputed testimony, the U.S. Navy—as

[5] Nova also points to the judge's failure to rule on its objection to the Secretary asking why the crane operator left his job. But before the witness could answer and before the judge could rule, counsel withdrew the question, rendering Nova's objection moot. Fed. R. Evid. 103(a); *Williams Enters., Inc.*, 13 BNA OSHC 1249, 1250 n.1, 1986-87 CCH OSHD ¶ 27,893, p. 36,582 n.1 (No. 85-355, 1987) (discussing harmless error).

property owner—took steps to secure the worksite so that it remained in the same condition at the time of the filming as it was right after the accident.

Lastly, Nova contends that the judge should have rejected the Secretary's request to admit for illustrative purposes a large, but relatively simplistic, illustration showing how Nova's employees stacked the pilings. However, Nova's counsel did not object when the Secretary's counsel first marked the exhibit nor did he object when the Secretary's counsel moved its admission. *See Power Fuels*, 14 BNA OSHC at 2214, 1991-93 CCH OSHD at p. 39,341. Further, Nova fails to explain how the admission of this exhibit affected a substantial right. Fed. R. Evid. 103(a); *Williams Enters.*, 13 BNA OSHC at 1250-51, 1986-87 CCH OSHD at pp. 36,582-83. In any event, the exhibit was relevant to the subject matter of the hearing, and counsel presented it in accordance with Commission procedure. *See* Fed. R. Evid. 401; 5 U.S.C. § 556(d); Commission Rule 51, 29 C.F.R. § 2200.51 (prehearing conferences and orders); Commission Rule 70, 29 C.F.R. § 2200.70 (exhibits).[6]

Besides its evidentiary challenges, Nova also claims that the judge failed to hear and/or understand the evidence presented at the hearing. The record reflects that the judge specifically acknowledged from the outset that he has difficulty hearing and asked participants to speak loudly enough so that he could hear them. Occasionally, he needed counsel to clarify their objections or requests, seemingly because he had not heard what was said. Still, after reviewing the transcript, we are unable to conclude, as Nova suggests, that the judge did not sufficiently understand the testimony and evidence presented. Moreover, Nova does not explain how the judge's alleged misunderstandings led to erroneous factual or legal conclusions, or an abuse of discretion. For these reasons, we hold that Nova has not identified any erroneous evidentiary rulings or provided sufficient other justification for its rehearing request.

II. Judge's Decision

Without referring to any specific facts, Nova claims that "the evidence that would be admissible in this case does not support the judge's findings of fact or conclusions of law" that it

[6] Nova also notes that the Secretary did not provide a copy of this exhibit prior to the hearing. However, parties are generally not required to exchange exhibits before their presentation and there was no pre-trial order requiring the parties to do so here. *See* Commission Rules 51, 70, 29 C.F.R. §§ 2200.51, 2200.70.

violated § 1926.250(a)(1).[7] Aside from this general contention, Nova points to no evidence that was erroneously excluded and, as discussed above, we find that the judge only relied upon admissible evidence in his opinion.

Moreover, we find that the judge's decision is well supported by the evidence. The record shows that Nova directed employees to place the pilings in a temporary storage area so uneven that the crane operator described it as having "waves." In an attempt to compensate for this uneven surface, workers set down pieces of lumber, known as "dunnage." Yet Nova's own post-accident investigation indicates that the quantity and quality of the dunnage were insufficient to prevent the pilings from sliding, falling, or collapsing. *See Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, pp. 39,449-50 (No. 86-1087, 1991) (affirming a serious violation for the improper stacking of concrete piles). At least two of Nova's employees working in the temporary storage area were exposed to this violative condition. *See Fabricated Metal Prods. Inc.*, 18 BNA OSHC 1072, 1073-74, 1995-97 CCH OSHD ¶ 31,463, p. 44,505 (No. 93-1853, 1997). And Nova had knowledge of the violative condition because its foreman supervised the procedure on the day of the accident, and his knowledge is imputable to Nova. *N&N Contractors, Inc*., 18 BNA OSHC 2121, 2122-23, 2000 CCH OSHD ¶ 32,101, p. 48,238 (No. 96-0606, 2000) ("The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer."), *aff'd*, 255 F.3d 122 (4th Cir. 2001).[8]

[7] Section 1926.250(a)(1) provides that "[a]ll materials stored in tiers shall be stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling or collapse." The Secretary alleges that Nova violated § 1926.250(a)(1) because "concrete [pilings] approximately 90 [feet] in length and weighing approximately 55,000 lbs. were stacked in a temporary storage area in a manner which allowed them to collapse."

[8] We also find no reason to set aside the serious characterization of this violation or the assessed penalty amount. Nova permitted its employees to stack 55,000-pound concrete pilings on an uneven surface with inadequate dunnage, leading to serious injuries, including the partial amputation of the injured employee's leg. 29 U.S.C. § 666(k) (defining serious violation as one in which "there is a substantial probability that death or serious physical harm could result"). In addition, Nova stipulated that the proposed penalty of $3,500 was properly calculated, and does not contest its appropriateness on review. 29 U.S.C. § 666(j) (providing that Commission's penalty assessment include consideration of its "appropriateness").

CONCLUSION

For the foregoing reasons, we find that a rehearing in this case is not warranted and, therefore, deny Nova's request for remand and reassignment. Accordingly, we affirm the judge's decision.

SO ORDERED.

/s/_____

Thomasina V. Rogers
Chairman

/s/_____

Cynthia L. Attwood
Commissioner

Dated: May 14, 2012

Some personal identifiers have been redacted for privacy purposes

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Nova Group /Tutor-Saliba, a Joint Venture, Respondent.	DOCKET NO. 10-0264

Appearances:

Matthew Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington
For Complainant

Robert D. Peterson, Esq., Rocklin, California
For Respondent

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Nova Group/Tutor-Saliba, a Joint Venture, ("Respondent") worksite on Puget Sound Naval Shipyard in Bremerton, Washington on November 24, 2009. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging one serious violation of the Act with a proposed penalty of $3,500.00. Respondent timely contested the citation and an administrative trial was conducted on July 20, 2010 in Seattle, Washington. Both parties submitted a post-trial brief and the case is ready for disposition.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (Tr. 9). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). Furthermore, because California manages its own OSHA state plan, it is important to note that Respondent was a Federal contractor engaged in construction on a Federal military installation under Federal OSHA jurisdiction. (Tr. 17, 112-113, 179-180).

Applicable Law

To establish a *prima facie* violation of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies to the 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. *Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

A violation is "serious" if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. 666(k). Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm would result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp*. v. OSHRC, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶29,942 (No. 88-0523, 1993).

Factual Stipulations

1. The alleged violation occurred on November 23, 2009;

2. Respondent consented to the OSHA search of Respondent's worksite and OSHA's investigation following the accident;

3. The proposed penalty of $3,500.00 was computed in accordance with Federal policy and procedures and was properly calculated for the alleged violation;

4. Respondent's employees were working at the following site on the Puget Sound Naval Shipyard on November 23, 2009: Z-lot, B-447 Farragut Avenue, Bremerton, Washington 98124;

5. Respondent was engaged in a business affecting interstate commerce. (Tr. 6-9).

Additional Factual Findings

Four witnesses testified at the hearing: (1) Selves Smith, a Mi-Jack Crane Operator employed by Respondent; (2) {redacted}, a Laborer employed by Respondent; (3) Ed Delach, an OSHA Compliance Safety and Health Officer; and (4) Gary Sager, a Casting Yard Superintendent employed by Respondent (Tr. 13, 99, 110, 165). Based on their testimony and discussion of evidentiary exhibits, the court makes the following factual findings:

On November 23, 2009, Respondent was a Federal contractor which maintained a work site on Puget Sound Naval Shipyard, manufacturing concrete and steel piles used in the construction of a new Navy pier. (Tr. 113, 115, 153; Ex. G-1A, G-2). The worksite at issue was known as the "Z-Lot" and was the location at which Respondent manufactured and stored the piles until they were needed in the pier construction process. (Tr. 18-21). The piles, sometimes called pilings, were two feet wide octagonal concrete and metal cylindrical poles that varied in

length. (Tr. 18-19, 149-150; Ex. G-2, G-3, G-4). The average weight of each piling was 55,000 pounds. (Tr. 19).

Respondent's work process, as illustrated in a drawing of Z-Lot, was for piles to first be formed and cured in a 400 foot-long casting bed. (Tr. 64; Ex. G-1A). Once cured, a Mi-Jack crane, which straddles the casting bed, would pick up a pile and set it immediately to the side in a temporary storage area. (Tr. 20, 70-72; Ex. G-1A, G-6). At that location, Respondent's employees patched any visible deficiencies on each piling, like air bubbles or areas in which concrete had crumbled off. (Tr. 169, 171). Once the cosmetic deficiencies were addressed, the piles were moved a few feet away and stacked in the more permanent storage area until needed at the location of the pier construction. (Tr. 45-46, 138; Ex. G-1A, G-2, G-3, G-6, G-7).

This process typically involved two employees: the Mi-Jack Crane Operator and a Rigger. (Tr. 26). The Mi-Jack Crane Operator remained in the crane, picking up and setting down piles as directed by the Rigger. (Tr. 42, 50). The Rigger was responsible for hooking the crane slings and hooks to lifting eyes on each pile, placing dunnage (wood) in the area where the pile was going to be placed, and removing the crane slings and hooks once a pile was positioned by the crane. (Tr. 27, 30-31, 86; Ex. G-6). The dunnage placed under each pile to secure it from movement consisted of various pieces of lumber ranging from plywood, to 2x4's, to 6x6's. (Tr. 22-24, 33, 182; Ex. G-9, G-24, G-25).

On the date of the accident, Selves Smith was the Mi-Jack Crane Operator and Justin Fryar was the Rigger. (Tr. 26-27, 169-170). A Laborer, {redacted}, was also working in the area assisting the Rigger. (Tr. 100, 102). Although Gary Sager was the Z-Lot Superintendent, he was gone that day and Larry Tinney was acting as the Z-Lot supervisor in his place. (Tr. 37, 76, 107). About 2-3 weeks before the accident, Mr. Sager had implemented a change in the way piles were

to be placed in the temporary storage area. (Tr. 37-38, 102-103, 173). The new procedure was to set the piles on the asphalt next to the casting bed four-piles-wide, and then start an upper row on top of those beginning with the fifth pile. (Tr. 41, 115, 172). Respondent had double-stacked piles on occasion in the past, but the primary method used prior to the accident consisted of setting two piles side-by-side, moving down the casting bed, and then setting two more piles side-by-side. (Tr. 89, 172). The procedure was changed because the piles being poured at the time were too long to set them all on the ground at one level next to each other; it was easier to start stacking them vertically on top of one another. (Tr. 57). Every pile lift required a supervisor to be present. (Tr. 36).

The asphalt area next to the casting bed on which the piles were initially stored was not level. (Tr. 89). It was described as having "waves." (Tr. 89). In contrast, the permanent storage area only a few feet away had been specifically constructed by Respondent when this project began to ensure that the piles in the permanent storage area would be sitting on a level concrete surface. (Tr. 90, 136; Ex. G-24, G-25). Respondent also used significantly more and better quality dunnage to secure the piles in the permanent storage area than in the initial temporary storage area. (Tr. 126-127, 136; Ex. G-24, G-25). When placing the dunnage in the temporary storage area before a pile was set down, Rigger Justin Fryar did not use any kind of leveling tool to ensure that the 55,000 pound piles would be sitting level once they were released by the crane. (Tr. 24, 104). He just "eyeballed it." (Tr. 24, 104).

This was the process Mr. Selves, Mr. Fryar, and {redacted} were following, under the supervision of Larry Tinney, when the accident happened. Justin Fryar and {redacted} had placed four pieces of dunnage on top of the four piles already set down in the temporary storage area so that the second row of piles could be placed on top of them. (Tr. 41, 49-50). Mr. Fryar

than called Mr. Selves on the radio and signaled for him to lift and place the fifth pile on top of the four previously placed piles. (Tr. 42, 50, 73, 79). After the fifth pile was set on top of the previous four, {redacted} began walking over to work on rigging the next pile when the upper pile that had just been set down, and one of the lower piles, began to roll. (Tr. 50, 77, 105-106). {redacted} was pinned between the piling and the casting bed, resulting in multiple injuries including the partial amputation of one of {redacted} legs. (Tr. 51-52, 106).

After the accident, it was clear that some of the pieces of dunnage used to secure the piles were cracked, broken, or partially crushed under the weight of the piles. (Tr. 129-133; Ex. G-24, G-25). Respondent's post-accident investigation concluded that the collapse of the piles resulted from three factors: (1) the lack of formal, standardized inspection criteria for dunnage, (2) the lack of a consistent practice of ensuring adequate dunnage beyond the resting, bottom horizontal surface of the pile, and (3) the use of the softer wood as leveling dunnage. (Tr. 185; Ex. G-26). Respondent's Job Hazard Analysis had identified a hazard from stacked piles falling or collapsing and recommended the use of good, quality dunnage. (Tr. 140; Ex. G-10). After learning about the incident from a news report, OSHA sent CSHO Ed Delach to the worksite to conduct an investigation the following day, which resulted in the issuance of the alleged violation in this case. (Tr. 110-112).

Discussion

Citation 1 Item 1

The Secretary alleged in Citation 1 Item 1 that:

> *29 C.F.R. §1926.250(a)(1): Materials stored in tiers were not stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling, or collapsing. (a) Casting yard Z-Lot, concrete piles*

approximately 90 foot in length and weighing approximately 55,000 lbs, were stacked in a temporary storage area in a manner which allowed them to collapse.

The cited standard provides:

(a) General. (1) All materials stored in tiers shall be stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling or collapse.

Respondent was engaged in the construction of a new pier using the piles it created at the nearby Z-Lot. In the process of preparing the piles for use in the construction of the pier, Respondent's crane operator was stacking piles next to one another in rows of four, and then on top of one another, in a second row of four. It was during the placement of a pile in the upper row that the collapse occurred. Respondent disputes that this process constituted storing materials in tiers. "Tier" is defined as "one of a series of rows placed one above another." *Webster's New Riverside University Dictionary, 1984*. Therefore, the court finds that Respondent was storing material in tiers. The cited standard applies to the condition.

The piles being stacked in the initial temporary storage area were secured with smaller and fewer pieces of dunnage than the nearby permanent storage area, on an unlevel surface, where the Rigger merely "eyeballed" whether he thought the 55,000 pound piles were sitting level. The size, weight, and shape of the piles were exactly the same at the temporary storage area vs. the nearby permanent storage area, except for some minor cosmetic repairs. There was no logical reason presented at trial to explain why virtually identical piles in the unlevel temporary storage area would require less and smaller pieces of dunnage than they did in the permanent storage area just a few feet away. It is also entirely inconsistent with the requirements

of the cited regulation to have one employee "eyeball" whether multiple piles, weighing 55,000 pounds each, stacked one on top of another, were sitting level. Respondent failed to stack the piles in a manner that would prevent sliding, falling, or collapsing. The terms of the cited standard were violated.

Two of Respondent's employees, the Rigger and the Laborer who was injured, were exposed to this violative condition because they were walking and working in the area of the stacked piles. (Tr. 51, 151). *Fabricated Metal Products*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997). To establish employer knowledge, an employer does not have to possess knowledge that a condition violated the Act, just knowledge that the condition existed. *Shaw Construction, Inc*., 6 BNA OSHC 1341, 1978 CCH OSHD ¶22,524 (No. 3324, 1978). Respondent's supervisors specifically directed its employees to store the piles in this manner. The court finds that Supervisors Gary Sager and Larry Tinney knew that these 55,000 pound piles were being placed on an unlevel surface, stacked one on top of another vertically, without a clear system for determining whether the dunnage being used was adequate, or whether the piles were being stacked in a level manner. Such an imprecise method of stacking multiple 55,000 pound piles on top of one another could, and did, result in a collapse. Mr. Sager's and Mr. Tinney's knowledge of these conditions is imputed to Respondent. *A.P. O'Horo Co*., 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991). Lastly, the violation was properly characterized as serious because stacking 55,000 pound piles in such a manner could have, and unfortunately did, result in permanently disabling injuries to one of Respondent's employees. (Tr. 156). *Whiting-Turner Contracting Co*., 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). Accordingly, Citation 1 Item 1 will be AFFIRMED.

Affirmative Defenses

Respondent did not argue any affirmative defenses in its post-hearing brief.

Penalty

In calculating the appropriate penalty for affirmed violations, 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. 29 U.S.C. §666(j). 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 Construction Co*., 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). The parties stipulated that the proposed penalty of $3,500.00 was computed in accordance with Federal policy and procedures and properly calculated for the alleged violation. Accordingly, based on the penalty stipulation and the totality of the factual circumstances discussed above, the court will not alter the proposed penalty amount.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is hereby AFFIRMED and a penalty of $3,500.00 is ASSESSED.

Date: November 29, 2010
Denver, Colorado

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SIDNEY J. GOLDSTEIN
Judge, OSHRC