Some personal identifiers have been redacted for privacy purposes

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. F & H COATINGS, LLC, Respondent.	DOCKET NO. 15-0558

Appearances:

Leigh Burleson, Esq. & Evert H. Van Wijk, Esq., Office of the Solicitor, U.S. Dept. of Labor, Kansas City, Missouri
For Complainant

Gary W. Auman, Esq & Douglas S. Jenks, Esq., Dunlevey, Mahan & Furry, Dayton, Ohio
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On September 23, 2014, Respondent's employees were preparing to sandblast and paint a pressure vessel at a facility owned by Boardman, LLC.[1] During the course of their preparations, the pressure vessel became unstable and fell off its supports, fatally crushing one of Respondent's employees. The next day, the Occupational Safety and Health Administration ("OSHA") conducted an inspection at the

1. Boardman is a pressure vessel and tank manufacturer. Boardman hired Respondent to sandblast and paint a specified number of vessels, which was primarily performed at the Boardman manufacturing facility.

Boardman facility. (Tr. 69). As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent. The Citation alleges a single, serious violation of the Act's General Duty Clause, with a proposed penalty of $7,000.00. Respondent timely contested the Citation. A trial was conducted in Wichita, Kansas on March 29–30, 2016. The parties each submitted post-trial briefs for consideration.

Nine witnesses testified at trial: (1) Sergeant John Ryan of the Wichita Police Department; (2) Ryan Hodge, OSHA Assistant Area Director for Wichita;[2] (3) Michael Moon, OSHA Assistant Area Director; (4) Robert Patrick, former supervisor for Respondent; (5) Michael Emmett, Respondent's Safety Director; (6) Jeff Mills, Boardman Plant Superintendent; (7) Keith Farish, Boardman Project Manager; (8) Max McMillan, former quality control inspector for Boardman; and (9) Brian Hope, OSHA's designated expert.

Jurisdiction

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. (Tr. 22). The parties also stipulated 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 U.S.C. § 652(5). (Tr. 22). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Stipulations[3]

1. F & H Coatings, LLC, uses goods, equipment, and materials shipped from outside the state of Kansas;

2. F & H Coatings, LLC, is engaged in a business affecting commerce;

2. At the time of the inspection, AAD Hodge was acting as a Compliance Safety and Health Officer (CSHO).
3. The following stipulations were read into the record at the beginning of the trial. (Tr. 22–24).

3. The Occupational Safety and Health Review Commission has jurisdiction over this matter;

4. F & H Coatings is a full-service professional industrial and commercial painting contractor;

5. [redacted] was employed by F & H Coatings, LLC, on September 23, 2014;

6. Robert Patrick was F & H Coatings, LLC's site supervisor on September 23, 2014;

7. Boardman utilized a crane to place the vessel onto a set of two pipe racks;

8. Robert Patrick was supervising [redacted] at the time of the accident on September 23, 2014;

9. On/or about September 23, 2014, F7 H Coatings was performing work at Boardman LLC, at Boardman located at 3400 North Broadway, Wichita, Kansas, which work involved the blasting and painting of a pressure vessel;

10. The pressure vessel at issue was manufactured by Boardman LLC;

11. The pipe racks were positioned North to South while the vessel was positioned East to West;

12. An incident occurred on September 23, 2014 at the Boardman facility wherein the vessel came off of the pipe racks and fell onto [redacted], an employee of F & H Coatings;

13. The incident on September 23, 2014 resulted in the death of [redacted];

14. The racks upon which the vessel was placed did not break or collapse;

15. Robert Patrick, Jarod Bina and [redacted] were the only three employees from F & H Coatings working at the Boardman facility at the time the incident occurred;

16. The vessel at issued was located inside of a containment area on the Boardman property;

17. Aside from [redacted], Robert Patrick was the only other person in the containment area at the time of the incident and was the only eyewitness to the incident involving [redacted].

Background

In 2014, Respondent contracted with Boardman, LLC to sandblast and paint six pressure vessels that were fabricated in Boardman's manufacturing facility. (Tr. 312; Ex. R-11). Due to the size of the vessels, most of the sandblasting and painting took place at Boardman's facility; however, in the past, some smaller vessels were taken to Respondent's facility to be painted. (Tr. 312–13). The vessel at issue in this case was sandblasted and painted at Boardman's facility.

Prior to beginning sandblasting and painting, Respondent brought pipe racks to Boardman's facility and told Boardman employees that these racks would be used to support the vessels during sandblasting and painting. (Tr. 77–78, 82, 211, 267; Exs. R-4, R-5). The pipe racks were literally pieces of 8-inch diameter, round pipe that were welded together to create what were essentially metal sawhorses. (Tr. 37; Exs. C-9; R-5). For each rack, there was one horizontal pipe for the crossbeam; two, shorter vertical pipes, which served as legs; and two pipe sections that served as the feet. (*Id.*). The racks also had chains and pins at the end of the cross beams, which were designed to prevent smaller gauge pipe from rolling off. (Tr. 174, 252; Exs. R-5, R-6). Much like sawhorses, the pipe racks were placed a certain distance apart, with the crossbeams running parallel to one another. (Tr. 149–50). The vessel at issue was placed on top of the racks with a crane by a Boardman employee; only authorized Boardman employees were allowed to operate the crane. (Tr. 23, 103, 119; Ex. R-9).

Boardman did not use pipe racks. (Tr. 291). Instead, Boardman primarily used what are known as rollers, which cradle the vessels between two sets of wheels.[4] (Tr. 97, 270–71, 342; Ex. C-11 at F6, F7). Those wheels were then used to rotate the vessel, which allowed Boardman to weld or otherwise attach implements to the vessel. (Tr. 273). As compared to Respondent's pipe racks, the rollers maintained four points of contact with the vessel. (Tr. 273).

According to Robert Patrick, who was responsible for safety and quality control on this particular job, Respondent did not have specifications, documented procedures, or training for setting vessels on the pipe racks. (Tr. 150). Instead, Patrick testified that the body of the vessel had to be resting "dead-center" of the racks' crossbeams and that the racks had to be placed an unspecified distance apart, depending on the length of the vessel. (Tr. 147–149). With respect to how the vessel was placed on the racks, Patrick testified that Boardman placed the racks and set the vessel on the racks using the crane. (Tr. 201). Once the vessel was placed on the racks, Patrick testified that he would "visually check it and then I would purposely try to move it" to ensure it was centered and stable. (Tr. 156). Without any other metric to rely upon, Patrick testified that he relied on his experience, though he did admit that he could not recall a single, specific instance in that time where a vessel was improperly placed on pipe racks, wobbled, or otherwise presented a problem. (Tr. 156–57).

On the day of the accident, Respondent's crew, which included Robert Patrick and [redacted], arrived at Boardman's facility around 10:30 a.m. (Tr. 194). When Patrick and [redacted] arrived, other F & H employees were busy setting up an enclosure around the vessel, which had already been placed on the pipe racks by Boardman employee Dustin Johnson. (Tr. 77–78, 194). This particular vessel was 16-feet long, weighed approximately 12,000 pounds,

4. The orientation of the rollers was similar to that of the pipe racks—spaced apart in such a way to allow one end of the vessel to sit in one set of rollers and the other end of the vessel to sit in another.

and had various valves protruding from it, including a manway entrance, which, on its own, weighed nearly 2,200 pounds. (Tr. 37, 160, 256; Ex. R-7). As was his practice, Patrick performed a Pre-Work Job Hazard Analysis (PWJHA), including the aforementioned visual inspection and associated attempt to move (by pushing on it) the vessel from its perch on the pipe racks to ensure it was stable. (Tr. 145–47).

After performing the PWJHA, Patrick and [redacted] began prepping the vessel to be sandblasted. (Tr. 161). [redacted] began by partially entering the vessel (body half-way in, feet on the ground) to hang up lights. (Tr. 162). Around that time, Patrick testified that he heard a noise, at which time he saw the racks flip upwards and the vessel rolling off. (Tr. 163). Patrick attempted to stop the vessel from rolling and yelled at [redacted] to get out of the way, but the force of the 12,000-pound tank pushed him backwards. (Tr. 166). [redacted] was still inside of the manway when the vessel fell, fatally crushing him under its weight. (Tr. 86, 125).

Complainant was notified of the accident on September 23, 2014, and sent CSHO Ryan Hodge to conduct an inspection. (Tr. 68). During the course of his inspection, CSHO Hodge reviewed the scene of the accident and interviewed employees of both Respondent and Boardman. (Tr. 70). At the conclusion of the inspection, Hodge recommended the issuance of a single-item citation of the general duty clause, 29 U.S.C. § 654(a)(1), because Respondent's employees were "exposed to struck-by hazards in that the pressure vessel was not placed on a work rack which prevented unintentional movement." Citation and Notification of Penalty at 6. The Citation was issued on March 17, 2015. Respondent contested the violation, which brought this matter before the Commission.

Applicable Law

To establish violation of the general duty clause, Complainant must prove, by a preponderance of the evidence, that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *See Waldon Healthcare Center*, 16 BNA OSHC 1052 (No. 89-2804, 1993); 29 U.S.C. § 654(a)(1). Complainant must also prove that Respondent knew, or with the exercise of reasonable diligence, could have known, of the violative condition. *Tampa Shipyards*, 15 BNA OSHC 1533, 1535 (Nos. 86-360, 86-469, 1992).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

Discussion

Citation 1, Item 1

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

> OSH ACT of 1970 Section 5(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to struck by hazards:
>
> On or about September 23, 2014, at the jobsite located at 3400 N. Broadway, Wichita, KS: Employees engaged in pressure vessel sandblasting and painting activities were exposed to struck-by hazards in that the pressure vessel was not placed on a work rack which prevented unintentional movement.

> Among other methods, one feasible and acceptable abatement method to correct his hazard is to utilize a work rack which is designed to cradle the pressure vessel in order to prevent displacement.

Citation and Notification of Penalty at 6.

A Condition in the Workplace Presented a Hazard

"[H]azards must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Pelron Corp.*, 12 BNA OSHC 1833 (No. 82-388, 1986) (citing *Davey Tree*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984)). "A safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur." *Baroid Div. of NL Indust., Inc.*, 660 F.2d 439, 444 (10th Cir. 1981).

In this case, it is not difficult to conclude that a hazard existed. At its most basic, the condition involved elevating an incredibly heavy object, placing it on a set of racks, allowing work to be performed on it, and not accounting for the possibility that the object might fall. Here, the object was a twelve-thousand-pound vessel,[5] which was cylindrical in shape and equipped with a protruding manway that extended 29-inches from the side of the vessel and constituted more than one-sixth of the total weight. (Tr. 54, 256; Ex. R-7). Based on the height of the pipe racks' legs, the vessel was elevated approximately two-and-a-half feet above the ground and placed on rounded crossbeams, which meant that the point of contact between the cylindrical body of the vessel and the cylindrical crossbeam was quite small. (Tr. 80; Exs. R-4, R-8).

5. Sergeant Ryan remarked that the weight of the vessel was approximately that of "four Honda Accords stacked on top of each other." (Tr. 37).

Finally, Respondent's employees worked on the vessel, as was their routine practice, without securing it against unexpected movement. (Tr. 202).

Patrick testified that on the day of the accident, he performed a number of pre-work checks to ensure that the placement of the vessel and the subsequent work were not hazardous. As noted above, he assessed whether the vessel was placed "dead center" of the crossbeams by looking at it and made sure it would not move by pushing on it. There was no method for these assessments, no training, and no rules, other than what Patrick termed his "experience". Unfortunately, Patrick also testified that he has never observed, or at least could not recall, a vessel that had been improperly placed on a rack, thus calling into question whether his experience is a useful barometer of stability. As part of his assessment, Patrick determined that the vessel's legs, which were made of angle iron, would lay flat on one of the pipe racks and prevent the vessel from rolling. (Tr. 149; Ex. R-7). He also determined that the legs would also prevent the weight of the 2200-pound manway, which was offset to the side of the vessel, from causing the vessel to shift. (Tr. 149, 256). Again, this determination was not based on any methodology or calculation; in fact, at one point during this testimony, Patrick admitted that he did not know how much either the vessel or the manway weighed and stated, "I'm not an engineer or anything." (Tr. 148, 214).

Notwithstanding Respondent's assertions that there was no hazard, the fact that Patrick was insistent that the vessel needed to be "dead center" and that he purported to ensure that the vessel would not move by pushing on it certainly seems to indicate that Respondent perceived one.[6] Indeed, Patrick himself admitted that if the vessel were off center, then it could roll. (Tr. 213). In that respect, the only thing preventing the vessel from rolling was Patrick's eyeball assessment of both the proper placement of the racks and the vessel upon them, during which he

6. This will be discussed in more detail below.

also claims to have considered the weight displacement imposed by the manway (even though he did not know how much it weighed) by assuming that the flat v. cylindrical shape of the attached legs would be capable of holding the remaining portion of the vessel in place.

Respondent argues that Complainant cannot prove that a hazard existed because he cannot establish how the accident occurred. Instead, Respondent contends that the accident was a "freakish and unforeseeable event." *Resp't Br.* at 13. This argument is problematic on a number of counts. According to the Commission, "There is no mathematical test to determine whether employees are exposed to a hazard under the general duty clause. Rather, the existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances." *Waldon*, 16 BNA OSHC 1052 (citing *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n. 33). While no definitive answer was given as to how the vessel came off of the racks, Complainant does not have to prove the cause of a particular accident in order to establish that a condition violated the Act. *See Williams Enters. Inc.*, 13 BNA OSHC 1249 (No. 85-355, 1987) ("We have many times held . . . that the cause of an accident is not necessarily relevant to whether a standard was violated."). Indeed, "it is the hazard, not the specific incident that resulted in injury . . . that is the relevant consideration in determining the existence of a recognized hazard." *Kelly Springfield Tire Co.*, 10 BNA OSHC 1970 (No. 78-4555, 1982), *aff'd* 729 F.2d 317 (5th Cir. 1984). It is also true, however, that an accident may demonstrate that a condition presents a hazard to employees. *See Coleco Industries, Inc.*, 14 BNA OSHA 1961, 1964 (No. 84-546, 1991).

In this case, it is irrelevant whether the vessel rolled, slipped, or slid off of the racks; rather, as noted above, "[a] safety hazard . . . is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur."

Baroid Div. of NL Indust., Inc., 660 F.2d at 444. The placement of a six-ton, cylindrical object on top of round metal pipes, with only visual observation and a shove to ensure stability, certainly increased the risk of serious harm to those employees assigned to perform work on the elevated object.[7] In recognition of this, Patrick admitted that death is one of the possible consequences of an unstable or poorly set tank. (Tr. 172). Further, that such a possibility could result from a simple oversight regarding the tank's placement on the racks or an incorrect assumption about the ability of the vessel's legs to counterbalance the weight of the protruding, two-thousand-pound manway indicates that a hazardous incident was far more likely than a "freakish or utterly implausible concurrence of circumstances." *Waldon*, 16 BNA OSHC 1052 (citing *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n. 33). As such, the Court finds that Complainant established the existence of a hazard.

Respondent Recognized the Hazard

According to the Commission, a hazard is recognized when either the cited employer or its industry recognizes the risk of harm from the cited conditions. *See Arcadian Corp.*, 20 BNA OSHC 2001, 2008 (No. 93-0628, 2004). Based on what follows, the Court finds that Respondent recognized the risk of harm associated with elevating and working on a 12,000-pound, round pressure vessel, supported only by pipe racks, which was otherwise unsecured. The Court grounds its decision on three bases: (1) Patrick's pre-work checks; (2) the chain and pin restraints used for smaller gauge pipe; and (3) the obvious nature of the hazard.

7. By way of illustration, the Court has identified a number of standards in the Act that address the hazard of elevated objects and unintentional movement. *See, e.g.,* 29 C.F.R. § 1926.305(c) ("Blocking. When it is necessary to provide a firm foundation, the base of the jack shall be locked or cribbed. Where there is a possibility of slippage . . . a wood block shall be placed between the cap and the load."); *id.* § 1926.1404(h)(6)(ii) ("Where there is insufficient information to accurately identify the center of gravity, measures designed to prevent unintended dangerous movement resulting from an inaccurate identification of the center of gravity must be used."); *id.* § 1910.244(a)(2)(iii) ("After the load has been raised, it shall be cribbed, blocked, or otherwise secured at once.").

With respect to the pre-work checks (PWJHA), Respondent states that it consists of three parts: defining the steps of the work to be completed; identifying the hazards associated with those steps; and identifying steps to mitigate those hazards. *Resp't Br.* at 26. Further along in that same section, Respondent notes that Patrick "visually inspect[ed] the pressure vessel on the pipe racks to ensure it was not off center . . . 'just to make sure that it wasn't going to move.'" *Id.* at 26–27. Patrick then attempted to move the 12,000-pound vessel to "make sure it's stable." (Tr. 154). In the end, Patrick concluded that there was no hazard and that it was safe to work. (Tr. 145).

Respondent contends that merely because it performs pre-work safety analyses does not mean that it recognized a hazard. Indeed, the Commission has held that "[w]hile an employer's safety precautions *alone* do not establish that the employer believed that those precautions were necessary for compliance with the Act . . . precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence." *Beverly Enters., Inc.*, 19 BNA OSHC 1161 (Nos. 91-3144 *et al.*, 2000) (emphasis added) (citing *Wheeling-Pittsburgh Corp.*, 16 BNA OSHC 1218 (No. 89-3389, 1993); *Waldon*, 16 BNA OSHC at 1061–62). In other words, simply because such precautionary measures may be insufficient in and of themselves to prove recognition, they are nonetheless relevant. Here, Respondent's supervisor utilized multiple methods to ascertain the stability of the pressure vessel: eyeballing its location on the racks, ensuring that the flat portions of the angle iron legs were placed on one of the racks, and pushing on it to see whether it would move. All of these steps were targeted at mitigating a hazard; namely, the possibility that the vessel could become unstable. *See St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, (8th Cir., 1980) (imputing knowledge of supervisory personnel to employer); *Peter Cooper Corps.*, 10 BNA OSHC 1203 (No. 76-596, 1981) (same). Clearly,

placing an awkwardly shaped, incredibly heavy object on elevated crossbeams creates, or at the very least contributes to, an increased risk of being struck by the vessel should it roll, slip, shift, fall, or slide. *See Baroid Div. of NL Indust., Inc.*, 660 F.2d at 444, *supra*. Respondent clearly recognized this increased risk, and sought to counteract it through various pre-work measures designed to ensure stability.

Respondent's pre-work checks were not the only evidence indicating that Respondent recognized the pipe rack set-up was hazardous. Each of the pipe racks in question came equipped with a set of chains and pins. (Exs. R-4, R-5, R-6). These chains and pins, which were attached to the end of the pipe racks, were designed to prevent smaller-gauge pipe ("two- to twelve-inch round") from rolling off the pipe racks during work projects. (Tr. 174, 252). Although the risk of injury was significantly reduced when sandblasting or painting smaller diameter pipe, the recognized hazard is still the same: round objects placed on convex,[8] round surfaces have a tendency to move. Even though Respondent recognized the need for, and actually took, precautions against unintentional movement when the pipes being handled were small, it disregarded those precautions when dealing with a similarly elevated 12,000-pound, cylindrical vessel.

In support of its argument on this issue, Respondent cites *Kinsley Construction, Inc.*, 21 BNA OSHC 1372 (2005) (ALJ), wherein the judge held that it is not sufficient to merely allege that "something could go wrong." While that is true, the facts of *Kinsley* show that Respondent's reliance is misplaced. In *Kinsley*, a front-end loader was transporting a large rock to a dump truck. In order to place the rock in the dump truck, the tailgate on the truck had to be removed, so the operator put the loader in idle, placed the bucket on the ground, and curled the bucket up into

8. Concave surfaces, on the other hand, such as the rollers in use and available at the Boardman facility, counteract that tendency. (Tr. 273). This will be addressed in greater detail below in the section regarding feasibility.

the closed position to prevent the rock from falling forward. At some point while the employees were removing the tailgate, the rock fell, striking one employee and fatally injuring the other.

In *Kinsley*, the Secretary attempted to illustrate the obviousness of the hazard, by analogizing the conditions of working *near* a load, which was on the ground and curled up in a bucket nearly 15-20 feet away, to working under a load held in the air. The Court held that, "[u]nlike a suspended load, there is no evidence to suggest that it was 'obvious and glaring' that the rock would flip over and roll toward the truck and endanger employees 15-20 feet away, especially since it was rolled up with the center of gravity away from the employees." *Id.* at *4. The Court also rejected the Secretary's argument that something could have gone wrong with the hydraulic lift on the front-end loader bucket, as there was no evidence to suggest that this particular model of loader was susceptible to hydraulic problems. *Id.* at *3.

In the present case, however, [redacted] was not only underneath the load, but was also partially inside of the protruding manway while the vessel was suspended on the pipe racks. This is not a case in which Complainant has merely alleged that "something could go wrong"; rather, Complainant presented evidence that indicates Respondent was specifically aware of the potential for round objects to shift/move/slide on the pipe racks, and had actually taken precautions to prevent that from happening, albeit only with respect to smaller gauge pipe. With respect to this 12,000 pound pressure vessel, Respondent simply did not go far enough to protect against the hazard. Respondent clearly recognized the hazard of this 12,000-pound cylindrical vessel moving, shifting, sliding, or otherwise falling from its elevated position on the pipe rack.

Respondent also claims that it should not be held responsible any alleged violative condition, because it relied on Boardman's expertise as the manufacturer to properly stage the vessel for painting. (Tr. 279–81). The problem, however, is that Respondent provided the racks,

claims to have used them multiple times before without incident, and, according to Boardman's superintendent, Jeff Mills, directed Boardman as to how the vessels should be placed upon them. (Tr. 293–95). With respect to the accident in this case, Mills testified that this vessel was similar in length, diameter, and shape, to one that had been placed on the racks before, so Boardman's employees acted in accordance with Respondent's prior instructions. (Tr. 295–297).

Notwithstanding the foregoing, even if we accept that Boardman was responsible for setting the vessel on the racks and for determining how to space and center it, Respondent would still be charged with recognition of the hazard. Under these circumstances, Boardman might be characterized as the creating employer; however, once the vessel was set, the record indicates that Respondent assumed control of the condition by taking responsibility for ensuring that the vessel was set properly and rested stably on the racks prior to its employees beginning work. *See Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129–2130 (No. 92-0851, 1994) (controlling employer liable if it could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite); *see also Lee Roy Westbrook Constr. Co.*, 13 BNA OSHC 2104, 2106 (No. 85-601, 1989) ("'Control is established when it is shown that an employer possessed the expertise and personnel to abate a hazard.'") (citation omitted). Patrick was the project supervisor and, therefore, had the wherewithal to both identify the hazard and, to the extent necessary, had the authority to request Boardman to reposition the vessel. (Tr. 142, 152). Respondent clearly can be characterized as the exposing employer. *See Southern Pan Svcs. Co.*, 25 BNA OSHC 1081 (No. 08-0866, 2014) ("[L]ong-standing Commission precedent hold[s] that an employer whose own employees are exposed to a hazard or violative condition—an 'exposing employer'—has a statutory duty to comply with a

particular standard even where it did not create or control the hazard.") (citing *Anning-Johnson Co*., 4 BNA OSHC 1193, 1198–99 (No. 3694, 1976)).

The Court finds that Respondent specifically recognized the hazards associated with working on a 12,000-pound cylindrical vessel, elevated above the ground on round pipe racks, without implementing any methods to prevent the vessel from shifting, sliding, rotating, or otherwise moving.

The Hazard was Likely to Cause Death or Serious Physical Harm

As the facts of this case clearly illustrate, the hazard was not only likely to cause death or serious physical harm, but it did, in fact, cause the death of Respondent's employee. Similar to the analysis for a serious violation, Complainant need not prove that the accident itself is likely; rather, he only needs to prove "that *if* an accident were to occur, death or serious physical harm would be the likely result." *Beverly Enters., Inc.*, 19 BNA OSHC 1161 at *31. Even disregarding the accident that occurred in this case, the Court would nonetheless find that placing a 12,000-pound cylindrical vessel on rounded, elevated crossbeams, without any additional precautions against falling or movement would be likely to cause death or serious physical harm if the vessel were to move or fall. Unfortunately, the facts of this case reinforce that conclusion. Thus, the Court finds that the hazard was likely to cause death or serious physical harm, and, as such, the violation is properly characterized as serious.

Respondent had Knowledge of Hazard

In addition to proving that Respondent, or its industry, recognized the hazard, Complainant must also prove that Respondent knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. *See Pride Oil Well Svc.*, 15 BNA OSHC 1809 (No. 87-692, 1992). Reasonable diligence, according to the Commission,

"involves several factors, including an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.'" *Id.* (quoting *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). "Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe." *Id.* (citations omitted). It should also be noted that Complainant need not show that Respondent knew the conditions were hazardous or violated the Act; rather, he need only show that Respondent had actual or constructive knowledge of the conditions giving rise to the hazard. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076 (No. 90-2148, 1995).

Respondent was clearly aware of the condition, as its supervisor was not only at the worksite, but directly involved in working on the vessel at the time of the accident. *Mountain States Telephone and Telegraph Co*., 623 F.2d 155 (10th Cir., 1980) (imputing knowledge of supervisory personnel to employer); *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, (8th Cir., 1980)(same). Thus, the Court finds that Respondent was aware of the hazardous condition at issue.

A Feasible and Effective Means Existed to Materially Reduce the Hazard

In order to establish a violation of the general duty clause, Complainant must "'specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard.'" *Arcadian Corp.*, 20 BNA OSHC 2001 (quoting *Beverly Enters., Inc.*, 19 BNA OSHC 1161 (No. 91-3144 *et al.*, 2000)). "Feasible means of abatement are established if 'conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Id.* (quoting *Pepperidge Farm, Inc.*, 17 BNA OSHC

1993)). Where an employer has taken steps to abate the recognized hazard, Complainant must show those measures are inadequate. *Alabama Power Co.*, 13 BNA OSHC 1240 (citing *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986)).

The Court was unable to identify any steps Respondent took to abate the hazard. Instead, Respondent relied upon assumptions about: the stability of the racks (without knowing the weight of the vessel or the load capacity of the racks); the centeredness of the vessel on the racks (without measuring); the ability of angle iron legs to prevent a round object from moving on a round surface; and the ability of those same legs to counteract the effect of a 2200-pound manway, which was offset to the side of the vessel. All of these assumptions were premised on two assessments: (1) whether the vessel looked like it was dead center on the racks; and (2) whether the vessel moved when Patrick pushed on it. Neither of these actions are attempts to mitigate the potential for a hazard; rather, they are assessment tools to determine the nature of the hazard. Assuming or hoping that an elevated vessel will not move is not the same as taking steps to ensure that it will not. Put more simply, eyeballing and shoving are not adequate means of preventing unintentional movement of a 12,000-pound cylindrical vessel.

The Court finds that there were multiple feasible means of abatement with respect to this particular hazard, at least one of which Respondent was aware of and had access to at the Boardman facility—rollers. As discussed earlier, rollers are a set of tires or wheels that are spaced apart such that a cylindrical object, such as a pressure vessel, can rest in between the tires and rotate. Due to the cradle orientation of the tires, there is no opportunity for lateral movement of the vessel. (Ex. C-11 at F6). According to Patrick, Respondent had used the rollers at Boardman's facility to sandblast and paint "40, 50, 60, 80-foot long vessels." (Tr. 159). However, with respect to the pressure vessel involved in this case, which was approximately 15–

16 feet long, Patrick stated that the rollers sat too low to the ground to accommodate the protruding valves and manway. (Tr. 160).

In contrast to Patrick's testimony, Max McMillan, who worked as a quality control inspector for Boardman, and who also fabricated the vessel at issue in this case, testified that the vessel was fabricated almost entirely while resting on rollers. (Tr. 389–91). According to McMillan, the vessel was still resting in the rollers when they attached the angle iron legs, which is the last part of the process. (Tr. 393). In other words, the rollers were able to accommodate the protruding valves and manway while McMillan welded the legs onto the vessel. (Tr. 394). Further, he testified that, although the orientation of this particular vessel prevented the rollers from being able to rotate the vessel a full 360 degrees, the rollers could still be used to rotate the vessel some portion thereof, assisted by a crane for re-positioning when necessary, to account for the protruding valves. (Tr. 395–96).

Given the testimony of McMillan, the Court rejects Respondent's claim that it was somehow infeasible for its employees to sandblast and paint the vessel using rollers when the more complicated task of fabricating the vessel was accomplished using the exact same piece of equipment. To be sure, McMillan testified that rotating the vessel becomes more difficult with each additional valve, but he also expressed that the crane could be used to assist in the rotation.[9] To the extent that Respondent is suggesting that requesting a crane assist from Boardman somehow indicates infeasibility, the Court rejects that argument. The record indicates that all vessels will need to be repositioned, regardless of what type of rack or support system is used, including the pipe racks themselves. (Tr. 274, 303). The only difference might be the number of times a particular vessel needs to be repositioned; however, just because an additional step or

9. Keith Farish, a project manager at Boardman, testified that cribbing or railroad ties have been placed underneath rollers in the past in order to accommodate protrusions such as manways and valves. (Tr. 357–58).

two is required does not mean that a particular course of action is infeasible, especially when those extra steps abate a significant hazard. For that matter, Respondent had already used alternative measures, such as rollers, in the past, which further supports the conclusion that Complainant's proposed abatement is feasible. *See, e.g., SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1215 (D.C. Cir. 2014) ("[SeaWorld] had already implemented abatement for at least one of its killer whales and needed only to apply the same or similar protective contact measures it used with Tilikum to other killer whales.").

In addition to the rollers that were available at Boardman's facility, multiple witnesses testified about alternative support systems, including those that were used by another painting contractor that was hired to complete the job after the incident involving Respondent. (Tr. 302, 358, 397, 437). Brewer Restoration, which served as the painting contractor until the plant closed, never used pipe racks; instead, they relied upon the rollers available at Boardman, as well as utilizing a system of wood pilings, which were used to chock the various vessels in place. (Tr. 301–303). Mills testified that they could not rotate the vessel when using the wood chocks, which meant they worked on it in a static position until it needed to be moved. (Tr. 302). The Court is persuaded by the fact that a different painting contractor was previously able to sandblast and paint vessels at the Boardman facility without elevating them, unsecured, on pipe racks. Instead, they did the exact same job using either Boardman's rollers or a wooden crib set-up, either of which would have materially reduced the hazard. *See Arcadian*, 20 BNA OSHC 2001.

In addition, Brian Hope, Complainant's designated expert, testified that Respondent could have implemented any number of alternatives for supporting the vessel while sandblasting and coating. For example, Hope testified that another employer used a rack constructed out of I-

beams, similar to those available at Boardman. (Tr. 461). The particular orientation of those racks was designed to prevent both movement of the vessel/tank and to prevent movement of the racks themselves. This was accomplished through welding vertical members to the ends of the crossbeam—not unlike the pins that were installed for smaller gauge pipe—and through the installation of round, steel discs, which were attached to the bottom of the stands to stabilize the racks. (Tr. 461–62).

The Court finds that Complainant established multiple, feasible alternatives to the pipe racks used by Respondent to sandblast and paint this vessel. Accordingly, and in consideration of the foregoing, the Court finds that Respondent violated section 5(a)(1) of the Act.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant proposed a penalty of $7,000.00, and did not apply any reductions for good faith, size, or history of prior violations. Because Respondent did not have an inspection history, Complainant determined that it was not eligible for a reduction. (Tr. 133–34). Further, given the

gravity of the violation and the fact that someone was fatally injured, Complainant did not apply any reductions for good faith or for the size of the employer. According to Moon, the AD has discretion as to whether to apply any of the available penalty reductions, and he determined that the gravity of the violation in this case justified the highest possible penalty. (Tr. 135).

The Court agrees. Respondent did not have a single rule, standard, or training program to address the hazard presented by elevating and supporting a 12,000-pound, cylindrical vessel; instead, Respondent simply relied upon visual examination and a supervisory "push" to ensure stability. No additional precautions were taken to mitigate the potential for the vessel to roll, shift, slide, fall, or otherwise move. Unfortunately, Respondent's employee was fatally crushed by the vessel when it fell off of the racks. In consideration of the entire record, the Court finds that a $7,000.00 penalty is appropriate and shall 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 and a penalty of $7,000.00 is ASSESSED.

/s/ Brian A. Duncan

Date: November 28, 2016
Denver, Colorado

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