21-486

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARTIN J. WALSH, SECRETARY OF LABOR,

Petitioner,

v.

WALMART, INC.,

Respondent.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission

FINAL FORM BRIEF FOR PETITIONER MARTIN J. WALSH

SEEMA NANDA
Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor for
Occupational Safety and Health

LOUISE M. BETTS
Counsel for Appellate Litigation

JUAN C. LOPEZ
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., NW, Ste. S-4004
Washington, DC 20210
(202) 693-5513

November 5, 2021

STATEMENT REGARDING ORAL ARGUMENT

This case presents questions regarding the Secretary's interpretation of 29 C.F.R. § 1910.176(b), a safety standard promulgated under the Occupational Safety and Health Act, to permit application of the standard to palletized material stored on multi-tiered racks regardless of whether the pallets are stacked directly one upon another. The Secretary submits that oral argument could assist the Court in deciding the issues before it.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

STATUTORY AND REGULATORY BACKGROUND 3

I. Statutory Framework 3

II. Regulatory History of 29 C.F.R. § 1910.176(b), the Secure Storage Standard 5

STATEMENT OF THE CASE 6

I. Nature of the Case and the Course of Proceedings Below 6

II. Statement of Facts 7

A. After a Walmart Employee is Injured, OSHA Cites Walmart for Violating Section 1910.176(b) 7

B. The ALJ Decision 11

C. The Commission Decision 12

SUMMARY OF THE ARGUMENT 16

ARGUMENT 17

I. Standard of Review 17

II. Section 1910.176(b) Applies to Pallets of Merchandise that Walmart Stored on Tiered Racks. 18

A. The Phrase "Stored in Tiers" in the Second Sentence of § 1910.176(b) Unambiguously Applies to Walmart's Storage of Pallets in a Tiered Racking System. 19

B. Even if the Standard Were "Genuinely Ambiguous," the Secretary's Interpretation of "Tiers" Is Reasonable and Therefore Entitled to Controlling Deference Because It Conforms to the Text and Purpose of the Standard, and Has Been Consistent Over Time 26

III. Walmart Nevertheless Violated the First Sentence in § 1910.176(b)—"Storage of Material Shall Not Create a Hazard"—Which is a Mandatory Provision that Unambiguously Applies to the Pallets Walmart Stored in Tiered Racks. 381

IV. The Record Conclusively Demonstrates That Walmart Violated § 1910.176(b) By Exposing Employees to the Struck-By Hazard of Storage Material Falling From Tiered Racking.....38

CONCLUSION.....41

CERTIFICATE OF COMPLIANCE 43

CERTIFICATE OF SERVICE 44

TABLE OF AUTHORITIES

Cases **Page(s)**

Am. Wrecking Corp.,
19 BNA OSHC 1703, 2001 WL 1668964 (Nos. 96-1330 & 96-1331, 2001) 32

Brennan v. OSHRC,
513 F.2d 1032 (2d Cir. 1975) 22

Brunswick Corp., d/b/a Brunswick Mockingbird Lanes,
5 BNA OSHC 1668, 1976 WL 21898 (No. 76-1435, 1976) 34

Buckeye Fabricating Co.,
14 BNA OSHC 2145, 1991 WL 55324 (Nos. 90-948 & 90-1013, 1991) 27

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA,
846 F.3d 492 (2d Cir. 2017) 27

D.C. v. Heller,
554 U.S. 570 (2008) 33

Dayton Tire v. Sec'y of Labor,
671 F.3d 1249 (D.C. Cir. 2012) 41

Eichleay Corp.,
2 BNA OSHC 1635 (No. 2610, 1975) 35

Fla. Gas Contractors, Inc.,
2019 WL 995716 (No. 14-0948, 2019) 35

General Dynamics Land Sys., Inc.,
2018 WL 3046401 (No. 17-0637, 2018) (ALJ Decision) 5, 28, 34

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 25

Haberle Steel, Inc., Respondent.,
23 BNA OSHC 2036, 2011 WL 5023845 (No. 11-0396, 2011) 34

Henkels & Mccoy, Inc.,
4 BNA OSHC 1502 (No. 8842, 1976) 34

J.A. Jones Constr. Co.,
15 BNA OSHC 2201 (No. 87-2059, 1993) 35, 36, 37

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 20, 24, 26

Martin v. Occupational Safety and Health Review Commission,
499 U.S. 144 (1991) 18, 26, 27, 28

Nat'l Indus. Constructors, Inc. v. OSHRC,
583 F.2d 1048 (8th Cir. 1978) 36

Taylor v. Vermont Dept. of Educ.,
313 F.3d 768 (2d Cir. 2002) 25

Trinity Indus., Inc.,
15 BNA OSHC 1481 37

Triumph Constr. Corp. v. Sec'y of Labor,
885 F.3d 95 (2d Cir. 2018) 18, 19, 38

United States v. Pitt-Des Moines, Inc.,
168 F.3d 976 (7th Cir. 1999) 35

Waskul v. Washtenaw Cty. Cmty. Mental Health,
979 F.3d 426 (6th Cir. 2020) 33

Whirlpool Corp. v. Marshall,
445 U.S. 1 (1980) 3

Xiao Ji Chen v. U.S. Dep't of Justice,
434 F.3d 144 (2d Cir. 2006) 40

Yanish v. Barber,
232 F.2d 939 (9th Cir. 1956) 40

Statutes

5 U.S.C. § 706(2)(A) 18
29 U.S.C. § 651(b) 3
29 U.S.C. § 655(a) 3, 5
29 U.S.C. § 655(b) 4
29 U.S.C. § 658 4
29 U.S.C. § 659(c) 1, 4
29 U.S.C. § 660(a) 1, 18
29 U.S.C. § 660(a)-(b) 5
29 U.S.C. § 660(b) 1
29 U.S.C. §§ 651–678 1
29 U.S.C. §§ 652-66 3
29 U.S.C. §§ 652(9)-(10) 3

Rules

Federal Rule of Appellate Procedure 30(c)(2)(B) 1

Regulations

29 C.F.R. § 1518.250 21
29 C.F.R. § 1910.1200(h)(1) 35
29 C.F.R. § 1910.176(b) ..... passim
29 C.F.R. § 1917.14 21
29 C.F.R. § 1926.20(b)(1) 36
29 C.F.R. § 1926.250(a) 21
29 C.F.R. § 1926.859(g) 32
29 C.F.R. § 2200.91(a) 4
29 C.F.R. § 2200.92(c) 20
41 C.F.R. § 50-204.3(b) 5, 21

Other Authorities

34 Fed. Reg. 7946 (May 20, 1969) 5, 21
36 Fed. Reg. 7357 (April 17, 1971) 21
36 Fed. Reg. 10465, 10612 (May 29, 1971) 5, 21
48 Fed. Reg. 30893 (July 5, 1983) 21

Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020) 4
Pub. L. 91-596 22

JURISDICTIONAL STATEMENT

This matter arises from an enforcement proceeding brought by the Secretary of Labor ("Secretary") before the Occupational Safety and Health Review Commission ("Commission") under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 ("OSH Act"). The Commission had jurisdiction over this proceeding under 29 U.S.C. § 659(c). The Commission issued its final order on December 31, 2020, *see* Deferred Joint Appendix (JA) 282-296,[1] and the Secretary filed his petition for review of the Commission's final order on March 1, 2021, within the sixty-day period prescribed by the OSH Act. *See* 29 U.S.C. § 660(a). This Court has jurisdiction over the Secretary's petition for review under 29 U.S.C. § 660(b). Venue is appropriate in this circuit because the alleged violations occurred in Johnstown, New York. *Id.* ("The Secretary may also obtain review . . . of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office . . . .").

[1] Pursuant to Federal Rule of Appellate Procedure 30(c)(2)(B), references to the record in this Final Form Brief are to pages in the Deferred Joint Appendix, filed on October 26, 2021.

STATEMENT OF THE ISSUES

(1) Whether the phrase "stored in tiers" in the second sentence of 29 C.F.R. § 1910.176(b) unambiguously applies to pallets of stacked items stored on tiered racking where the common definition of the word "tiers" includes items that are arranged one above another and reading § 1910.176(b) to encompass pallets stored in tiered racks, irrespective of whether the pallets are stacked directly upon another with nothing in between, is consistent with the standard's plain language and purpose of protecting employees from the hazard of being struck by falling material in storage.

(2) Whether, assuming the phrase "stored in tiers" in § 1910.176(b) is genuinely ambiguous, the Secretary reasonably interpreted the phrase as applying to palletized merchandise stored on Walmart's tiered racking system, regardless of whether the pallets are stacked directly one upon another, where the interpretation sensibly conforms with the standard's plain language and purpose, and the interpretation has been consistent over time.

(3) Whether the phrase "[s]torage of material shall not create a hazard" in the first sentence of § 1910.176(b) creates a mandatory duty, or whether this clause is merely a precatory or hortatory introduction to the standard's second sentence, where the first sentence uses mandatory, rather than precatory, language and is not impermissibly vague.

(4) Whether the record evidence establishes that Walmart violated § 1910.176(b) where, due to the configuration of Walmart's tiered racking system, the pallets were susceptible to falling through the racking when displaced by material handling equipment, exposing employees working in the storage aisles to struck-by hazards from falling storage material, and Walmart managers were aware and were warned that storage material frequently fell from the storage racks.

STATUTORY AND REGULATORY BACKGROUND

I. Statutory Framework

Congress enacted the Occupational Safety and Health Act of 1970 (OSH Act or Act) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). The OSH Act's goal is to prevent occupational injuries and deaths. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980). To achieve that goal, the Act authorizes the Secretary to promulgate and enforce mandatory occupational safety and health standards. 29 U.S.C. §§ 652-66.

The Act provides two mechanisms for promulgating permanent OSHA standards. Section 6(a), 29 U.S.C. § 655(a), directed the Secretary to adopt, without notice-and-comment rulemaking, existing standards (*i.e.*, national consensus standards and established federal standards, 29 U.S.C. §§ 652(9)-(10)), as OSHA standards "as soon as practicable" during the first two years the Act was

in effect (*i.e.*, April 28, 1971 – April 27, 1973). In contrast, section 6(b) of the Act, 29 U.S.C. § 655(b), authorizes the Secretary, at any time, to promulgate, modify or revoke any OSHA standard through notice-and-comment procedures, subject to applicable Administrative Procedure Act exceptions.

OSHA enforces the OSH Act by inspecting workplaces and issuing a citation when it determines an employer has violated a standard.[2] 29 U.S.C. § 658. OSHA citations "describe with particularity the nature of the violation," require the employer to abate the violation, and, where appropriate, assess a civil penalty. *Id*. §§ 658-659, 666. A violation of the Act may be classified as "serious," "other-than-serious," "willful," or "repeated." *Id*. § 666.

When an employer contests a citation, an administrative law judge (ALJ) appointed by the Commission adjudicates the dispute, after which an adversely affected party may petition the Commission for discretionary review. 29 U.S.C. §§ 659(c), 661(a), (j); 29 C.F.R. § 2200.91(a). Commission final orders are reviewable in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office,

[2] The Secretary has delegated his authority and responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

or in the Court of Appeals for the District of Columbia Circuit. 29 U.S.C. § 660(a)-(b).

II. Regulatory History of 29 C.F.R. § 1910.176(b), the Secure Storage Standard

The standard at issue here, 29 C.F.R. § 1910.176(b), the Secure Storage standard, provides: "Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse." 29 C.F.R. § 1910.176(b). The objective of the standard is to prevent struck-by hazards caused by falling storage material. *General Dynamics Land Sys., Inc.*, 2018 WL 3046401, *3 (No. 17-0637, 2018) (ALJ decision).

The Secure Storage standard was originally promulgated in May 1969 under the Walsh-Healey Public Contracts Act of 1936. *See* Part 50-204—Safety and Health Standards for Federal Supply Contracts, 34 Fed. Reg. 7946, 7947 (May 20, 1969) (codified at 41 C.F.R. § 50-204.3(b)). The standard was then adopted verbatim as an OSHA standard in May 1971 under Section 6(a) of the OSH Act, 29 U.S.C. § 655(a). *See* National Consensus Standards and Established Federal Standards, 36 Fed. Reg. 10465, 10612 (May 29, 1971).

STATEMENT OF THE CASE

I. Nature of the Case and the Course of Proceedings Below

This case arose from a workplace injury that occurred when an employee was struck by merchandise stored on a tiered racking system at Walmart distribution center No. 6096 in Johnstown, New York ("Johnstown Facility"). JA 151-152. After inspecting the Johnstown Facility in March 2017, OSHA issued a citation alleging a serious violation of 29 C.F.R. § 1910.176(b). JA 4 (Secretary's Citation and Notification of Penalty). The citation alleged that Walmart violated 29 C.F.R. § 1910.176(b) because "employees are exposed to struck-by hazards from unstable material storage." *Id.*

Walmart timely contested the citation, and, after hearing the case, a Commission ALJ affirmed the citation and assessed the proposed penalty of $10,864. JA 162-163. Walmart filed a petition for discretionary review of the ALJ's decision; the Commission directed the case for review; and, on December 31, 2020, a divided Commission (Chairman Sullivan and Commissioner Laihow, majority; Commissioner Attwood, dissent) held that the standard was inapplicable and therefore vacated the citation. *See* JA 282-296 (Commission Decision). The Secretary's timely petition for review to this Court followed on March 1, 2021.

II. Statement of Facts

A. After a Walmart Employee Is Injured, OSHA Cites Walmart for Violating § 1910.176(b).

Walmart is one of the largest employers in the United States and is in the business of operating department stores, distribution centers and related activities. JA 95. The OSHA violation at issue here occurred at Walmart's Johnstown Facility. JA 151-152. Employees at this facility process merchandise for distribution to individual Walmart stores and Sam's Clubs in the northeast region of the country. JA 61. Walmart's Johnstown Facility stores packaged merchandise by placing it on a pallet and then arranging the pallet on "selective racking." JA 64, 153. Walmart's selective racking system consists of tiered storage racks placed back-to-back. JA 67, 96. The items on each pallet are generally stacked directly on top of each other, and the pallets are arranged one on each rack tier.

The racks themselves are arranged back-to-back such that the pallets are two-deep on the back-to-back racking, and employees load and unload merchandise using aisles between the sets of racks. JA 67, 96. There is no physical barrier between the back-to-back racks to prevent a pallet on one rack from contacting a pallet stored on an adjacent rack. JA 97, 153, 283.

Each storage rack has seven or eight tiers (or slots) and each slot holds only one layer of pallets, *i.e.*, the pallets are not stacked directly on top of one another. JA 283. As seen in Complainant's Exhibit 3A below, pallets at each rack level above the floor are supported by two parallel front (marked "A") and back (marked "B") load-bearing beams, which create a 42-inch wide gap under the pallets. JA 17, 19-20, 100. Each pallet is approximately 48 inches deep, and thus, when a pallet is placed evenly between the front and back beams, there is only a three-inch overhang on each end to keep the pallet in place. JA 67, 99, 283.

The upper tiers of the racking system are between 40 to 50 feet in height. JA 15, 18, 153. When Walmart receives merchandise from a vendor, a hauler brings the merchandise on a pallet and leaves the pallet on the warehouse floor. JA 153.

A "put-away" driver then lifts the pallet using a forklift and places it into one of the upper reserve tiers of the racking. JA 15, 22, 24, 153.

Employees filling orders move through the storage aisles and retrieve merchandise from the lowest two tiers of the storage racks (*i.e.*, on the floor and the slot just above the floor). JA 15, 23, 153. The rack tier just above the floor has an additional front-to-back rail to allow employees to manually remove empty pallets without them falling into the gap between the front and back beams. JA 101, 153, 283. The upper reserve slots, however, do not have these front-to-back rails. JA 72.

On February 25, 2017, an order filler at Walmart was injured when merchandise fell from one of the upper reserve slots, more than 40 feet above her. JA 10-11, 18, 42, 283. The order filler was filling orders in one aisle while a forklift driver was moving a pallet in the adjacent aisle. JA 10-11 78-79, 98-99. The forklift driver bumped a pallet of crescent roll containers stored in a slot more than 40 feet above the order filler. JA 18, 78-79. This caused some of the containers to spill out, with most falling through the open gap between the load-bearing beams and some falling into the aisle where the order filler was working. JA 10-12, 78-79. Some containers struck the order filler in the head and upper body, causing long-term injury, including vertebral displacement and loss of curvature in her neck. *Id.*

During OSHA's inspection of the worksite, an OSHA Compliance Safety and Health Officer (CSHO) took photographs of the selective racking system, obtained training records, and interviewed Walmart personnel. JA 34-36. The CSHO observed that each pallet rested on the parallel front and back beams of the storage racks, with only a few inches of overhang on each side, and that there was a large gap (underneath the pallet) between the beams on the upper reserve slots. JA 17-18, 96, 100. Because the stored pallets on the upper reserve tiers of the racking system rested precariously on only two narrow beams—with no bracing between the parallel beams—the pallets were vulnerable to sliding and falling through the wide gap between the beams when inadvertently bumped by a forklift driver loading merchandize onto the adjacent rack. JA 24-26, 39-43. An employee told the CSHO that merchandise frequently fell through the beams of the storage racks and sometimes landed in the aisles. JA 44. Walmart's general manager also admitted to the CSHO that he was aware that merchandise sometimes fell through the racking system and acknowledged that the racking system lacked bracing between the front and back beams. JA 45.

As a result of the inspection, OSHA issued Walmart a serious citation alleging the company violated 29 C.F.R. § 1910.176(b) by exposing employees "to struck-by hazards from unstable material storage," and proposing a $10,864.00 penalty. JA 4.

B. The ALJ Decision

A hearing on the merits of the citation took place before a Commission ALJ on December 19, 2017. JA 152. On June 6, 2018, the ALJ issued a decision affirming the serious citation and assessing the proposed penalty. JA 163. The ALJ held that § 1910.176(b) applied to the cited conditions because stored crescent rolls were dislodged from a pallet that was on Walmart's storage rack. JA 156. The ALJ rejected Walmart's argument that the "material" that fell and struck the employee was "not covered by the standard because it was in the process of being placed into storage," finding that the cans of crescent rolls that were displaced and fell were already stored on the racks.[3] *Id.*

The ALJ also concluded that the Secretary had established that Walmart violated the terms of the standard because the stored pallets easily "became unstable when struck by moving equipment," JA 157; employees were exposed to the hazard because order fillers, including the injured employee, were routinely in the storage aisles to retrieve merchandise from the racks, JA 158; and Walmart had knowledge of the violation because two Johnstown Facility managers were aware that items sometimes fell through the racks, and the injured employee personally

[3] Walmart did not dispute that pallets stored in its selective racking system were "stored in tiers" within the meaning of § 1910.176(b) at the hearing or in its post-hearing brief. Rather, it argued that the pallets were not covered by the standard because they were being moved in and out of storage. *See* JA 139.

informed managers of the struck-by hazard before she was injured, JA 159-160. The ALJ also held that Walmart was precluded from asserting the unpreventable employee misconduct defense because it failed to raise the defense before the hearing. JA 156 (footnote 3). Lastly, the ALJ rejected Walmart's request for six months to abate the cited conditions because the company only made the request in its post-hearing brief and the issue had not been litigated. JA 163 (footnote 5).

C. The Commission Decision

1. *The Majority Opinion*

The Commission granted Walmart's petition for discretionary review of the ALJ's decision and vacated the citation on the ground that § 1910.176(b) did not apply. JA 286. The Commission determined that the first sentence of the standard—"[s]torage of material shall not create a hazard"—is "merely a precatory or hortatory introduction to the second sentence, which contains the operative, specific requirements of the provision." JA 284. Therefore, the Commission concluded that § 1910.176(b) applies only if the material at issue is "stored in tiers," pursuant to the standard's second sentence. JA 285.

Next, because the standard does not define the term "tier," the Commission looked to Webster's Dictionary to determine the term's "ordinary meaning." JA 285-86. According to Webster's, "tier" means "a row, rank or layer of articles, and one of two or more rows arranged one above another." JA 285. The Commission

opined that the definition's reference to a "layer," along with Webster's example of "tier upon tier of huge casks," "plainly narrows the meaning of the term to articles stacked one on top of another *with nothing in between*." JA 286 (emphasis added). The Commission also posited that Webster's definition of "tierable"—"suitable for stacking"—provided further support for the notion that the term "tier," as used in § 1910.176(b), "applies only to material stacked *directly* one upon another." *Id.* (emphasis added). The Commission drew a distinction between Walmart's storage racks and the "tiers" in a wedding cake, reasoning that a "'tiered' wedding cake consists of individual layers that *sit directly* upon the layer below." *Id.* (emphasis added).

Finally, having concluded that § 1910.176(b) is only triggered when stored material is stacked directly one upon another with nothing in between, the Commission held that the Secretary failed to prove that pallets at issue were stored in this manner. *Id.* The Commission noted that while the pallets at Walmart's distribution center were arranged one above another on the racking system, "each rack level held one pallet, with space between the top of the merchandise on each pallet and the bottom of the next rack level." *Id.* Moreover, the Commission added, the Secretary "has never alleged that the *racking* was itself unstable." *Id.* (emphasis added). Therefore the Commission vacated the citation without addressing the remaining elements of the Secretary's prima facie case. *Id.*

2. *The Dissent*

Commissioner Attwood issued a dissenting opinion, in which she concluded that the standard applied to Walmart's tiered racking system because the limitation that the majority had placed on § 1910.176(b) – *i.e.*, that "tiers" means material stacked directly on top of one another – "does not appear in the standard, nor does it comport with the provision's plain language." JA 287-88. And, while the dictionary's reference to "'layer' may support the majority's idea of materials stacked directly on top of one another, this definition does not exclude Walmart's use of racks, which themselves created the 'tiers' at issue." JA 288. Indeed, "the tiers of any cake—wedding or otherwise—rarely have, as the majority asserts, 'nothing in between them'" because they are "usually separated by a layer of frosting, and wedding cakes often have decorative pillars between each layer or use dowels." *Id.* (footnote 4). She also noted that the dictionary definition includes "rows," which is broadly described as items being "'arranged'—not stacked or piled—'one above another,' and therefore accords with the pallets in the various slots of Walmart's racking system." *Id.*

Commissioner Attwood therefore concluded that the standard applied because the material at issue was stored in "tiers" in that "[t]he rack levels on

which the pallets rest are arranged one above another."[4] *Id.* Furthermore, Commissioner Attwood found that OSHA has given notice to employers that § 1910.176 applies to material stored on racks even when they are not stacked on top of one another. JA 289 (citing *Materials Handling and Storage*, OSHA Publication No. 2236, at 6 (2002 Revised)).

Commissioner Attwood also found, based on the undisputed record evidence, that Walmart violated the standard, employees were exposed to the hazard, and Walmart had knowledge of the violative condition, and thus would have affirmed the citation. *See* JA 290-96 (Commissioner Attwood's dissenting opinion). Specifically, Commissioner Attwood found that Walmart violated the terms of the standard by failing to properly stabilize and secure pallets of stored merchandise to prevent sliding or collapse. JA 290-93. The pallets of stored merchandise rested precariously on two thin beams with a large gap in between and there was nothing to block the pallets from sliding and falling through the open gap when displaced by mechanical handling equipment. JA 290-91.

Furthermore, Commissioner Attwood concluded that employees who retrieved merchandise from the storage racks, including the injured employee,

[4] In a footnote, Commissioner Attwood noted that she was "inclined to agree" with the majority that the first sentence of § 1910.176(b) is "simply an introduction to the substantive requirements in the second sentence, and does not stand alone as its own obligation." JA 287 (footnote 1).

were regularly exposed to the hazard of material falling off the rack. JA 293-95. She also found employer knowledge because the injured employee personally informed managers of falling items, and at least two managers at the Johnstown Facility acknowledged knowing that merchandise occasionally falls from racks when pallets are struck by a forklift. JA 295-96.

SUMMARY OF THE ARGUMENT

The Secure Storage standard, § 1910.176(b), unambiguously applies in this case because the plain meaning of the phrase "stored in tiers" covers items placed or arranged one above another, and the standard's purpose is to protect employees from struck-by hazards caused by falling storage material. Furthermore, even assuming the term "tiers" in § 1910.176(b) is genuinely ambiguous, the Secretary's interpretation of § 1910.176(b)—as covering pallets arranged one above another in a tiered storage rack, irrespective of whether the pallets are stacked directly upon another with nothing in between—is eminently reasonable. This interpretation reflects the dictionary definition of the regulatory text, is consistent with the protective purpose of the OSH Act and the Secure Storage standard, and has been consistent over time. Because the Secretary's interpretation is reasonable, it is entitled to controlling deference.

In addition, the plain text of the standard's first sentence—"Storage of materials shall not create a hazard"—also applies to all pallets that Walmart stored

in the Johnstown Facility. This provision uses mandatory, rather than precatory, language and is not impermissibly vague as it pertains to Walmart because the company knew what was required to prevent hazards associated with its storage of material on the tiered racking. Walmart violated this standard by failing to prevent struck-by hazards resulting from merchandise falling from the pallets stored in the storage racks.

Under the Secretary's controlling interpretation of § 1910.176(b), there is no question that Walmart violated the standard. The record conclusively establishes that due to the configuration of Walmart's selective racking system the pallets were susceptible to falling through the racking when displaced by material handling equipment, exposing employees working in the storage aisles to struck-by hazards from falling storage material. Substantial evidence also establishes that Walmart had knowledge of the violative condition because managers at the Johnstown Facility were aware that storage material frequently fell from the storage racks. The Court should therefore reverse the Commission's decision and affirm the citation.

ARGUMENT

I. Standard of Review

The Second Circuit will set aside an order by the Commission if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

the law." 5 U.S.C. § 706(2)(A); *see Triumph Constr. Corp. v. Sec'y of Labor*, 885 F.3d 95, 98 (2d Cir. 2018). It will uphold factual findings if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 660(a); *see Triumph*, 885 F.3d at 98. The Court will also "review [the Commission's] legal conclusions *de novo*, deferring as appropriate to the Secretary's reasonable interpretation of the OSH Act." *Triumph*, 885 F.3d at 98.

The Secretary's interpretation of an OSHA standard is entitled to substantial deference, "so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 150-51 (1991) (internal quotation marks and citations omitted). In particular, "a reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary." *Id.* at 158.

II. Section 1910.176(b) Applies to Pallets of Merchandise that Walmart Stored on Tiered Racks.

The Commission erred in finding § 1910.176(b) inapplicable to Walmart's tiered storage system. The standard applied because the term "tiers" in the second sentence of § 1910.176(b) unambiguously includes material placed or arranged one

above another in tiered storage racks.[5] And, even if the Court were to conclude that the term "tiers" in § 1910.176(b) is ambiguous, the Court should defer to the Secretary's reasonable interpretation of the term because it sensibly conforms to the text and purpose of the standard, and has been consistent over time.

A. The Phrase "Stored in Tiers" in the Second Sentence of § 1910.176(b) Unambiguously Applies to Walmart's Storage of Pallets in a Tiered Racking System.

The phrase "stored in tiers" in the second sentence of § 1910.176(b) unambiguously applies to pallets stored on a tiered racking system based on the ordinary meaning of the standard's terms and its purpose to protect employees from hazards caused by storing material in an unstable manner.[6] As the Supreme

---

[5] To establish a violation of an OSHA standard, the Secretary must prove, by a preponderance of the evidence, that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited condition. *Triumph Constr. Corp. v. Sec'y of Labor*, 885 F.3d 95, 98 n.3 (2d Cir. 2018). The Commission majority assessed only the first element of the Secretary's prima facie case.

[6] Walmart raised its contention that the pallets were not in "tiers," within the meaning of § 1910.176(b), for the first time in its reply brief to the Commission. *Compare* JA 200 (Walmart's Opening Commission Brief: "[T]he plain language of the standard makes clear that it does not apply to . . . the process of moving material into or out of storage."), *with* JA 267 (Walmart's Reply Commission Brief arguing that "the pallets were not stored in tiers" because such storage "refers to the stacking of material directly on top of other material."). For this reason, neither party had the opportunity to address the issue of whether the pallets were stacked in "tiers" before the ALJ or the Commission. *See* JA 287-88 (footnote 2: Commissioner Attwood noting that "Walmart did not make this argument until its

Court explained in *Kisor*, a court will not defer to the Secretary's reasonable interpretation of a regulation "unless the regulation is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* (internal citation omitted). To determine whether a regulation's meaning is "genuinely ambiguous," the Court must make "a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning." *Id*. at 2423-24.

In this case, the phrase "stored in tiers" in § 1910.176(b) is not "genuinely ambiguous," *Kisor*, 139 S. Ct. at 2415, because the only sensible way to read that phrase, considering the standard's protective purpose and the ordinary meaning of the term "tiers," is to conclude that it applies to pallets stored in tiered racking where the rack levels on which the pallets rest are arranged one above another.

The term "tier" is undefined in the standard, but it is defined in the Webster's dictionary as "a row, rank, or layer of articles," and "one of two or more

---

reply brief to the Commission," and questioning the Commission majority's willingness to address the "stored in tiers" question when the ALJ "'did not have the opportunity to pass upon' the issue first." (citing Commission Rule 92(c), 29 C.F.R. § 2200.92(c))).

rows arranged one above another."[7] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2391 (1971). Notably, the Cambridge Dictionary defines "tier" as "one of several layers or *levels*."[8] (emphasis added). And, the American Heritage Dictionary defines "tier" as "[o]ne of a series of rows placed one above another," as in "a stadium with four tiers of seats."[9] These three definitions all similarly define the term "tiers" as items that are "arranged" or "placed" "one above another," including examples such as stadium seats that are plainly not stacked directly on top of one another.

---

[7] Neither 29 C.F.R. § 1910.176(b), nor its source standard, 41 C.F.R. § 50–204.3(b), define the term "tiers." And, because § 1910.176(b) was adopted by as an established Federal standard without notice-and-comment rulemaking under § 6(a) of the OSH Act, the preamble for this standard does not provide guidance on the term's meaning. 36 Fed. Reg. 10465, 10612 (May 29, 1971); *see also* 34 Fed. Reg. 7946 (May 20, 1969) (promulgating 41 C.F.R. § 50–204.3(b) without an explanatory preamble). The phrase "stored in tiers" also appears in the marine terminals standard (29 C.F.R. § 1917.14) and in the general requirements for storage in construction (29 C.F.R. § 1926.250(a)), but the term "tiers" is not defined in either standard, nor in their respective preambles. *See* 48 Fed. Reg. 30893 (July 5, 1983) (promulgating safety standard for marine terminals); 36 Fed. Reg. 7357 (April 17, 1971) (promulgating general requirements for storage in construction at 29 C.F.R. § 1518.250).

[8] Cambridge English Dictionary (emphasis added), *available at* https://dictionary.cambridge.org/us/dictionary/english/tier?q=tiers.

[9] American Heritage Dictionary, *available at* https://www.ahdictionary.com/word/search.html?q=tiers.

Accordingly, the pallets stored one above another in Walmart's tiered racking system are by definition "stored in tiers."

The protective purposes of the OSH Act and of the Secure Storage standard further indicate that the standard unambiguously applies to items stored in a tiered racking system. The purpose of the OSH Act is to "assure safe and healthful working conditions for working men and women," in part "by authorizing enforcement of the standards developed under the Act." Pub. L. 91-596; *see also Brennan v. OSHRC*, 513 F.2d 1032, 1038-39 (2d Cir. 1975) (finding the Commission's narrow interpretation of a construction standard unreasonable based, in part, on the remedial and preventative nature of the OSH Act and its "broad purpose"). The central purpose of the Secure Storage standard, made manifest by its plain text, is to protect employees from the hazard of being struck by "sliding or collapsing" material in storage. 29 C.F.R. § 1910.176(b). The only sensible way to read the second sentence of the Secure Storage standard in the context of its protective purpose is to conclude that it applies to storage material that is arranged one above another in tiered racks, not only materials stacked directly on top of each other with nothing in between. Section 1910.176(b) is OSHA's only standard generally applicable to storage of materials, and reading the phrase "in tiers" in § 1910.176(b) to encompass material stored on tiered racks, irrespective of whether the pallets are stacked directly upon another, serves the standard's clear purpose.

On the other hand, the Commission's conclusion that the term "tiers" unambiguously applies *exclusively* to material stacked directly one upon another "with nothing in between," JA 285-86, is wholly unsupported. To arrive at this exceedingly narrow reading of § 1910.176(b), the Commission cherry-picked the words (layers) and example (layers of a cake) from one dictionary definition that relates to items that are stacked directly on top of one another *with nothing in between*. *See* JA 285-86. However, the dictionary references relied upon by the Commission contain no such limitation. As Commissioner Attwood correctly noted in her dissenting opinion, the standard's reference to "tiers" also applies to materials stored on tiered racks like those at issue in this case:

> While "layer" may support the majority's idea of materials stacked directly on top of another, this definition does not exclude Walmart's use of racks, which themselves created the "tiers" at issue. Indeed, the definition broadly describes "rows" of items being "arranged"—not stacked or piled—"one above another," and therefore accords with the pallets in the various slots of Walmart's racking system. . . . In short, nothing in the standard's use of the phrase "stored in tiers" excludes items stored on racks "arranged one above the other."

JA 288-89. The Commission majority failed to explain why § 1910.176(b)'s reference to "tiers" cannot plausibly be understood, given the purpose of the OSH Act and the standard, to apply both to pallets stacked directly on top of one another *and* to pallets stored in a tiered racking system but not directly on top of one another. *See id.*

In fact, the Commission's narrow focus on "stacking" ignores the text of the standard itself, which does not reference "stacked" material as the exclusive means for securing items in tiers, but as one of multiple possible methods. *See* 29 C.F.R. § 1910.176(b) (items "stored in tiers shall be stacked, blocked, interlocked and limited in height"). Indeed, § 1910.176(b) references material "stored in tiers," not merely material *stacked* in tiers. *See id.*

Moreover, the Commission's analysis fails to consider, in accordance with *Kisor*, 139 S. Ct. at 2423-24, the standard's purpose of preventing struck-by hazards from collapsing storage material. Indeed, the Commission's narrow view that pallets must be stacked directly upon one another before this provision is triggered is antithetical to the standard's purpose. After all, merchandise that is stacked onto a pallet and stored on the upper levels of a tiered storage rack is subject to sliding or collapsing whether that pallet is stacked directly upon another pallet or placed directly on the beams of the racking—especially where, as in this case, the collapse hazard stems from the faulty configuration of the rack beams and not the stacking of the pallets. JA 50-51 (CSHO testifying: "The way that [the storage racks] are constructed contributes to the hazard[.]"), 54 (CSHO describing the nature of the hazard as storage of pallets without cross beams that would prevent pallets from collapsing through gap in beams when jostled).

The Commission's conclusion that the standard would apply to a "tower of used pallets," JA 286 (footnote 6), but not to items stored on shelves or racks, is nonsensical. The Commission's reading of the standard would effectively exempt most stored items from § 1910.176(b)'s coverage because, as a matter of common sense, storage in multi-tiered shelving or racking is a widespread and common practice among employers, and the purpose of the standard is to ensure that all materials are stored in a stable manner, not just towers of used pallets.

Under the Commission's erroneous interpretation, even the storage of items on a patently unstable shelving unit that was subject to toppling over would be exempt from the standard's coverage simply because the items on the shelves were not "stacked directly upon one another with nothing in between." JA 286. Such a bizarre result was evident in this case, where the tiered nature of the racks themselves was directly relevant to the hazard of the pallets being susceptible to falling from considerable heights through the wide gaps in the racking and dislodging other pallets stored, but not stacked, below. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations . . . which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Taylor v. Vermont Dept. of Educ.*, 313 F.3d 768, 779 (2d Cir. 2002) (rejecting an interpretation of a Department of Education regulation that would lead to "absurd results").

In sum, § 1910.176(b) can only be sensibly read as covering pallets stored on tiered racking with multiple rows, even when the pallets themselves are not stacked directly on top of one another.[10] The standard therefore unambiguously applies to the pallets stored on Walmart's tiered racking system.[11]

B. Even if the Standard Were "Genuinely Ambiguous," the Secretary's Interpretation of "Tiers" Is Reasonable and Therefore Entitled to Controlling Deference Because It Conforms to the Text and Purpose of the Standard, and Has Been Consistent Over Time.

To the extent there may be some ambiguity in the phrase "stored in tiers," the Court should defer to the Secretary's interpretation of the standard because it is reasonable. When regulatory text is "genuinely ambiguous," the Secretary's interpretation is "controlling" as long as it "is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Kisor*, 139 S. Ct. at 2415; *Martin*, 499 U.S. at 150-51. Moreover, "a reviewing

[10] Indeed, while the Commission majority did not appear to realize it, the packaged merchandise stored on each pallet were clearly stacked directly on top of each other with nothing in between, and therefore, even under the Commission's narrow interpretation of the term "tiers," the standard applies. *See* JA 97, 100. Regardless, as explained above, the Commission's interpretation is erroneous and should be set aside.

[11] There is no dispute that the storage material at issue (*i.e.*, the pallets and/or the packaged merchandise on the pallets) is covered by § 1910.176(b)'s reference to "[b]ags, containers, bundles, etc." *See, e.g.*, JA 288 (Commissioner Attwood finding that Walmart's pallets fit the definition of "bundles.").

court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary." *Martin*, 499 U.S. at 158; *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 520 (2d Cir. 2017) ("The agency's view need not be the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." (internal quotation marks and citation omitted)). The same framework applies whether the question is before the Commission or a federal court of appeals: the Secretary's interpretation of ambiguous regulatory text controls as long as it is reasonable, and the Commission's interpretation of ambiguous regulatory text is not entitled to deference, or weight of any sort, by a reviewing court of appeals. *Martin*, 499 U.S. at 152.

Here, the Secretary's interpretation that § 1910.176(b) applies to palletized merchandise stored on Walmart's tiered racking system "sensibly conforms to the purpose and wording of the regulations" and is therefore reasonable for all of the reasons discussed *supra* at pp. 19-26. *See Martin*, 499 U.S. at 151. The reasonableness of the Secretary's interpretation is further supported by two prior ALJ decisions which, though not precedential, both concluded that the phrase "stored in tiers" applies to items arranged "one above another." *See Buckeye Fabricating Co.*, 14 BNA OSHC 2145, 1991 WL 55324, at *3 (Nos. 90-948 & 90-1013, 1991) (concluding that the term "tiers" means "at least one row above

another."); *General Dynamics Land Systems, Inc.*, 2018 WL 3046401, at *3 (No. 17-0637, 2018) (ALJ decision) ("The common definition of a tier is 'a layer of articles arranged one above another.'" (citing Webster's New Collegiate Dictionary)).

In addition, the consistency of the Secretary's interpretation since the standard's promulgation in 1971 is further evidence of its reasonableness. *See Martin*, 499 U.S. at 157 (consistency of agency interpretation over time is a factor bearing on reasonableness). OSHA has uniformly applied the standard to *any* material in storage, and considered palletized material placed on a tiered storage rack as being stored "in tiers," even when the pallets are not stacked directly on top of one another.

In 1996, an OSHA letter interpreting the Secure Storage standard stated that § 1910.176(b) "governs the secure storage of *all materials*." OSHA Interpretation Letter (September 9, 1996) (archived) (emphasis added).[12] Then, in 2006, OSHA was asked to address a stocking practice in which retail stores placed items in a cardboard case and then placed the entire case on a shelf instead of stocking the case contents individually. OSHA Interpretation Letter (August 18, 2006) ("2006

[12] *Available at* https://www.osha.gov/laws-regs/standardinterpretations/1996-09-09-0.

Letter").[13] In its response, OSHA stated that this storage practice was covered by the "*broad* requirement for material storage" in § 1910.176(b). 2006 Letter (emphasis added). OSHA also noted that it would evaluate an individual employer's compliance with § 1910.176(b) on a case-by-case basis and added that "there could be imbalances and instability in instances when a case is stacked on top of other cases, and the items beneath the top case are removed." *Id.* Notably, however, OSHA provided no indication that the "broad" requirements of § 1910.176(b) would be triggered *only* if the boxes were stacked directly on top of one another. *Id.*

In a 2007 letter of interpretation, OSHA responded to an inquiry from the Office of the Secretary of the Army that asked what safety standard would apply to boxes that were stored on an anchored shelving unit's top shelf and overhung the shelf. In its response, OSHA stated that § 1910.176(b) may be applicable and that its requirements "are *broad* in nature, . . . [and] cover guarding against sliding or collapse." OSHA Interpretation Letter (March 21, 2007) (emphasis added).[14]

[13] This interpretation letter is not available online and therefore is included as an addendum to the brief.

[14] This interpretation letter is not available online and therefore is included as an addendum to the brief.

Again, OSHA gave no indication that § 1910.176(b) only applied to boxes that were stacked directly on top of one another on a shelf. *Id.*

In fact, OSHA has given express notice to employers that § 1910.176(b) is not so limited. In OSHA Publication 2236 (1998), OSHA issued guidance to employers on how to prevent hazards associated with storage of materials. In this initial guidance document, and in the revised version issued in 2002, OSHA refers specifically to "racks" and shows that the standard contemplates their use for storage purposes, without regard to whether items on the racks are stacked directly on top of one another. Materials Handling and Storing, OSHA Publication No. 2236, at 5 (1998 Revised) [15] ("All bound material should be stacked, *placed on racks*, blocked, interlocked, *or* otherwise secured to prevent it from sliding, falling, or collapsing." (emphasis added)); Materials Handling and Storage, OSHA Publication No. 2236, at 5 (2002 Revised)[16] ("[T]o avoid storage hazards," workers "should consider placing bound material *on racks*, *and* secure it by stacking, blocking, or interlocking to prevent it from sliding, falling, or collapsing." (emphasis added)). Indeed, OSHA's use of the word "racks" in place of "tiers" in these guidance documents signals to employers that racks are considered tiers

[15] This guidance document is not available online and therefore is included as an addendum to the brief.

[16] *Available at* https://www.osha.gov/Publications/osha2236.pdf.

under the standard. Thus, OSHA has both contemplated and communicated to employers that § 1910.176(b) applies to all material in storage, and more specifically, that items placed on racks are covered by the standard, regardless of whether they are stacked directly upon another.

Because the Secretary's interpretation comports with the plain language of the standard and the purpose of the OSH Act and has been consistent over time, and because the Commission's interpretation is analytically flawed and entitled to no deference, this Court must defer to the Secretary's reasonable interpretation of the standard.

III. Walmart Nevertheless Violated the First Sentence in § 1910.176(b)—"Storage of Material Shall Not Create a Hazard"—Which is a Mandatory Provision that Unambiguously Applies to the Pallets Walmart Stored in Tiered Racks.

Even if Walmart's pallets are not considered "stored in tiers" within the meaning of § 1910.176(b), the company nonetheless violated the standard's first sentence by storing pallets in a manner that created a hazard. The first sentence in § 1910.176(b) provides: "Storage of material shall not create a hazard." By its plain terms, this mandate applies without limitation to "storage" of *any* "material," and requires employers to ensure its means of storing material does not "create a

hazard."[17] 29 C.F.R. § 1910.176(b). The standard's second sentence, however, applies more narrowly to "[b]ags, containers, bundles, etc.," and requires employers to take specific precautions (*i.e.*, "stack[ing], block[ing], interlock[ing], and limit[ing] in height") when these materials are "stored in tiers." *Id.* By their plain terms, the two sentences impose two distinct, but related, duties on employers. *Cf. Am. Wrecking Corp.*, 19 BNA OSHC 1703, 2001 WL 1668964 n.15 (Nos. 96-1330 & 96-1331, 2001) (noting that the two sentences in 29 C.F.R. § 1926.859(g) unambiguously impose two separate duties on employers).

The first sentence of § 1910.176(b), therefore, unambiguously applies to the pallets stored (in tiers or otherwise) at Walmart's Johnstown Facility, and imposes a duty on the company to prevent hazards associated with their storage.[18] Contrary to the Commission's decision, *see* JA 284-85, this duty is not optional. This conclusion is reinforced by the *mandatory*, rather than precatory, language of the provision itself. 29 C.F.R. § 1910.176(b) ("Storage of material *shall not* create a

[17] Under the Commission's narrow view, OSHA could not enforce § 1910.176(b) to address non-tiered storage conditions that clearly create a hazard. For example, the standard would not be applicable to a box hanging precariously on the edge of single shelf that sits high above non-storage material (i.e., not part of a "tiered" shelving system), nor to large metal plates stored side-by-side in an unstable manner on a rack.

[18] The Secretary's citation in this case alleged that Walmart violated 29 C.F.R. § 1910.176(b) by exposing employees to "*struck-by hazards* from unstable material *storage*." JA 4 (Secretary's Citation and Notification of Penalty) (emphasis added).

hazard." (emphasis added)); *see also Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 426, 455 (6th Cir. 2020) (language in statute stating, "[a] waiver *shall not* be granted ... unless the State provides [the] assurances," was mandatory, not precatory).

The Commission provided several flawed reasons for its conclusion that the first sentence of § 1910.176(b) is non-mandatory. *See* JA 284-85. First of all, the case the Commission cites for the proposition that the first sentence of the standard is "merely precatory or hortatory" does not support such a conclusion. *See D.C. v. Heller*, 554 U.S. 570, 577 (2008). In *Heller*, the Supreme Court was tasked with interpreting the Second Amendment, which reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *Id.* (quoting Second Amendment). The Court concluded that the phrase "A well regulated Militia, being necessary to the security of a free State," was merely "prefatory" to the Amendment's operative clause, which was "the right of the people to keep and bear arms, shall not be infringed." The Court majority therefore rejected the argument that the Second Amendment only protects the right to bear arms in connection with militia service. *Id.* The complicated phrasing of the Second Amendment, however, bears no relationship to the very straightforward wording of the Secure Storage standard, which contains two stand-alone sentences, each using mandatory language.

Furthermore, although the Commission correctly stated the maxim that "[r]egulations are to be read as to give effect to all their terms," its conclusion that giving effect to the standard's first sentence would "effectively render[] the second sentence a nullity" turns this maxim on its head. JA 285. Giving effect to *all* the terms of the standard requires giving effect to the terms in the standard's first sentence as well the second. Contrary to the Commission's decision, the two sentences can be read to impose two distinct, but related, duties, without rendering the requirements of the second sentence a nullity.[19]

"Nothing in the Act forbids the adoption of standards which address a broad range of hazards or which speak in general terms." *Henkels & Mccoy, Inc.*, 4 BNA OSHC 1502 (No. 8842, 1976). In fact, the Commission regularly gives force and

[19] Though lacking precedential value, several unreviewed ALJ decisions have given force and effect to § 1910.176(b)'s first sentence. *See, e.g.*, *General Dynamics Land Sys., Inc.*, 2018 WL 3046401 at *4 (No. 17-0637, 2018) (ALJ decision) (interpreting § 1910.176(b) as applying "generally to all material in storage"); *Haberle Steel, Inc., Respondent.*, 23 BNA OSHC 2036, 2011 WL 5023845 (No. 11-0396, 2011) (ALJ decision) ("I agree with the Secretary that the *first* sentence of [29 C.F.R. § 1910.176(b)], which prohibits storage of material in a manner that creates a hazard, applies in this case [to storage rack consisting of vertical steel beams, which created several pockets for storing steel plates on edge].") (emphasis added); *Brunswick Corp., d/b/a Brunswick Mockingbird Lanes*, 5 BNA OSHC 1668, 1976 WL 21898 at *6 (No. 76-1435, 1976) (ALJ decision) (affirming § 1910.176(b) citation alleging bowling alley operator "stored materials on overhead racks above the aisleway behind the pinsetters in such a way as to create a hazard, in that the overhead storage racks showed signs of overloading and the wall braces were loose," without reference to whether items were stored in "tiers").

effect to generally-worded provisions contained within OSHA standards. *E.g.*, *Fla. Gas Contractors, Inc.*, 2019 WL 995716 (No. 14-0948, 2019) (Commission decision affirming citation of standard with first sentence that provides: "Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations."); *Cagle's, Inc.*, 2006 WL 4916424, at *6 (No. 98-0485, 2006) (giving force and effect to generally-worded first sentence in 29 C.F.R. § 1910.1200(h)(1), which provides: "Employers shall provide employees with effective information and training on hazardous chemicals in their work area . . . .," irrespective of more specific requirements in the standard's second sentence).

Here, the Commission reasoned that the "sheer breadth and generality of the first sentence's language, were it to be interpreted as imposing a separate obligation, could raise serious vagueness concerns…." JA 285. "Absolute precision of language, however, is not required, and a standard is not impermissibly vague simply because it is broad in nature." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). "The fact that an employer is required to think in implementing the requirements of a standard does not *per se* make it unenforceable." *Eichleay Corp.*, 2 BNA OSHC 1635 (No. 2610, 1975); *see also United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 990 (7th Cir. 1999) (OSHA training rule requiring employer to instruct employees in recognition and

avoidance of "unsafe conditions" was not unconstitutionally vague); *Nat'l Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1054 (8th Cir. 1978) (same). In *J.A. Jones Construction*, the Commission stated:

> [G]eneralized standards ... are not vague and unenforceable if a reasonable person, examining the generalized standard in the light of a particular set of circumstances, can determine what is required, or if the particular employer was actually aware of the existence of a hazard and of a means by which to abate it. An employer can reasonably be expected to conform a safety program to any known duties.

J.A. Jones Constr., 1993 WL 61950 at *5 (internal citation and quotation marks omitted). In that case, the Commission held that by developing a safety program with measures for detecting and correcting fall hazards the employer manifested "actual notice" of what it must do in order to provide the appropriate fall prevention program mandated under 29 C.F.R. § 1926.20(b)(1). *Id.*

Here, Walmart was well aware that its storage of material created a struck-by hazard because items regularly fell from stored pallets into areas where employees were working, the very hazard that § 1910.176(b) aims to eliminate. *See* JA 45-46, 74-77, 92-93. Walmart also had a work rule requiring employees filling orders in the storage aisles to maintain a "safe distance" of 20 feet from forklift drivers who were moving palletized merchandise onto or off a reserve location on the storage racks. JA 28, 31, 88, 128 (paragraph 16).

This effort to prevent employees from being struck by merchandise falling from the upper slots of the racks, coupled with the company managers' knowledge

that articles sometimes fell from the upper levels of the storage racks, establishes that Walmart "was aware of the existence of a hazard and of a means by which to abate it." *J.A. Jones Constr.*, 1993 WL 61950 at *5; *see also Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1485 n. 8 (No. 88-2691, 1992) (an employer's safety efforts constitute evidence that the employer had notice of its obligations under a broadly-worded standard). Hence, the first sentence in § 1910.176(b) is not impermissibly vague as it pertains to Walmart because the company indeed determined that it could prevent struck-by hazards from falling storage material by keeping employees a "safe distance" away when pallets were being moved via material handling equipment. *See J.A. Jones Constr.*, 1993 WL 61950 at *5; JA 28, 31, 88, 128 (paragraph 16).

In sum, because § 1910.176(b)'s first sentence contains a mandatory requirement applicable to material in storage generally, the provision applies in this case and required Walmart to prevent hazards associated with storage of all pallets at the Johnstown Facility. Accordingly, even if Walmart's pallets are not considered "stored in tiers" within the meaning of § 1910.176(b), the company nonetheless violated the standard's first sentence by exposing employees to struck-by hazards from falling storage material.

IV. The Record Conclusively Demonstrates That Walmart Violated § 1910.176(b) By Exposing Employees to the Struck-By Hazard of Storage Material Falling From Tiered Racking.

There are no material facts in dispute in this case, and the record evidence establishes that Walmart violated § 1910.176(b). Undisputed evidence in the record establishes all of the elements of the Secretary's *prima facie* case: (1) the cited standard applied; (2) Walmart violated the standard; (3) Walmart had knowledge of the violative conditions; and (4) employees were exposed to the violation. *See Triumph Constr. Corp. v. Sec'y of Labor*, 885 F.3d 95, 98 n.3 (2d Cir. 2018). No additional fact-finding is necessary to establish any of these elements and to affirm the Secretary's citation.

The Court should therefore affirm the citation based on undisputed record evidence that Walmart violated the terms of § 1910.176(b) by exposing employees at the Johnstown Facility to struck-by hazards from pallets of material stored in tiered racking. As Commissioner Attwood concluded in her dissenting opinion, "the manner in which Walmart stored its pallets—overhanging the front and back rails of the racking by only 3 inches, with back-to-back racks only 4 to 5 inches from one another—was not 'stable and secure against sliding and collapse' caused by a known and frequently occurring outside force [*i.e.*, material handling equipment]." JA 292. The pallets of stacked merchandise rested precariously on the front and back rails with a 42-inch gap underneath and there was nothing to

block the pallets from sliding and falling through the open gap. JA 16-18, 21, 37-39, 42, 67, 70, 97, 99, 156-57, 292. And as the ALJ correctly noted, even a "perfectly placed" pallet had only a few inches of overhang on each beam to it from falling. JA 157.

These storage conditions presented a hazard, in violation of § 1910.176(b), because merchandise stacked on the pallets occasionally fell from the tiered racking system due to operator error when another pallet moved via forklift bumped a pallet stored on an adjacent rack, causing it to tip and fall through the 42-inch gap underneath the pallet.[20] *See* JA 24-27, 77-79, 92, 97, 99, 157, 292. Moreover, employees retrieving merchandise were regularly exposed to the hazard of falling merchandise, and one employee was seriously injured when displaced storage material fell on her head. *See* JA 10-13, 23-27, 29, 39-41, 44, 48-49, 66-67, 73-75, 77-79, 92-93, 157-58, 293-94.

And, as both Commissioner Attwood and the ALJ correctly found, the undisputed evidence established that Walmart had knowledge of the violative condition. *See* JA 158-60, 295-96. Two managers at the Johnstown Facility admitted being aware of merchandise falling through the racks. JA 14, 45-46, 74,

[20] Furthermore, as Commissioner Attwood correctly determined, "even if Walmart's racks are configured and used in accordance with industry standards and manufacturer recommendations," the undisputed evidence that two Walmart managers had actual knowledge that pallets frequently tip and spill merchandise "establishes a known hazard with regard to Walmart's storage of pallets." JA 293.

92-93, 159, 292, 295-96. In fact, one manager acknowledged that merchandise "occasionally" fell from the racking system when a pallet was struck and tipped by a forklift driver. JA 92-93. The injured employee also confirmed that Walmart managers were aware of the hazard because she personally expressed concern to managers about storage materials falling from the racks. JA 14. Her concerns, however, were simply "brushed off to the side." *Id.* Walmart also failed to adequately communicate to supervisors and effectively enforce its 20-foot work rule to prevent struck-by hazards caused by its storage practices. JA 159-60, 128 (paragraph 16).

Given this undisputed evidence, the Court has the discretion to decide this case without remanding it to the Commission, and the Court should exercise that discretion to conserve administrative and judicial resources and prevent further prolonging this case.[21] This case has already been unresolved for more than four years, and further delay in clarifying the standard would "do[] a disservice to both

[21]A remand in this case is unnecessary because the record conclusively establishes that Walmart violated § 1910.176(b). "A recognized exception to the general rule, requiring a case to be sent back for lack of findings, is where the record considered as a whole does not present a genuine issue as to any material fact." *Yanish v. Barber*, 232 F.2d 939, 947 (9th Cir. 1956) (internal quotation marks and citations omitted); *see also Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 161 (2d Cir. 2006) (noting that the Court has discretion to, where appropriate, affirm factual findings made by a fact-finder instead of issuing a remand).

employers and employees. . . ." *Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249, 1254 (D.C. Cir. 2012).

CONCLUSION

For the foregoing reasons, the Court should grant the Secretary's petition for review, reverse the final order of the Commission, and affirm the citation.

Respectfully submitted,

SEEMA NANDA
Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor for
Occupational Safety and Health

LOUISE M. BETTS
Counsel for Appellate Litigation

/s/ Juan C. Lopez
JUAN C. LOPEZ
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., NW, S-4004
Washington, DC 20210
(202) 693-5513
lopez.juan.c@dol.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief is produced using Microsoft Word, 14-point typeface, and complies with the type volume limitation prescribed in Fed. R. App. P. 32(a)(7)(B), because it contains 9,503 words, excluding the material referenced in Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman.

/s/ Juan C. Lopez
JUAN C. LOPEZ
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., NW
Room S-4004
Washington, DC 20210
(202) 693-5513
lopez.juanc.c@dol.gov

November 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on November 5, 2021, a copy of the Secretary's Final Form Brief was filed electronically via the Court's CM/ECF Electronic Filing System, providing service on counsel for Appellee, listed below:

Ronald W. Taylor
Thomas H. Strong
Venable LLP
750 E. Pratt St., Suite 900
Baltimore, MD 21202
(410) 244-7654
rwtaylor@venable.com
thstrong@venable.com

Benjamin E. Stockman
Venable LLP
Rockefeller Center
1270 Avenue of the Americas, 24th Floor
New York, New York 10020
(212) 307-5500
bestockman@venable.com

/s/ Juan C. Lopez
JUAN C. LOPEZ

Date: November 5, 2021