



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.

OSHRC Docket No. 16-0803

THE LANE CONSTRUCTION CORP.,

Respondent.

ON BRIEFS:

Allison Graham Kramer, Senior Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Ann S. Rosenthal, Associate Solicitor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.

For the Complainant

David Bondanza, Corporate Attorney; The Lane Construction Corp., Cheshire, CT

For the Respondent

DECISION

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

In October 2015, a Lane Construction Corporation employee was fatally injured while operating a diesel-powered hammer used to drive concrete support pillars (“piles”) at a bridge construction project in Ocoee, Florida. Following the accident, the Occupational Safety and Health Administration conducted an inspection of the worksite and issued Lane a single-item citation alleging a serious violation of the Occupational Safety and Health Act’s general duty clause, 29 U.S.C. § 654(a)(1), for exposing employees to “struck-by hazards” while they worked near the hammer’s base of operation.¹ Following a hearing, Administrative Law Judge Heather

¹ The general duty clause requires each employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1).

A. Joys affirmed the violation as serious and assessed the proposed penalty of \$6,300. For the following reasons, we reverse.

BACKGROUND

Lane was hired by the Florida Department of Transportation to build a bridge on a section of a highway that ran along an area described as a “watercourse.” Lane used a Delmag D30-32 hammer to drive the bridge’s 65-foot concrete piles into the ground along the highway. The Delmag hammer is diesel-powered and rides in—and is guided by—an elongated cage-like device (the “leads”) which is closed on three of its four sides. At the bridge worksite, the open side of the leads faced the watercourse. During the pile-driving process, Lane used a crane to suspend the hammer and the leads above the ground. Fuel to the hammer was controlled by three ropes; two of the ropes controlled the flow of fuel to the hammer’s throttle and the third rope—a “kill rope”—was attached to a shutoff valve and, if pulled, would stop the flow of fuel. A 90-pound block made of plywood layers—known as a pile “cushion”—was placed at the bottom of the hammer to act as a buffer between the metal hammer and the concrete pile during the pile-driving operation.

On the day of the accident, Lane’s crew was conducting a “dry run” in preparation for driving a “test pile” to assess ground conditions and the pile-driving operation in general. During a dry run, the hammer is lifted to a certain height and then the hammer’s piston is unlocked, causing the piston to drop and the hammer to drive the test pile into the ground. For this dry run, the hammer operator was holding the kill rope but not the other two ropes because, unlike regular driving operations, a dry run does not require the use of fuel—the piston drops and drives the hammer only as a result of its own weight.² When the piston dropped, the impact of the hammer against the test pile caused it to sink approximately 12 to 15 feet into the ground, much further than is typically the case during a dry run. For reasons not entirely clear from the record, after the piston dropped and the hammer hit the test pile, the cushion was ejected from the bottom of the hammer, fell 55 to 60 feet, and fatally struck the hammer operator.

DISCUSSION

To prove a general duty clause violation, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a

² There is no explanation in the record as to why the hammer operator needed to hold the “kill rope” during the dry run when fuel was not being used.

feasible and effective means existed to eliminate or materially reduce the hazard.³ *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The only issue on review is whether the Secretary established a feasible and effective means of abatement. Specifically, “the Secretary must ‘demonstrate both that the measure[] [is] capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard.’ ” *Mo. Basin Well Serv., Inc.*, 26 BNA OSHC 2314, 2319 (No. 13-1817, 2018) (citation omitted).

In the citation, the Secretary asserts as a means of abatement that Lane require its employees to “keep a minimum distance of 13 feet . . . from the units to be driven” in accordance with the hammer’s operating instructions.⁴ Lane does not dispute that requiring its employees to stand at least 13 feet away from the pile during driving operations would materially reduce the struck-by hazard. Indeed, before the judge, Lane conceded that the hammer operator, “[i]n most instances,” would have stood at least 13 feet away from the pile but argued that the Secretary failed to show it was feasible for the operator to do so here because of the adjacent watercourse.⁵

The judge rejected the company’s feasibility challenge, finding that Lane could convert the hammer’s “manual” fuel control system (i.e., one controlled by ropes) to a hydraulic one, which she found would allow the operator to stand 13 feet or more away from the pile. In support of her finding, the judge pointed out that “[a]fter the accident, Lane changed from a manually operated

³ The Secretary must also prove the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Burford’s Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010), *aff’d*, 413 F. App’x 222 (11th Cir. 2011) (unpublished). We need not reach this issue given our decision to vacate on other grounds.

⁴ The operating instructions include warnings that require certain workers, including the operator, to maintain a 13-foot distance from the hammer itself, as well as “the units to be driven” and, more generally, “the operating equipment.”

⁵ It is undisputed that, in this case, the hammer operator was standing less than 13 feet away from the pile when he was struck by the cushion. It is also undisputed that he had to stand on the open side of the leads, which faced the watercourse, to obtain the “correct torque” when pulling the ropes and to keep the ropes away from any obstructions. Given the pile’s distance from the watercourse, the operator therefore could not have stood 13 feet away while operating the kill rope unless, as the parties stipulated, “he stood in the watercourse or on something that allowed him to be placed above the watercourse.” At the hearing, the CO posited that Lane could have built a platform on the watercourse for the operator to stand on. The judge opined that building a platform would be “a seemingly simple solution,” but that the specifics of that abatement method “are absent from the record” and “the Secretary needed to present more to establish [its] feasibility.” The Secretary has not pursued this potential method of abatement on review.

diesel hammer to a hydraulically operated diesel hammer.” She concluded that the method of abatement was, therefore, feasible because “[i]t was unrebutted on this record that Lane was able to use such a system at this worksite.”⁶

On review, Lane argues that the judge’s conclusion is not supported by a preponderance of the evidence. Specifically, Lane claims that the Secretary has not shown that using a hydraulic control system obviates the need for a kill rope and, thus, has failed to establish that such a system was a feasible means of enabling the operator to stand at least 13 feet away from the pile. We agree. In finding that feasibility was established here, the judge relied heavily on the CO’s limited testimony on this issue: “Another feasible method was [to] change the . . . fuel line operation where it went from a manual operation to a hydraulic operation. Where the person doesn’t have to stand in front of th[e] [leads] opening.”⁷ But the CO’s testimony provides no detail on how such a system was, or could have been, used at the worksite.⁸ Nor does it address whether Lane’s employees, when they subsequently used a hydraulic control system, could have operated the hammer at the worksite standing at least 13 feet away from the pile.

⁶ We note that the judge found Lane’s foreman was also exposed to the struck-by hazard because he was positioned closer to the pile than the hammer operator at the time of the accident. But the record does not discuss how the foreman’s exposure could have been abated, and the Secretary has never addressed this issue, either before the judge or on review.

⁷ At the hearing, the CO raised the possibility of changing the orientation of the leads so that the opening did not face the watercourse—the watercourse would then have no longer limited the operator’s ability to maintain a safe distance from the pile. Lane’s foreman testified, however, that the open side of the leads had to face the watercourse rather than the highway to ensure that the pile, if it were to fall, would land away from the highway. He further testified that the open side could not have been positioned on one of the two remaining sides because the open side cannot “face in line with the crane” at the worksite—to do so would risk inadvertently crossing the cable that “holds the top of the leads” and the cable that “hooks up the hammer”—and there was not enough room to reposition the crane itself. Having heard the foreman’s testimony, the CO subsequently testified that he “found out today” that the leads could not have been reoriented as he suggested. In her decision, the judge concluded that the “Secretary conceded the orientation of the equipment could not have been altered” and the Secretary does not dispute this on review.

⁸ The CO conceded that the operating instructions for the hammer do not even discuss a hydraulic control system. The only mention we have found appears in a table in the section on accessories that lists “Complete fuel control pump, hydraulically regulated” as either a “Special” or an “Optional” accessory. However, no description or instruction concerning this device is otherwise provided.

The only other testimony on this issue occurred during the CO's cross-examination, when Lane's counsel asked the CO two questions about a hydraulic control system, one regarding the possibility that modifying the hammer's fuel system could impact where the operator stands and another regarding Lane's subsequent installation of "hydraulic operators." But, once again, the CO's affirmative responses ("Yes, sir" and "Correct") fail to explain how a hydraulic control system works or where an operator would actually stand when using one. *See Briones Util. Co.*, 26 BNA OSHC 1218, 1219 n.2 (No. 10-1372, 2016) (citing *Hurlock Roofing Co.*, 7 BNA OSHC 1108, 1111 (No. 76-357, 1979), for proposition that CO's opinion testimony should not be credited where it is "not explained" and "no basis [is] given"). Therefore, neither the CO's testimony nor the fact that Lane used a hydraulic control system after the accident establishes that such a system would have allowed the operator here to stand at least 13 feet away from the pile while operating the hammer.

Finally, it is not clear from the record whether characteristics of the bridge worksite—i.e., the location of the watercourse and highway—would have limited the utility of such a system. Indeed, apart from an instructional pile driving video from the Florida Department of Transportation (which sheds no light on this issue), there is virtually no evidence in the record concerning how hydraulic control systems generally function or are used.⁹ In short, we agree with Lane that "the Secretary never put forth . . . evidence of what a hydraulic [control system] does, what it replaces, or what the operational implications are to the workplace." Without this evidence, there is simply no basis for us to conclude that such a system was feasible.¹⁰ *See Peacock Eng'g*,

⁹ The CO testified that the hammer depicted in the video, which the Florida DOT uses to train its inspectors, was being operated using a hydraulic control system, and in the video itself, a narrator describes a worker as controlling the hammer using a "hydraulic control mechanism." The judge references the video in her discussion of feasibility, stating only that it depicts the operation of a hydraulic fuel control system. In the video, however, a "hydraulic control mechanism" appears for only about ten seconds, and the close-up view of the mechanism is such that, as Lane points out, "it cannot be discerned where the operator is located in relation to either the pile or the hammer." It also does not help that the video is of poor image quality. For these reasons, we find that the video provides no support for the judge's conclusion that a hydraulic control system would have allowed the operator to stand at least 13 feet away from the pile.

¹⁰ On review, Lane contends that the CO was not qualified (nor could he qualify) as an expert on pile driving and that the judge, therefore, should not have relied on the CO's unsubstantiated opinion that use of a hydraulic control system would abate the violation. The judge explicitly stated that neither party had called an expert witness in this case. Moreover, as discussed above,

Inc., 26 BNA OSHC 1588, 1593 (No. 11-2780, 2017) (vacating item alleging general duty clause violation because, among other things, “the evidence upon which the Secretary relies does not establish the feasibility of the stand-clear method” during crypt installation).

For all these reasons, we find that the Secretary failed to establish a feasible means of abatement. Accordingly, we reverse the judge and vacate the citation.

SO ORDERED.

/s/ _____
James J. Sullivan, Jr.
Chairman

/s/ _____
Cynthia L. Attwood
Commissioner

/s/ _____
Amanda Wood Laihow
Commissioner

Dated: July 28, 2020

we conclude that the CO’s limited testimony—regardless of whether the judge should have relied on it—was insufficient to establish feasibility.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,

v.

The Lane Construction Corporation,
Respondent.

OSHRC Docket No. 16-0803

Appearances:

Brooke D. Werner McEckron, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

David Bondanza, Esquire, The Lane Construction Corporation
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

On October 16, 2015, an employee of The Lane Construction Corporation (Lane) was struck by a large plywood block during a pile driving operation on a road construction project in Oconee, Florida. The employee died from his injuries. Following Lane's report of the fatality to OSHA, Compliance Safety and Health Officer (CSHO) Luis Cebollero of the Tampa Area OSHA Office conducted an inspection. Based upon his investigation, the Secretary issued Lane a serious citation alleging a violation of § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (the Act), also known as the general duty clause, for failure to protect employees from being struck by objects falling from the pile driving equipment. As a feasible means of abatement, the Secretary proposed Lane require employees stand 13 or more feet from the pile driving equipment during operation. The Secretary proposed a penalty of \$6300.00 for the Citation. Lane timely contested the citation bringing this matter before the Commission under § 10(c) of the Act.

I held a hearing in this matter on January 12, 2017, in Sanford, Florida. The parties filed

post-hearing briefs on March 17, 2017.¹¹

For the reasons discussed below, the citation is affirmed and a penalty of \$6,300.00 is assessed.

JURISDICTION

The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 12). The parties also stipulated at the hearing that at all times relevant to this action, Lane was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 12). Based on the stipulations and the facts presented, I find Lane is an employer covered under the Act and the Commission has jurisdiction over this proceeding.

BACKGROUND

Lane is a large construction company. It operates across the United States and employs approximately 5000 individuals (Tr. 205). At the time of the accident, Lane was performing road construction work along State Route 50 in Ocoee, Florida (Tr. 65). The project involved installing a bridge to address flooding along a section of the highway (Tr. 65-66).

In October of 2015, Lane was installing the piles that were to serve as support for the bridge (Tr. 8). The worksite was located along South Blueford Avenue on one side and a water course on the other (Tr. 8). Lane was using a Delmag diesel-powered hammer to set the piles (Tr. 21, 106). A pile hammer drives the pile into the ground by repeatedly hitting the top of the pile – much like driving a nail with a hand-held hammer (Exh. J-1 p. 6-10). The hammer sits in a set of leads and is held by a crane (Tr. 21, 27).¹² The leads surround the hammer on three sides (Tr. 22). The leads serve as a guide for the hammer (Tr. 22). The pile is held in place by a template (Tr. 75; Exh. R-1 pp. 4 and 5). The crane is also used to set the piles into the template prior to beginning the process of driving the pile.

Piles are pillar-like structures made of precast concrete and rebar (Tr. 20). Piles come in various sizes and can weigh from 40,000 to 100,000 pounds (Tr. 20, 57). The size hammer used

¹¹ To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

¹² The setup is depicted in Exhibits R-1 p. 1; and J-1 p. 9-1.

to set the pile is based on the size of the pile to be driven (Tr. 20-21). At the worksite, Lane was setting 18-inch piles that were 65 feet long (Tr. 20-21, 73; Exh. R-1 p. 3).

A diesel-powered hammer is controlled by a hammer operator. If the hammer is manually operated, as it was here, the hammer operator controls the hammer throttle with three ropes (Tr. 24).¹³ One rope increases the fuel flow; one decreases the fuel flow; and the third stops the flow of fuel (Tr. 24). The third rope is called the “kill rope” and is located between the other two ropes (Tr. 24). The hammer throttle is positioned so that the section to which the ropes are attached faces the open side of the leads (Tr. 22). The operator stands on the ground below the hammer, facing the open side of the leads (Tr. 22). According to James O’Neill, the foreman onsite, the operator stands “a comfortable distance to where you can see the operation up top.” (Tr. 31). The operator must ensure the ropes, in particular the kill rope, are held taut and do not flap in the wind or become tangled (Tr. 25).

Among the hazards associated with the pile driving operation are noise generated by the equipment, pinch points, falls, hazards associated with the use of the crane, and being hit by falling objects, such as nuts or washers (Tr. 35-38; Exh. J-1 p. 3-9). Foreman O’Neill testified pieces of the pile may fall from the top in a process called “spaulding.”¹⁴ (Tr. 37). These pieces of concrete are generally not large (Tr. 39). Foreman O’Neill admitted to having been hit hard enough on his foot by a piece of concrete to cause him to seek treatment (Tr. 39). He ultimately required first aid for the injury to his foot (Tr. 39). Foreman O’Neill testified the closer an individual is to the equipment, the greater the risk of being hit (Tr. 37).

To reduce spaulding or damage to the pile, a “cushion” is placed between the hammer and the top of the pile.¹⁵ A cushion is a pad, commonly made of plywood, placed within the “bonnet.” The bonnet is part of the hammer equipment and fits over the top of the pile.¹⁶ The cushion in this instance was an 18 inch x 18 inch x 15 inch piece of plywood and weighed approximately 90 pounds (Tr. 9-10, 48). It was held in place with large nails (Tr. 81).

¹³ The hammer throttle body with control ropes is depicted in Exhibit R-1 p. 3 (Tr. 73).

¹⁴ Exhibit C-5 refers to this process as “spalling.” (Exh. C-5 p. 11).

¹⁵ A used cushion is depicted in Exhibit R-1 p. 6.

¹⁶ A bonnet is depicted in Exhibit C-2c.

On the day of the accident, Lane was performing a “dry fire” or “test pile.” (Tr. 44-46). This involves lifting the hammer and dropping it onto the pile using only the force of gravity (Tr. 46). The purpose is to drive the pile into the ground and give it more stability. Foreman O’Neill testified it is also to “get an idea of the how the pile is going to react” to being driven (Tr. 46). The equipment had been set up so that the open side of the leads was facing the water course. Foreman O’Neill had decided not to position the open side of the leads toward the road out of concern that, should the pile break, it would fall into the road (Tr. 131).¹⁷ The decedent was the hammer operator for this operation. He had positioned himself in front of the open side of the leads, with his back to the water. The parties stipulated under normal circumstances the operator would stand further away from the equipment, but the water course prevented him from doing so (Tr. 11). Foreman O’Neill had positioned himself so he could see his entire crew (Tr. 50). He estimated he was closer to the pile than the decedent (Tr. 56).

In a dry fire, the pile will typically move a few feet (Tr. 53). On this occasion, the pile dropped an unexpected 12 to 15 feet (Tr. 54). When this occurred, the cushion was forced out of the bonnet, fell toward the ground, and struck the decedent in the head (Tr. 55-56). The decedent was rushed to the hospital and died of his injuries a short time later.

Lane notified OSHA of the fatality that same day. CSHO Cebollero was assigned to conduct an inspection of Lane’s worksite. He went to the worksite the following business day. CSHO Cebollero took photographs, measurements, and interviewed employees. He measured the distance from the pile to the edge of the template and from the edge of the template to the edge of the dirt mound on which the decedent had been standing (Tr. 98-99). He found the total distance to be 13 feet and concluded the decedent had to be standing less than 13 feet from the pile as it was being driven. He also reviewed the operator’s manual for the hammer (Exhs. J-1 and C-1) and ASNI/ASSE A10.19-2008 *Safety Requirements for Pile Installation and Extraction Operations* part of the *American National Standard for Construction and Demolition Operations* (the ANSI standard) (Exh. C-5). Both these documents contain prohibitions against standing within 13 feet of the operating equipment. CSHO Cebollero determined the decedent had been exposed to the hazard of being struck by objects falling from the equipment because he had been standing too close to the pile as it was being driven. He recommended Lane be issued a citation

¹⁷ Foreman O’Neill testified due to size constraints the only two options were to have the open side of the leads face the road or the water (Tr. 63-64).

alleging a violation of the general duty clause for failing to ensure employees remain at least 13 feet from the pile equipment during pile driving operations. Lane timely contested the citation, bringing this matter before the Commission.

THE CITATION

The citation alleges a serious violation of the general duty clause, § 5(a)(1) of the Act. Section 5(a)(1) requires each employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). The citation alleges a violation of § 5(a)(1) as follows:

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 when they were exposed to struck-by hazards:

- a) On or about 10/16/2015 at the job site, employees were exposed to a struck by hazard while working near the D30-32 pile hammer base of operation. An employee working as a D30-32 pile hammer fuel line operator was struck-by a 18” X 18” X 15” plywood block cushion. The employee was standing approximately 5 feet from the base of operation.

As a feasible means of abatement, OSHA proposed:

Among other methods, one feasible and acceptable abatement method(s) is to follow the American Pile Driving Equipment, Inc. operating instructions for Pile Hammers D5-43 through D100-13, Section 3.3 Work Places: Employees must keep a minimum distance of 13 feet (4 meters) from the units to be driven.

The Secretary recognized to stand a distance of 13 or more feet from the unit being driven would place the employee in the watercourse. In his brief, the Secretary argues Lane could have built a platform over the watercourse in order to accomplish this method of abatement. CSHO Cebollero also testified Lane could have utilized a hydraulic hammer, eliminating the need for an operator.

DISCUSSION

Elements of a § 5(a)(1) Violation

Section 5(a)(1) of the Act mandates that each employer “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the

hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Pegasus Tower*, 21 BNA OSHC 1190, 1191, 2005 CCH OSHD ¶ 32,861, p. 53,077 (No. 01-0547, 2005).

Erickson Air-Crane, Inc., 2012 WL 762001 at *2 (No. 07-0645, 2012).

In addition to the above-quoted elements of a § 5(a)(1) violation, the Secretary must also establish the employer had either actual or constructive knowledge of the hazardous condition. *Deep South Crane & Rigging Co.*, 23 BNA OSHC 2099 (No. 09-0240, 2012), *aff'd Deep South Crane & Rigging Co. v. Seth D. Harris*, 535 Fed. Appx. 389 (5th Cir. 2013).¹⁸

Whether an Activity or Condition at the Site Constituted a Hazard

The Commission has held that as part of his burden of proving a § 5(a)(1) violation, the Secretary “must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices over which the employer can reasonably be expected to exercise control.” *Otis Elevator Co.*, 21 BNA OSHC 2205, 2206 (No. 03-1344, 2007).

The Commission has held the Secretary has the obligation to define the hazard in terms of the preventable consequences of the work operation, not by the method of abatement. *Otis Elevator*, 21 BNA OSHC at 2208, *citing Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1121-22 (No. 88-572, 1993); *see also Arcadian Corporation*, 20 BNA OSHC 2001, 2009 (No. 93-0628, 2004). Put another way, the Secretary must define the hazard “in terms of the physical agents that could injure employees rather than the means of abatement.” *Arcadian Corporation*, 20 BNA OSHC at 2009, *quoting Chevron Oil Co.*, 11 BNA OSHC 1329, 1331 n. 6 (No. 10799, 1983). The Secretary defined the hazard in this case as being struck by objects falling from the pile driving equipment while standing in proximity to the pile. It is undisputed the cushion fell from the equipment. There is little dispute spaulding routinely occurs. O’Neill testified nuts and washers have fallen from the equipment (Tr. 38). Piles also break upon occasion (Tr. 38, 131). Employees working within 13 feet of the pile driving equipment have a greater likelihood of being struck by this material. The Secretary has adequately defined the hazard.

¹⁸ Citation under § 5(a)(1) is only proper where no specific standard applies. *Active Oil Service, Inc.*, 21 BNA OSHC 1184, 1185 (No. 00-0553, 2005). The Secretary has promulgated a standard applicable to pile driving equipment. 29 C.F.R. § 1926.603. The burden to establish applicability of a specific standard to the cited conditions is on the employer. *Safeway Inc. v. OSHRC*, 382 F.3d 1189, 1191 (10th Cir. 2004). Lane has not argued the standard is applicable to the conditions at issue in this proceeding.

In reaching my conclusion the Secretary has adequately defined the hazard, I have considered the pile driving operation is, by its nature, perilous. The work is often performed near active roadways. The equipment is large and heavy. Much of the work is performed overhead. The Commission has recognized “some industrial activities are by their very nature dangerous.” *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No.82-3888, 1986). For that reason, the Secretary must define the hazard “in a way that appraises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control.” *Id. citing Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984). Although the citation is not the model of clarity, it does identify the hazard under Lane’s control and provides Lane with notice of its obligations. Foreman O’Neill conceded the closer an individual is to the pile driving equipment, the greater the risk of being struck by a falling object (Tr. 37). Lane set up the equipment and determined where employees were to work. Lane controlled employee exposure to the hazardous condition.

Having defined the hazard, the Secretary must also show the existence of the hazard at the worksite. There is no dispute both Foreman O’Neill and the decedent were standing within 13 feet of the pile (Tr. 10, 56). This exposed them to an increased chance of being hit by falling objects. The decedent’s position on a small mound of dirt prevented him from being able to easily get out of the way of any falling objects. The Secretary has established the existence of the hazard at the worksite.

Whether the Activity or Condition was a Recognized Hazard

A recognized hazard is a practice, procedure or condition under the employer’s control that is known to be hazardous by the cited employer or the employer’s industry. *Pelron Corp.*, 12 BNA OSHC at 1835. The preponderance of the evidence establishes the pile driving industry recognizes a struck by hazard. Moreover, the evidence establishes the industry recognizes this hazard when individuals are standing within 13 feet of the pile.

The Secretary relies on prohibitions found in the operator’s manual for the pile hammer (Exh. J-1) and the ANSI standard (Exh. C-5) to establish industry recognition of the hazard. The operator’s manual instructs the operator and the foreman to remain a minimum distance of 13 feet

from the “units to be driven.” (Exh. J-1 p. 3-1).¹⁹ The manual includes this specific admonition five more times (Exh. J-1 pp. 8-10, 8-12, 8-14, 8-16, 9-1). This warning is to be placed on a sign that the manual instructs be positioned “at a highly visible location on the carrier equipment!” (Exh. J-1 p. 3-8). It contains an admonition to “Pay careful attention at any time for components that come loose and fall from the Diesel pile hammer, lead, impact head, pile guiding system or from the pile itself!” (Exh. J-1 p. 3-4). The manual specifically references the potential for an incorrectly seated pile cushion to fall out or for the hammer to “come crashing down” (Exh. J-1 pp. 8-3, 9-2). In the section titled “Safety information for the operator” the manual twice warns, “Never work under the Diesel pile hammer, lead or material being driven! Avoid standing in the area, in which the material to be driven touches the ground.” (Exh. J-1 pp. 3-6, 3-7). The ANSI standard similarly requires the creation of a controlled access zone (Exh. C-5 p. 15). It contains a prohibition against standing “under the kicker or directly under, in front of, or within at least 12 feet of the pile hammer or pile when a pile is being driven.” (Exh. C-5 p. 18).

“Manufacturers’ instructions and voluntary industry standards that contain explicit safety warnings regarding compliance may be probative evidence in establishing a general duty clause violation.” *K.E.R. Enterprises, Inc.*, 23 BNA OSHC 2241, 2242 (No. 08-1225, 2013), *citing Young Sales Corp.*, 7 BNA OSHC 1297, 1299 (No. 8184, 1979). As the Commission stated in *Young Sales*, “To allow employers to ignore manufactures’ warnings of the potential dangers inherent in the use of a product would undermine the general duty clause.” 7 BNA OSHC at 1299. Here the Secretary has presented evidence of both the manufacturer’s warning about the potential of falling objects and the requirement to stand a minimum distance from the pile. The manufacturer’s warning is the same as the voluntary industry standard. The Secretary has established industry recognition of the hazard.

Lane argues the Secretary has relied on two identical documents in an attempt to bolster his evidence of industry recognition (see Exhs. J-1 and C-1). Lane takes great pains to point out the documents are identical in all respects except for the removal of the Delmag name from Exhibit C-1. A careful review of the two documents reveals Lane is correct. I find no significance to this.

¹⁹ The manual also requires, with the exception of the excavator operator, the hammer operator, and the foreman, no other person is to stand “within a distance of 1.5 times the lead height.” (Exh. J-1 p. 8-15; *see also* Exh. J-1 p. 10-1 (referring to this area as the “danger zone”)). The ANSI standard also refers to creating and maintaining a controlled access zone from which persons not directly involved in the operation should be prohibited (Exh. C-5 p. 15). Lane asserts without the FDOT closing the road, this requirement could not have been met. Lane was not cited for failing to maintain this safe zone.

Lane does not dispute Exhibit J-1 is the manual specifically applicable to the diesel hammer in use at the worksite. In finding the preponderance of the evidence supports the Secretary's case, I have considered the persuasiveness of the Secretary's evidence, not its volume. Even discounting the manual at Exhibit C-1, I find the Secretary has established industry recognition of the hazard.

Lane argues the manual cannot be relied upon. Lane points out the manual refers to safety standards that are inconsistent with OSHA standards, lacks definitions, and covers more than one size diesel hammer. As a result, Lane argues, the manual is too unclear to be a reliable source for recognition of a hazard. I disagree that the manual is unclear. Page 9-1 of the manual contains an illustration of a pile hammer and an operator. This graphic depiction makes clear the meaning of the requirement to stand at least 13 feet from the pile in a manner easily understood by a reader of normal intelligence.

In rebuttal to the Secretary's evidence, Lane presented a video posted on the website of the Florida Department of Transportation (FDOT) showing a similar operation (Exh. R-2). Among other things, the video depicts individuals working in proximity to the pile while it is being driven. In at least one instance, an individual is seen touching the pile with a level to ensure the pile is plumb. Lane argues:

Clearly FDOT does not recognize the hazards asserted in either the ANSI standard, nor the manuals relied upon by the Secretary. If the State of Florida Department of Transportation does not recognize a hazard while contractor's employees are working about the pile being driven, this Court has no basis to find that the industry recognizes such a hazard.

(Resp. Brief at p. 16). In so arguing, Lane concedes the prohibition in the operator's manual and ANSI standard against working within 13 feet of the pile addresses a hazard. It does not necessarily follow that because FDOT has published a video showing individuals exposed to a hazard that the hazard is not recognized.²⁰ Even if the inference were to be drawn from the video that FDOT does not recognize the hazard, it does not follow that the industry also does not. The Secretary's evidence that the manufacturer of the equipment and the American Society of Safety Engineers both recognize the hazard is persuasive evidence of industry recognition.

In the same vein, Lane argues because the Secretary did not promulgate a standard addressing the hazard in the pile driving equipment standard at 29 C.F.R. § 1926.603, the Secretary

²⁰ It should be noted none of the individuals in the video are hammer operators. The pile hammer in the video is being operated hydraulically rather than manually.

cannot establish industry recognition. This argument is unavailing. The purpose of the general duty clause is to “‘fill those interstices necessarily remaining after the promulgation of specific safety standards,’ because ‘it would be utterly unreasonable to expect the Secretary to promulgate specific safety standards which would protect employees from every conceivable hazardous condition.’” *American Cyanamid Co.*, 9 BNA OSHC 1596, 1603 (No. 79-5762, 1981) quoting *Briston Steel & Iron Works, Inc. v. OSHRC & Marshall*, 601 F.2d 717, 721 n. 11 (4th Cir. 1979). Citation under § 5(a)(1) is only proper where no specific standard applies. *Active Oil Service, Inc.*, 21 BNA OSHC 1184, 1185 (No. 00-0553, 2005). To hold the Secretary’s failure to promulgate a specific safety standard addressing the hazard alleged in a general duty clause violation is probative evidence that the hazard was not recognized would defeat the purposes of the general duty clause.

The preponderance of the evidence establishes the industry recognizes a struck by hazard during pile driving operations.

Whether the Hazard Caused or was Likely to Cause Death or Serious Physical Harm

Having established a recognized hazard existed at the worksite to which Lane’s employees were exposed, the Secretary must show that the hazard was likely to cause death or serious physical harm. The inquiry is neither whether an object falling from the equipment is likely nor whether this particular violation caused this particular fatality. *Safeway Inc. v. OSHRC*, 382 F.3d 1189, 1195 n.5 (10th Cir. 2004) citing *Dye Construction v. OSHRC*, 698 F.2d 423, 426 (10th Cir. 1983). Rather, the salient inquiry is whether the struck by hazard could cause death, of which there is no factual dispute.

Whether Feasible Means Existed to Eliminate or Materially Reduce the Hazard

To establish the alleged general duty clause violation, the Secretary must show feasible means of abatement existed to eliminate or materially reduce the hazard of being struck by falling objects. The Secretary has the burden of establishing both the feasibility of the abatement and that it is effective in materially reducing the hazard. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1190 (Nos. 91-3144, et. al., 2000). “Feasible means of abatement are those regarded by conscientious experts in the industry as ones they would take into account in ‘prescribing a safety program.’” *Id.* at 1191 quoting *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973). The Secretary need not show the proposed abatement would completely eliminate the hazard. *Morrison-Knudsen Co./Yonker Contracting Co.*, 16 BNA OSHC at 1122.

The Secretary contends Lane could have abated the hazard by implementing the requirements of the operator's manual and the ANSI standard and required their employees remain at least 13 feet from the pile. The operator's manual and the ANSI standard provide persuasive evidence a conscientious safety expert would take into account the need for such a requirement. As foreman O'Neill testified, standing a greater distance from the pile equipment reduces the potential of being hit by falling objects. Lane had no policy or procedure in place to ensure anyone, including the operator, remained a minimum distance from the pile during pile driving operations. The Secretary has established Lane could have materially reduced employee exposure to the hazard by requiring such a minimum distance be maintained.

I note, as Lane points out, the Secretary did not call an expert to testify and CSHO Cebollero claims no expertise in the pile driving industry. The Secretary relies on the contents of the operator's manual and the ANSI standard to establish a conscientious safety expert would take into account the need for maintaining a minimum 13-foot distance from the pile. Lane presented no expert rebuttal to this evidence. Lane called its area safety manager, but he provided no testimony regarding the contents of the operator's manual or the ANSI standard. Although expert testimony may have been helpful, it is not necessary here, where documentary evidence provides persuasive authority.

Lane argues even if maintaining a minimum 13-foot distance from the pile would reduce the hazard, the Secretary failed to show doing so was feasible in this instance. The Secretary conceded the orientation of the equipment could not have been altered. To accomplish the proposed abatement, Lane would have had to eliminate the need for the operator to manually operate the hammer or build a platform over the water to allow the operator to stand farther from the pile. I agree with Lane the Secretary failed to prove the feasibility of building a platform. Although building a platform is a seemingly simple solution, given it would have had to have been built over a water course, the specifics of which are absent from the record, the Secretary needed to present more to establish feasibility.

The record does establish the feasibility of using alternative equipment, thereby allowing the operator to stand outside the 13-foot minimum distance from the pile. After the accident, Lane changed from a manually operated diesel hammer to a hydraulically operated diesel hammer (Tr. 199, 202-03). This eliminated the need for the operator to stand in front of the open sides of the leads while operating the hammer (Tr. 132). Such an operation is depicted in the FDOT video

submitted by Lane (Exh. R-2). It was un rebutted on this record that Lane was able to use such a system at this worksite. The Secretary has established feasible means of abatement existed to materially reduce the hazard.

Whether Lane had Knowledge of the Violative Condition

An essential requirement for meeting the Secretary's burden of proof is establishing the employer had knowledge of the hazard.

[T]he Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer. *See Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir.1979); *New York State Elec. & Gas Corp.*, 88 F.3d at 105; *see also Secretary of Labor v. Access Equip. Sys., Inc.*, 18 O.S.H. Cas. (BNA) 1718, at *9 (1999). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.*, 5 O.S.H. Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to respondent")

ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1307–08 (11th Cir. 2013).

On the day of the accident, numerous members of Lane management were on site (Tr. 66-67). Foreman O'Neill was in charge of the site and determined how to setup the equipment. He had made a conscious decision to place the open side of the leads away from the road in the event the pile broke and fell in the direction of the open side. CSHO Cebollero testified the decedent's brother told him an operator will normally stand 25 to 50 feet from the base of the pile (Tr. 128). Foreman O'Neill was aware the decedent would be positioned closer than usual to the pile (Tr. 127). Foreman O'Neill was also aware he was standing closer to the pile than the operator. He was aware the closer the operator stood to the pile, the greater the risk. Spaulding is a common occurrence. Foreman O'Neill had himself been hit by a piece of concrete. Foreman O'Neill had actual knowledge of the conditions that exposed the decedent to a hazard and that actual knowledge is imputed to Lane.

PENALTY DETERMINATION

The Secretary proposed a penalty of \$6,300.00.00 in this case. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* § 17(j) of the Act. The Commission is the

final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (“The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission’s authority to raise or lower penalties within those limits.”), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App’x 152 (5th Cir. 2002) (unpublished). “Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

As previously discussed, Lanes employees were exposed to a hazard likely to cause serious injury or death. The citation is properly classified as serious which carries a maximum penalty of \$7,000.00. The gravity of the violation is high. Foreman O’Neill testified the majority of objects that fall are small. Employees are partially protected from such small objects by hard hats (Tr. 68). The likelihood of a more substantial object falling or equipment failure is lower, but the result would be a much more severe injury. The decedent was positioned in such a manner he could not have easily gotten out of the path of a falling object. A high gravity based penalty is warranted.

Lane is a large construction contractor. The record contains no evidence of a history of OSHA citations. Lane has a safety program and training for new hires (Tr. 206-07), but the record contains few details. Lane was cooperative in the OSHA inspection. For these reasons, Lane is entitled to some adjustment of the penalty for good faith and a lack of history of violations.

Based on the foregoing, I find a penalty of \$6,300.00 is appropriate for the general duty clause violation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

- (1) Item I of Citation No. 1, alleging a serious violation of § 5(a)(1), is **AFFIRMED** as Serious and a penalty of \$6,300.00 is assessed.

Dated: May 1, 2017

/s/
HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia