United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. KEHE DISTRIBUTORS, LLC and its successors, Respondent.	OSHRC Docket No. 22-0696

Appearances:

Seema Nanda, Christine Heri, Barbara Villalobos, Department of Labor, Office of Solicitor, Chicago, Illinois,
For Complainant

Matthew Horn, Michael Cocciemiglio, Amundsen Davis, Chicago, Illinois,
For Respondent

Before: First Judge Joshua R. Patrick – U. S. Administrative Law Judge

DECISION AND ORDER

I. Introduction

On February 14, 2022, one of Respondent's employees was injured after walking into a moving forklift, also known as a powered industrial truck (PIT).[1] Respondent reported the accident to Complainant, and a Compliance Safety and Health Officer (CSHO) conducted an inspection of Respondent's facility located in Romeoville, Illinois. As a result of her inspection, the CSHO recommended, and Complainant issued, a Citation and Notification of Penalty, which alleges

[1] The parties also refer to PITs as forklifts.

Respondent violated 29 C.F.R. § 1910.176(a) by failing to appropriately mark a permanent aisle or passageway.[2]

Based on the following findings of fact and conclusions of law, the Court finds Complainant failed to establish the area at issue was a permanent aisle or passageway. Accordingly, the standard did not apply to the area identified by Complainant. In the alternative, even if the standard applied, the Court finds Respondent did not violate the cited standard. Accordingly, the Amended Citation and Notification of Penalty is VACATED.

II. Procedural History

On February 24, 2022, Complainant initiated an inspection in response to a report of an injury requiring hospitalization. (Tr. 27). As a result of that inspection, Complainant issued a single-item Citation, with a total penalty of $14,502. (Citation at 6). The Citation alleged a serious violation of 29 C.F.R. § 1910.176(a), which, among other things, requires an employer to appropriately mark permanent aisles or passageways. Respondent filed a timely notice of contest, bringing this matter before the Commission. On May 13, 2022, the Court granted Complainant leave to amend the Citation. (Amended Citation at 1-2). Specifically, the Amended Citation alleged the area where the employee was injured was a passageway used primarily by forklift traffic, and it had not been appropriately marked as an aisle or passageway. (Amended Complaint at 1-2).

Later, Respondent filed a motion for summary judgment, arguing that: (1) the cited standard did not apply, (2) the citation was based on an incorrect interpretation of the standard, (3) Respondent had complied with the standard, and (4) it had established the unpreventable employee misconduct defense. (Resp't Motion for Summary Judgment). On July 24, 2023, the Court denied

[2] The Citation and Notification of Penalty was later amended. (*See* Section II).

the motion, finding there were disputed issues of material fact as to whether the purported aisle was "permanent" and whether it was "appropriately marked." (Order Denying Motion for Summary Judgment).

A one-day trial was held on September 20, 2023, in Chicago, Illinois. CSHO Eloise Minett-Jackson and Juan Arroyo, Safety Manager for Respondent, testified. Both parties submitted post-trial briefs for the Court's review.

III. Stipulations and Jurisidction

Complainant and Respondent reached several stipulations prior to trial, both factual and legal, which the Court will incorporate by reference.[3] Those stipulations include: (1) the Commission has jurisdiction over this matter under section 10(c) of the Act; and (2) Respondent is an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act. (Jt. Stip. Nos. 1, 4).

IV. Factual Background

a. Respondent's Business

Respondent is a wholesale food distribution company. (Jt. Stip. No. 2). Respondent owns a warehouse in Romeoville, Illinois (Warehouse), which is used to store and ship grocery and other related products to customers. (Tr. 129). The Warehouse is approximately 1.2 million square feet, and roughly 375 to 400 employees work there. (Tr. 130). Respondent's operations at the Warehouse include receiving product from the manufacturers, processing it, stocking it, and storing it until a customer (usually a grocery store) orders it. (Tr. 129). When an order is placed, conveyors and PITs move the product through the Warehouse so an employee can fill the order by

[3] Where applicable, the Court shall cite to those stipulations as follows: "Jt. Stip. No. ___".

placing items on a pallet. (Tr. 130). Once the pallet is filled, it is then wrapped, loaded onto a truck, and delivered to the customer. (Tr. 130).

Employees and PITs travel throughout the Warehouse to complete orders for customers. Respondent has installed designated permanent pedestrian walkways and permanent PIT lanes throughout the facility to facilitate travel. (Tr. 146-47). Permanent pedestrian walkways lanes are marked with yellow chains and stanchions. (Tr. 147; Ex. R-5 at 10). Permanent PIT lanes are identified by safety barriers or tall racking along each side and signage stating that the area does not allow pedestrians. (Tr. 147, 150, 157; Ex. R-5 at 10, 13). The location of permanent pedestrian pathways and PIT lanes were established in accordance with Respondent's safety and hazard analysis. (Tr. 151). There are also shared workspaces throughout the Warehouse. (Tr. 146). Shared workspaces permit both PITs and pedestrians to travel in the same area. (Tr. 146). Shared workspaces make up 75% of the Warehouse. (Tr. 146).

The area at issue in this case was referred to as the palletizing area, a shared workspace where employees receive product on conveyors and manually assemble customers' orders on pallets. (Tr. 140-41). The palletizing area has a series of conveyors running into it, as well as stacked pallets at the end of each conveyor ready to be loaded with product. (Tr. 30, 141; Ex. R-5 at 5). The configuration and composition of the palletizing area frequently changes to accommodate the nature and volume of orders, and conveyors can be lengthened or shortened to accommodate those changes. (Tr. 154-55).

The palletizing area has a special conveyor for any product that is not recognized by Respondent's sortation system.[4] (Tr. 141-42). Those products require a quality assurance associate (QAA) to determine why a particular product has been separated from its larger order. (Tr. 142).

[4] Based on the testimony at trial, the Court understands the sortation system to be Respondent's computer system that inventories product at the Warehouse.

QAAs either replace the product if the packaging was damaged or physically move the product to the proper pallet. (Tr. 142). QAAs also audit orders for accuracy and manually sort product moving through conveyors. (Tr. 142-43). QAAs routinely move throughout the facility on foot. (Tr. 166).

Respondent has safety policies governing pedestrian and PIT travel and provides training in support of those policies. (Tr. 135, 183). For example, its Safe Distance Policy requires a pedestrian to maintain at least 6 feet of distance from a PIT in shared workspaces. (Tr. 160-62; Ex. R-8). In support of this policy, pedestrians are trained to be aware of their surroundings. (Tr. 136, 171). PIT operators are required to slow down when approaching pedestrian areas and use their horn when changing directions or going into areas shared with pedestrians. (Tr. 165).

b. The Accident

On February 14, 2022, MV—a QAA with 15 years of experience—left her workstation and walked into the side of a moving PIT entering the palletizing area. (Tr. 69, 169; Ex. R-6). The PIT ran over her foot, and MV was injured. (Tr. 56). Mr. Arroyo, Respondent's Safety Manager, conducted an accident investigation, discussed the accident with the manager on site at the time, reviewed available statements and the incident report, and reviewed video footage of the accident. (Tr. 140; Ex. R-6; J-2). The video footage showed MV looking down at something in her hand—a clipboard or scanner—as she left her workstation, which was located in the palletizing area. (Tr. 143, 169-70; Ex. J-2; Ex. R-5 at 6). Mr. Arroyo and various individuals in Respondent's management discussed the accident and concluded it was caused by MV's failure to comply with the Safe Distance Policy, which required her to maintain awareness of her surroundings. (Tr. 164; Ex. R-12). After the accident, a temporary orange belt was erected to block the opening from the workstation into the palletizing area. (Tr. 185; Ex. R-5 at 15).

At the time of the accident, the palletizing area was configured as follows: Multiple conveyors ran parallel to one another into the palletizing area, and pallets were stacked in a line towards the end of each of the conveyors. (Ex. R-5 at 5). Across from the stacked pallets and conveyors was a designated pedestrian walkway, which was separated by a set of yellow chains. Between the pedestrian walkway and the stacked pallets and conveyors there was an open space that both pedestrians and PITs crossed to access the conveyors and pallets, including MV, who traversed the area where the accident occurred at least 30 times a day, five days a week, to complete her job duties as QAA. (Tr. 148, 151, 153, 166; Ex. R-5 at 10). The open space within the palletizing area had been present for several years prior to the accident but was sometimes used to stage pallets or, as previously discussed, to extend the conveyors to account for larger orders. (Tr. 153, 182). Pallets were also at times placed in the workstation area. (Tr. 191). Pallets were never staged in the permanent pedestrian walkway. (Tr. 154).

MV's workstation—which consisted of a large table, computer screens, files, and other office supplies—was positioned on one end of the palletizing area facing away from the conveyors toward a designated PIT travel lane. (Ex. R-5 at 12; Ex. R-13 at 1, 2). The workstation was separated from the PIT travel lane by a yellow metal barrier. (Ex. R-5 at 12; R-13 at 1, 2). MV could exit the workstation on either the left or right side of the workstation. (Ex. R-5 at 2, 16). The right side of the workstation opened into the open space of the palletizing area near the location where PITs would enter and exit the palletizing area from the designated PIT lane. (Ex. R-13 at 1). This was where the accident occurred. (Tr. 153; Ex. J-3).

c. OSHA Inspection & Citation

Respondent timely reported the accident to Complainant. (Tr. 26). On February 24, 2022, CSHO Minett-Jackson conducted an inspection of the Warehouse palletizing area, where the

accident occurred. (Tr. 28). She spoke with Mr. Arroyo, photographed the palletizing area, and interviewed various employees. (Tr. 29, 33, 37). She did not review the surveillance video that day. (Tr. 99).

On May 13, 2022, Complainant issued a Citation and Notification of Penalty alleging a serious violation of 29 C.F.R. § 1910.176(a). (Tr. 54; *see* Citation; Amended Citation). CSHO Minett-Jackson concluded the open space where MV collided with the PIT was a permanent aisle or passageway used by PITs to access the palletizing area, and that it was not appropriately marked. (Tr. 49; 50-51). She determined employees were exposed to a hazard because they worked close to moving PITs without a barrier or other marking identifying it as a PIT traffic lane. (Tr. 53). The CSHO concluded it was a serious violation because an employee could be, and in this case was, seriously injured in an accident involving a PIT. (Tr. 54). She classified the severity of the violation as high and characterized the probability that an injury could occur was "greater", given the amount of PIT travel in the area. (Tr. 56). She did not give a reduction in penalty for history or good faith. (Tr. 57).

V. Analysis

a. Legal Standard

To establish the violation of a safety standard under the Act, the Secretary must prove: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at * 6 (OSHRC, Dec. 5, 1994). The Secretary has the burden of establishing each element by a preponderance of the evidence. *The Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498, at *3 (OSHRC, Sept. 15, 1995).

b. Citation 1, Item 1

The CSHO cited Respondent for a serious violation of 29 C.F.R. § 1910.176(a), which provides:

> *Use of mechanical equipment*. Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

The Amended Citation sets forth the violation as follows:

> 29 CFR 1910.176(a): Permanent aisles or passageways were not appropriately marked:
>
> On or about February 14, 2022, in the palletizing area at a facility located at 900 N. Schmidt Road, Romeoville, IL 60446, a struck-by injury occurred when an employee stepped into an aisle or passageway intended primarily for PIT traffic and made contact with a moving PIT. Respondent failed to mark the area where the employee stepped into the aisle or passageway intended primarily for PIT traffic. Pedestrian employees crossing the aisle or passageway were exposed to struck-by hazards caused from PIT traffic.

(Amended Citation at 1-2). Respondent argues the standard did not apply because the open space in the palletizing area was not a permanent aisle or passageway. Respondent argues in the alternative that even if the standard applied, it was not violated. The Court agrees on both counts.

i. <u>The Standard Did Not Apply</u>

To determine whether the cited provision applies to the cited condition, the Court first considers "the text and structure of the standard at issue." *Superior Masonry Builders, Inc*, No. 96-1043, 2003 WL 21525277, at *2 (OSHRC, July 3, 2003). The standard's plain language will govern if the wording is unambiguous. *Id*.; *see also Diamond Roofing Co*. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976) (noting well-established principle that a "regulation should be construed to give effect to the natural and plain meaning of its words"). Here, the open space within the palletizing area was used by both pedestrians and PITs—or "mechanical handling equipment"—

on a daily basis. However, by its own terms, the standard only applied to aisles or passageways that were "permanent."

The word "permanent," which the standard does not define, means "continuing or enduring (as in the same state, status, place) without fundamental or marked change; not subject to fluctuation or alteration." Webster's Third New International Dictionary of the English Language Unabridged (1971); *see Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term "carries its ordinary meaning"); *United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020) ("We find words' ordinary, contemporary, common meaning by looking at what they meant when the statute was enacted, often by referencing contemporary dictionaries."); *Cler v. Illinois Educ. Ass'n*, 423 F.3d 726, 731 (7th Cir. 2005) (same).

This definition comports with the Court's reading of the standard as a whole. *See Jesco, Inc*., No. 10-0265, 2010 WL 9448085, at *3 ("A standard must be read as a coherent whole and, if possible, construed so that every word has some operative effect."); *see also Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("[R]egulations are to be read as a whole, 'with each part or section . . . construed in connection with every other part or section.'") (internal citations omitted); *see also Hughes Bros., Inc*., No. 12523, 1978 WL 7138, at *4 (OSHRC, July 27, 1978) (holding subsections of a standard should be read *in pari materia*). On its face, § 1910.176(a) ensures aisles and passageways used by mechanical handling equipment are sufficiently wide to allow the mechanical handling equipment to turn or otherwise maneuver, and that aisles or passageways are marked and clear of obstructions. In other words, the standard was created to ensure safe clearances and clear aisles. *See, e.g., Cullen Indus., Inc*., No. 77-4267, 1978 WL 6893, at *3 (OSHCALJ, Oct. 19, 1978) (consolidated) (emphasizing the standard's purpose was to provide safe clearances "to drive the forklift in and to turn around and load and

unload pallets"). It follows that aisles and passageways that rarely change and are used primarily for moving materials or products should be clearly marked for the safety of both pedestrians and PIT operators. *See Heat Transfer Prods., LLC*, No. 16-0289, 2016 WL 6312071, at *4 (OSHRCALJ, Sept. 1, 2016) (holding "the standard was intended to protect pedestrians as well as forklift drivers" and "[w]here material handling equipment is used, the standard only limits applicability to those aisles that are permanent"); *see also General Electric Co.,* No. 27393, 1975 WL 5142, at *16-17 (OSHRC, Apr. 21, 1975), *aff'd in relevant part*, 540 F.2d 67 (2d Cir. 1976) (holding that permanent "does not mean forever" and should be construed in light of the purpose of the standard).

Complainant asks the Court to focus specifically on the area where the employee collided with the PIT to evaluate permanence. (Compl't Br. at 17). Complainant seems to argue the entry and exit point of the palletizing area at MV's workstation was separate from the palletizing area and did not change. Complainant notes that Arroyo testified pedestrian employees had been permitted to traverse that area since his tenure as manager began in 2018. (Tr. 148, 182). Further, in an attempt to sidestep the question of permanence as it relates to the purported "aisle", Complainant argues that MV's workstation was permanent. However, this is too narrow a view of the area at issue as well as a mischaracterization of the evidence presented.

Though Complainant characterizes the area between the permanent pedestrian passageway and the end of the palletizing conveyors as a "passageway intended primarily for PIT traffic", Respondent has clearly designated it as a shared workspace and used it as such. In support of its assessment of "permanence", Complainant argues MV's workstation was "permanent" because it has a computer workstation, desk, and protective bars on the one side adjacent to a PIT-designated travel lane. (Ex. R-5 at 2). While there were certainly permanent aspects to MV's workstation, that

only refers to one portion of the aisle or passageway Complainant originally alleged was "permanent" and disregards Arroyo's testimony (discussed in more detail below) that the open space at the end of MV's and other employees' workstations in the palletizing area fluctuated. Moreover, the CSHO testified that she considered the open space within the palletizing area—not just the area where the accident took place—to be a permanent aisle or passageway for PIT travel. (Tr. 90-91). To the extent Complainant is attempting to carve out an area different from the one alleged in the Citation and repeatedly addressed at trial, this argument is rejected.

The open space within the palletizing area had operated as multi-use space and was utilized by both pedestrians and PITs for several years. As such, the configuration of the open space was transitory and flexible. For instance, the area was sometimes used to stage pallets. In fact, pallets throughout the palletizing area were frequently moved into various configurations to accommodate different orders, and the conveyors were shortened or lengthened, if needed, for a particular order. (Tr. 153-54). Pallets were sometimes even stacked in or near MV's permanent workspace. (Tr. 191; Ex. J-2). In contrast, pallets were never stacked in permanent pedestrian passageways or permanent PIT lanes. (Tr. 154). The evidence presented at trial demonstrated the area in question was subject to alteration and fluctuation and was not permanent.

The transitory nature of the palletizing area generally and how the open space within the palletizing area was used specifically demonstrates that it did not have a permanent configuration. The area had to remain transitory and flexible to account for changing conditions, orders, and job requirements. Indeed, this was the expressed purpose of the palletizing area's shared space, a function which is not prohibited by the terms of the cited standard. The area cited by Complainant was not a permanent aisle or passageway exclusively, or even primarily, designated for PIT travel. Accordingly, the Court concludes the standard did not apply.

ii. The Standard was not Violated

Even if the standard applied, the Court concludes it was not violated. To establish Respondent failed to comply with the standard, the Secretary has the burden to show the section of the palletizing area that OSHA contends was an aisle or passageway was not appropriately marked. The term "appropriately" means "specially suitable." Webster's Third New International Dictionary of the English Language Unabridged (1971). In using the word "appropriately," the standard is akin to a performance standard. *See, e.g., Emery Chems.*, No. 86-0457, 1987 WL 89211, at *3 (OSHRC, Nov. 18, 1987) (evaluating standard requiring "appropriate hazard warnings" as a performance standard allowing the employer to determine the relevant information required on the label). Because performance standards do not identify specific means for accomplishing an obligation, they are interpreted in light of what is reasonable. *Thomas Indus. Coatings, Inc*., No. 97-1073, 2007 WL 4138237, at *4 (OSHRC, Nov. 1, 2007). Here, the Court concludes the phrase "appropriate markings" means something that, to a reasonable person, identifies an aisle or passageway to an employee. 29 C.F.R. § 1910.176(a); *see also Heat Transfer Prods.*, 2016 WL 6312071, at *6 (evaluating § 1910.176(a) as a performance standard).

Here, one side of the open area was a permanent pedestrian walkway, which was separated by yellow chains and stanchions. (*See* Ex. J-4). On the other side of the open space, stacked pallets were placed at consistent intervals in a straight line parallel to the yellow chains and stanchions. (*See* Ex. J-4). The standard does not require more or set forth specific mandated markings. CHSO Minett-Jackson admitted the pallets appeared sufficient as to the employees other than MV because they worked further back from the purported aisle. (Tr. 75, 91-92). However, she noted MV's workstation setup placed her closer to the threshold of the aisle.[5] Thus, the pallets were, in her

[5] The Court also questions this assessment, as Exhibit J-4 illustrates the desk and computers are set back from the aisle by at least a few feet. (Ex. J-4).

opinion, an inadequate marking *as to MV*. (Tr. 92). In other words, CSHO Minett-Jackson premised her assessment of both "permanence" and "appropriateness" on the question of the workers' proximity to the "aisle", not on the uniformity or spacing of the pallets. As such, she also minimized or disregarded the other visual cues available to MV, including the end of the pallets on one side and the terminus of the bright yellow guardrail on the other, each of which were uniform with the pallets that stretched down the identified "aisle". (Ex. J-4).

Again, the Court will not subdivide the palletizing area generally or the open area specifically to find a violation. The yellow chains and stanchions, along with the symmetrically placed pallets, served to appropriately delineate the open space as it appeared on the day of the inspection. *See Hughes Tool Co*., No. 15086, 1978 WL 7017, at *4 (OSHRC, Feb. 2, 1987) (holding heavy machinery could serve as aisle markings under certain circumstances and painted lines were not the sole method by which aisles may be appropriately marked); [6] *see also Cullen Industries, Inc*, 1978 WL 6893, at *3 (holding the alignment of pallets on one side and the arrangement of stored materials between the pillars on the other constituted appropriate marking of aisles).

Applying the reasonable person standard, an employee entering the palletizing area would see and understand the open space to be a passageway with delineated sides.[7] Accordingly, the

[6] In *Hughes Tool*, the two-member Commission disagreed on whether the aisles were appropriately marked. They both agreed that machines could be used to delineate aisles. However, Commissioner Cleary believed those machines had not been placed in a "sufficiently symmetrical configuration so as to clearly indicate the limits of the aisles." 1978 WL 7017, at *4. The Commissioners were ultimately unable to reach agreement on the disposition of the citation alleging a violation of § 1910.176(a).

[7] Although the Court did not reach the Secretary's interpretation of "appropriately marked" because it did not find the term ambiguous, the Court's reading of the term is consistent with how Complainant interpreted identical language contained in 29 C.F.R. § 1910.22(b)(2) (1978. *See* OSHA Program Directive #100-60, STD 1-1.4 (Oct. 30, 1978) ("The intent of 'appropriately

Court concludes Respondent did not violate the cited standard.[8] *See Hughes Bros., Inc*., 1978 WL 7138, at *4 (holding subsections of a standard should be read *in pari materia*).

VI. Conclusion

The Court concludes Complainant failed to establish that 29 C.F.R. § 1910.176(a) applied to the cited condition. Alternatively, the Court concludes Complainant failed to establish Respondent's noncompliance with the cited standard. Therefore, the Court does not reach the questions of employee exposure, Respondent's knowledge, or Respondent's affirmative defenses. The Court also does not address whether the violation was properly characterized as serious.

VII. Order

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. In accordance with those Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1 is VACATED.

SO ORDERED.

Date: June 24, 2024
Denver, Colorado

/s/ Joshua R. Patrick
Joshua R. Patrick
First Judge, OSHRC

marked' is not to restrict the markings to one method only. It would be impractical to paint lines on dirt floors or floors that have continuous concentrations of sand or other dusts . . . Other appropriate methods such as marking pillars, powder stripping, flags, traffic cones or barrels are acceptable . . . ."). OSHA later deleted the provisions requiring aisles and passageways to be appropriately marked because it was duplicative and "§ 1910.176(a) addresses that issue." Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems), 81 FR 82494-01 (Nov. 18, 2016).

[8] The Court's conclusion comports with various other ALJ decisions, which the Court notes are not binding but nevertheless instructive on this issue. *See, e.g., Marion Power Shovel Co., Inc.*, No. 76-4114, 1977 WL 24283, at *4 (OSHRCALJ, June 20, 1977) (area at issue was adjacent to a permanent walkway and determined to be a production area, not an aisle or passageway); *Cullen Indus., Inc*., No. 77-4267, 1978 WL 6893, at *3 (OSHCALJ, Oct. 19, 1978) (consolidated) (pallets stacked at relatively regular increments marked the boundaries of the aisle).