UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. GANDER AND WHITE SHIPPING, INC., Respondent.	OSHRC Docket No. **22-0494**

DECISION AND ORDER

Attorneys and Law firms

C. Renita Hollins, Trial Attorney, Office of the Solicitor, Atlanta, GA, for Complainant.

Sean Maguire, Non-Attorney Representative, Long Island City, NY, for Respondent.

JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

An employee of Respondent Gander and White Shipping, Inc. (Gander) was injured in an accident on January 18, 2021, in Miami, Florida (worksite), which resulted in the initiation of an investigation by Compliance Safety and Health Officer Anthony Campos[1] with the Occupational Safety and Health Administration (OSHA). After Campos conducted the inspection the Complainant Secretary of Labor (Secretary)[2] subsequently issued Gander two citations with proposed penalties totaling $4,681.00. Gander's late notice of contest (NOC) contested the penalties only.[3] Since no penalty was involved in Citation 2, Gander did not contest Citation 2,

[1] "Compliance Safety and Health Officer" means "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d).

[2] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order 8-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020*), superseding* Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms "Secretary" and "OSHA" are used interchangeably herein. For simplicity, the court also refers to actions taken by the Assistant Secretary and the Area Directors as actions taken by the Secretary.

[3] The late NOC stated, "We respectfully request that the fine be waived as we regularly conduct safety training for each new hire and periodically thereafter when circumstances permit." Early decisions of the Commission held that when an employer contested the penalties, the citations were automatically in

Item 1. Therefore, in accordance with §10(a) of the Act, Citation 2, Items 1 is "deemed a final order of the Commission and not subject to review by any court or agency."

The Secretary subsequently filed a formal complaint[4] with the Commission seeking an Order affirming the Citation. Thereafter, the Court granted Gander's unopposed request to convert the case to simplified proceedings, where pleadings are not required, and the admission of evidence is generally not controlled by the Federal Rules of Evidence.[5] The court held a bench trial on February 8, 2023. Based upon the record, the court concludes it has jurisdiction over the parties and subject matter in this case. For the reasons indicated *infra*, the Court **AFFIRMS** Citation 1, Item 1 and assesses a penalty of $4,681.

II. BACKGROUND

OSHA received an anonymous complaint on January 21, 2021, which alleged an employee was elevated on a scissor lift checking a box that was on a shelf and fell out of the lift approximately 9 feet to the ground fracturing the elbow on his left arm. (Ex. C-2.) Campos opened an inspection on January 25, 2021. (Compl. Ex. A.) Through his investigation, Campos learned that the accident occurred on January 18, 2021. (Ex. C-2.) During the course of his investigation, Campos determined that Gander's employees were operating forklifts in the warehouse without having the required training and certification. (Tr. 30; *see also* Ex. C-2.) According to the Campos, forklifts are powered industrial trucks. (Tr.19). Eugene Layton, Gander's Operations Manager, admits it operates a scissor lift and a battery powered forklift at the worksite, which were power industrial equipment. (Tr. 61). Layton also admitted its employees were not trained at the time of the accident and testified that since the accident, Gander has now trained its employees. (Tr. 62). Admitted into the record were certifications showing Ganders employees were certified in Powered Industrial Trucks *after* the date of the accident and *after* the initial inspection. (Ex. R-1 through Ex. R-41.)

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contest. *See Swan Lake Moulding Co.*, 1 BNA OSHC 1419, 1421 (No. 1305, 1973). This position was reversed by the Commission in *Florida East Coast Properties, Inc.* when the Commission held that "even though a respondent properly contests the amount of a penalty proposed by the Secretary, the Commission does not thereby acquire jurisdiction to review the violation." *Fla. E. Coast Properties, Inc.*, 1 BNA OSHC 1532 (No. 2354, 1974).

[4] Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R §2200.30(d). Attached to the complaint and also adopted by reference were the citations, which were "a part thereof for all purposes."

[5] The Secretary stipulated the Federal Rules of Evidence will apply to him. (*See* 29 C.F.R §2200.209(c)).

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety and Health Review Comm'n (CF&I Steel Corp.),* 499 U.S. 144, 147 (1991) (*quoting* 29 U.S.C. § 651(b)). "The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards." *Id*. To achieve this purpose, the Act imposes two duties on an employer, a general duty 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), and a specific duty to "comply with occupational safety and health standards promulgated under this Act." Id. § 654(a)(2). Thus, each employee must "comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct." Id. § 654(b).

Pursuant to that authority, the standards at issue in this case were promulgated. *See* 29 U.S.C. § 665. Meanwhile, the Commission is assigned to carry out adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I Steel Corp*., 499 U.S. at 151.

Under the law of the Eleventh Circuit where this case arose,[6] "the Secretary will make out a *prima facie* case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *Quinlan*

[6] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. See 29 U.S.C. §§ 660(a) and (b). The Commission has held that "[w]here it is highly probable" that a case "would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case — even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2068 (No. 96-1719, 2000). The Eleventh Circuit has jurisdiction over the site of the alleged violations and Respondent's principal place of business, both of which are in Miami, Florida. The court applies its precedent here.

v. Sec'y, U.S. Dep't of Labor, 812 F.3d 832, 836 (11th Cir. 2016) (quoting *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013)). "If the Secretary establishes a *prima facie* case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Id.* (citing *id.* at 1308).

Citation 1, Item 1

The cited standard mandates that the employer "shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l)." 29 CFR §1910.178(l)(1)(i). Citation 1, Item 1 asserts Gander violated §1910.178(l)(1)(i) when it "did not ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l)[.]" (Compl. Ex. A.) More specifically, the Secretary asserts that on or about January 21, 2021, Gander "did not ensure that employees while operating powered industrial truck to transport merchandise were trained and evaluated, thereby exposing employees to falls, crushed-by and struck-by hazards." (*Id.*)

(1) Cited Standard Applied

The powered industrial truck standard found at 29 C.F.R. § 1910.178 "contains safety requirements relating to fire protection, design, maintenance and use of fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by electric motors or internal combustion engines." 29 C.F.R. § 1910.178(a)(1). Gander's Operations Manager admits it operates a scissor lift and a battery powered forklift at the worksite. Thus, the cited standard applied.

(2) Cited Standard was Violated

Gander's Operations Manager admits its employees were not trained at the time of the accident. Therefore, Gander violated 29 CFR §1910.178(l)(1)(i).

(3) Whether Employees were Exposed to Hazard

Employees working inside the warehouse were exposed to struck by hazards from untrained forklift operators. Therefore, the Secretary has satisfied the third element as it relates to Citation 1, Item 1.

(4) Whether Gander "Knowingly Disregarded" the Act's Requirements

The Act imposes liability on the employer for a serious violation only if the employer knew, or with the exercise of reasonable diligence, should have known of the presence of the violation. *Fla. Lemark Corp. v. Sec'y, U.S. Dep't of Lab.*, 634 F. App'x 681, 687 (11th Cir. 2015). "When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1317 (11th Cir. 2013) (citation omitted). "It is reasonable to do this because a corporate employer can, of course, only act through its agents . . . and the supervisor acts as the 'eyes and ears' of the absent employer. That makes his knowledge the employer's knowledge." *Id.*

"The Secretary may prove that an employer had knowledge of a violation in one of two ways—(1) by imputing the actual or constructive knowledge of a supervisor or (2) by demonstrating constructive knowledge based on the employer's failure to implement an adequate safety program." *Samsson Constr., Incorp. v. Sec'y, U.S. Dep't of Lab.*, 723 F. App'x 695, 697 (11th Cir. 2018) (*citing ComTran Grp., Inc.*, 722 F.3d at 1311). Here, Joel Hernandez, the warehouse foreman admitted to Campos that he and another employee operated the forklifts even though they have never been trained.

However, "the Secretary does not carry [his] burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct." *ComTran Grp., Inc.*, 722 F.3d at 1316. "A supervisor's 'rogue conduct' cannot be imputed to the employer in that situation." *Id.* "Rather, 'employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor, [that is, with evidence of lax safety standards]." *Id.* (citation omitted). "Without such evidence, a supervisor's misconduct may be viewed as an isolated incident of unforeseeable or idiosyncratic behavior . . . which is insufficient, by itself, to impose liability under the Act." *Id.* (citations omitted).

Here, Hernandez admitted both he and a subordinate employee operated the forklifts even though they have never been trained. Therefore, "the situation with respect to the non-supervisory subordinate employee in this case is analogous to the ordinary situation in which imputation is

clearly established." *Quinlan*, 812 F.3d at 841. Hernandez's actual knowledge of a subordinate employee's hazardous conduct is imputed to Gander.[7] Therefore, the Secretary has satisfied the fourth element as it relates to Citation 1, Item 1.

IV. PENALTY

Under the Act, the Secretary has the authority to propose a penalty according to Section 17 of the Act. See 29 U.S.C. §§ 659(a), 666. Ultimately, it is the province of the Commission to "assess all civil penalties provided in [Section 17]", which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995). In determining an appropriate penalty, the Court is required to consider "the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (citation omitted). Gravity is the primary focus of any penalty analysis, which takes into consideration: (1) how many employees were exposed and for how long; (2) whether Gander took precautions against injury; (3) the probability an accident will occur; and (4) the likelihood an injury will occur. *See, e.g., Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished).

The Secretary proposed a penalty of $4,681.00 for Citation 1, Item 1. The Secretary determined the violation was of medium severity because an employee being struck by a forklift could suffer a fracture, and lessor probability based on the limited time of employee exposure to the hazard. (*See* Ex. C-3; *see also* Ex. C-12) (where Carlos Sosa stated, "I used the forklift sometimes 2 to 3 times a week to 2 to 3 times a month"). The court agree with the Secretary's determination. The Secretary proposed a 60% reduction in the penalty amount because Gander had 15 employees. Based upon Carlos Sosa's statement, the court finds the actual number of employees was 20 ("about 15 people in the warehouse and 5 in the office"). (Ex. C-12.) The court

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[7] The Secretary classified the violation as "serious," which is true if "an employer knew about and failed to prevent 'a substantial probability that death or serious physical harm could result from a condition which exists' in the workplace." *Fluor Daniel v. Occupational Safety & Health Review Comm'n*, 295 F.3d 1232, 1239 (11th Cir. 2002) (*quoting* 29 U.S.C. § 666(k)). As the Commission has noted, "[t]his does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (*quoting Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321 (No. 97-0469, 2003) (consolidated) (citation omitted)). Based upon the record, the court concludes the Secretary properly classified the violation as a serious one.

nonetheless agrees that a 60% reduction for size is appropriate. The Secretary did not provide an increase or a reduction based upon Gander's history since OSHA had not inspected Gander in the previous 5 years. The court agrees with that determination. The Secretary also did not provide a reduction based upon good faith. Since Gander had no program in place to ensure that each powered industrial truck operator was competent to operate a powered industrial truck safely prior to the accident, the court also agree with that determination. Thus, considering Gander's size, the gravity of the violation, the lack of good faith, and its history, the court concludes the appropriate penalty is $4,681. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Item 1 is **AFFIRMED** and a civil penalty of $4,681 is **ASSESSED**.

SO ORDERED.

/s/
JOHN B. GATTO, Judge

Dated: March 10, 2023
Atlanta, GA