OAH 65-1901-34598

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Minnesota Department of Labor and
Industry,

Complainant,

vs.

Gary Carlson Equipment Co.,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

This matter came before Administrative Law Judge Ann O'Reilly for a contested case hearing on July 31 and August 1, 2018, at the Office of Administrative Hearings in St. Paul, Minnesota.

Scott A. Grosskreutz, Assistant Attorney General, represents the Minnesota Department of Labor and Industry (Department). Thomas B. Wieser, Meier, Kennedy & Quinn, Chartered, represents Gary Carlson Equipment Co. (Respondent or GCE).

On September 17, 2018, the Department and Respondent each filed post-hearing briefs. The hearing record closed on October 12, 2018, upon the receipt of electronic versions of photographs requested by the Administrative Law Judge.

## STATEMENT OF THE ISSUES

1. Does the standard cited in the citation, 29 C.F.R. § 1910.178(o)(1), apply to conditions at Respondent's worksite?

2. Did Respondent violate 29 C.F.R. § 1910.178(o)(1) on October 25, 2016?

3. Were employees exposed to, or did they have access to, the hazards created by the violation?

4. Did Respondent know or should Respondent have known of the existence of hazards created by the violation?

5. Was the abatement date set forth in the statute appropriate and reasonable under Minn. Stat. § 182.66, subd. 1 (2018)?

6. Was the violation properly classified as serious pursuant to the definition of "serious violation" set forth under Minn. Stat. 182.651, subd. 12 (2018)?

7. Was the penalty of $25,000 appropriately calculated pursuant to Minn. Stat. § 182.666 (2018)?

## SUMMARY OF DECISION

The Department has established by a preponderance of the evidence that on October 25, 2016, Respondent's employee handled a load of pipe that was not stable or safely arranged in violation of 29 C.F.R. § 1910.178(o)(1). The facts in the case establish that the cited standard applies to the conditions at Respondent's worksite and that two employees, including one direct employee of Respondent, were exposed to, or had access to, the hazard created by the violation.

The evidence further establishes that, due to a failure to implement an adequate safety program related to the handling of pipe at Respondent's worksite, the violation was reasonably foreseeable to Respondent and, thus, Respondent had constructive knowledge of the violation.

Because the violation was the proximate cause of the death of an employee, it was properly classified as serious under Minn. Stat. § 182.651, subd. 12, and the proposed penalty of $25,000 is mandated under Minn. Stat. § 182.666. The Administrative Law Judge, therefore, respectfully recommends that the Commissioner of the Department of Labor and Industry (Commissioner) **AFFIRM** the citation and proposed penalty.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

### I. Gary Carlson Equipment and Pipe Rental

1. Respondent GCE is in the business of selling and renting construction equipment to contractors.[1] GCE has offices in Roseville and Blaine, Minnesota.[2] This case involves GCE's storage yard in Blaine, where GCE maintains the inventory that it rents to its customers.[3]

2. GCE has been in business for 15 years.[4] It began operations in 2003, renting trench boxes and shoring equipment to contractors.[5] Over the years, GCE expanded its

[1] Testimony (Test.) of Gary Carlson, Hearing Transcript (Tr.) at 264.
[2] Ex. 1 at OSHA 002.
[3] Test. of G. Carlson at Tr. 264-265.
[4] *Id.* at Tr. 264.
[5] *Id.* at Tr. 264, 277.

business to rent a wider range of construction equipment and supplies, including various forms of pipe.[6]

3. The most common type of pipe rented by GCE includes 4, 6, and 8-inch diameter pipe, between 10 and 25 feet in length, used for trenching.[7] Much less common, and "sporadically" rented by GCE, is the very large, high density polyethylene (PE) pipe used in water or sewer infrastructure projects.[8] This high density or "fused" PE pipe is between 18 and 24 inches in diameter, and is generally cut into 40 or 50-foot long sections.[9] These large pipes weigh approximately 1,100 pounds each[10] and require flatbed semitrailer transportation to and from GCE's storage yard.[11]

4. To move, load, and unload pipe, GCE uses forklifts in its storage yard.[12] When transported on a forklift, pipe must be laid horizontally across the two forks of the lift, such that the forks are centered vertically under the load of pipe, as shown below:[13]


[6] *Id.* at Tr. 266-267.
[7] *Id.* at Tr. 267.
[8] *Id.* at Tr. 268.
[9] *Id*. at Tr. 267-268.
[10] Test. of Jennifer Algiere at Tr. 53.
[11] *See* Ex. 1 at OSHA 007.
[12] Test. of Alexander Christianson, Tr. 153.
[13] Test. of G. Carlson, Tr. 304-305; Ex. 118.

5. To lift a load of pipe from a flatbed truck, the "forks" of the lift are placed underneath the pipe, usually through space created by row boards or "dunnage" (i.e., wood boards that separate layers of pipe on a load),[14] as shown below:[15]

6. Once the forks are fully extended beneath a layer of pipe and all straps securing the pipe to the truck are removed, the forks are raised and, at the same time, tilted at an angle to help prevent the pipes from rolling off the forks during transport.[16] Once the forks are raised and tilted, the forklift is considered to have "taken possession" of the load.[17]

## II. Pipes Rented from GCE

7. In August 2016, Engineering & Construction Innovations (ECI) rented several sections of 24-inch diameter, high-density PE pipe from GCE to be used for a dam repair project in Bisbee, North Dakota.[18] The pipe was loaded onto a flatbed semitrailer by GCE's forklift operator, Alexander Christianson (Christianson), in GCE's storage yard for transport to North Dakota.[19] The pipe was loaded onto the truck by Christianson without incident.[20]

[14] Test. of G. Carlson, Tr. 304-305; Ex. 118.
[15] Ex. 2 at OSHA 027.
[16] Test. of G. Carlson, Tr. 283, 327-328.
[17] *Id.* at Tr. 283, 327-328.
[18] Ex. 100.
[19] Test. of Alexander Christianson, Tr. 177-178.
[20] *Id.*

8. Once the project in North Dakota was completed, ECI hired Pathway Transportation (Pathway), a trucking company, to transport the used pipe back to the GCE facility in Blaine.[21] There was no contractual relationship between Pathway and GCE.[22] Instead, the shipping contract was between ECI and Pathway.[23]

9. ECI and Pathway loaded the pipe onto the Pathway flatbed semitrailer in North Dakota.[24] GCE was not involved in the loading of the pipe in North Dakota.[25]

10. Ten sections of pipe were loaded for return to GCE: eight 40-foot-long sections; and two 25-foot-long sections.[26]

11. During this process, ECI had difficulty getting the pipe loaded because the pipe had "bowed" during its use by ECI.[27] As a result, loading of the pipe required two forklifts, one on each side of the truck to enable the bowed pipe to be strapped onto the semitrailer.[28]

12. The parties stipulate that, upon leaving North Dakota, the Pathway truck appeared as depicted below:[29]


---

[21] Ex. 4 at GCE0140.
[22] Test. of J. Algiere, Tr. 113.
[23] Ex. 4 at GCE0140.
[24] Test. of A. Christianson, Tr.180; Ex. 102.
[25] Test. of J. Algiere, Tr. 129.
[26] Ex. 4.
[27] Test. of A. Christianson, Tr. 167-168; Ex. 111.
[28] Test. of A. Christianson, Tr. 167.
[29] Ex. 4 at GCE0139; Tr. at 72-73.

13. As shown above, the truck was “strip loaded” with a bottom layer consisting of four 40-foot long pipes; a middle layer consisting of four 40-foot long pipes; and a top layer consisting of two 25-foot long pipes.[30]

14. “Strip loading” is a method of stacking pipe in layers, with each layer directly on top of the other and separated with wood boards called “row boards” between each layer.[31] The space between the layers of pipe created by the row boards allow a forklift to slide its fork beneath each layer of pipe and remove the pipe from the truck at the point of destination.[32]

15. The layers of pipe on the flatbed were secured by four-inch wide canvas straps that were attached to the side of the flatbed truck through permanently mounted winches.[33] In total, there were 11 straps holding the pipe to the flatbed truck.[34] Two straps held the bottom layer down; six straps held the middle layer down; and three straps spanned across the top layer.[35]

16. The canvas straps were secured to the flatbed by threading them through winches, attached to the flatbed truck.[36] An example of one of the 11 winches located on the truck appears below:[37]

[30] Ex. 4; Test. of J. Algiere, Tr. 66; Ex. 7 at OSHA 246; Ex. 102.
[31] Ex. 7 at OSHA 246; Test. of J. Algiere.
[32] Ex. 4; Test. of J. Algiere, Tr. 66.
[33] Ex. 1 at OSHA006.
[34] Ex. 4; Test. of G. Carlson at Tr. 326-327.
[35] Ex. 4.
[36] *See, e.g.,* Ex. 3 at OSHA 172, OSHA 175.
[37] Ex. 3 at OSHA 172, OSHA 175.

17. The winches allow the straps to be tightened and loosened.[38] To tighten or loosen a strap using a winch, an individual must insert a metal bar into a handle on the winch, as shown below:[39]

18. Once the handle is inserted into the winch, it is used to turn the winch wheel, which tightens or loosens the strap.[40]

19. Nine of the 11 winches used to secure the straps were located on the driver's side of the truck and two were located on the passenger side.[41]

20. Of the 11 straps holding the pipes onto the truck, six straps were fastened around the middle row of pipe.[42] With respect to those six straps holding the middle row of pipe, two straps were attached to winches located on the driver's side of the truck, and four straps were attached to winches located on the passenger side of the truck.[43]

21. In addition to the straps securing the middle layer of pipe to the flatbed, there was one, two-inch wide canvas strap that bound the four middle row pipes together toward the rear of the truck.[44] This banding strap wrapped around the four pipes, but was not attached to any winches on the flatbed.[45] There was not a similar banding strap on the middle layer at the front of the load.[46]

---

[38] Test. of A. Christianson, Tr. 188-189.
[39] Ex. 3 at OSHA 174; Test. of A. Christianson, Tr. 189.
[40] Test. of G. Carlson.
[41] *See* Ex. 4 at GCE0139; Test. of G. Carlson at Tr. 326-327.
[42] Ex. 4 at GCE139 (best viewed from electronic file on computer using slight magnification).
[43] Ex. 4 at GCE0136, GCE0138, GCE0139 (best viewed from electronic file on computer using slight magnification).
[44] Ex. 4 at GCE0136, GCE0137.
[45] Ex. 4 at GCE0136, GCE0137.
[46] Ex. 4 at GCE0139.

22. Given the number of straps shown on the photographs of the truck as it left North Dakota, to remove the middle row of pipe at the GCE facility in Minnesota, an individual would need loosen all seven straps securing the middle row: the two straps attached to the winches on the passenger side of the truck; the four straps attached to the winches on the driver's side of the truck; and the single strap binding the four pipe together.[47]

23. When loading the pipe on the truck, ECI or Pathway, also installed "chocks" or triangular wood blocks at one end of the row boards.[48] The purpose of a chock is to prevent the pipe from rolling.[49] A depiction of a chock is provided below:[50]

NOT PUBLIC DATA - MINN. STAT. § 13.39


OSHA 038

24. The chocks were located only on the passenger side of the load.[51] There were no chocks on the driver's side of the load.[52]

25. In addition, there were no pipe stakes on the load.[53] A pipe stake is a vertical stake placed on the sides of a truck bed to prevent pipes from rolling off.[54]

## III. October 25, 2016

26. The Pathway truck, loaded with pipe to be returned, arrived at GCE at approximately 8:30 a.m. on October 25, 2016.[55] Upon entering GCE's storage yard, the driver of the truck (Truck Driver) stopped at GCE's front office to identify himself and his

---

[47] *See* Ex. 4.
[48] Ex. 106 at 5-6.
[49] Test. of J. Algiere, Tr. 55.
[50] Ex. 3 at OSHA38.
[51] Ex. 103 at GCE0015. *See also* Ex. 3 at OSHA 113 (showing a couple, small chocks on the passenger side of the truck) *compared to* Ex. 3 at OSHA 116 (showing no chocks on driver's side). *See also* Ex. 107 at GCE00018 (showing no chocks on driver's side).
[52] Ex. 103 at GCE0015; Ex. 1 at OSHA006.
[53] *See, e.g.,* Ex. 4; Test. of J. Algiere, Tr. 67.
[54] Test. of J. Algiere, Tr. 67.
[55] Ex. 103 at GCE0014.

load.[56] Dean Anderson (Anderson), a supervisor for GCE, was working in the front office when the Pathway truck arrived.[57]

27. Anderson directed the Truck Driver to the rear of the storage yard.[58] He then radioed to forklift driver Christianson and instructed him to unload the truck.[59] Anderson did not give Christianson any information about the pipe or the load.[60] There was no evidence presented about any information the Truck Driver provided to Anderson about the load.

28. Christianson made contact with the Truck Driver and told him where to park in relation to where the pipe needed to be unloaded and stacked.[61] Christianson did not pay attention to the location of the winches on the truck or the chocks on the load when deciding where to direct the Truck Driver to park.[62] Instead, Christianson directed the Truck Driver to park in a location where it would be easiest for Christianson to unload the truck with a forklift, and closest to the place where the pipes were to be stored on the yard.[63]

29. Christianson had never met the Truck Driver and had never worked with him before.[64]

30. In directing the Truck Driver where to park, Christianson made the determination to remove the pipe with his forklift on the passenger side of the truck.[65] Christianson made this determination by looking at the truck as it drove into the parking spot.[66] Christianson did not conduct a walk-around of the truck with the Truck Driver to determine the location of the chocks or winches when deciding from which side he would unload the pipe from the truck.[67] At the hearing, Christianson admitted that it would be important to know where the chocks and strap releases (i.e., winches) are located when determining the safest way to unload a flatbed filled with pipe.[68]

31. Once the truck was parked, Christianson and the Truck Driver worked to unload the pipe together. First, Christianson unloaded the top two pipes, which were each 25 feet long.[69] To remove these two pipes, Christianson and the Truck Driver removed the three canvas straps securing the top pipes.[70] The winches securing the three straps covering

---

[56] Ex. 1 at OSHA 005.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Test. of A. Christianson, Tr. 162-163.
[61] *Id.* at Tr. 164, 192-194.
[62] *Id.* at Tr. 164, 166, 194.
[63] *Id.* at Tr. 182, 194-195.
[64] *Id.* at Tr. 166.
[65] *Id.* at Tr. 193-195.
[66] *Id.*
[67] *Id.* at Tr. 164, 166, 193-195.
[68] *Id*. at Tr. 161, 165.
[69] Ex. 106 at 3-4.
[70] Ex. 106 at 3 (Christianson stating that he removed the straps securing the top layer of pipe) *compared to* Test. of A. Christianson, Tr. 205 (stating that the Truck Driver removed the straps securing the top layer of pipe); Ex. 4 at GCE0139 (showing three straps securing the top layer of pipe as the truck left North Dakota). Christianson believed there were only two straps securing the top layer of pipe. *See* Test. of A. Christianson, Tr. 205.

the top layer of pipe were all located on the driver's side of the truck; and Christianson unloaded the pipe with the forklift from the passenger side of the truck.[71]

32. Christianson unloaded the top two pipes without incident.[72]

33. As set forth above, the middle layer of pipe was secured to the truck with six canvas straps.[73] The winch for two of those straps were located on the passenger side of the truck.[74] The remaining six winches were located on the driver's side of the truck.[75] In addition, there was a single canvas strap binding the four middle pipes together, which was not attached to any winch on the flatbed.[76]

34. As Christianson was transporting the top layer of pipe to a location in the storage yard, he observed the Truck Driver beginning to remove the straps securing the middle row of pipe.[77]

35. Seeing this, Christianson lowered his load and asked the Truck Driver to come over.[78] Christianson told the Truck Driver to stop unstrapping the load until Christianson was able to put the forklifts under the middle row.[79] It was at this time that the Truck Driver told Christianson that, in North Dakota, they "had a hell of a time loading the pipe" on the truck.[80] According to Christianson, the Truck Driver said it was "a bitch" to load the pipe on the flatbed and required the use of two loaders -- one on each side of the truck -- to get the straps secure on the pipe.[81]

36. While the Truck Driver complained about how difficult the pipes were to load, he did not mention anything about the load being unstable or insecure during transport.[82] Christianson did not ask the Truck Driver any further questions about the load.[83] According to Christianson, nothing about the load made it appear that the pipes were unsafe or unstable.[84] Christianson did not notice any curvature or bowing of the pipe.[85] Nonetheless, after hearing the Truck Driver describe the difficulty with loading the pipe, Christianson asked the Truck Driver to wait for him to return before releasing the remaining straps.[86]

---

[71] Ex. 4 at GCE0139; Test. of A. Christianson, Tr. 169.
[72] Ex. 106 at 3-4.
[73] Ex. 4 at GCE0139 (showing six straps securing the middle layer of pipe as the truck left North Dakota).
[74] *Id.*
[75] *Id.*
[76] Ex. 4 at GCE0136, GCE0137.
[77] Test. of A. Christianson, Tr. 181.
[78] *Id.*
[79] *Id.* at Tr. 182, 212.
[80] *Id.* at Tr. 167-168.
[81] Test. of A. Christianson, Tr. 167, 212; Ex. 6 at OSHA 268.
[82] *Id.* at Tr. 167-168, 187.
[83] *Id*. at Tr. 168.
[84] *Id.* at Tr. 172, 212.
[85] *Id.* at Tr. 189, 212.
[86] Ex. 106; Test. of A. Christianson, Tr. 182.

37. After dropping off the first layer of pipe, Christianson returned to the flatbed to unload the middle layer of pipe.[87]

38. Based upon the before and after pictures of the load, four of the straps securing the middle layer to the flatbed were removed without incident.[88] The straps that had been removed included the two straps whose winches were located on the passenger side of the truck; and two of the four straps whose winches were located on the driver's side of the truck.[89]

39. In addition, someone removed the single canvas strap that bound the four middle pipes together.[90] The OSHA investigation report notes that a single, two-inch wide canvas strap was found lying on the back of the flatbed.[91] This strap is likely the strap that was binding the four middle pipes together toward the rear of the truck.[92] The record is silent as to who removed the single strap that bound the middle pipes together.

40. When Christianson returned to unload the middle layer of pipe, only two straps remained securing the middle layer of pipe to the flatbed.[93] As with the top row of pipe, Christianson approached the load in his forklift from the passenger side of the truck.[94] As he approached the load to place the lift forks under the middle layer, the Truck Driver was standing at the rear of the trailer, where Christianson was able to see the Truck Driver.[95]

41. Christianson extended the lift forks under the middle layer of the load while the Truck Driver was still in sight.[96] The forks of the lift measured 8 feet long, making the forks just barely long enough to extend under the four sections of 24-inch diameter pipe (which, together, measured 8 feet in width).[97]

42. Due to the space between the pipe layers created by the row boards, the forks of the lift were not touching the pipes but, instead, were resting just underneath them.[98] The OSHA investigation report noted that the ends of the forks were "slightly elevated to the row boards and did not touch the pipes."[99]

43. Christianson "very slightly" tilted the forks under the pipes,[100] but could not further tilt the load due to the constraints of the two straps, which were still tightly connected

---

[87] Ex. 106.
[88] *Compare* Ex. 4 at GCE0139 to Ex. 3 at OSHA 161.
[89] Ex. 4 at GCE0139.
[90] *Compare* Ex. 4 at GCE0136 and GCE0137 to Ex. 3 at OSHA 161.
[91] Ex. 1 at OSHA 006.
[92] *See* Ex. 4 at GCE0136, GCE0137.
[93] Ex. 106; Test. of A. Christianson, Tr. 204.
[94] Test. of A. Christianson, Tr. 194-195.
[95] Ex. 1 at OSHA 005; Test. of A. Christianson, Tr. 185, 206.
[96] Ex. 1 at OSHA 005.
[97] Test. of J. Algiere, Tr. 120, 237, 238. The forks were also extended to their maximum width of 88 inches (7.3 feet). Test. of J. Algiere, Tr. 185; Ex. 1 at OSHA012; Test. of J. Algiere, Tr. 183-184, 197-198.
[98] Test. of A. Christianson, Tr. 185.
[99] Ex. 1 at OSHA 012.,
[100] Test. of A. Christianson, Tr. 205.

to the flatbed.[101] The OSHA investigation found that the forks of the lift were not tilted in any visible way to provide a cradle to the load.[102]

44. Once the forks were fully extended under the middle layer of the pipe, Christianson turned off the forklift, and directed the Truck Driver to release the last two remaining straps.[103] Because the winches for those two straps were located on the driver's side of the truck, the Truck Driver proceeded to the driver's side of the load.[104] Due to the fact that Christianson was located on the passenger side of the loaded flatbed, and given the height of the load, Christianson could not see the Truck Driver releasing the winches on the driver's side of the vehicle.[105]

45. The Truck Driver began by loosening the front strap, which was closest to the truck's cab.[106] Once that strap was loose, the Truck Driver walked to the rear of the truck to release the last remaining strap.[107] While the Truck Driver was loosening the last strap, Christianson heard a loud "snap" or "pop."[108]

46. Sensing that something had gone wrong, Christianson called out to the Truck Driver to see if he was alright.[109] When Christianson received no response, he walked around the truck to check on the Truck Driver.[110] He then saw the Truck Driver laying on the ground beneath a pipe that had fallen from the middle row of the load.[111] One end of the pipe was resting on the driver's side front fender, and the other end of the pipe had fallen upon the Truck Driver at the rear of the truck.[112] The winch pry bar was lying next to the Truck Driver.[113]

47. Christianson immediately sought help from another yard worker and they retrieved a smaller forklift to lift the pipe from the Truck Driver's body.[114] Emergency medical assistance was requested, and the Truck Driver died at the hospital after being removed from the scene.[115] The cause of death was blunt force head injury due to impact by a large pipe.[116]

---

[101] *Id.* at Tr. 185, 205. *See also* Test. of G. Carlson at 327.
[102] Test. of J. Algiere, Tr. 240.
[103] Test. of A. Christianson, Tr. 184-185, 203, 208-209; Ex. 1 at OSHA 005; Ex. 106.
[104] Test. of A. Christianson, Tr. 185-186.
[105] Test. of A. Christianson, Tr. 170-171, 202, 208; Test. of J. Algiere, Tr. 63.
[106] Test. of A. Christianson, Tr. 185-186, 207-209.
[107] Test. of A. Christianson, Tr. 186, 207-209.
[108] *Id.* at Tr. 186, 209.
[109] Ex. 106; Ex. 6 at OSHA 268; Test. of A. Christianson, Tr. 186.
[110] Ex. 6 at OSHA 268.
[111] Ex. 106 at 1, 5.
[112] *See* Ex. 107 at GCE0018.
[113] *Id.*
[114] Ex. 106 at 3-4; Ex. 6 at OSHA 267.
[115] Ex. 103 at GCE0015.
[116] Ex. 105.

48. In an interview with the Blaine Police Department immediately after the accident, Christianson stated that he did not know how the pipe had fallen because he believed the row boards were chocked on both sides of the load.[117]

## IV. OSHA Investigation

49. Jennifer Algiere (Algiere) is an Occupational Safety and Health (OSHA) investigator employed by the Department.[118] She has been an inspector with the Department for approximately three years.[119]

50. Algiere was dispatched to GCE's Blaine facility shortly after the accident occurred.[120] Algiere arrived after the Truck Driver had been removed by the emergency medical crew.[121] The Blaine Police Department and the Anoka County Sheriff's Department were on the scene when Algiere arrived and were conducting their own investigations.[122] Shortly thereafter, Algiere was advised that the Truck Driver had been pronounced dead at the hospital.[123]

51. Algiere began her investigation by conducting a walk-around of the flatbed truck and its load.[124] She took measurements and photographs, and spoke with individuals on the scene.[125] The load, as it appeared upon her arrival, is depicted below, with the second forklift holding up the fallen pipe from where it had fallen upon the Truck Driver:[126]

[117] Ex. 106 at 5.
[118] Test. of J. Algiere, Tr. 35.
[119] *Id.*
[120] *Id.* at Tr. 46.
[121] *Id.* at Tr. 48.
[122] *Id.* at Tr. 47.
[123] Ex. 1 at OSHA 005.
[124] Test. of J. Algiere, Tr. 48.
[125] *Id.* at Tr. 48-49
[126] Ex. 2 at OSHA 053.


52. Algiere noted that the second forklift, which was holding up the fallen pipe, had not been used in the unloading of the pipe; and that Christianson was the only forklift operator or GCE employee involved in the accident.[127]

53. Algiere observed that there were no chocks on the row boards on the driver's side of the load, where the Truck Driver was releasing the straps.[128] The only chocks used for the load were located on the passenger side of the load, where Christianson was operating the forklift to remove the pipe.[129]

54. Chocks are used to prevent pipe from rolling when tie-down straps are removed.[130] Therefore, the lack of chocks on the driver's side of the load, where the Truck Driver was loosening the straps, presented a risk to the Truck Driver.[131] Once the straps were removed, there were no mechanisms in place on the driver's side of the vehicle to prevent the pipe from rolling off the flatbed truck.[132]

55. Christianson was unloading the pipe on the passenger side of the load where all the chocks were located.[133] Because Christianson was on the passenger side of the load,

[127] Test. of J. Algiere, Tr. 54.
[128] *Id.* at Tr. 65.
[129] *Id.*
[130] *Id.* at Tr. 55.
[131] *Id.*
[132] Test. of A. Christianson, Tr. 210, 233.
[133] *Id.* at Tr. 193-195.

seated in a forklift, he was protected from falling pipe on his side of the load, not just by the chocks, but by the heavy equipment he was operating.[134]

56. As part of her investigation, Algiere conducted interviews of Christianson; Anderson; GCE's owner, Gary Carlson; the owner of Pathway; the construction manager for ECI, and another employee of Respondent.[135] These interviews were conducted over the course of several months after the accident.[136] While Algiere recorded some of these conversations, due to a malfunction in her recording equipment, all recordings were lost and unavailable for trial.[137] The only evidence of these interviews are Algiere's handwritten notes and her recollection of what was said.[138]

## V. Additional Investigation

57. The Blaine Police Department conducted its own investigation of the death. Its investigation report describes a discussion with GCE employee, J.S., who was present at the GCE yard when the accident occurred, but who did not witness the events.[139] J.S. told a Blaine Police Officer that he had overhead a conversation that the Truck Driver was having on the Truck Driver's Bluetooth telephone headset prior to the accident.[140] J.S. did not provide a formal statement to police because he "did not hear anything concrete."[141] However, J.S. did state that he heard the Truck Driver on a telephone call complaining about the load and talking about how dangerous the shipment was on the Pathway flatbed trailer.[142]

58. The OSHA investigation did not include information from J.S. in its report.[143]

## VI. Forklift Training

59. As part of the investigation, Algiere examined the training provided by GCE to Christianson related to his use of a forklift and, specifically, his use of a forklift to load, unload, or transport large PE pipe.[144] Algiere reviewed CGE's documentations related to training and all training provided to Christianson.[145]

---

134 Test. of J. Algiere, Tr. 64-65. *See also* Tr. at 231 (explaining that Christianson was not exposed to injury as a result of the violative condition).
135 Ex. 1; Ex. 6.
136 Test. of J. Algiere, Tr. 49-50.
137 *Id.* at Tr. 49.
138 Ex. 6.
139 Ex. 105.
140 *Id.*
141 *Id.*
142 *Id.*
143 Ex. 1.
144 Test. of J. Algiere, Tr. 77, 114-116.
145 *Id.* at Tr. 114-116.

60. Christianson began working for GCE in approximately 2013.[146] He received his initial training to run a forklift from a former manager at GCE.[147] That training consisted of on-the-job use of the forklift, but no formal training or testing.[148]

61. In approximately 2015, supervisor Dean Anderson took over the training responsibilities at GCE.[149] Anderson implemented an IVES Training Group forklift training program for the company.[150] This program entails workbook training in a classroom setting, a written test, and a driving test that required the operator to move wood pallets with the forklift.[151]

62. Respondent's forklift training documents, however, did not include a procedure for operator retaining should an operator demonstrate non-proficiency or irresponsible operation of a lift.[152]

63. In addition, GCE's forklift training materials did not address the loading or unloading of PE pipe.[153]

64. GCE maintained no written policies or procedures for unloading PE pipe.[154]

65. Christianson was not trained or directed to conduct a walk-around of a load to ensure that chocks were present on both sides of row boards, or to install chocks where chocks were missing.[155]

66. Christianson acknowledged that loading and unloading pipes present different challenges than the wooden pallets upon which Christianson was trained and tested.[156] GCE's owner, Carlson, agreed.[157]

67. On March 12 and 31, 2015, Christianson completed two written exams and a driving test on the use of a forklift.[158] The driving test lasted approximately 18 minutes and entailed moving 10 wood pallets and some boxes.[159] The driving test did not include moving any kind of pipe.[160] Christianson received no training by GCE related to the loading or unloading of pipe, and all of his training related to the hauling of pipe for GCE was obtained through on-the-job experience.[161]

---

[146] Test. of A. Christianson, Tr. 152.
[147] *Id.* at Tr. 153-154.
[148] *Id.*
[149] *Id.* at Tr. 154-155.
[150] *Id.*
[151] Ex. 1 at OSHA007.
[152] Test. of J. Algiere, Tr. 77-78.
[153] Test. of A. Christianson, Tr. 158.
[154] Test. of J. Algiere, Tr. 77.
[155] Test. of A. Christianson, Tr. 201; Test. of J. Algiere, Tr. 78.
[156] Test. of A. Christianson, Tr. 157-158.
[157] Test. of G. Carlson, Tr. 311.
[158] Ex. 108; Test. of A. Christianson, Tr. 196.
[159] Ex. 108; Test. of A. Christianson, Tr. 156-157.
[160] Test. of A. Christianson, Tr. 158.
[161] *Id.* at Tr. 158, 196, 198.

68. Prior to his employment at GCE, Christianson spent two years working in the oil fields of North Dakota, where he obtained experience moving pipe with a front-end loader and fork attachment.[162] However, the pipes in the oil fields were steel and different than the pipes at issue in this case.[163]

69. The majority of Christianson's experience with moving pipe for GCE involved 4 to 12-inch diameter pipe, which CGE rented out much more frequently than 24-inch diameter pipe.[164] Christianson had only loaded or unloaded 24-inch diameter pipe approximately three to four times during his work at GCE, including the two times that he moved the 24-inch diameter pipe at issue in this case.[165]

70. According to both Christianson and GCE owner Carlson, it was not common for GCE to rent out these larger size pipes.[166]

71. OSHA standards govern the periodic training and retraining of forklift operators, and the certification process for establishing that training was performed.[167] Algiere did not identify, or issue any citations for, violations of OSHA forklift training standards.[168]

## VII. Plastics Pipe Institute Material Handling Guide

72. As part of her investigation, Algiere researched industry standards for hauling, loading, and unloading large PE pipe.[169] Algiere looked to the Plastics Pipe Institute (PPI), an industry group, for guidance.[170] Algiere located a Material Handling Guide published by PPI in 2001 (PPI Guide).[171] According to PPI Guide:

> Th[e] guide was developed and published with the technical help and financial support of the members of PPI (the Plastics Pipe Institute). The members have shown their interest in quality products by assisting independent standards-making and user organizations in the development of standards, and also by developing reports and guides on an industry-wide basis to help engineers, *code officials*, specifying groups, contractors and end-users.
>
> The purpose of this guide is to provide important safety information on handling, lifting, loading, storing and installing polyethylene pipe and fittings.

---

[162] *Id.* at Tr. 172, 176-177.
[163] *Id.* at Tr. 190.
[164] *Id.* at Tr. 190.
[165] *Id.* at Tr. 190, 198, 199-200.
[166] Test. of A. Christianson, Tr. 199-200; Test. of G. Carlson, Tr. 268 (noting that rental of 24-inch diameter pipe was "sporadic.").
[167] *See* 29 C.F.R. § 1910.178(l).
[168] Ex. 1.
[169] Test. of J. Algiere, Tr. 62, 236-237.
[170] *Id.*
[171] Ex. 7.

> As in almost all industries, the handling, transportation and installation of polyethylene pipe and fittings present the potential for serious injury or even death. This guide seeks to raise awareness of the potential hazards involving in the polyethylene piping industry. By adhering to these and other safety guidelines, it is the sincere hope of PPI and its members that the number of serious accidents and injuries can be kept to a minimum.[172]

73. Chapter 4 of the PPI Guide specifically addresses the loading, unloading, and transportation of PE pipe by trucks and forklifts. The PPI Guide notes that, when unloading or loading a truck with pipe, "[t]he location of the driver should be known at all times"[173]

74. The PPI Guide further states:

> Operators of power lifting equipment [used to load, unload, or transport PE pipe] should be trained and competent in the operation of their equipment. Special courses are available for both beginners and experienced operators. Before operators gain experience, they must go through field training. An experienced operator must supervise this field training until such time as the trainee becomes comfortable and the trainer feels that they [sic] have received the necessary experience.[174]

75. The PPI Guide specifically addresses the loading of "strip loads" of PE pipe, as were present in this case. According to the PPI Guide:

> 'Strip loading' is a method of packaging truckload quantities of pipe in combination with lumber between each layer. Individual boards called 'saddles' or 'row boards' separate each pipe layer. *The use of pipe stakes is not required on strip loads*. It is recognized however that there may be a request that pipe stakes be used on the sides of a strip load.[175]

76. With respect to unloading strip loads from a flatbed trailer, the PPI Guide states:

> When unloading with a forklift, a second truck (or some other means) should be placed on the opposite side to the unloading equipment to prevent pipe from being pushed from the truck.[176]

77. With respect the use of chocks when unloading strip loads from a flatbed trailer, the PPI Guide states:

> Check the load to assure that all chocks are securely in place *on both ends of the timbers*. If not, nail a chock or other suitable wedge into position.

---

172 Ex. 7 at OSHA 231 (emphasis added).
173 *Id.* at OSHA 238.
174 *Id.* at OSHA 239.
175 *Id.* at OSHA 246 (emphasis added).
176 *Id.* at OSHA 246.

At no time or under any circumstances should the chocks on timbers be removed. The chocks prevent pipe from rolling.

*Only after checking that all chocks are in place should the truck driver remove the nylon trucker straps securing the load to the trailer. Do not remove 'belly' straps until unloading is to take place on that layer.* Use caution when straightening shifted loads before unloading.

. . .

If fork truck is used, the forks should have sufficient length to safely support the strip load. The load should be approached slowly at the midpoint of the pipe lengths. To improve the load stability during transportation, the forks should be as far apart as possible. [177]

. . .

78. The PPI Guide also includes certain "warnings" or instructions to be given to unloading personnel. These warnings include:

. . .

6. ***If strip loaded***, before moving, **assure that chocks are secured to both ends of the timbers.** If not, nail a chock or other suitable wedge into position.

7. **The trucker's chains or straps should not be removed from the load until it is known that the load has not shifted and will remain stable.** [178]

. . .

## VIII. Release of OSHA Investigative Report

79. Algiere completed her investigation on or about March 30, 2017.[179] The OSHA investigation report prepared by Algiere details how the Department alleges the cited standard was violated by Respondent.[180]

80. First, the report states that the forks of the lift "did not provide enough support to stabilize the load" and that the forks "were not long enough to hold the row of pipes in place."[181]

---

[177] *Id.* at OSHA 247 (emphasis added).
[178] *Id.* at OSHA 257 (emphasis in original).
[179] Ex. 1.
[180] *Id.*
[181] Ex. 1 at OSHA 012.

81. Second, the report notes that the row boards on the driver's side of the load did not have chocks in place to stop the pipes from rolling off and there were "no other means . . . used to ensure the pipes would not roll when the tiedown straps were released."[182]

82. Third, the report states that Christianson failed to perform a walk-around of the load to assess how best to unload the pipe.[183] According to the report, "[n]ot having chocks in place to stabilize the load should have been noticed and considered and precautions taken to stabilize the load prior to attempting to unload the pipes."[184]

83. With respect to employer knowledge of the hazard, the report identifies the training provided by GCE.[185] The criticisms of the GCE training program identified in the report were that: (1) GCE maintained no written policy for unloading pipes from a flatbed truck; (2) the training materials did not include procedures for retaining an operator if the operator demonstrated non-proficiency or irresponsible operation; and (3) the training did not require an operator to conduct a walk around assessment of the load before unloading.[186] At the same time, the investigation report states that the forklift "[o]perators received formal instruction, hands-on training, and on-the-job training; [and] operator evaluations were provided at the required 3-year intervals."[187]

84. Despite the criticisms of GCE's overall training program with respect to the handling of PE pipe, investigator Algiere testified that GCE was in compliance with all OHSA rules and regulations with regard to forklift training.[188] According to Algiere, GCE "met minimums standards" of forklift training.[189]

## IX. Issuance of Citation

85. The Department completed its investigation on or about March 30, 2017.[190]

86. On April 4, 2017, within 90 days of the completion of its investigation, the Department issued a Citation and Notification of Penalty to GCE.[191] The citation includes just one item, the violation of 29 C.F.R. § 1910.178(o)(1), which requires that "[o]nly stable or safely arranged load shall be handled" by forklifts.[192]

87. This citation was GCE's first and only OSHA citation.[193]

---

[182] *Id.*
[183] *Id.* at OSHA 013.
[184] *Id.*
[185] *Id.* at OSHA 015.
[186] *Id.*
[187] *Id.* at OSHA 002.
[188] Test. of J. Algiere, Tr. at 115.
[189] *Id.*
[190] Ex. 1.
[191] Ex. 9.
[192] *Id.*
[193] Test. of J. Agiere Tr. at 109.

88. The citation identifies the violation as "serious" and imposed a $25,000 penalty against GCE.[194] The citation required abatement by April 28, 2017, a date agreed upon by GCE.[195]

89. On or about April 10, 2017, within 20 days of the issuance of the citation, GCE filed a Notice of Contest challenging the citation.[196]

90. The Department timely filed a Summons and Complaint in this matter on or about July 10, 2017,[197] and a contested case proceeding was initiated with the Office of Administrative Hearings.[198]

## X. Expert Testimony Related to Bowed Pipe

91. At the hearing, in lieu of expert witness testimony, GCE submitted a written Expert Witness Disclosure signed by witness Michael Pluimer, PhD (Dr. Pluimer).[199] The Department did not object to the receipt of Dr. Pluimer's written statement into the hearing record without live testimony or the opportunity to cross examine Dr. Pluimer.[200] In addition, the Department did not contest Dr. Pluimer's qualifications as an expert witness; the foundation for Dr. Pluimer's expert opinions; or Dr. Pluimer's conclusions.[201]

92. Dr. Pluimer holds a bachelor's degree in mechanical engineering from Calvin College; a master's of science degree in mechanical engineering from the University of Minnesota; and a doctor of philosophy degree in civil and environmental engineering from Villanova University.[202] He is the owner of Crossroads Engineering Services, LLC in Breezy Point, Minnesota, and has 21 years of experience as a practicing engineer.[203] Dr. Pluimer served as the Director of Engineering at the Plastic Pipes Institute.[204] In addition, he worked as the Director of Engineering at a plastic pipe manufacturing company, and served as a consultant for four years in the plastic pipe industry.[205]

93. Dr. Plumer reviewed photographs of the PE pipes transported in this case, as well as pictures of the site in Bibsee, North Dakota, where the pipes were utilized by ECI.[206]

94. Based upon his review of the photographs, Dr. Pluimer opined that:

- The "thermoplastic pipes" being transported in this case were susceptible "to creep over time under the presence of an external load."

[194] Ex. 9.
[195] Ex. 1 at OSHA 014; Ex. 9.
[196] Ex. 10.
[197] Ex. 11.
[198] *See* Notice and Order for Hearing and Prehearing Conference (Aug. 7, 2017).
[199] Ex. 111. Notably, the expert witness disclosure statement was signed but not notarized by Dr. Pluimer.
[200] *See* Digital Recording (Aug. 1, 2018) at 03:56 to 04:11, not transcribed by Respondent.
[201] *Id.*
[202] Ex. 111.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*

- When these pipes were weighted down to traverse a berm in North Dakota, the pipes became curved.

- Upon return to GCE, the pipes maintained a “creep-induced curvature” caused by their use.

- When the pipes were strapped onto the flatbed truck in North Dakota, they were straightened, but the “residual stresses remained present in the pipes throughout transport.”

- “Upon removal of the straps, the residual stresses in the pipes were relieved, causing a spring force which rapidly dislodged the pipes from the trailer.”

- The pipes were randomly loaded on the trailer, without regard to the residual stress or curvature. As a result, the pipes were prone to spring in different directions.

- Given the large size of the pipes and “the random direction of their spring-back action upon removal of the restraining straps,” chocks on the driver’s side of the load would not likely have been adequate to restrain the pipe from falling off the trailer when the straps were removed.

- Because the forks were not yet in contact with the pipes, Christianson did not cause the pipe to dislodge. Instead, the pipe fell when unstrapped due to the residual stress in the pipe and the resulting spring action.[207]

## XI. Parties’ Stipulations as to Penalty

95. Pursuant to Minn. Stat. § 182.666, subds. 2 and 2a, if a serious violation, that is not willful or repeated, causes or contributes to the death of an employee, the employer shall be assessed a nonnegotiable fine of $25,000.

96. At the hearing, Respondent stipulated that, if a serious violation of 29 C.F.R. § 1910.178(o)(1) is found by the Administrative Law Judge, a mandatory minimum penalty of $25,000 is an appropriate assessment due to the death of the Truck Driver.[208]

97. The parties further stipulated that Respondent is an employer with fewer than 50 employees.[209] Accordingly, the Department agreed that, should a serious violation be found in this case, Respondent should be assessed an initial fine of $5,000 and four additional payments of $5,000 during each of the subsequent four years, subject to the

---

[207] *Id.*
[208] Tr. at 79-80.
[209] Tr. at 80.

Commissioner's option to waive futureinstallments pursuant to Minn. Stat. § 182.666, subd. 2a(b).[210]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS OF LAW

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 182.661, subd. 3 (2018).

2. The Department timely issued the citation and served its Complaint in this matter pursuant to Minn. Stat. §§ 182.66, subd. 1 and 182.661 (2018). In its Complaint and Notice and Order for Hearing and Prehearing Conference, the Department provided proper notice of the citations, penalties, and hearing in this matter. Consequently, the Department has fulfilled all relevant procedural requirements of rule and law.

3. Respondent's Notice of Contest and Answer to the Complaint was timely; and this matter is properly before the Administrative Law Judge.

4. Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7 (2018).

5. Minnesota Statutes section 182.653, subd. 2 (2018) mandates that an employer "furnish each of its employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death and serious injury or harm to its employees."

6. To that end, Minn. Stat. § 182.653, subd. 3 requires each employer to comply with Occupational Safety and Health standards and rules adopted pursuant to Minn. Stat. §§ 182.65 – .676 (2018).

7. The Commissioner has adopted by reference the federal Occupational Safety and Health Administration (OSHA) standards found in 29 C.F.R. Part 1910.178.[211]

8. 29 C.F.R. § 1910.178 applies to "powered industrial trucks," including forklifts, like the one used in this case.[212]

9. Under 29 C.F.R. § 1910.178(o)(1), "[o]nly stable or safely arranged loads shall be handled" by a forklift.

10. The Commissioner has the burden of establishing a violation of an OSHA rule or regulation by a preponderance of the evidence.[213]

---

[210] *Id.*
[211] Minn. R. 5205.0010, subp. 2 (2017).
[212] 29 C.F.R. § 1910.178(a)(1).
[213] Minn. R. 1400.7300, subp. 5.

11. To demonstrate a violation of an OSHA standard, the Department must prove that: (1) the cited standard applies to the employer; (2) the requirements of the cited standard were not met; (3) employees were exposed to, or had access to, the violative condition; and (4) the employer knew or, through the exercise of reasonable diligence, could have known of this condition.[214] Further, in order to establish a "serious" violation of law, the Department must prove that the violation of the standard was the proximate cause of the death of an employee or that "there is a substantial probability that death or serious physical harm could result" from the violative condition.[215]

12. The Department has established that the cited standard, 29 C.F.R. § 1910.178(o)(1), applies to Respondent. Respondent's employee was operating a forklift and handling a load at the time of the accident on October 25, 2016. Therefore, 29 C.FR. § 1910.178(o)(1) applies to Respondent.

13. The Department has also established that on October 25, 2016, Christianson was handling a load that was not stable and was not safely arranged. The load was unstable because the pipes were bowed as a result of their use by ECI, which caused the pipes to rapidly dislodge when unstrapped. The load was not safely arranged because it did not contain chocks or other mechanisms on the driver's side of the load to prevent the pipe from rolling off the truck once the straps were released. The lack of chocks or other means to prevent a roll on the driver's side of the load was particularly dangerous because a majority of the winches were located on the driver's side, where an individual would have to stand to release the straps.

14. Minnesota law provides that when multiple employers are at a worksite, an employer may be cited for OSHA violations that do not result in the exposure of that employer's own workers to a hazard.[216] Such liability results where the cited employer created or controlled the hazard; or where the cited employer exercised a level of supervisory authority over a worksite that created a reasonable expectation that it would prevent or abate the hazard resulting in the violation.[217]

15. The evidence establishes that both Respondent's employee, Christianson, and Pathway's employee, the Truck Driver, were exposed to the handling of a load that was not stable and not safely arranged. While Christianson did not suffer harm, he was, nonetheless, exposed to the violative condition, even if he was protected from injury by his position in the forklift at the time the pipe fell from the truck.

16. Moreover, because Respondent created and controlled the hazard that caused the death of the Truck Driver, Respondent is liable for the violation even though it did not employ the Truck Driver.

---

[214] *See Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002); *D.A. Collins Constr. Co. v. Sec'y of Labor,* 117 F.3d 691, 694 (2nd Cir.1997); *see also Gary W. Bastian, Comm'r, State of Minn. Dep't of Labor & Indus. v. Indus. Containers & Dumpbox Mfg., Inc.,* FINDINGS OF FACT, CONCLUSIONS, AND ORDER, OAH Docket No. 8-1901-112200-2 1997 WL 706203 at *12 (Minn. Office Admin. Hrgs Sept. 9, 1997).
[215] 29 U.S.C. § 666(k); Minn. Stat. § 182.651, subd. 12 (2018).
[216] *Bastian v. Carlton County Highway Dept*., 555 N.W.2d 312, 316-316 (Minn. Ct. App. 1996).
[217] *Id.* at 317.

17. Finally, a preponderance of the evidence establishes that, while Respondent did not have actual knowledge of the violation, Respondent had constructive knowledge of the hazardous condition due to Respondent's failure to implement an adequate safety program, including policies, procedures, and training, related to the handling of PE pipe.

18. Respondent is in the business of renting large construction equipment to its customers, including large PE pipe. Such business necessarily requires the loading and unloading of PE pipe by Respondent's employees. Due to their shape and size, and, specifically, their propensity to roll, PE pipe present special challenges when loading and unloading from a flatbed truck. As a result, the PE pipe industry has issued safety guidelines for the loading and unloading of PE pipe.

19. Th evidence establishes that Respondent had no policies or procedures in place for the handling of PE pipe. In addition, its employees were not specifically trained in the handling of PE pipe, a type of material that presents special challenges and dangers when loading or unloading from a flatbed truck. In the absence of any safety program related to the handling of PE pipe, a violation of the cited standard was reasonably foreseeable. Therefore, Respondent is deemed to have constructive knowledge of the violation.

20. Minnesota Statutes section 182.651, subdivision 12 (2018), defines a "serious violation" of state work safety standards as:

> [A] violation of any standard, rule, or order other than a de minimis violation which is the proximate cause of the death of an employee. It also means a violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

21. Respondent's violation of 29 C.F.R. § 1910.178(o)(1) was not de minimus and was the proximate cause of the death of an employee. As a result, the violation of 29 C.F.R. § 1910.178(o)(1) was a "serious violation," as that term is defined in Minn. Stat. § 182.651, subd. 12 (2018).

22. Pursuant to Minn. Stat. § 182.666, subd 2a, if a serious violation is not willful or repeated, but causes or contributes to the death of an employee, the employer shall be assessed a nonnegotiable fine of $25,000.

23. The violation in this case was not willful or repeated, but did contribute to the death of an employee. Therefore, the Department must assess a mandatory minimum penalty of $25,000.[218]

24. Section 182.666, subd. 2a further provides:

[218] *See* stipulations of counsel, Tr. at 79-80.

> If there is no willful or repeated violation and the employer has fewer than 50 employees, the employer shall be assessed an initial fine of $5,000 and an additional fine of $5,000 for each of the following four years. The commissioner may elect to waive the $5,000 fine for any of the following four years if the employer received no citations in the preceding calendar year.[219]

25. Respondent is an employer with fewer than 50 employees.[220] Accordingly, Respondent is subject to the fine payment schedule and waiver options provided for in Minn. Stat. § 182.666, subd. 2a(b).

## ORDER

**IT IS HEREBY ORDERED that:**

1. The MnOSHA Citation 1, Item 001, issued in Inspection No. 318086733 for the violation of 29 C.F.R. § 1910.178(o)(1) is **AFFIRMED**.

2. A penalty in the amount of **$25,000** is **AFFIRMED**.

Dated: November 6, 2018

ANN O'REILLY
Administrative Law Judge

Reported: Digitally recorded; Transcript prepared by Meier, Kennedy & Quinn.

## NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3 (2018), this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3, and 182.664, subd. 5 (2018), the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

[219] Minn. Stat § 182.666, subd. 2a(b).
[220] *See* stipulations of counsel, Tr. at 80.

## MEMORANDUM

To establish a prima facie violation of an OSHA standard, the Department must prove four elements: (1) that the cited OSHA standard applies to the employer; (2) that the employer failed to comply with the cited standard; (3) that employees were exposed to, or had access to, the violative condition; and (4) that the employer had actual or constructive knowledge of the violation (i.e., that the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition).[221] Each of these elements is addressed below.

### I. Applicability of 29 C.F.R. § 1910.178(o)(1) to Respondent

Respondent asserts that the cited standard, 29 C.F.R. § 1910.178(o)(1), does not apply to this action because: (1) the load of pipe at issue in this case was located on Pathway's flatbed trailer, not Respondent's forklift; and (2) the forklift was not touching the middle layer of pipe at the time the accident occurred. Respondent argues that because the middle layer of pipe was not on the forklift at the time of the accident, it's employee was not handling a load at the time of the accident.

The cited regulation, 29 C.F.R. Part 1910.178, applies to the "use" of "powered industrial trucks."[222] Under the regulation, "powered industrial trucks" specifically include "fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by electronic motors or internal combustion engines."[223] Accordingly, a forklift is a "powered industrial truck" to which the cited standard applies.

It is undisputed that Respondent's employee, Christianson, was operating a forklift to remove pipe from a flatbed truck when the Truck Driver was killed. Consequently, Christianson's *use* of that forklift requires Respondent to comply with 29 C.F.R. Part 1910.178.

Section 1910.178(o)(1) provides that "[o]nly stable or safely arranged loads shall be handled." The operative words at issue in the standard are "loads" and "handled."

The rules of statutory construction provide that, "[w]hen the words of a law in their application to an existing situation are clear and free from ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."[224] The Administrative Law Judge does not find Section 1910.178(o)(1) ambiguous and must, therefore, apply the plain meaning of the terms.

---

[221] *See Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002); *D.A. Collins Constr. Co. v. Sec'y of Labor,* 117 F.3d 691, 694 (2d Cir.1997); *see also Secretary v. Atlantic Battery Co.,* 1994 WL 682922 *6, 16 O.S.H. Cas. (BNA) 2131, 2138 (O.S.H.R.C. 1994); *Gary W. Bastian, Comm'r, State of Minn. Dep't of Labor & Indus. v. Indus. Containers & Dumpbox Mfg., Inc.,* FINDINGS OF FACT, CONCLUSIONS, AND ORDER, OAH Docket No. 8-1901-112200-2 1997 WL 706203 at *12 (Minn. Office Admin. Hrgs Sept. 9, 1997).
[222] 29 C.F.R. § 1910.178(a)(1).
[223] *Id.*
[224] Minn. Stat. § 645.16 (2018).

The Merriam Webster Dictionary defines a “load” as “whatever is put in a ship or vehicle or airplane for conveyance . . . a quantity of material assembled or packed as a shipping unit.”[225] The example given in the definition is, “[t]he ship was carrying *a load* of automobiles.”[226] According to this common definition, the “load” in this case was the group of 10 pipes that were brought to Respondent’s storage yard for unloading by Respondent – not just the middle four pipes that Respondent was in the process of removing when the accident occurred.

Respondent’s employee, Christianson, was charged with the job of unloading the entire shipment of pipe; that is, the entire load. Christianson was in the process of unloading the shipment of pipe at the time the pipe fell off the truck. Indeed, Christianson had already used the forklift to remove the top layer of pipe; and he was preparing to unload the second layer of pipe from the load when the Truck Driver was killed.

After removing the first layer of pipe, Christianson placed the forks of the lift beneath the second layer of pipe and slightly tilted those forks. While the forks were not yet touching that second layer of pipe, the forklift was clearly being used to move the remainder of “the load.”

Similarly, the term “handled” is without ambiguity. Black’s Law Dictionary defines the verb “handle” to mean, “[t]to control, direct, to deal with, to act upon, to perform some function with regard to or to have passed through one’s hands. . . .To manage or operate.”[227]

Here, Christianson was “handling” the load when the accident occurred. Though the forks of the lift had not yet touched the middle layer of pipe, Christianson was using the forklift to manage, control, and direct a part of the load. Therefore, Respondent’s employee was using a forklift to “handle” a “load” of pipe at that the time the accident occurred. Consequently, 29 C.F.R. § 1910.178(o)(1) applies to Respondent and its employee’s actions in this case.

## II. Failure to Comply with 29 C.F.R. § 1910.178(o)(1)

The second prong of the four-part OSHA liability test requires the Department to prove that Respondent failed to comply with the cited standard.[228] As set forth above, 29 C.F.R. § 1910.178(o)(1) provides that “[o]nly stable or safely arranged loads shall be handled.”

A preponderance of the evidence in this case establishes that the pipe comprising the load had been used in a dam project whereby the pipe had been bowed or subject to curvature. According to Respondent’s own expert, Dr. Pluimer, while the pipe may have appeared stable when stacked and compressed with numerous straps, once those straps were released, the latent energy in the bowed pipes caused them to “spring” in various

[225] Merriam Webster Online Dictionary at https://www.merriam-webster.com/dictionary/load.
[226] *Id.* (Emphasis supplied in original).
[227] Black’s Law Dictionary, Abridged 6th Ed. at 493 (West 1991).
[228] *Omaha Paper*, 304 F.3d at 784.

directions. Based upon Dr. Pluimer's expert opinions,[229] the bowing of the pipes resulted in a load that was not stable – it was prone to rapid and unpredictable release. This was further evidenced by the fact that, upon release of the final strap on the middle layer, a pipe "sprung" from the pile and fell off the flatbed truck, crushing the Truck Driver.

In addition to being unstable, the load was not safely arranged. The evidence shows that chocks were only present on the passenger side of the flatbed. There were no chocks on the driver's side of the load, where nearly all of the winches were located. Accordingly, an individual would need to be standing on the driver's side of the truck to operate the winches and release the straps. Because there were no chocks on the driver's side of the load – and there were no other mechanisms to prevent the pipe from rolling off that side once the straps were released-- it was inherently dangerous for a person to be present on that side of the load releasing the straps.

Notably, the forklift was not a mechanism to prevent a roll-off on the driver' side. The forks of the lift were eight feet long, the exact width of the middle layer of pipe. Therefore, even fully extended, the forks barely extended to the end of the last pipe on the middle layer. While the forks may have been long enough to extend under the middle layer of pipe, they could not prevent a roll. This is because the middle layer of pipe was still tightly secured by straps when the forklift was turned off and the straps were released. As long as the straps were still securing the layer of pipe, the forks could not be sufficiently tilted to allow the lift to take possession of the load and cradle the pipes to prevent roll-off.

Industry standards for PE pipe handling recommend several safety measures to prevent accidents when loading or unloading pipe. These recommendations include the use of saddle boards to "cradle" each layer of pipe; the use of chocks on both sides of the load; the use of vertical pipe stakes to hold a stack of pipe in place; and the use of two forklifts (one on each side of the load) when loading or unloading pipe from a flatbed vehicle.[230] While the PPI Guide does not require pipe stakes on strip loads, it does make clear that, when unloading strip loads from a flatbed trailer: (1) chocks must be present on both sides of a load; (2) a check must be conducted to ensure all chocks are in place before a driver removes the straps; and (3) a second forklift should be placed on the opposite side of the load to prevent pipe from being pushed off the flatbed.[231] Had these industry guidelines been followed, this tragedy may have been avoided.

Unlike the instability of the load, which may not have been readily apparent while the truck was fully loaded and secured with straps, the defects in the arrangement of the load were open and obvious conditions. The load did not include chocks on both sides of the row boards; and the side without chocks was the side from which the driver would be releasing the winches. In addition, the Truck Driver had verbally altered Christianson to the fact that the pipe was difficult to load onto the flatbed truck in North Dakota.

[229] Dr. Pluimer was not an actual witness, but the parties stipulated to the entry of his Expert Disclosure Report as evidence in this case. *See* Digital Recording (Aug. 1, 2018) at 03:56 to 04:11, not transcribed by Respondent.
[230] Ex.7 at OSHA 246, 247, 257.
[231] Ex. 7 at OSHA 246, 247, 257.

While Respondent was not responsible for arranging the load in North Dakota, it was responsible for ensuring that its employee not handle a load that was not safely arranged. A cursory review of the load from a walk-around of the truck would have uncovered the defects in the load's arrangement. Christianson's fatal decision to unload the pipes from the passenger side of the truck, and allow the Truck Driver to release the straps from the driver's side, where there were no chocks or other mechanisms in place to stop the pipes from rolling off, was an error and not in compliance with reasonable safety practices or industry standards.

In sum, the curvature of the pipe and the instability of the load were established by Respondent's own expert witness. In addition, the lack of chocks on the driver's side of the load where most of the winches were located, evidences that the load was not safely arranged for unloading. By unloading the pipe without taking additional safety measures to prevent roll-off from the driver's side of the truck, Christianson handled a load, which, the evidence establishes, was neither stable nor safely arranged for such unloading. Accordingly, the Department satisfied its burden of proof that Respondent's employee failed to comply with 29 C.F.R. § 1910.178(o)(1).

## III. Employee Exposure to Violative Condition

The third factor in the liability test is whether employees were exposed to, or had access, the violative condition.[232] As set forth above, the "violative condition" in this case was the handling of a load that was not stable or safely arranged.

Respondent asserts that because Christianson was protected on the passenger side of the truck by both chocks and the forklift, he was not exposed to the danger presented by the unstable or unsafe load. Respondent further contends that, because the Truck Driver was an employee of Pathway, not GCE, Respondent cannot be held responsible for the exposure of that employee to the violative condition.

A totality of the evidence establishes that Christianson was, in fact, exposed to the violative condition. Christianson was the GCE employee actually handling the load that was unsafe and not safely arranged. Although Christianson was protected from falling pipe while he was inside his forklift, there were times in which Christianson was not in his forklift and yet handling that load.[233] Had Christianson walked to the driver's side of the load, he, too, could have been injured or killed by the falling pipe.[234]

Actual injury is not required to find that an employee was exposed to, or had access to, a violative condition.[235] The fact that a violative condition exists and an employee is

---

[232] *Bastian*, 555 N.W.2d at 316.

[233] Test. of A. Christianson, Tr. 209.

[234] Note that, in his statement to police, Christianson stated that he released the straps on the top layer of pipe. *See* Ex. 106 at 3. Accordingly, Christianson could have tried to assist the Truck Driver in releasing the last two middle layer straps, in which case he could have been subjected to injury or death.

[235] *See All Erection & Crane Rental Corp. v. Occupational Safety & Health Review Comm'n*, 507 F. App'x 511, 515 (6th Cir. 2012) ("[T]he Secretary need not prove that the violative condition was actually hazardous, since under a standard such as this the existence of a hazard is presumed.").

proximate to that condition is sufficient for liability.[236] Remember here, the violative condition is the handling of a load that was not stable or safely arranged. Christianson was handling the load and had exposure to its unsafe and unstable condition, even if he was not in a position to be harmed at the time the accident occurred. The fact that Christianson was not the person killed, does not negate Christianson's exposure to the dangerous condition.[237]

But even if Christianson was not exposed to the violative condition, the law establishes that Respondent is nonetheless responsible for exposing another employer's worker to violation. Under Minnesota law, when multiple employers are at a worksite, an employer may be cited for OSHA violations that do not result in the exposure of that employer's own workers to a hazard.[238] There are only two situations in which liability attaches: (1) if the cited employer created or controlled the hazard; or (2) if there is evidence that the cited employer exercised a level of supervisory authority over a worksite that created a reasonable expectation that it would prevent or abate the hazard resulting in the violation.[239]

In this case, Respondent created and controlled the "hazard." The "hazard" was the handling of an unstable or unsafe load.

First, Respondent created the hazard by its employee (Christianson) deciding to unload the pipes from the passenger side of the vehicle, despite the fact that there were no chocks on the driver's side of the load, where a majority of the winches were located and where the Truck Driver would be present releasing the straps. Had Christianson used the forklift to unload the truck from the driver's side, at least the forklift could have provided some protection to the Truck Driver when the straps were released. Thus, even though Respondent did not load the flatbed, Respondent's employee nonetheless created a hazard by handling that unsafe load. Christianson created the hazard when he decided to unload the pipes from the passenger side of the vehicle and directed the Truck Driver to release the straps on the driver's side of the load – the side that had no chocks or other measures to prevent the pipe from falling. In this way, Respondent's employee caused Pathway's employee to be fatally exposed to a significant safety hazard.

Respondent also controlled the hazard. Respondent owned the pipes that were being unloaded. It also owned and controlled the worksite in which the pipes were being unloaded. Christianson directed the unloading of the pipes and chose the side from which the pipes would be unloaded. In addition, Christianson directed the Truck Driver to unstrap the load on the unprotected side of the vehicle, thereby resulting in that employee's death.

Because the evidence establishes that Respondent's employee created and controlled the handling of the unstable and unsafe load of pipe (i.e., the violative condition),

---

[236] *See Id.* ("The Secretary need not prove that employees were actually exposed to the condition, but only that it was reasonably predictable that employees would be within the zone of danger.").
[237] The Department's witness, Algiere, testified only that Christianson was not exposed "to injury." *See* Test. of J. Algiere, Tr. 231. Algiere did not testify that Christianson was not exposed to the violative condition or hazard created thereby.
[238] *Bastian*, 555 N.W.2d at 316.
[239] *Id.* at 316-317.

Respondent is responsible for the violation even though its employee was not the one who suffered harm as a result of the violation.

Finally, in opposition to the Department's application of multi-employer liability, Respondent argues that it was not provided with adequate notice of the multi-employer liability theory in either the citation or violation report. The Administrative Law Judge rejects this argument.

With respect to evidence of the "employer/employee relationship," the investigation report states:

> Contact 1 [Carlson] stated that Contact 6 [Christianson] is employed by Gary Carlson Equipment Company. When Contact 7 [Truck Driver] arrived onsite he was directed by Contact 2 [Anderson] to drive to the back of the yard. Contact 2 [Anderson] then radioed for a yard worker to assist with unloading the pipes.[240]

While the investigation report does not effectively explain how Respondent is connected to the Truck Driver, it does state that Christianson is employed by Respondent and that Respondent's supervisor, Anderson, directed the Truck Driver into the storage yard and radioed Christianson to unload the pipe.[241] From this information, and from the full description of the accident contained earlier in the report, it is apparent that the Department was alleging that Respondent created or controlled the hazardous condition that resulted in the Pathway employee's death; and that Respondent did not take reasonable care to prevent or detect the violation. Accordingly, Respondent's liability for the death of another employer's worker can be reasonably deduced from the report, thereby giving Respondent adequate notice of the allegations against it.

## IV. Actual or Constructive Knowledge of the Violative Condition

To satisfy the last element of a prima facie case, the Department must prove the employer had knowledge of the violation. As the federal courts have determined, the Department may prove knowledge of this in two different ways:

> First, where the [Department] shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer. . . . An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. . . . An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have. . . . In the alternative, the [Department] can show knowledge based upon the employer's failure to implement an adequate safety

[240] Ex. 1 at OSHA 014.
[241] *Id.*

program, with the rationale being that -- in the absence of such a program -
- the misconduct was reasonably foreseeable.[242]

The Department does not assert that Respondent had actual knowledge of the unstable or unsafe load. Instead, it asserts two arguments with respect to Respondent's constructive knowledge. First, the Department contends that Respondent's supervisor, Anderson, should have discovered the defects in the load when he met the Truck Driver at the entrance of the storage yard. Second, the Department argues that Respondent did not implement an adequate safety program to prevent the accident.

### A. Imputed Knowledge to Supervisor Anderson

With respect to the Department's first argument (that supervisor Anderson should have discovered the defect in the stability of the load), the Department presented no evidence that Anderson had even observed the load or had been informed about the Truck Driver's concerns regarding the stability of the load. In addition, there is no evidence that Anderson knew that the pipes had been used in a manner that may have caused them to be bowed; or that there had been issues loading the pipe in North Dakota. The only evidence presented by the Department was that Anderson met the Truck Driver in the front office and radioed Christianson to unload the pipe.

According to the evidence in the record, Anderson was not in the vicinity where the pipes were being unloaded and there is no evidence that Anderson ever even observed the load. Because the Department did not call Anderson as a witness, and because Algiere's interview with Anderson was lost (and apparently did not solicit such information), the Department has failed to establish by a preponderance of the evidence that Anderson knew or had reason to know of the violative condition based simply upon his presence at the jobsite that day.

Anderson was a supervisor. Christianson was not. The evidence establishes that Christianson knew or should have known of the instability of the load -- he was specifically warned about how difficulty it was to load the pipe onto the flatbed in North Dakota. In addition, Christianson knew or should have known that the load was not safely arranged. There were no chocks on the driver's side of the load, the side of the load where the Truck Driver was releasing the straps. Nor were there other mechanisms on the driver's side of the truck to prevent the pipes from falling once the straps were removed. But Christianson's negligence is not enough, in itself, to cite Respondent with an OSHA violation. There must be some nexus of foreseeability by Respondent.

It has been long-established that OSHA does not impose absolute (or strict) liability on employers for harmful workplace conditions; instead, it focuses liability where harm can, in fact, be prevented.[243] There must be some nexus between the employer and the alleged

---

[242] *ComTran Group, Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304,1307-1308 (11th Cir. 2013) (citations omitted). See also Quinlan v. U.S. Dept. of Labor, 812 F.3d 832, 837 (11th Cir. 2013).

[243] *See, e.g., Central of Ga. R.R. Co. v. Occupational Safety & Health Review Comm'n,* 576 F.2d 620, 623 (5th Cir.1978) (collecting cases); *Brennan v. Occupational Safety & Health Review Comm'n,* 502 F.2d 946, 951 (3d Cir.1974).

violation, otherwise employers would be strictly liable for all OSHA violations.[244] Thus, while courts have emphasized the importance of proper instruction and adequate supervision in safety-related matters, "they have consistently refused to require measures beyond those which are reasonable and feasible."[245]

### B. Inadequate Safety Program

The Department's second argument, however, is stronger and creates the nexus between Respondent and the violation committed by Christianson. The Department argues that constructive knowledge should be imputed to Respondent based upon an inadequate safety program maintained by Respondent with respect to the loading and unloading of PE pipes. While the Department cited no forklift training violations, it asserts that Respondent's safety program was inadequate because Respondent had no policies or training for employees on the loading or unloading of PE pipe. This argument is a closer question.

#### i. General Forklift Training

The OSHA standards specifically prescribe the training required of forklift operators. Those training requirements are contained within the same regulation that the Department has cited Respondent, 29 C.F.R. § 1910.178.

According to 29 C.F.R. § 1910.178(i), an employer must ensure that a forklift driver complete training and an evaluation before operating a forklift. This training must include:

> . . . formal instruction (e.g., lecture, discussion, interactive computer learning, video tape, written material), practical training (demonstrations performed by the trainer and practical exercised performed by the trainee), and evaluation of the operator's performance in the workplace.[246]

In addition, an employer must offer refresher training when an operator has been observed to operate a vehicle in an unsafe manner; when an operator has been involved in an accident or near-miss accident; when an operator has received an unfavorable evaluation; when an operator is assigned a different type of truck; or when a condition in the workplace changes in a manner that could affect safe operation of a truck.[247] Regardless of the need for refresher training, an evaluation of an operator must be conducted every three years.[248]

The Department reviewed the forklift training program provided by Respondent to its forklift operators and determined that it included formal instruction, practical training, and an evaluation.[249] In addition, the Department confirmed that all operator evaluations were

---

[244] *Brennan v. Occupational Safety & Health Review Comm'n,* 511 F.2d 1139, 1145 (9th Cir.1975).
[245] *See Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n,* 528 F.2d 564, 569 (5th Cir.1976) (discussing cases).
[246] 29 C.F.R. § 1910.178(l)(2)(ii).
[247] 29 C.F.R. § 1910.178(l)(4)(ii).
[248] 29 C.F.R. § 1910.178(l)(4)(iii).
[249] Ex. 1 at OSHA 002.

provided at the required three-year intervals.[250] As a result, the Department found no violations of OSHA standards with respect to forklift training.[251]

### ii. Absence of a Safety Program

Because Respondent met all general forklift training requirements under OSHA, the Department focuses on the lack of training and safety program for handling PE Pipe according to industry standards.

The evidence in this case establishes that Respondent maintained no policies and conducted no training for employees related to the handling of PE pipe.[252] Christianson testified that he did not receive any formal training on how to handle PE pipe from GCE. Instead, Christianson used the knowledge he obtained from his previous work in the North Dakota oil fields, and his on-the-job experience working in Respondent's yard, to learn how to load and unload the type of pipe at issue in this case. While Christianson did complete forklift training, that training involved the general operation of a forklift, and included an 18-minute practical exam evaluating his ability to move wood pallets, not pipes or other cylinder-type objects.

The fact that Respondent was not cited for any violations of OSHA forklift training standards, does not mean that Respondent had an adequate safety program in place. The adequacy of Respondent's safety program is separate and distinct from general forklift training. A safety program includes policies, procedures, warnings, and/or training intended to prevent and avoid possible risks. Thus, while Respondent's forklift training was sufficient to satisfy OSHA's general forklift training standards, the lack of any safety program or policies for handling loads of PE pipe, rendered the violation that occurred here reasonably foreseeable to Respondent.

Both Christianson and Carlson acknowledged that PE pipes, due to their size and shape, present distinct challenges for movement by a forklift.[253] First, pipes are round and are prone to roll. The tendency to roll differentiates pipe from other types of materials (such as wood pallets) being transported on trucks and forklifts.[254] Second, the pipes rented out by Respondent were very large and heavy. In this case, they were 40 feet long, 24 inches wide, and 1,100 pounds each.

Due to the special characteristics of PE pipe, the Plastics Pipe Institute has established specific guidelines for moving this type of material. These guidelines recommend several safety measures for loading and unloading pipe with a forklift. These measures include:

- Having the forklift operator know the location of the driver at all times during unloading;

---

250 *Id.*
251 *See* Ex. 1.
252 Test. of J. Algiere, Tr. 77; Test. of A. Christianson, Tr. 158, 196, 198.
253 Test. of A. Christianson, Tr. 157-158; Test. of G. Carlson, Tr. 311.
254 Test. of A. Christianson, Tr. 157-158; Test. of G. Carlson, Tr. 311.

- Placing a second truck or using other means on the opposite side of a load to prevent pipe from being pushed from the truck by the forklift unloading the pipe;

- Ensuring that chocks are placed securely on both ends of the row boards;

- Affixing a chock or other wedge when one is missing from a row board;

- Checking that all chocks are in place before allowing a truck driver to remove the trucking straps; and

- Not removing straps from the load until it is known that the load has not shifted and will remain stable.[255]

Because Respondent had never developed any policies or conducted any training related to the handling of PE pipe, these industry standards were not adopted by Respondent; and Christianson, had not been instructed to take these recognized safety measures.

Moreover, Respondent had no policies or procedures place for evaluating shipments before they were loaded or unloaded by Respondent's yard workers. Being in the business of renting construction materials, the loading and unloading of trucks would occur frequently; yet there was no evidence of any policies, procedures, or plans for evaluating the safety or stability of loads. Thus, while Respondent did not violate any OSHA forklift training standards, Respondent had not developed a sufficient safety program for handling the type of equipment that Respondent was in the business of renting out and, thus, loading and unloading for customers.

By not developing policies or safety programs for the handling of loads, Respondent could not ensure that its employees were following recognized safety standards. Moreover, Respondent was not properly preparing its employees to safely handle these loads or identify deficiencies in the stability or arrangements of such shipments.

Notably, the lack of a safety program, including policies and procedures related to PE pipe, is the reason Respondent cannot assert the affirmative defense of unavoidable or unpreventable employee misconduct,[256] a defense that generally applies when an employer

---

[255] Ex. 7 at 238, 246, 247, 257.

[256] An employer is shielded from liability for workplace safety violations under the affirmative defense of "unpreventable employee misconduct" if the employer:

(1) established a work rule to prevent the reckless behavior or unsafe condition from occurring;
(2) adequately communicated the rule to its employees;
(3) took steps to discover incidents of noncompliance; and
(4) effectively enforced the rules whenever employees transgressed it.

claims no knowledge of an employee's violation of law. To assert the defense of unavoidable employee misconduct, an employee must to identify specific work rules that its employee violated, which could have prevented the unsafe condition from occurring.[257] Given that Respondent had no work rules, policies, or procedures related to the handling of unsafe loads or PE pipe, such defense was not available to Respondent in this case.

Ultimately, a young man lost his life due to an error that may have been avoided through the implementation of a safety program for loading and unloading the type of construction equipment supplied by Respondent. Due to the inherent risks associated with the loading and unloading of large PE pipe, and the lack of any safety program related to handling that type of pipe, the violation -- and hazardous condition caused by the violation - was reasonably foreseeable. Accordingly, Respondent is deemed to have constructive knowledge of the violative condition.

**A. C. O.**

---

*See, e.g., Modern Continental Construction Company, Inc. v. Occupational Safety and Heath Review Commission,* 305 F.3d 43, 51 (1st Cir. 2002), *citing P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Commission,* 115 F.3d 100, 109 (1st Cir. 1997).

[257] *See Valdak Corporation v. Occupational Safety and Health Review Commission,* 73 F.3d 1466, 1469 (8th Cir. 1996) ("To establish the defense of unforeseeable employee misconduct, [the employer] must prove that it had a work rule in place which implemented the standard, and that it communicated and enforced the rule.").