United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. SCHAAD DETECTIVE AGENCY, INC., Respondent.	OSHRC Docket No. 16-1628

Appearances: Nicholas C. Geale, Acting Solicitor of Labor
Oscar L. Hampton III, Regional Solicitor
Michael P. Doyle, Regional Counsel
U.S. Department of Labor, Office of the Regional Solicitor, Philadelphia, Pennsylvania
For the Secretary

L.C. Heim, Esq.
Katherman, Heim & Perry
York, Pennsylvania
For the Respondent

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to sections 2-33 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). At about 7:00 a.m., March 20, 2016, an employee, first name

[redacted],[1] for Schaad Detective Agency (Schaad or Respondent) was shot and killed by an armed robber, Clarence Leslie Briggs, during a robbery of one of Respondent's clients that occurred at the Fort Littleton Pennsylvania Turnpike Interchange, near Mile Marker 180 of the Pennsylvania Turnpike (PA Turnpike). [redacted] was a contracted armed security guard tasked with protecting a Pennsylvania Turnpike Commission (PTC) employee and van driver (also referred to as a "teller"), [redacted], while he delivered and collected money at PA Turnpike tollbooths.[2] Mr. Briggs was a retired 25-year state trooper familiar with the money exchange detail on the PA Turnpike. (Tr. 153, 157; Ex. 9 at 1-4). [redacted] was not wearing a ballistic-resistant vest, even though Respondent had provided and encouraged, but did not require, him to wear one.[3] Mr. Briggs shot [redacted] at least twice in the chest with a high-power rifle, and he died due to the bullet wounds to his torso. (Tr. 153-55; Ex. 9 at 1-4, 9, 12).

The Occupational Safety and Health Administration (OSHA) investigated Respondent as a result of this incident. As a result of the investigation, OSHA issued Respondent on September 20, 2016, a citation alleging a serious violation of 29 C.F.R. § 1910.132(a)[4] and

[1] For privacy reasons and in view of his death as a result of the incident, only [redacted]'s first name is used in this decision.

[2] Mr. Briggs also shot and killed a PTC tollbooth collector employee during the robbery. (Tr. 45; Ex. 9 at 1-4, 12).

[3] In this case, the vests at issue have been referred to throughout the record as "ballistic vests," "ballistic-resistant vests," "bullet-proof vests," "bulletproof vests," "bullet-resistant vests," and "body armor," interchangeably. For the purposes of this decision, the Court also uses the terms interchangeably, even though the terms may have different definitions in another context outside of this case. The Court recognizes that the vests at issue here are commonly referred to as "bulletproof vests," but in this case, the exact capability of the vest (whether it be completely bulletproof or just resistant, and whether it protects against all ballistics, or just bullets) was not squarely placed in front of the Court. The issue, rather, was whether any vest, qualifying as personal protective equipment, required by OSHA. Here, the Court finds that the Secretary has not established that Personal Protective Equipment (PPE) vests were required at all.

[4] Section 1910.132(a) states:

> *Application*. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of

proposing a $12,471 penalty.[5] Respondent filed a timely notice of contest, bringing this matter before the Commission.

In its Answer to the Secretary's Complaint, Respondent admitted that it was an employer within the meaning of section 3(5) of the OSH Act, 29 U.S.C. § 652(5) and admitted to "the time, location, place, and circumstances of each alleged violation under contest [as] set forth in the Citation and Notification of Penalty." (Answer at ¶¶ 3-5). Respondent, however, denied that the proposed penalty gave "due consideration to the gravity of the violations, the size of Respondent's business, Respondent's good faith, and its history of previous violations, as required by Section 17(j) of the Act, 29 U.S.C. 666(j)." (Answer at ¶ 6). Respondent further stated: "The penalties are unreasonable under the circumstances in this case." (Answer at ¶ 6). Respondent then requested "that the Commission either dismiss the Citations or reduce the penalties to a minimal amount." (Answer at 1).

The trial was held on October 24 and 25, 2017 in York, Pennsylvania.[6] Both parties filed post-trial briefs, and Respondent filed a post-trial reply brief. For the reasons set forth below, the Court vacates Citation 1, Item 1.

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causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

29 C.F.R. § 1910.132(a).

[5] Along with Citation 1, Item 1, OSHA also issued another citation item, Citation 2 Item 1, alleging one other-than-serious violation of 29 C.F.R. § 1904.39(a) and proposed an $8,908 penalty. The parties settled this Citation 2, Item 1 (an alleged reporting violation) on October 19, 2017. (Tr. 12-13). Only Citation 1, Item 1 (the alleged PPE violation) remains to be adjudicated. (Tr. 15).

[6] The Secretary had filed a Motion for Summary Judgment on September 25, 2017, and Respondent filed its Opposition on October 10, 2017. The Secretary's Motion for Summary Judgment remained pending at the time of the trial. (Tr. 34). On November 1, 2017, the Secretary's Motion for Summary Judgment was denied without prejudice to raising the arguments contained in his Motion and presenting evidence in support thereof at the trial on the merits, and/or in his post-trial briefs. *See Order Denying Secretary's Motion for Summary Judgment Without Prejudice* (Nov. 1, 2017).

STIPULATIONS

The following statements were stipulated to by the parties before trial and entered into the record at the request of the parties at trial:

1. Respondent is a corporation organized under Pennsylvania law.

2. Respondent has a website at www.schaad.com.

3. Respondent provides comprehensive security and private investigation services throughout Pennsylvania, including armed security guard services.

4. Russell Wantz, Jr. is, and at all relevant times was, owner and sole shareholder of Respondent.

5. Timothy Lenahan is, and at all relevant times was, general manager of Respondent.

6. Mr. Lenahan is responsible for day-to-day operations for Respondent.

7. Mr. Lenahan reports directly to Mr. Wantz.

8. From 1997 through 2016, Respondent had a contract with the Pennsylvania Turnpike Commission under which Respondent provided armed escorts to ride with Turnpike tellers in Turnpike vans as the tellers collected money from toll stations.

9. In 2008 and 2009, Respondent purchased Level IIIA ballistic-resistant vests for employees who served as armed security guards, including those who performed armed escort duty under the Turnpike contract.

10. Respondent encouraged employees who had been provided ballistic-resistant vests to wear the vests, but did not require their use.

11. Respondent provided ballistic-resistant vests to armed guards, but not to unarmed guards.

12. [redacted] was an employee of Respondent on March 20, 2016.

13. [redacted] was shot and killed on March 20, 2016, while serving as an armed escort pursuant to the contract between Respondent and the Pennsylvania Turnpike Commission.

14. [redacted] was shot during an attempted robbery at a tollbooth interchange.

15. [redacted] was not wearing a ballistic-resistant vest at the time he was shot on March 20, 2016.

16. Respondent knew before 5 p.m. on March 20, 2016, that [redacted] had been killed earlier that day.

17. Respondent reported [redacted]'s death to OSHA on March 22, 2016.

18. [redacted]'s failure to wear a ballistic-resistant vest on March 20, 2016, was not a violation of any of Respondent's rules or policies.

19. Prior to [redacted]'s death, in Respondent's 45-year history of providing armed and unarmed security services, and involving thousands of employees, there was never a single incident of an employee being confronted by deadly force.

20. At the time of [redacted]'s death, Respondent had no policy requiring its employees who served as armed security guards to wear ballistic-resistant vests while on duty.

21. After [redacted]'s death, Respondent drafted and implemented a policy requiring all armed guards to wear ballistic-resistant vests during their shifts while engaged in field activities.

22. OSHA's August 6, 2013 opinion letter on ballistic-resistant vests (from Thomas Galassi to Mrs. Diane Stein) was posted to OSHA's public website on April 16, 2014.

(Stipulations (Stip.), Joint Pre-Hearing Statement (Jt. Pre-Hr'g St.)), at 6-8; Tr. 31-32).

During the trial, the parties also stipulated that the bullet proof vests purchased by Schaad from 2009 through March 2016 were Level III-A. (Tr. 84; Ex. 6).

JURISDICTION

The record establishes that Respondent has approximately 380 employees, most of which are security guards in either armed or unarmed capacity. (Tr. 124). Additionally, Respondent filed a timely notice of contest and admits that, as of the date of the alleged violations, it was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. (Answer at ¶¶ 3-5). Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case, and

Respondent is covered under the OSH Act.

OSHA CITATION

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1910.132(a) and proposes a $12,471 penalty. The Secretary claims that Respondent violated the cited standard because:

> Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:
>
> (a) Turnpike Interchanges and Regional Offices throughout the Entire Pennsylvania System – Employees worked as armed security officers providing security for the Pennsylvania Turnpike Commission fare collection operation, which involved the delivery and pick up of money. The employer did not require and ensure that these armed security officers wore ballistic-resistant body armor vests, exposing employees to ballistic injuries to the vital organs in the torso, on or about March 20, 2016.

(Citation at 6). Section 1910.132(a) requires that PPE "shall be provided, used, and maintained … wherever it is necessary by reason of hazards of processes or environment…." 29 C.F.R. § 1910.132(a).

BACKGROUND

Respondent's Armed Security Guards

Respondent provides armed and unarmed security for its clients throughout Pennsylvania. About 65% of Respondent's employees are armed security guards. (Tr. 124; Stip. 3). In 1997, Respondent contracted with the PTC to provide armed security guards to protect PTC teller employees who delivered and collected money at PA Turnpike tollbooths.

As part of their duties, Respondent's armed security guards accompany the PTC teller employee in an unmarked, "standard civilian-issue cargo van (van), no windows on the sides or the back," and no signage to identify what it was. (Tr. 79). The PTC teller employee drove the unmarked van and Respondent's armed security guard would sit "shotgun seat with them." (Tr. 95). The PA Turnpike detail generally started around 7:00 a.m. when Respondent's armed

security guard met the PTC teller employee at a PA Turnpike tollbooth, accompanied the PTC teller employee in the unmarked van to about 6-8 Turnpike tollbooths, and then returned around noon. (Tr. 95-97).

The duties of Respondent's armed security guards while working the PA Turnpike detail focused on the security of the PTC teller employee who was responsible for driving the van and exchanging money at the PA Turnpike tollbooths. The armed security guards' focus was not on the money being exchanged. As a guard of the PTC teller/driver of the van, Respondent's armed security guard stood outside the van while the PTC teller entered tollbooths. The armed security officer guarded the PTC teller's back while the PTC teller took money inside the tollbooth. The armed security guard would stay outside of the tollbooth, and then accompany the PTC teller back into the van and leave. (Tr. 71-73, 87-89, 95-97).

At no time, including in the event of a robbery, were Respondent's armed security guards to handle the money. (Ex. 5 at 1-2). Rather, Respondent's armed security guards served as a "deterrent" to robberies. (Ex. 5 at 1, section 2.0(C)). As a "deterrent," the armed security guards were to act in accordance with Respondent's Standard Operation Procedures while working the PA Turnpike detail. (Ex. 5). In the event of a robbery, Respondent's policy for its armed security guards is "to be a deterrent only. The safety of the teller is the only goal. If a robbery is attempted/committed contact the PSP [Pennsylvania State Police] immediately." (Ex. 5 at 2; Tr. 143).

In this case, however, after being told of an armed robbery in progress, [redacted] left the van and Teller [redacted] sitting in it at a tollbooth and moved to a building looking for Mr. Briggs, who shot and killed him. (Tr. 152-55: Ex. 4, 12). After the incident, Respondent no

longer held the contract with the PTC for the PA Turnpike detail. The PTC now contracts with an armored truck company for that task. (Tr. 125).

The Incident

At about 6:45 a.m., March 20, 2016, PA Turnpike Tollbooth Collectors [redacted] and [redacted][7] were in their tollbooth at the Fort Littleton Pennsylvania Turnpike Interchange, near mile marker 180 of the PA Turnpike. Mr. Briggs approached their tollbooth on foot wearing a camouflage mask and body armor. He pointed a hand gun at [redacted] and ordered both her and [redacted] into the breakroom of an adjacent building, where he ordered [redacted] to tie [redacted]'s hands behind his back. She did so. While Mr. Briggs was tying [redacted]'s hands, [redacted] got out of his restraints and took the hand gun away from Mr. Briggs. [redacted] ran back to her tollbooth and notified Pennsylvania State Trooper Highspire (presumably by telephone) that an armed robbery was in progress.

As the PA Turnpike toll collection unmarked red van driven by PTC Teller [redacted], with Respondent's armed security guard [redacted] (age 71) sitting in the passenger seat, arrived at lane 3 of the toll area at about 7:00 a.m., [redacted] saw Tollbooth Collector [redacted] walking around a building holding a gun and missing a shoe. He also saw and overheard [redacted] telling Trooper Highspire that she and [redacted] had been robbed at gun point. [redacted] knocked on [redacted]'s passenger door and told [redacted] "they needed him because he was armed and the robber just went around the building." [redacted] exited the van and circled around the rear of the van towards the south side of the building. [redacted] went around the front of the van and also moved toward the building.

[7] For privacy reasons and in view of his death as a result of the incident, only [redacted]'s first name is used in this decision.

Mr. Briggs recovered a high-power assault rifle he had pre-positioned outside the building before the start of the robbery. Mr. Briggs fired three shots from his rifle striking [redacted] twice in the chest and killing him at the south side of the building. Mr. Briggs also struck [redacted] with one shot from his rifle while [redacted] was at the south side of the building. [redacted] then walked to the west side of the building and collapsed falling to the ground and died.

Pinned in the van because the tollbooth was blocking him from opening the door of his van, [redacted] saw and/or heard the shootings. [redacted] then saw Mr. Briggs, wearing a mask, in front of his PA Turnpike red van. Mr. Briggs fired one shot into the van's windshield. [redacted] put the van in reverse and while driving about 60 feet backwards, Mr. Briggs fired another shot into the van's windshield. Fearing for his life, [redacted] put the van in park, exited the van and ran along the guardrail. As he was running, he heard Mr. Briggs fire two additional gun shots. He crouched lower and fell because he pulled his hamstring. He got up and jumped over a concrete Jersey barrier. He then saw Mr. Briggs get into and steal the PA Turnpike's red van that had been earlier driven by [redacted]. Mr. Briggs drove the red van through the lane of the toll area heading towards SR 522.

Pennsylvania State Troopers [redacted] and [redacted] then arrived at the scene. [redacted] showed them his identification badge and told them that the robber had just got into the PA Turnpike's van and was driving away towards SR 522. The two troopers drove through the tollbooths towards SR 522. Mr. Briggs fired additional shots. Trooper Holdford positioned his marked patrol vehicle facing towards the PA Turnpike building. He heard two more shots coming from the direction of the red van that he could see through pine trees that were between himself and SR 522. Mr. Briggs fired two additional shots coming from the direction of the

red van. Using his personal patrol rifle, Trooper [redacted] shot Mr. Briggs one time in the upper leg femur, hitting an artery. Mr. Briggs died at the scene "fairly quickly" from loss of blood. (Tr. 153-56; Ex. 9, at 1-4, 9, 12, 39).

Respondent's Uniform and Policies for Armed Security Guards

While on duty, Respondent's armed security guards wear a uniform which includes black boots, navy blue pants, a black belt, navy blue uniform shirt, and a gold badge denoting the guard's rank within Respondent's hierarchical structure. (Tr. 75-76). Each armed security guard supplies his own weapon. For example, Matthew Titus testified that he wore his Glock Model 22.4 caliber handgun while on duty. (Tr. 76).

In accordance with Respondent's continuum of force policy, Respondent's armed security guards were, in all instances, trained to use deadly force, and in some instances, allowed to use deadly force. (Ex. 4). The following is the relevant portion from Respondent's use of deadly force continuum document:

1. All Schaad Armed Officers receive their certification and initial training from Harrisburg Area Community College. The curriculum is approved by the Pennsylvania State Police. We provide sustainment training annually on the use of force continuum (see below).
2. Always remember:
   (a) The threat must be current, immediate, and unavoidable.

   (b) Your level of force must be appropriate to the threat.

   (c) Your use of force must stop when the threat ceases.

3. The use of force continuum:

   1. Physical Presence
   2. Soft Hands
   3. Mace or Pepper Spray
   (A K-9 unit would fall here)
   4. Hard Hands
   5. Police Baton, Taser, etc.
   6. Threat of Deadly Force
   7. Deadly Force

4. POC this memorandum is Timothy P. Lenahan, General Manager.

(Ex. 4 at 1). All of Respondent's armed security guards are required to complete "Act 235 training."[8] (Tr. 128).

Respondent also provides a Level IIIA ballistic resistant vest to its armed security guards. (Tr. 84, 147, 256-57; Exs. I (photograph of Level III-A), II (photograph of Level II-A; Jt. Pre-Hr'g St. at ¶ 9). The parties stipulated that the chart below represents "the protection level of the various levels of ballistic-resistant vests, and what they stop and what they are meant to stop." (Tr. 120).

Level IIA Density 3.5 Thickness 4mm Protection from: .22mms/.9mm/.45mm/.380mm/.38mm
Level II Density 4.2 Thickness 5mm Protection from: .22mms/.9mm/.45mm/.380mm/.38mm/.22mml
Level IIIA Density 5.9 Thickness 6mm **Protection from: .22mms/.9mm/.45mm/.380mm/.38mm/.22mml/.44mag**
Level III Density 25.9 Thickness 15mm Protection from: Same as Level IIIA and .30carb/5.56mm/7.62mm/.30-06
Level IV Density 32.5 Thickness 20mm Protection from: Same as Level III and .30armor Piercing

Ex. II (Level IIIA emphasis added in bold).

Respondent actively encourages its armed security guards to wear the vest but does not require them to wear it. (Jt. Pre-Hr'g St. at ¶ 10). The record shows that reasons Respondent's armed security guards wore the vest include: feeling like a target in the uniform, wearing a firearm, and working with money. (Tr. 53, 76-78, 99). The record shows that reasons

[8] Act 235 training was described by many witnesses at the trial, but no legal citation to Act 235 is in the record. *See, e.g.*, Tr. 97-98 (Ann Allman), 128 (Timothy Lenahan), 160-61 (Dr. Daniel Benny). Respondent's memorandum regarding use of lethal force by its armed security guards suggests that it requires training in accordance with Act 235. *See* Ex. 4 at 1 ("All Schaad Armed Officers receive their certification and initial training from Harrisburg Area Community College. The curriculum is approved by the Pennsylvania State Police.") Based on this record evidence regarding the relevance of Act 235, which is undisputed, the Court finds that Act 235 is a Pennsylvania firearm training requirement for Respondent's armed employees.

Respondent's armed security guards did not wear the vest include: it can get too hot, and it can also be uncomfortable while driving. (Tr. 53, 150). Mr. Lenahan, one of Respondent's supervisors, also told OSHA Compliance Officer (CO) Annette Ritner that the "older element didn't prefer to wear them because of comfort." (Tr. 46).

Secretary's Case

The Secretary's witnesses included CO Ritner and OSHA Assistant Area Director (AAD) David Olah, who were responsible for the investigation of and citation issued to Respondent for the alleged OSHA violation. The Secretary also called four of Respondent's armed security guards as witnesses, all of whom either were or are supervisors for Respondent's armed security guards (Matthew M. Titus, John Spadafora, Ann Allman and Timothy Lenahan). The Secretary further introduced testimony from one expert witness, Dr. Daniel J. Benny. The Secretary also introduced an OSHA Letter of Interpretation (LOI), issued in 2013, regarding bulletproof vests and the standard that was cited in this case. The following is the relevant excerpt from the letter:

> **Question:** Does the Personal Protective Equipment (POE) standard, specifically 29 CF[R] 191 0.132(a) apply to body armor (such as, but not limited to, bullet or stab resistant vests)?
>
> **Reply:** If an employer chooses bullet proof vests and body armor to protect its employees on the job from gunshot wounds and knife stab wounds, the employer must select equipment that is adequate to protect against these hazards and must provide it at no cost to its employees. OSHA considers equipment or clothing such as body armor, a bullet proof vest or a stab-resistant vest, to be personal protective equipment that may be required by 1910.132(a) fn 1 and would not be ordinary clothing or everyday clothing for purposes of the exceptions for payment at 1910.132(h)(4)(ii) fn 2 or (iii) fn 3." [sic]
>
> Fn 1: Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable

> of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact[.]
>
> Fn 2: Everyday clothing, such as long-sleeve shirts, long pants, street shoes, and normal work boots[.]
>
> Fn 3: Ordinary clothing, skin creams, or other items, used solely for protection from weather, such as winter coats, jackets, gloves, parkas, rubber boats, hats, raincoats, ordinary sunglasses, and sunscreen.

(Ex. 10 at 1-2).

Respondent's Case

In its defense, Respondent used two expert witnesses, Edward Sorrells and M. Rebecca Downing, to rebut the Secretary's case. Respondent also introduced testimony from an armed security guard, John Derryman. Mr. Derryman is not Respondent's employee, but a contracted employee of the private security firm that provides armed security for a United States District Courthouse.

HIGHLIGHTED FINDINGS OF FACT

The following findings of fact drawn out during the trial are the most influential to the conclusions of law for this case:

1) OSHA considers the hazard in this case to be exposure to a "typical holdup" involving a "lower-caliber handgun" based on the everyday money transfer over the course of Respondent's armed security guards' duties; not the sensational series-of-events that occurred on March 20, 2016. (Tr. 114).

2) It is undisputed that Respondent's armed security guards face a hazard of being shot on the job. What is in dispute is the level of risk (composed of severity of harm and likelihood of occurrence) associated with this hazard at Respondent's worksites. *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC 1396, 1400-01 (No. 08-1292, 2015) ("[t]o establish the applicability of a PPE standard that, by its terms, applies only where a hazard is present," Secretary must demonstrate that "there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE"), *aff'd in part and vacated in part on other grounds*, 819 F.3d 200 (5th Cir. 2016); *Weirton Steel Corp.*,

20 BNA OSHC 1255, 1259 (No. 98-0701, 2003) ("Whether there exists a significant risk depends on both the severity of the potential harm and the likelihood of its occurrence . . . .").

3) It is undisputed that the severity of being shot while not wearing PPE is high, potentially leading to death.

4) It is undisputed that a bulletproof vest would reduce the harm to an employee if the employee were shot in the torso. (Tr. 130).

5) The Secretary's expert opined that any guard is in a "high-risk position" when they are armed, handling money, and wearing a uniform, because they are a target for a robber. (Tr. 175-76). The Secretary's expert did not specifically testify regarding the unmarked van in this case and Respondent's 45-year assault-free history.

6) In contrast, Respondent's expert testified that the specific factors surrounding the PA Turnpike detail "at a minimum give rise to the conclusion that this is not a high level of risk[.]" (Tr. 207). In making this risk assessment, Respondent's expert specifically considered the act of money transfer, the unmarked van which masked the money transfer operation, and the zero instances of physical assault that had occurred in the previous 45 years. (Tr. 206-07, 214). Respondent's expert testified that this was not an "armored car" situation leading up to and on March 20, 2016. (Tr. 214).

7) All expert witnesses, including the Secretary's expert witness, agreed that Respondent's industry does not require, and has never required, bulletproof vests. *Voegele Co. v. Occupational Safety & Health Review Comm'n*, 625 F.2d 1075, 1080 (3d Cir. 1980) ("'The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary.' However, it would be error totally to ignore or fail to consider prevailing industry standards."). (citation omitted).

8) It is undisputed that Respondent went beyond the industry norm to purchase and provide bulletproof vests to its armed security guards. Respondent spent $30,000 in 2008 to purchase tailored-fit ballistic vests, which took 8-9 weeks to manufacture. Respondent subsequently spent $18,000 in 2016 for more ballistic vests. (Tr. 130-35).

RELEVANT TESTIMONY

CO Annette Ritner

CO Ritner testified regarding her inspection of Respondent's workplace.[9] AAD Olah called her on Tuesday, March 22, 2016 to give her the assignment.[10] She went first to the main office of Schaad in York. She presented her credentials and met with Messrs. Wantz and Lenahan. Mr. Wantz told her he had called OSHA that morning, but CO Ritner did not know that at the time of the inspection. She conducted an opening conference. Messrs. Wantz and Lenahan described the event to CO Ritner together. CO Ritner asked Mr. Wantz about Respondent's training and PPE requirements. She learned that Respondent provided bullet proof vests to its employees, but that [redacted] was not wearing one on the day of the incident. Mr. Lenahan told CO Ritner that "the older element didn't prefer to wear them because of comfort." (Tr. 43-46).

According to CO Ritner, Respondent had the PA Turnpike contract with the PTC since 1997. All of Respondent's security officers have "been law enforcement – had to provide documentation to prove that they were previous law enforcement officers." CO Ritner thought to ask about ballistic-resistant vests because [redacted] was shot in the torso and "that would protect against bullet wounds to the torso." CO Ritner had seen bulletproof vests that go under and over clothing. Messrs. Wantz and Lenahan said the vests that "their people wore" were

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[9] At the time of the trial, CO Ritner had been an OSHA CO for 20 years. She has a Bachelor of Science degree in business administration, and also Bachelor of Science and Master of Science degrees in safety sciences from Indiana University of Pennsylvania. CO Ritner has performed 20-30 fatality investigations over 20 years involving various industries including construction, demolition, and manufacturing, like metal fabrication shops, machine shops, boundaries, warehouses, and food processing. She has inspected cases resulting in OSHA citations for improper or lack of PPE such as head protection, hand protection, foot protection, clothing, and fire-resistant clothing. (Tr. 41-43).

[10] CO Ritner also testified that the incident had been reported in the media, so she was already aware of the matter when it was assigned to her. (Tr. 43-44).

"level 3A." CO Ritner viewed a security officer wearing a bulletproof vest during their meeting, and, even though the vest was worn underneath the security officer's shirt, CO Ritner "could see that she had it on, because it was bulky." (Tr. 46-48; Stip. 8).

CO Ritner researched the following during her investigation: the OSHA directive regarding workplace violence, National Institute of Occupational Safety and Health (NIOSH) publications on the security and protective industry, Bureau of Labor Statistics information on that industry, and the OSHA citation database for previous similar instances (where employees are "shot on the job"). During the investigation, CO Ritner subpoenaed the following documents: the state police investigative report, the contract between Pennsylvania and Respondent to see the description of the work detail or the scope of work, Respondent's safety and health programs and PPE requirements, a list of Respondent's current employees, and information on the vans that were used on the PA Turnpike detail.[11] (Tr. 48-50).

CO Ritner interviewed two employees over the phone: Robert Burford told her that he had worked for Respondent about 10-14 days per month, including during the previous six months of the OSHA investigation. He had taken lethal weapons training and was a retired Pennsylvania State police officer. He had to provide his own weapon, and he had his own bulletproof vest. Mr. Burford told CO Ritner that he always wore his vest and wore a uniform that Respondent required him to wear. He told her that "he did not feel afraid, but the fact that they handled money, there was always a threat." (Tr. 54-55).

CO Ritner also interviewed Jeffrey Aster, who was a "very part-time" but current employee of Respondent. For example, he had worked for Respondent only one time since the

[11] CO Ritner did not receive a copy of the police report prior to issuing the citation because the police were not finished with the investigation yet. (Tr. 50).

incident six months prior to their interview. Mr. Aster carried his own weapon on the job, he had lethal weapons training, and was previously a police officer. Mr. Aster told CO Ritner that he was issued a bullet-proof vest, and wore it "mostly," but not when it was hot, "like if it was 95 degrees or more." Mr. Aster worked the northeast extension of the PA Turnpike, his hours being 5:00 a.m.-12:00 noon.[12] Mr. Aster told CO Ritner that he had to wear a uniform – but did not like it because he thought it drew attention to the operation that involved money. (Tr. 50-54).

CO Ritner wrote the citation. (Tr. 56-57; Ex. 1 at 8). She proposed an alleged section 1910.132(a) violation based on her research. CO Ritner considered the combination of money and firearms contributed to a "struck-by hazard from bullets," and testified that "a bulletproof vest is designed to protect against that." She also considered the OSHA National Office's LOI, where OSHA stated that it considers bulletproof vests as personal protective equipment. (Tr. 58; Ex. 10). She relied on this letter to make a recommendation to issue the citation here. She testified that OSHA letters of interpretation "provides us guidance on – one how to – how standards apply and how to address hazards." (Tr. 56-58).

On cross-examination, CO Ritner testified that the alleged violation was based upon the wording of section 1910.132(a)[13] and the LOI. (Tr. 59; Ex. 10). She agreed that the LOI did not include mandatory language that said if an employer supplies bullet proof vests to its employees, they must wear the them. (Tr. 59-60). She further agreed the LOI said OSHA considers bullet proof vests to be PPE that "may be required by 1910.132(a)." She also agreed

[12] The northeast extension of the PA Turnpike runs north to south in the Lehigh valley; the PA Turnpike runs east to west. (Tr. 54).

[13] CO Ritner testified "that it [section 1910.132(a)] requires an employer to provide personal protective equipment where there are hazards that necessitate the use and the environment that employees work in." (Tr. 60). She also said, "the standard says that if there is a hazard that necessitates the use of personal protective equipment then it's required." (Tr. 61).

that the LOI did not say bullet proof vests are required. The CO agreed that, even though there are four or five levels of bulletproof vests, the regulation does not specify which level would satisfy the regulation requirements. In her opinion, the requirement for an employer to provide a bulletproof vest and require its wear was triggered by the fact that Schaad's employees "carried firearms" and "were involved in an operation with the protection of money and valuables, so they had an exposure to a struck-by hazard of bullets." CO Ritner said that [redacted] "died of multiple bullet wounds to the torso, and a bullet-resistant vest would protect against that." She said that [redacted]'s exposure "to a struck-by hazard from bullets" required Schaad to provide bullet proof vests to its employees and mandate their wear. The CO said that the "armed robber" caused the hazard by firing bullets at [redacted]. (Tr. 60-64).

She also agreed that Mr. Wantz told her that Respondent had never had an employee killed before. In addition, CO Ritner testified that Respondent had no other previous incidents of being confronted with deadly force. She testified that "studies" indicate that security officers have "a higher instance of fatalities" and that a "risk factor" in the occupation "was protecting valuables and money." She said that a study stated that "in 75 percent of the time security officers die because of being shot." CO Ritner agreed that these studies are not in the regulation itself. She agreed that each citation "comes down to the evaluation of the individual investigator … because I propose the citation." (Tr. 60-67).

Matthew McGarvey Titus

Mr. Titus is a Legal Assistant II for the Pennsylvania State Police in the PICS Unit, where he runs background checks for firearm purchases. He also works as a part-time security officer for Respondent. Mr. Titus was first hired by Respondent in January 2007 as a

lieutenant and testified that he was issued a Level II vest around 2010 or 2011.[14] Mr. Titus became a supervisor for Respondent in 2014. Her served for six months as a supervisor for Respondent until February 2015, when he left for his current position for the Pennsylvania State Police. Before being hired by Respondent in 2007, Mr. Titus had also previously served as a police officer for the Southwest Regional Police Department in York County for about a year. (Tr. 70-72, 80-81).

Mr. Titus has worked the "east/west" PA Turnpike detail for Respondent, where he "provided escort to the money vans that went up and down the turnpike." He worked the detail "once or twice" before the incident, and he worked as a fill-in officer for a few weeks "shortly after the incident." His primary job duty on the PA Turnpike detail was to escort the individuals transporting money; their safety was his primary concern, he was "not the keeper of the money." He said that the security officers "did not touch money at all." They were there as a deterrent. Mr. Titus explained that he "stayed with the driver and the change maker." (Tr. 71-73, 75, 78).

The duties of the driver, also known as a "teller," included driving "from turnpike station to turnpike station," and picking "up bags to be placed into the back of the van, which were then transported back to headquarters." Sometimes another "teller" would sit in the back of the van preparing a bag of ones, fives and tens for the PA Turnpike tollbooth to make change. Mr. Titus testified that he did know the exact amount of money that the tellers handled, but it "struck him" as a large amount of money because of the "five-foot by two-foot trays, arranged in denominations" of money, and anywhere between 10 and 50 bags of money

[14] Mr. Titus testified that he believed the vest was Level II, but he did not know for certain. (Tr. 77). He also did not know who manufactured his vest. (Tr. 83). Based upon the parties' stipulation and Invoice # 33862, dated January 9, 2009, the Court finds that Mr. Titus was actually issued a Level III-A bullet proof vest that was manufactured by First Choice Armor and Equipment. (Tr. 84; Ex. 6 at 3).

that the van kept "locked" in the back. The tellers exited the van at every PA Turnpike tollbooth (also known as a turnpike station) they stopped at to go in and make change, pick up bags and bring the bags back to the van. Mr. Titus estimated that they stopped at about 8-9 stations per route. (Tr. 71-75).

While performing this job, Mr. Titus wore the "Schaad uniform," which included black boots, navy blue pants, black belt, navy blue uniform shirt, gold badge and a bulletproof vest. Mr. Titus estimated that the vest weighed about 5 to 6 pounds. His gold badge said Lieutenant "because that was the rank" he held when he was last issued a badge. According to Mr. Titus, other Schaad rankings were officer and captain. (Tr. 75-76, 82).

Mr. Titus was also armed with his own "Glock Model 22.4 caliber handgun" during the detail. He wore a Level III ballistic-resistant vest issued to him by Schaad.[15] He testified that Respondent did "not necessarily" require him to wear the vest, "[t]hey just said this is the vest that we're issuing." As a manager, Mr. Titus himself never enforced any such a requirement for the guards he supervised. He, however, wore the vest when he worked the detail because:

> Any time I am around a large amount of money when I work as a security officer, I feel much more comfortable having the vest on. It may not be visible to anyone else, what we were carrying, but I knew, and that made me more comfortable, to wear the vest [in case] someone tried to rob the van [because] he's a pessimist by nature.

(Tr. 76-78).

On cross-examination, Mr. Titus testified that he never handled the money and that he was there as a "deterrent." The van was a "standard, civilian-issue cargo van, no windows on the sides or the back," with no signage. He was not a supervisor on the PA Turnpike detail,

[15] *See* n14.

just a "fill-in officer." He would sit in the passenger front of the van, referred to by others as the "shotgun" seat, which had a window. (Tr. 78-79).

John Daniel Spadafora, Sr.

As a supervisor for Schaad, Mr. Spadafora answers alarms and checks on the guards, to see if they are following rules and regulations. He has worked at Schaad for 8 years. He was a regular guard until he got his "235," which allowed him "to carry a gun as a guard, around 2010." Previously, Mr. Spadafora had served 27 years in law enforcement (full and part-time) in West Manchester township, York township, and Jackson township as a detective for ten years, Anaheim City in California, and Biglerville police departments. (Tr. 86-87).

Mr. Spadafora has worked the PA Turnpike detail three times: "once or twice before the incident" he worked the northeast extension for five days when someone was on vacation, and once he worked the Harrisburg extension for two or three days, and then he worked [redacted]'s schedule for a couple days after the incident. Mr. Spadafora described the PA Turnpike detail as follows: as a guard of the driver of the van, the guard stood outside the van while the driver entered the tollbooth and guarded the driver's back while the driver took the money inside. The guard would stay outside of the tollbooth building, and then accompany the driver back in the van and leave. Mr. Spadafora estimated that they stopped at about 6 or 7 tollbooths along the line from 5:00 a.m. to 10:30 or 10:45 a.m. He testified that he was never told how much money was in the van. (Tr. 87-89).

Mr. Spadafora testified that he wore a uniform. Schaad gave him a vest, but never said he had to wear it. He sometimes wore "my vest" and sometimes "I didn't." Before the incident, he wore the vest when it was not "real hot" because in the summertime he would have to "change my t-shirt twice on an eight-hour shift." He testified that, "I didn't feel secure or

that nothing would happen to me because I had a vest." Mr. Spadafora testified that he wore vests that were supplied to him when he served on police forces, starting in 1972 with York Township, and the Anaheim, Jackson and York Township police forces mandated that he wear them. (Tr. 89-91). After the incident, he said he was required to wear his vest. (Tr. 89).

Ann Marie Allman

Ms. Allman is a supervisory agent with Schaad. She supervises 15 armed and unarmed guards, three armed at the most. Ms. Allman rose up the ranks at Schaad, starting as a courier in 2011, becoming a supervisor in 2014, and then she was promoted to lieutenant. Ms. Allman has a law enforcement background. She started at the dispatch center with the county, and then she worked for the York County Sheriff's Department, and then for the Baltimore City Police Department as a sworn officer.[16] (Tr. 93-94).

Ms. Allman was a fill-in guard for the PA Turnpike detail from 2014 to the "current date." Ms. Allman testified that Schaad no longer has that account. (Tr. 94-95). Her tasks on the PA Turnpike detail included: meeting with the driver, loading up everything, riding "shotgun seat" with them, stopping at each turnpike interchange tollbooth where they handled their "money situation," and then continuing on to the next interchange station. While the driver was out of the van and taking the money, Ms. Allman "stood by the van, that was where we were supposed to be." She got out of the van because "that's where I could see the driver." Ms. Allman did not know how much money the driver handled. She testified that there were several bags. The purpose of bringing the money to tollbooths was to do the "money exchange," for example, sometimes "they needed quarters, or whatever would make their

[16] Ms. Allman testified that a "sworn officer" was like a standard police officer on the street but did not have the power of arrest. (Tr. 93-94).

change." Ms. Allman estimated the they did 8 stops during the run. They would start the actual run around 7:00 a.m. and would finish by noon. (Tr. 95-97).

Ms. Allman testified that while she was on the detail she was armed with a Glock 9-millimeter gun. She received Act 235 training, schooling that is run by the state police in the classroom as well as field training. According to Ms. Allman, to qualify as Act 235 trained, the student must achieve a certain "score" with the weapon. Ms. Allman testified that only armed Schaad guards go through the Act 235 training. (Tr. 97-98).

Ms. Allman testified that she always wore a ballistic-resistant vest while serving on the PA Turnpike detail. Schaad provided her the vest with the uniform but did not provide instructions with it. Schaad never mandated that she wear the vest. But, Ms. Allman testified, "if I had a firearm on, I had a vest on," explaining: "growing up in a law enforcement family, I was used to seeing that as part of the uniform and it just was instilled in me." Now, according to Ms. Allman, after the incident, armed Schaad officers must wear a vest. Ms. Allman testified that, as a supervisor, "the ones on my shift get checked [to verify they are wearing a vest]." (Tr. 98-99).

Ms. Allman testified that the decision to wear the vest was a "personal choice." She received a Level III vest in January of 2011, when she started at Schaad. Ms. Allman came to Schaad qualified under Act 235 training as an armed person, so when Schaad issued her the uniform, Schaad also issued her the vest. (Tr. 100-01). Ms. Allman was issued a newer vest, a Level II, after the incident. (Tr. 101-02). According to Ms. Allman, she testified that the vest protects against a .38 caliber bullet and .40 caliber bullet, but Ms. Allman does not know "exactly all of them." (Tr. 100-02).

David Olah

David Olah is the OSHA Area Director (AD) for the Harrisburg Area OSHA office. (Tr. 103). He was the AAD at the time the citation was issued and was promoted to AD in October 2016. As AAD, Mr. Olah supervised five to six COs, including CO Ritner. AAD Olah reviewed inspection case files and approved or made further recommendations to the AD based on facts. He was responsible for verifying legal sufficiency of OSHA citations. (Tr. 103-05).

AD Olah described how OSHA developed the proposed penalty for this OSHA citation. He testified regarding the maximum statutory penalty limit for a serious violation. "At the time that this citation was issued, [$12,471] was the maximum penalty for a serious violation."[17] He also testified to the criteria OSHA uses to propose a penalty: severity, probability, company history, good faith, and size of the company. He testified that he participated in the development of the proposed penalty, which he testified to as follows:

1) No discount for good faith because the citation "carried a gravity-based penalty of a high gravity greater probability,"

2) No size discount because the company had greater than 251 employees at the time of the inspection,

3) High severity because "the result of a struck-by hazard from a bullet to the torso could result in death,"

4) Higher probability because the employee was at a greater probability of being robbed due to "the assets that were being handled."

[17] AD Olah referred to the summer 2016 adjustment to OSHA penalties (from $7,000 to $12,471) legislated by Congress the prior fall. (Tr. 106). The Court notes that OSHA's statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). OSHA established new penalties for violations that occurred after November 2, 2015. 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred after November 2, 2015, and was assessed between August 1, 2016 and January 13, 2017, thus the statutory maximum of $12,471applies.

(Tr. 105-11; Ex. 1 at 8). AD Olah testified that due to these factors, "there was no increase nor decrease to the actual history." He then testified that his "recommendation to the area director was not changed by the [acting] area director at the time. So he [Acting AD at the time] did not exercise any discretion in this case." (Tr. 111).

On cross-examination, AD Olah testified that the valuable assets and the multiple daily interactions affected the probability determination. He agreed that of the multiple daily interactions over the years that factored into the probability determination, none of them involved any interaction. (Tr. 115-16). AD Olah also understood that PA Turnpike tollbooth collector [redacted] "engaged in an altercation with the perpetrator and actually wrestled [a] handgun away from him," and the second weapon, a rifle, was used by the robber to kill [redacted]. (Tr. 115-16, 118). Regarding the specifics of the gun, the bullet, and where [redacted] was shot, AD Olah deferred to the police incident report. (Tr. 115-17).

He testified that the actual death in this case was not a factor into the probability calculation. He further testified that the fact that a protective vest may not have made any difference against the high caliber of bullet used in this case also did not affect "the ultimate outcome." (Tr. 112-13). He stated, "Ms. Ritner's investigation showed that typical holdups, typical robberies would involve a lower-caliber handgun," and that while "PPE doesn't prevent injuries, [] it reduces the likelihood of an injury; in this case, struck by a bullet." (Tr. 114). AD Olah said he did not know of any incidents involving the shooting of an armed guard that occurred throughout the years Schaad completed its daily trips to the PA Turnpike tollbooths prior to March 20, 2016. (Tr. 114-15).

Timothy Patrick Lenahan

Mr. Lenahan has been the General Manager of Schaad since March 2007. Mr. Lenahan began at Schaad in May 1999 as a "fill-in" (or area supervisor), trained for 90 days, became certified that July in Act 235, and was responsible for 2700 man-hours of security service for armed and unarmed security guards until August 2005, when he went back as a military contractor. Mr. Lenahan came back to Schaad in March 2007 as general manager. He served in the military, where he worked as an electronic technician, he was responsible for security at a nuclear facility overseas, and worked in various staff positions, as a recruiter, and in intelligence. He retired honorably from the military after completing 21 years of service. (Tr. 122-24).

Mr. Lenahan's day-to-day obligations at Schaad included overall operation, training supervisors, management, marketing, and recruiting. Mr. Lenahan answers to Mr. Wantz, the president of Schaad. Schaad presently has 380 employees, mostly security guards, approximately 65% of which are armed. Based on the incident in this case, Schaad no longer holds the PA Turnpike detail contract with the PTC. Mr. Lenahan understands that the PTC no longer allows its own employees to do "money runs," PTC now contracts with an armored car service that does it all. Schaad had held the contract with PTC since before Mr. Lenahan started at Schaad. (Tr. 123-25).

Mr. Lenahan authored Respondent's "Use of Lethal Force/Use of Force Continuum" document, undated, which memorializes Respondent's policy regarding armed security guards and the use of their weapon. (Tr. 126-27; Ex. 4). Mr. Lenahan explained:

> It's conveying to our officers that there is a use of force continuum. Basically, our presence as a security officer, and honestly whether it's armed or unarmed, could be level or the first step in the use of force. The use of force goes up and down. We defined this document to further guide

> our armed employees in what they – they understand that equal to or less force is what we apply. In other words, if someone comes at me with a whiffle ball bat, I'm not going to draw my weapon and shouldn't have. I'm going to retreat because my life is not threatened. I'm not in fear of my life at that point. And we want to explain through training that they understand that.

(Tr. 126-27; Ex. 4). Mr. Lenahan testified that this document is only given to the armed security guards "because they are carrying a weapon." (Tr. 127). It is not given to the unarmed guards "because our unarmed guards don't have deadly force, or the capability of using deadly force. They are unarmed guards." (Tr. 127; Stip. 11). He stated that the use of deadly force is not taken lightly, and this policy was true in March 2016. (Tr. 127).

Mr. Lenahan testified that all armed security guards were required to attend Act 235 training and be Act 235 certified. He explained the following aspects of Act 235 training and certification:

> Act 235 training for – it's called lethal weapons training. It is provided by – I went to Harrisburg Area Community College. The curriculum is, I guess, controlled by the State police. And it's a 40-hour course, 20-hour administrative, 20-hours of range work or range shooting, and qualification thereof. Upon completion of that training, and prior to that training you have to go through a psychological evaluation. You have to go through a medical physical with a doctor, and a fingerprint background investigation.

(Tr. 128).

Mr. Lenahan also testified to Respondent's "Body Armor Policy and Procedure," dated "Revised September 29, 2016." (Tr. 128-29; Ex. 7). This policy document was drafted by a third party.[18] Mr. Lenahan did not know if the policy was in place before the March 20,

[18] The Body Armor Policy and Procedure stated, in part:

> PROCEDURES: All employees assigned to identified duty assignments that places them in a position of where there is a possibility of criminal activity which exposes an employee to the threat of lethal force being used against them in the performance of their assigned duties and responsibilities shall be issued agency-approved body armor.

(Ex. 7 at 1).

2016 incident. Mr. Lenahan agreed that, "body armor provides a significant level of protection." (Tr. 129-30).

Mr. Lenahan testified to his experience regarding Respondent's purchase of ballistic vests for its employees. Mr. Lenahan first discussed the matter with Mr. Wantz in 2008. Mr. Lenahan testified: "But we just thought it was – let's not do what the industry standard is and do nothing, because it's not mandated. We couldn't find anywhere where a statute, a law, local, state, federal, defined body armor as a mandatory requirement for safety gear. So we were proactive, we purchased it and we tried to supply the best level of safety for our offices." (Tr. 130-31). Mr. Lenahan thought Respondent paid $28,900.00 in about November 2008 for ballistic vests for its employees.[19] (Tr. 132-34; Ex. 6). Respondent did not charge its employees for the body armor. The vests were personalized for fit. Employees names were placed inside the vests when shipped from the manufacturer. Mr. Lenahan identified the names of thirteen employees listed on First Choice Armor and Equipment invoices that worked on the PA Turnpike detail. (Tr. 131-33; Ex. 6 at 2-8). Respondent bought Level III-A vests based on the vendor's recommendation of "best bang for our buck." Respondent also ordered "extra pieces" in "ordinary sizes." (Tr. 138; Stip. 9).

Respondent also made a subsequent purchase of $18,000 "in the last year."[20] (Tr. 134). For this purchase, Mr. Lenahan testified that Respondent used U.S. Armor. U.S. Armor's representative recommended Level II body armor and told him that nearly every law enforcement agency in York County were "coming to use a Level II vest." He also said U.S.

[19] The body armor was purchased from First Choice Armor and Equipment. *See:* a) Invoice # 33862, dated December 23, 2008, for $23,030.00, b) Invoice # 34090, dated January 19, 2009 for $770, c) Invoice # 35189, dated March 13, 2009 for $5,326.56, and d) Invoice # 39846, dated November 10, 2009 for $1,163.48. (Tr. 132-34; Ex. 6). Together these four invoices total $30,290.04.

[20] Mr. Lenahan testified that Respondent also purchased a handful of vests in the interim period between 2010 and 2016. (Tr. 138).

Armor's representative told him that all of its clients were law enforcement and that he [the representative] did not know of any security company that U.S. Armor provided body armor to in Respondent's area. (Tr. 134-36).

Regarding the difference between levels of vests, according to Mr. Lenahan, "[t]he difference is simply Level III-A will stop a .44 caliber and a Level II won't." "Why are they doing Level II versus III-A? Comfort. Same level of protection minus a .44 caliber." (Tr. 136). Mr. Lenahan explained: "It's more comfortable. My officers agree today. Because if you don't get somebody to want to wear it, they're not going to wear it. We want them to wear it because we care about every life and every officer that puts a gun on or body armor." (Tr. 136).

In 2009, Respondent "encouraged everyone to wear" the bulletproof vest but did not require everyone to wear it. (Tr. 136-37; Stip. 10). Mr. Lenahan testified:

> Our law enforcement community walks down the street today. I mean, it's like they are looking over their shoulder. Well my armed officers look like cops in some respects. They're wearing blue on blue with a badge and a gun. And that person that's out to do harm, he doesn't know the difference. Because he didn't see that patch that said Schaad, because he doesn't know what that is.

(Tr. 137).

Regarding other types of PPE, Mr. Lenahan testified that he did not know how much Schaad paid, if at all, for fall protection equipment, lanyards, or lifelines. He testified that officers brought their own mesh gloves. Respondent provided 50% for steel toed boots. Mr. Lenahan also testified that Respondent provided specific PPE for the individual facilities that they provided service for such as hairnets, safety glasses, and rubber gloves. (Tr. 138-40).

Regarding Schaad's armed security guard duties, Mr. Lenahan testified that when he arrived at Schaad in 1999, the duties were memorialized on a five by seven laminated placard,

entitled "Security Officers PA. Turnpike Standard Operations Procedures". (Tr. 140-41; Ex. 5). Mr. Lenahan testified that, when he became a supervisor, he took the placard and made an electronic copy of it. (Tr. 141; Ex. 5). Mr. Lenahan testified and agreed that the document as written applied to Schaad's armed security guards on the PA Turnpike detail, including the "general scope" and "duties" sections. (Tr. 142-44; Ex. 5). The following is the relevant portion of the document:

1.0 General Scope

A. The major responsibility of the Schaad Detective Agency is to ensure the safety of the Pa Turnpike employee's (tellers) who collect money from the toll booths that run the distance of Pennsylvania Turnpike.

2.0 Duties

A. The security officers assigned to this detail will be in command of the collection vehicle they are riding in. They are to sit in the front passenger seat.
B. The security officers will at **NO TIME** handle any money or documents that are the property of the Pa. Turnpike.
C. The primary duty of the security officer is to act as a deterrent. The officer is to be **NON PRO ACTIVE** to any incidents that occur on the turnpike except those that affect the safety of the tellers. They are to keep the tellers in sight at all times, especially when the tellers are out of the transport vehicle.
D. All security officers will maintain a daily log. The information will include the following:
    1. Officer starting time
    2. Time of arrival at all toll plazas
    3. Time of departure from each toll plaza
    4. Time and descriptions of any incidents (who, what, where time and location)
    5. Time off duty

E. Security officers will be issued incident report forms to be used to give detailed description of any incident encountered.

3.0 Traffic Accidents

A. Security officers will render **NO** accident assistance. PSP are responsible
B. If there is notification of blockage (due to an accident), the security officer will instruct the driver to wait at the nearest exit until the accident is cleared or an alternate route is given by a Turnpike Manager

4.0 Attempted Robberies

A. The security officers job is to be a deterrent only. The safety of the teller is the only goal. If a robbery is attempted/committed contact the PSP immediately.

(Ex. 5 at 1-2). Regarding the use of the word "deterrent" in section 2.0C, under "Duties," Mr. Lenahan testified the following:

> People that want to perpetrate a crime, they -- they want to take the path of least resistance. So if we have uniformed, armed officers and they're visible, that's a deterrent. People generally don't want to confront. It's like going to a grocery store and robbing it. If there's a armed guard standing in the door, there's four more down the street that don't have one.

(Tr. 143; Ex. 5).

Regarding the bulletproof vests that Schaad issued to its armed security guards, Mr. Lenahan testified that Schaad "[e]ncouraged everybody", including [redacted], to wear them.

> So alls I can hope and pray is these officers in the field, through the State of Pennsylvania, that were issued a vest, that were stationed in Pittsburgh or Philadelphia, in the Northeast Extension, would put that vest on and wear it.

(Tr. 145-46). He testified that he believed that Messrs. Titus, Spadafora and Robert Stover and Ms. Allman always wore their bullet proof vests.[21] Mr. Lenahan testified that Respondent issued vests "to everybody that was armed and/or wanted one." He testified that [redacted] had a vest that was issued by Respondent; but chose not to wear a vest on the day of the incident. (Tr. 145-46, 152).

Mr. Lenahan described the differences between the Level II bulletproof vest and the Level III-A bulletproof vest. (Tr. 147-51; Exs. I (Level III-A), II (Level II)). The Level II vest can be worn outside the uniform (or as an "outer carrier") and is more comfortable in terms of heat and when driving. According to Mr. Lenahan, it also comes "in concealed fashion" where "it could be worn under the duty uniform." It has a plate for added protection to cover the vital areas. According to Mr. Lenahan, it will stop a .357 magnum, but will not stop a .44 magnum.

[21] But, as noted earlier, Mr. Spadafora testified that sometimes he did not wear his vest. (Tr. 89-91).

(Tr. 150-51). In contrast, the Level III-A vest will stop a .44 magnum. (Tr. 150-51). The Level III-A is worn under the uniform, is fitted for the individual guard, has Kevlar squares to provide protection in the front, back and sides, and also has "soft trauma plates," which provide additional protection covering the vital areas. According to Mr. Lenahan, however, Schaad bought and provided the more comfortable Level II vests for its armed security guards because "you want it more comfortable so that they want to wear it." (Tr. 150).

On cross-examination, Mr. Lenahan testified that he knows of no other security company in the area that provides bulletproof vests for their employees. (Tr. 151). He said [redacted] had a law enforcement background. (Tr. 151). Mr. Lenahan testified that he negotiated Schaad's contract with the PTC. He said in the event of an armed robbery, it was PTC's policy for its own employees to "always listen to and do whatever the armed robber wants you to do." (Tr. 152-53). Based on his understanding of the "556-page [police] report," Mr. Lenahan testified that [redacted], the deceased PTC tollbooth collector, "absolutely" did not follow that policy. (Tr. 153, 156). He also testified based on his understanding of the police report and who the armed robber was (a retired 25-year veteran state trooper, "resident expert," "trained professional," who "knows everything"), a bulletproof vest would not have made a difference in this case because Mr. Briggs would have seen the vest and shot [redacted] in the head. (Tr. 154-55). He noted that the police who responded to the scene shot Mr. Briggs, who was wearing a camouflage mask and what looked like tactical "SWAT-type" body armor, "in the upper leg femur, in an artery, and he bled out." (Tr. 155-56; Ex. 9 at 4).

On re-direct examination, Mr. Lenahan conceded his testimony is not based on witnessing any of the events that took place on March 20, 2016, rather his testimony was based on his knowledge of who the individual was, and his own 21 years of military service. He also

testified that PTC gave training for robberies to all of its employees, including tellers and tollbooth collectors. The PTC tollbooth collector, [redacted], who was also killed at the scene by Mr. Briggs, participated in that 30 to 45 minutes of training on March 17, 2016. (Tr. 153-58).

Dr. Daniel J. Benny

Without objection, the Court found Dr. Benny qualified to serve as an expert in security-related matters. Dr. Benny testified as an expert in security-related matters for the Secretary. (Tr. 174). Dr. Benny is a sole proprietor licensed private investigator, and a security consultant. (Tr. 160) He testified that he teaches "for several universities online" courses that include criminal justice, security, national security, intelligence, and aviation security. He is also a State-certified part-time lethal weapons Act 235 instructor at the Harrisburg Area Community College. (Tr. 160-61). Dr. Benny testified that he has a Ph.D. in criminal justice from Capella University in 2010, a Master of Arts in Security Administration from Norwich University, a Bachelor-in-Arts degree in Security Administration from Alvernia College in 1982, and Associate degrees in Police Administration and Commercial Security from Harrisburg Area Community College.[22] (Tr. 161-62, 167-68).

Dr. Benny has worked in law enforcement since 1975 for various organizations. For example, Dr. Benny was the deputy director of security, police chief for the Navy Ships Parts Control Center in Mechanicsburg, Pennsylvania from 1984-1990. (Tr. 162, 171). He testified that he "was responsible for an approximate 80-person DOD Navy Police Department and also all of the physical security related to that position; intrusion detection, access control, badges and things of that nature." (Tr. 171). He testified that it was an armed position, but he did not

[22] He testified that he obtained both his Ph. D. and Masters' degrees as a non-resident student from online or correspondence programs for accredited schools. (Tr. 167).

wear a ballistic-resistant vest. (Tr. 171). He testified that the position was supervisory in nature. (Tr. 172).

Dr. Benny also was the director of public safety chief of police for Elizabethtown College in Elizabethtown, Pennsylvania in the early 1990s. (Tr. 162-63). He testified that, in that position, he "was able to mandate a policy for ballistic vests. And we bought vests for our officers, and they were required to wear them." (Tr. 162-63). But he testified "we were unarmed" in that position, yet still wore vests. (Tr. 173). He has never been personally employed to provide armed security services. (Tr. 172-73).

Dr. Benny has authored "hundreds of articles over the past 40 years for professional magazines, to include security management." He has also authored and published four books related to the security industry. (Tr. 163). Dr. Benny is a member of many professional organizations related to the security industry, including ASIS International[23], which he described as "the oldest and the most prestigious security organization internationally." (Tr. 164). Dr. Benny holds his highest security certification, Certified Protection Professional (CPP), as well as his Professional Certified Investigator (PCI) certification, through ASIS. He has been an ASIS member since 1975. (Tr. 164-65).

Dr. Benny testified that he has participated as an expert in 20 cases involving security-related issues: all of them where he provided a written expert opinion and three of them where he testified, including one where two security officers chased an individual that led to their death. (Tr. 165).

[23] Dr. Benny testified that ASIS International used to stand for "the American Society for Industrial Security, but since they went international they just stayed with ASIS." (Tr. 164-65).

Dr. Benny opined that armed guards hired to protect persons who transport money and valuables face a hazard of being shot because individuals that commit robberies focus on individuals transporting money.[24] (Tr. 175-76). Dr. Benny testified:

> Well any time security involved with protecting money, especially large sums of money, it's a high-risk position because robberies do occur. And individuals that commit robberies focus on individuals transporting money. And most armed robberies, based on the research and my years of experience, there are weapons involved, and oftentimes security officers are shot. And – and they – so that makes it a very high risk.

(Tr. 175-76; Ex. 8 at 5). Dr. Benny referred to an article quantifying the rate of fatal work injuries as more than double the rate for all workers: "In 2009, the rate of fatal work injuries among security guards and related workers was 7.4 per 100,000 full-time equivalent workers, more than double the 3.5 rate for all workers."[25] (Tr. 179 quoting "On Guard Against Workplace Hazards" by William J. Wiatrowski); *see also* Ex. 8 at 5). Dr. Benny further testified that wearing a uniform and being armed makes it "particularly dangerous" because the armed guard is identified as a "[deadly force] threat to a perpetrator who wants to commit a crime" and "shows a perpetrator that the security officer can respond with deadly force." (Tr. 176).

Dr. Benny testified that the security industry recognizes the hazard of security guards being fatally shot and opined that this hazard warrants using a ballistic-resistant vest because "if you were wearing a bullet-resistant vest you can potentially stop the projectile and prevent serious injury or death." (Tr. 179-80; Ex. 8 at 6-7). Regardless of the incident, a ballistic-resistant vest materially reduces an armed escort's risk of being injured or killed in the event of

[24] He testified that it was his understanding that about $58,000 was in the van driven by [redacted] that was stopped at the tollbooth at the time of the incident. (Tr. 175; Ex. 8 at 5).
[25] Dr. Benny testified that the quantified rate in this article was consistent with Dr. Benny's 45 years of experience in security management and supports his professional opinion. (Tr. 179-80).

an armed attack because "it would provide protection from the projectile that would be fired" – bullet-resistant, not bulletproof. (Tr. 181-82; Ex. 9 at 8). Dr. Benny relied on the following statement from the article "The Effect of Body Armor on Saving Officers' Lives":

> In this study we examined a controlled association between wearing body armor and the likelihood of dying from a shooting to the torso. While controlling for range, potential founders, our results showed that body armor quadruples the likelihood that a police officer will survive a shooting in the torso.

(Tr. 182). He testified that, while this article was written about police officers, it helped formed his opinion for this case because he believes that it also applies to armed security guards. (Tr. 182-83). He testified that "bullets don't discriminate between a police officer and a security officer." (Tr. 183). Dr. Benny therefore opined that he would recommend requiring armed escorts to wear bullet-resistant vests as part of a safety program for armed escorts providing security to PA Turnpike tellers.[26] (Tr. 183; Ex. 9 at 8).

During cross-examination, Dr. Benny testified that, for the lethal weapons course he teaches, the syllabus provided by the Pennsylvania State Police does not mandate the wearing of ballistic-resistant vests. Dr. Benny has no personal experience with armed robbery. He also testified that armed security "can" be a deterrent to robberies. (Tr. 185). Dr. Benny testified that the "2.33 rifle" used by the assailant in this case was a high-power rifle with a .223 caliber bullet, and that the Level III-A vest is not rated for that caliber. (Tr. 181, 185). Dr. Benny testified that the vest does not protect anything but the body cavity. However, Dr. Benny testified that:

> [E]ven wearing a vest that is not rated for the caliber of the weapon that is fired against an individual, that it may have – it may have reduced the

[26] During cross examination, Dr. Benny stated his opinion was not the result of any legal requirement to do so. (Tr. 188).

> velocity of the bullet and not have caused death [] even if it would have penetrated.

(Tr. 186). He then conceded that it "absolutely" may not have either. (Tr. 186).

With regard to the article that he consulted that quantified the rate of injury for armed security, Dr. Benny testified that the article does not mention the cause of the fatalities.[27] (Tr. 187). Regarding the second article about how body armor saves lives, Dr. Benny conceded that the article was written specifically about police officers, who face different hazards because police officers are supposed to engage in altercations. (Tr. 187-88). Dr. Benny nevertheless opined that both police officers and armed security officers are at "high risk," "especially in the case at hand." (Tr. 188).

Dr. Benny testified that he is aware of hundreds of private security agencies in Pennsylvania. (Tr. 188). However, as of the time of his deposition in this matter, Dr. Benny did not know of any security agencies that mandated use of bullet-proof vests, even after his 45 years of experience. (Tr. 188-89). He also said he was not aware of any efforts by ASIS or any other organization to develop standards about wearing ballistic-resistant vests. (Tr. 190). Dr. Benny further testified that some practitioners "on their own initiative do realize the threat [] and they go and buy vests for their officers," but this issue has been debated among practitioners "over the years" and he does not know of any consensus standard or anything being developed "at this point." (Tr. 190-91).

Edward Bennet Sorrells

Without objection, the Court found Mr. Sorrells qualified to serve as an expert in security for Respondent. (Tr. 198). Mr. Sorrells is the Chief Operating Officer and General

[27] Later, on re-direct examination, Dr. Benny quoted the following excerpt from the same article: "among security guards, nearly 2/3 of fatal work injuries were the result of assaults or other violent acts, while transportation incidents were a distant second." (Tr. 190).

Counsel for DSI Security Services (Tr. 193; Ex. C at 1). DSI Security Services has been in private security business since 1969, providing armed and unarmed uniformed security. Mr. Sorrells has been with organization since 1991. His company operates in 25 states currently. (Tr. 210). DSI Security Services does not provide ballistic-resistant vests to any of its armed guards and does not have a policy that mandates vest wear. (Tr. 223).

Mr. Sorrells has a bachelor's degree with a major in English and a minor in criminal justice. In 2003, he was awarded a juris doctor from Jones School of Law, Faulkner University in Montgomery, Alabama. Mr. Sorrells has been admitted to the Alabama bar "since 2004 or 2005 through the present." (Tr. 194-95). Mr. Sorrells testified that he has a CPP offered through ASIS International, which means he has demonstrated proficiency and competency in security management. He also is a Physical Security Professional through ASIS International, which he says denotes competency and expertise in physical security systems, technology, security force management and offering solutions to abate any kind of security concerns. (Tr. 195-96). Mr. Sorrells is also a PCI through ASIS International, which denotes competency in the area of investigations. (Tr. 196).

Mr. Sorrells has been employed in the securities industry for over 26 years. He has performed both unarmed and armed duties as a security officer in a variety of environments. He has also served in positions pertaining to site supervision, local branch management, area supervision, and regional management. (Tr. 196). His current employer has 3,000 employees – 95% unformed security officers, 10-15% of those are armed (about 300 armed guards). He is a frequent speaker and has published one book in 2015 that "dealt primarily with preventing and defending premises liability lawsuits." He is a member of at least four organizations involved with the contract security industry, including ASIS international (20 years, serving as

counsel vice-president), the Security Services Council (member), National Association of Security Companies (NASCO) (city board member), and the International Association of Security and Investigative Regulators (IASIR). (Tr. 201-02).

Mr. Sorrells has served as an expert witness frequently. He testified, "usually my services are educating attorneys on the ins and outs of contract security and some of the standards in our industry." (Tr. 198). He testified that he has specific expertise in the area of contract security, such as what Respondent provided in this case. (Tr. 198).

In developing his opinions for this case, Mr. Sorrells relied upon: the police report, the discovery responses including post instructions for the PTC, the service agreement between Schaad and the PTC, Schaad's internal procedures concerning body armor, and depositions. (Tr. 199). Mr. Sorrells testified that his own company has no policy for their 300-armed guards to be required to wear a bulletproof vest because, according to Mr. Sorrells, his company does not deem "the type of armed work we participate in" as "high risk," and neither does the security industry. He also said that there is no prevailing industry standard on whether employers need to supply armed security guards with ballistic-resistant vests and mandate their use when armed. (Tr. 202-03).

With regard to risk assessment, Mr. Sorrells takes issue with the argument that an armed security guard "is working in a high-risk environment, just by virtue of the fact that he or she is armed [] because that's not taking into a variety of other factors." (Tr. 204). He believes that factors that should be taken into account when assessing risk include environment, foreseeability, whether incidents have occurred in the past, type of duties, location of duties (geographically, crime rate), and the internal policies of the customer. (Tr.

205-206). Mr. Sorrells differentiates between high risk, medium risk and low risk.[28] (Tr. 206). Mr. Sorrells opined that, in this case, he considers the absence of any kind of prior history involving incidents as a significant factor. (Tr. 206). Based upon the absence of any kind of prior history involving incidents over a long period of time, he opined that there would be a future probability of a lower risk of something happening. (Tr. 206). He also opined that the incident in this case was not necessarily foreseeable under the circumstances because of the lack of previous incidents in many, many years and the use of the unmarked van, which helped mask the transfer of money.[29] (Tr. 206-07, 210-11, 214). He testified that these factors "at a minimum give rise to the conclusion that this is not a high level of risk[.]" (Tr. 207). He further opined that the PA Turnpike's policy to not engage with any robber is a "very sound policy," consistent with his years of conducting training sessions for armed security officers in cash handling environments. (Tr. 207). He opined that the policy "certainly at minimum lessens the likelihood of violence, and in most situations causes no violence to occur." (Tr. 207). He testified that "in most cases if they [robbers] secure that property and can leave, they are going to do so." (Tr. 208).

Mr. Sorrells testified that no company other than Schaad provides body armor as a proactive measure. (Tr. 209). He testified that he knows of no other company similar to his that has a mandatory policy of all armed officers wearing bulletproof vests. (Tr. 204). Mr. Sorrells opined that Respondent was proactive to unilaterally provide body armor based on his 26 years of experience, and that Respondent went "above and beyond" what other security companies are doing. (Tr. 209). He said that bulletproof vests are "not a standard piece of

[28] Mr. Sorrells opined that "you need to go through a pretty thorough analysis, to look at every situation individually before you can say something is high risk, medium risk or low risk. (Tr. 206).
[29] Mr. Sorrells stated that when speaking about foreseeability it was "related to whether or not this occurrence was going to take place." (Tr. 211).

PPE" in the industry, in that employers typically do not require them. (Tr. 203-04). He also testified that his company does not mandate armor, so his company has no experience with officers that complain about wearing it. (Tr. 209-10).

On cross-examination, Mr. Sorrells testified that he did not factor in the exact amount of money into his risk analysis, although the actual transfer of money was part of his risk analysis. (Tr. 216-18). He testified that the organizations he participates in do not have consensus-type standards on safety-related issues.

> In our industry what we typically do, we will assume the safety posture, so to speak, of our customers. Ninety-nine percent of the service we perform is not on our property, so we will make sure that we're complying with what the instructions and mandates are in the customer. So from an industry standpoint, you won't see a lot of activity promulgating or issuing any type of standards when it comes to the typical safety measures.

(Tr. 218). He testified that the industry's focus is related to training or gaining a license in the activity. (Tr. 218-19). He explained that "… the current state in the industry is this is not really contemplated when it comes to the offering of unarmed or armed security services, and certainly not an industry norm to provide bullet-resistant vests to all officers." (Tr. 219). Even post-accident, he testified that he believes that, while tragic, the incident does not:

> always mean that policies or standards change in the future. So it's not an automatic blanket policy that things have to be mandated afterwards. I believe that you still have to take a common-sense approach and do what you need [to do], as much as you can, to prevent future occurrences.

(Tr. 220). He then testified that he believes that Respondent had already been extraordinary in offering vests prior to the incident. Mr. Sorrells would not even recommend offering or mandating the use of vests even after the incident because "it's not something that is normally contemplated in the industry currently." (Tr. 212, 217-21).

Mr. Sorrells testified that he was not prepared to offer a statement of financial impact on his own company should bullet-resistant vests become mandatory. (Tr. 222-23). His

company has never provided vests to its employees. "If the government was to place that kind of a restriction on the company, we would probably get out of the armed guard business." (Tr. 224). He testified, however, that the potential impact on his company would be "very, very minimal, if at all," because armed guard services is a small portion of what they do (300 armed guards out of 3,000 unarmed guards). (Tr. 225). Mr. Sorrells does not agree that this potential conflict of interest affects his credibility. He testified, "I firmly believe that Schaad was not on notice of any kind [of] the requirement to provide these vests. And as I just testified, the impact on me personally and our company would be very, very minimal, if at all." (Tr. 224-25).

John Derryman

John Derryman testified for Respondent.[30] Mr. Derryman works for Akal Security, a company that contracts with the U.S. Marshals Service to provide security for the Federal Courts and the Federal Judges. (Tr. 228). Mr. Derryman has been employed by Akal Security as an armed security guard for eight years. He provides security at a Federal District Courthouse. (Tr. 229-32). Prior to joining Akal Security, Mr. Derry was a county detective in York County and ran the Drug Task Force. (Tr. 228-29). Prior to that, Mr. Derryman was a York City police officer for 29 years as a detective in charge of the drug unit. (Tr. 229). Regarding his experience with bulletproof vests, Mr. Derryman testified that some officers bought their own vests in the 1970's; years later, the City provided vests and it was a "personal choice" whether to wear the vests, throughout his tenure there. (Tr. 229, 232). He further testified that "I had never seen anybody [that he was on duty with] wear a vest prior to October

[30] The Secretary objected to the use of some of Mr. Derryman's testimony due to relevance. Respondent persuasively argued that Mr. Derryman's testimony with regard to the use of bulletproof vests in the private armed guard security industry is relevant to the issue of notice in this case. (Tr. 229-31).

1, [2017]." After October 1, 2017, he testified that he is required to wear body armor. (Tr. 232).

M. Rebecca Downing

Without objection, the Court found Ms. Downing qualified to serve as an expert in security for Respondent. (Tr. 247-48; Ex. B). Ms. Downing is a security consultant. (Tr. 234). Ms. Downing started her career as a York City police officer in 1974 and served for 27 years. She was the Chief of County Detectives and retired in 2004. Presently, Ms. Downing teaches at Pennsylvania State University, Justice and Safety Institute, and has since 1990. Ms. Downing teaches 12 different courses. Ms. Downing also teaches at Harrisburg Area Community College, since 1982, as an adjunct instructor. She has opened "every police academy" that has taken place there since that time. "I am brought back from Florida, especially to instill the basic ethics, use of force, community policing and certain other skills that any university may jump in there, but always those." (Tr. 235-36). Ms. Downing taught the lethal weapons course, same as Dr. Benny, until 2007. She testified that body armor was not even mentioned at all during the course. (Tr. 244).

With regard to her educational background, Ms. Downing began at Westchester University, but finished with an Associate's degree in Criminal Justice at York College. She received her Bachelor's-degree in Law Enforcement at York College, and a Master's degree in Criminal Justice from Villanova University. (Tr. 236).

Regarding her private sector work, Ms. Downing testified, "I started out as a young officer that needed a second job to put food on the table." (Tr. 236). She worked in security at a company in York that is no longer present. She "rode around in a van and helped transport money to banks." She also worked private investigations for Ruppert Detective Agency. Ms.

Downing worked for Schaad for a limited time in 1974-1975 as security protection for a union head that was physically threatened during a labor dispute. She provided training for Schaad in 1995 and 1996. (Tr. 237).

Regarding her experience with bullet-resistant vests, as a police officer in 1990 she was in charge of ordering equipment. She looked into providing vests, became educated in levels of vests, ballistics "that is supposedly guarded against," and was participated in the decision-making process. She testified that vests were not mandatory throughout her tenure as a York City police officer. Ms. Downing is extremely familiar with other police departments in this area because she teaches in a five-county area in central Pennsylvania. She testified that vests are not mandatory in those areas either, stating, "make it this way, I have heard there are some mandatory polices, but absolutely nothing happens when the officers are caught not wearing them." (Tr. 238).

Ms. Downing also has experience in testing vests. She was a firearms instructor for York City Police Department in 1976 – at the time, 4 out of 104 officers had a vest from 1974 to 1978. Vests had a five-year shelf life. They would test the discarded vests. Ms. Downing testified, "we would shoot every kind of different ammunition in there that we could get our hands on." (Tr. 240). She tested Level II and Level III vests, but not Level IV vests.

Ms. Downing testified that Joint Exhibit II accurately sets forth the levels of bullet-resistant vests. (Tr. 239; Ex. II). She testified that there is a Level V vest that is "only available to sworn military personnel in the United States service." She also testified that there is no uniformity in police departments with respect to which level vest to use in the tri-county area. (Tr. 239).

Ms. Downing reviewed the following to prepare for Court: Schaad's use of force policy, Pennsylvania State Police report on the incident, and the "verdict" between PA Turnpike and Schaad. She noted that [redacted] was shot by a .253 caliber full metal jacketed bullet, which she described as "a pretty kick-ass bullet" from a "high-power rifle." She testified that nothing under a Level IV vest is meant to protect against something like that. Ms. Downing described what happens to bullets depending on characteristics of vests. (Tr. 241-42). She testified that bullet-resistant vests cut down the chance of serious problems. She has known two police officers that were shot in the vest and suffered severe injuries. (Tr. 242).

Ms. Downing testified that she is unaware of any private security provider that requires the use of bullet-resistant vests.[31] She based this opinion on her knowledge, as well as researching "15-20 hours on the internet" and not finding anything. (Tr. 242-43; Ex. B at 2-3). Ms. Downing also testified that she asked her students the same question in her teaching assignments. Ms. Downing testified that very few of her students who worked in the private security field know of any private providers that even offered bullet-resistant vests. (Tr. 243-44).

On cross-examination, Ms. Downing admitted to having no medical training, but then testified that "no one on this earth does" to say whether [redacted] would have survived that

[31] Ms. Downing's expert report further states:

I have never been made aware of any agency that is compelled to provide body armor to its officers, unless it has been mandated in language negotiated with the political entity and the agency bargaining unit. Even then, it has been my experience, that agency officers may refuse to accept the provision of the vest, which allows them to opt out of mandatory wearing. Such is especially the case with civilian security agencies. Despite research, I have located absolutely no documentation that would obligate civilian agencies to provide bullet resistant vests to its employees.

I also could not find no legal mandate to require officers or security guards in the Commonwealth of Pennsylvania to be provided employees with said vests.
(Ex. B at 2-3).

shooting. She testified that she doubted [redacted] would have survived being struck by a .322 caliber bullet while wearing a Level III-A vest. She also testified that when she did the transporting money work, early in her career, she could not afford a "bulletproof vest," and until her second year, she had no protection at all. (Tr. 245-46; Ex. B at 3). She agreed that vests are capable of providing material and significant protection to a shooting victim. Once she bought a vest, though, Ms. Downing testified that "there were very few days in police work in the next 31 years that I didn't wear one" because "it provided that extra security, that extra possibility of allowing me to escape with less injury in the event that something like that would occur." (Tr. 246-47). She agreed that she would rather have a vest on than not have a vest on in the event of an armed attack. (Tr. 247).

DISCUSSION

To prove a violation of an OSHA standard, the Secretary must establish that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980).

While the incident that precipitated this case draws intense interest and scrutiny, the Commission has long held that "it is the hazard, not the specific incident that resulted in injury or might have resulted in injury, that is the relevant consideration in determining the existence of a recognized hazard." *Associated Underwater Servs.*, 24 BNA OSHC, 1248, 1250-1251 (No. 07-1851, 2012) (citations omitted). As the Secretary notes, judges do not leave their common sense at the courthouse door. (Sec'y Br. at 19 citing *Brock v. City Oil Well Serv. Co.*, 795 F.2d 507, 510 (5th Cir. 1986) and *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283,

2288 (No. 97-1073, 2007)). Despite the sensational series of events that occurred on March 20, 2016, OSHA maintains that the hazard in this case is exposure to a "typical holdup" involving a lower-caliber handgun, not the kind of robbery that ultimately occurred with the high-power rifle and the high caliber bullets, along with a hand gun at the start, that were used in this case. (Tr. 113-14). The Court analyzes this case accordingly.

The Secretary argues that the cited standard required Respondent not only to provide bullet-proof vests to its armed security guards, but also to require its armed security guards to wear those bullet-proof vests. Because Respondent did not require its armed security guards to wear bullet-proof vests, the Secretary claims that Respondent violated section 1910.132(a). *Peavey Co.*, 16 BNA OSHC 2022 (No. 89-2836, 1994) (finding employer failed to comply with section 1910.132(a) by not requiring its employees to wear PPE for fall protection).

Respondent, in turn, argues that "[t]he Secretary failed to meet his burden of proving that: (1) the Regulation applies to the specific facts of this case; (2) that Respondent failed to comply with the Regulation; or, (3) that Respondent either knew or could have known with the exercise of reasonable diligence, that its conduct was in violation of the Regulation." (Resp't Br. at 14-15). Respondent also argues that "Respondent did not have 'actual notice' of the hazard." (Resp't Reply Br. at 1).

Applicability

There are two options to establishing applicability for this case. "To establish the applicability of a PPE standard that, by its terms, applies only where a hazard is present," the Secretary must demonstrate that: (1) "there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment, or [(2)] that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts

unique to the particular industry, would recognize a hazard requiring the use of PPE." *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC at 1400-01 *citing Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2065 (No. 78–1443, 1984) (consolidated), *aff'd*, 764 F.2d 32 (1st Cir.1985). The Court will address each option in turn.

Significant Risk and Actual Knowledge

According to Commission precedent, Option 1 for the Secretary to establish applicability of a general PPE standard is to prove both that "there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment." *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC at 1400-01 (emphasis added). Regarding the first prong of Option 1, whether there is a significant risk is "[a] question [that] is one part empirical and one part policy-based." *Pratt & Whitney Aircraft, Div. of United Techs. Corp. v. Donovan*, 715 F.2d 57, 64 (2d Cir. 1983).

> Whether there exists a significant risk depends on both the severity of the potential harm and the likelihood of its occurrence, but there is an inverse relationship between these two elements. As the severity of the potential harm increases in a particular situation, its apparent likelihood of occurrence need not be as great.

Weirton Steel Corp., 20 BNA OSHC at 1259 (citations omitted). Here, the Secretary bears the burden of establishing that both the severity of being shot in the torso on the job, and that the likelihood of its occurrence, together warranted the use of ballistic-resistant vests on Respondent's worksite. *Seward Ship's Drydock, Inc.*, 26 BNA OSHC 2303, 2308 (No. 09-1901, 2018).

The second prong of Option 1, actual knowledge of whether protective equipment was necessary, includes actual knowledge of the significant risk (composed of severity and likelihood) of harm. *Envision Waste Serv., LLC*, 27 BNA OSHC 1001, 1003-04 (No. 12-1600,

2018) (discussing how to establish actual knowledge of alleged eye hazard requiring protective eyewear in lieu of prescriptive eyewear). This burden also rests with the Secretary. *Id.* at *5 *citing Wal-Mart Distribution Ctr. # 6016,* 25 BNA OSHC at 1400-01.[32]

The Secretary claims that he has established Option 1 for this case because "Respondent had actual notice of a need for protective equipment based upon its awareness that armed escorts face the hazard of being shot during the course of an attempted robbery." (Sec'y Br. at 14-17). The Secretary points to the following to support his claim: that Respondent actually provided bullet-proof vests ("Companies do not spend such sums [of money] to protect against unforeseen hazards; Respondent did not, for example, spend money over the same course of time for fall protection equipment"), the PA Turnpike contract called for "armed guards," Respondent's Standard Operating Procedures includes duties to "ensure the safety of [PA Turnpike tellers] and includes a section "entitled 'Attempted Robberies'," and the very purpose of Respondent's armed security guards was to "deter" potential robberies. (Sec'y Br. at 15-17).

Respondent claims that the hazard was not obvious and argues that the "general language of the [cited regulation] and the 'one size fits all approach,' may work in an industrial setting for low-cost items such as hard hats, safety glasses, gloves and steel toed shoes, however, it does not work in this instance for the security industry whose services and work sites are so varied." (Resp't Br. at 2-3, Resp't Reply Br. at 1-2). Respondent has also argued the following:

> The Secretary also claims the Respondent had actual knowledge of the hazard, without citing specifically that actual knowledge. To the contrary in

[32] The Court notes that the majority in *Wal-Mart* did not analyze whether the Secretary established "significant risk," holding instead based on the Secretary's failure to establish notice. *Wal-Mart Distribution Ctr. # 6016,* 25 BNA OSHC at 1401 n10. The Court analyzes notice in the Notice section below.

> Respondent's 45-year history of providing armed and unarmed security services, and involving thousands of employees, there was never a single incident of an employee being confronted by deadly force. We all face hazards every time we leave home in the morning. The real question is what it the probability of that risk. Given the Respondent's long history that was totally devoid of such an incident, what happened on March 20, 2016 was not foreseeable.

(Opposition to Motion for Summary Judgment at 4).

Here, the Secretary must establish both severity and likelihood of the alleged hazard. As an initial matter, the evidence regarding severity of the harm is undisputed and undeniable: being shot in the torso could lead to an employee's death. The Court finds that the severity related to this hazard is high. The Court is therefore mindful that the evidence regarding the apparent likelihood of the occurrence of this hazard need not be as great. *Weirton Steel Corp.*, 20 BNA OSHC at 1259.

The Commission has previously evaluated various levels of likelihood, together with a sufficient showing of severity, that warranted the applicability of an OSHA performance standard. *See, e.g., Seward Ship's Drydock, Inc.*, 26 BNA OSHC at 2308-11 (cited provision inapplicable where Secretary failed to show that the risk of encountering either carbon monoxide or iron oxides at levels above the PEL made respirators necessary.); *Snyder Well Serv., Inc.*, 10 BNA OSHC 1371 (No. 77-1334, 1982); *Gulf Oil Corp*., 11 BNA OSHC 1476 (No. 76-5014, 1983); *Weirton Steel Corp*., 20 BNA OSHC at 1260. The Commission described sufficient levels of likelihood as: "a distinctive possibility," and "more than a speculative possibility." *Snyder Well Serv., Inc.*, 10 BNA OSHC at 1375-76; *Weirton Steel Corp*., 20 BNA OSHC at 1260. Together, these sufficient levels of severity and likelihood constituted "significant risk." *Wal-Mart Distribution Ctr. # 6016*, 25 BNA at 1400-02 & n10, citing to *Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC at 2065. Conversely, the

Commission has previously evaluated levels of likelihood that did not warrant the applicability of the OSHA performance standard. The Commission described these insufficient levels of likelihood as: "a vague risk," "no evidence of possible emergency situation," and "a speculative possibility." *Seward Ship's Drydock, Inc.*, 26 BNA OSHC at 2309-10; *Gulf Oil Corp*., 11 BNA OSHC at 1480-81; *Weirton Steel Corp*., 20 BNA OSHC at 1260; *see also Pratt & Whitney Aircraft, Div. of United Techs. Corp. v. Sec'y of Labor*, 649 F.2d 96, 104 (2d Cir. 1981) (must be more than a "mere possibility" or "freakish event"). Together, these insufficient levels of severity and likelihood in those cases constituted no significant risk to warrant the applicability of an OSHA performance standard.[33]

The Secretary bears the burden of establishing this aspect of risk: likelihood of occurrence. It is this aspect of risk that the parties dispute. The evidence in the record must weigh in favor of the Secretary if the Secretary is going to establish applicability. Here, the Secretary has failed to overcome Respondent's rebuttal.

The record contains multiple pieces of evidence regarding the likelihood of occurrence of being shot. As the Secretary points out, and the record supports, Respondent's employees were guarding someone who was transferring money. Respondent's employees wore a uniform that looked like a police officer's uniform and carried a gun. Per its contractual

[33] Recently, the D.C. Circuit analyzed "significant risk" in the context of evaluating a challenge to OSHA's silica standard in *N. Am.'s Bldg. Trades Unions v. Occupational Safety & Health Admin.*, 878 F.3d 271 (D.C. Cir. 2017). In that case, the D.C. Circuit evaluated "significant risk" from the empirical evidence OSHA provided to support its promulgation of its regulation of silica exposure. *Id. at* 282–83 (citing to the Supreme Court's "guidepost that OSHA follows: a one-in-a-thousand risk that exposure to the regulated substance will be fatal can reasonably be considered significant but a one-in-a-billion risk is likely not significant") (citations omitted). Under a substantial evidence test, which is a lower standard of proof than the preponderance of the evidence test applied by the Commission, the D.C. Circuit upheld OSHA's evaluation of "significant risk" by using the "more likely than not" test in deciding whether exposure to silica levels would cause worker disease. *Id*. The Commission did not address the silica case in *Seward's*, which was issued shortly after the D.C. Circuit case was issued. Neither have the parties. Accordingly, this Court relies on *Seward's* for evaluating likelihood with regard to "significant risk."

obligation, Respondent's employees were tasked to deter potential robbery. The Court finds that the uniform and gun were visually apparent with the intent to identify Respondent's employee to a potential robber as an obstacle to the valuables being transferred, *i.e.*, rendering Respondent's employee a target.

It is undisputed among the witnesses that Respondent's employees faced a hazard of a potential robbery. The Secretary's expert "in security-related matters," Dr. Benny, testified that "any time security involved with protecting money, especially large sums of money, it's a high-risk position because robberies do occur." (Tr. 174-75). Dr. Benny then testified, "[a]nd most armed robberies, based on the research and my years of experience, there are weapons involved, and oftentimes security officers are shot. And – and they – so that makes it a very high risk." (Tr. 176). As the Secretary notes, Respondent even purchased bullet-proof vests for its armed security guards, and no company would invest in such a purchase for an "unforeseen" hazard. (Sec'y Br. at 15). To support his opinion, Dr. Benny referred to an article quantifying the rate of fatal work injuries as more than double the rate for all workers: "In 2009, the rate of fatal work injuries among security guards and related workers was 7.4 per 100,000 full-time equivalent workers, more than double the 3.5 rate for all workers." (Tr. 176-79 quoting "On Guard Against Workplace Hazards" by William J. Wiatrowski; Ex. 8 at 5). Dr. Benny, though, did not explain how a "rate of fatal work injuries," as described in this article, specifically related to the "likelihood of occurrence" of being shot on Respondent's worksite.

It is also undisputed, however, that Respondent's purchase of the bullet-proof vests was not standard for its industry. Respondent introduced testimony by Mr. Sorrels, an expert in security, regarding the likelihood of occurrence of robbery on the PA Turnpike detail. (Tr. 198). He testified that, before March 20, 2016, Respondent had not experienced any armed

robberies or violent assaults during the preceding 45 years, including nearly 20 years of transfers of large sums of money performing the PA Turnpike detail, and the use of an unmarked van (rather than an armored car) on the PA Turnpike detail, "at a minimum gives rise to the conclusion that this is not a high level of risk[.]"[34] (Tr. 207, 214).

Respondent, with testimony specific to its own worksite, has rebutted the Secretary's claim, based on generalities of the security industry, that the PA Turnpike detail was "high-risk." Respondent has rebutted the Secretary's evidence regarding the likelihood of occurrence of robbery on the PA Turnpike detail. The Secretary seems to concede this by stating the following in his brief: "Getting shot in the torso is obviously as high on the severity scale as a potential harm can get. Thus, whether or not the likelihood of an occurrence was low, the life-threatening hazard to be guarded against was enough to necessitate the use of vests[.]" (Sec'y Br. at 23).

It is the Secretary's burden, however, to establish that the likelihood of occurrence of an armed robbery on the PA Turnpike detail was "a distinctive possibility," or "more than a speculative possibility." *Snyder Well Serv., Inc.*, 10 BNA OSHC at 1375-76; *Weirton Steel Corp*., 20 BNA OSHC at 1260. It is not here, not in this record. Given Respondent's evidence

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[34] Respondent also points to AD Olah's testimony regarding probability, building on Olah's understanding of the 45 years of zero previous incidents. (Resp't Br. at 5-7 citing to Tr. 107-14.) This testimony, however, related to one of the factors of assessing penalty (probability of harm) when assessing the penalty, after the citation has been affirmed. (Tr. 109-10.)

> When assessing a penalty under section 17(j) of the OSH Act, 29 U.S.C. § 666(j), the Commission must give 'due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of the previous violations.' The principal factor in a penalty determination is gravity, which 'is based on the number of employees exposed, duration of exposure, <u>likelihood of injury</u>, and precautions taken against injury.'

Associated Underwater Servs., 24 BNA OSHC at 1253 (citations omitted) (emphasis added). The issue of penalty is separate and apart, and analyzed through a different prism, from the issue of the likelihood of occurrence, the element of applicability of a general performance standard that is at issue here.

regarding the unmarked van that masked the money transfer process, and the previous 45 years of no incidents at all (including during the near 20 years of providing armed guard security to the PTC), Respondent has rebutted the Secretary's arguments regarding likelihood of occurrence. The Court is not prepared enough, based on the preponderance of the evidence, to find that the Secretary established likelihood in this case regarding this Respondent; thus, the Court cannot find that the Secretary showed a significant risk of the hazard.

Regarding actual knowledge of the alleged significant risk of the hazard, [a] safety policy alone cannot be used to establish the employer's knowledge of an alleged hazard. *Owens-Corning Fiberglass Corp. v. Donovan*, 659 F.2d 1285, 1288 (5th Cir. 1981) ("Knowledge that personal protective equipment is required may not be implied from voluntary safety efforts standing alone."); *Envision Waste Serv., LLC*, 27 BNA OSHC at 1106; *see also Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC at 2066 ("If employers are not to be dissuaded from taking precautions beyond the minimum regulatory requirements, they must be able to do so free from concern that their efforts will be relied on to establish their knowledge of an alleged hazard.").

Here, the Secretary claims that Respondent actually knew about the hazard. As noted above, while the record is replete with undisputed evidence regarding actual knowledge of the severity of the hazard, regarding actual knowledge of the likelihood of its occurrence, however, the Secretary's evidence stands rebutted by Respondent. *Envision Waste Serv., LLC*, 27 BNA OSHC at 1005-06 (Secretary failed to establish employer had actual knowledge of a hazard requiring use of eye protection where Secretary established there was only one recorded eye injury in the sorting rooms between 2009 and 2012 and the record did not show how many employees worked in the sorting room during this period.).

Under these circumstances, the Court cannot find that the Secretary has established significant risk and actual knowledge of the hazard.

Reasonable Person Test

Option 2, according to Commission precedent, for the Secretary to establish applicability of a general PPE standard is to prove "that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE." *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC at 1400-01; *see also Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC at 2065-66 (discussing whether general PPE standard covers safety shoes at Respondent's workplace). This concept was further reinforced by the First Circuit; *Cape & Vineyard Div. of New Bedford Gas v. Occupational Safety & Health Review Comm'n*, 512 F.2d 1148, 1152 (1st Cir. 1975) ("OSHA had to establish here that a prudent man familiar with linework would have understood that more protective equipment was 'necessary' in the situation at issue.").

> Section 1910.132(a) is a general standard, broadly worded to encompass many hazardous conditions or circumstances. If the duty to comply with the standard is not defined, it could run the risk of being almost indefinitely applicable. To avoid that result, and in order to carry her burden of proof as to applicability, [] the Secretary must establish that a reasonably prudent employer, concerned about the safety of employees in the circumstances involved in a particular case, would recognize the existence of a hazardous condition and provide protection as required by the Secretary's citation. Evidence that other employers in the industry actually provide the particular personal protective equipment satisfies this test. Also allowed for consideration is evidence of accidents, evidence of industrial safety standards or recommendations, or opinion testimony from persons experienced in performing the work or familiar with the working conditions.

Trinity Indus., Inc., 15 BNA OSHC 1481, 1484-85 (No. 88-2691, 1992) (citations omitted).

The Third Circuit, to which this case could be appealed, has held that with regard to the "reasonable person test," while industry custom and practice are relevant, the ultimate inquiry

is whether a reasonable person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment. *Voegele Co. v. Occupational Safety & Health Review Comm'n.*, 625 F.2d 1075, 1078 (3rd Cir. 1980) (finding "quite compelling" other courts refusing to limit the reasonable person test to the custom and practice of the industry because "(s)uch a standard would allow an entire industry to avoid liability by maintaining inadequate safety") (citations omitted); *see also Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of the circuit where it is probable a case will be appealed).

> There are actually three factors to evaluate under this standard: recognition of a hazard, feasibility of alternatives, and whether the alternatives would create a greater hazard. The burden of proof rests with the Secretary to prove all elements of a violation of a general safety standard.

Voegele Co. v. Occupational Safety & Health Review Comm'n., 625 F.2d at 1079. Once the Secretary establishes the hazard,

> It is the Secretary's burden to demonstrate and describe feasibility and the likely utility of particular measures that the employer could have used. The appropriate weight to be accorded to industry practice of whether these suggested methods were feasible and a reasonable person would have utilized them in the context of the hazard presented, is best summarized as follows: 'This is not to say that safety precaution must find general usage in (the) industry . . . . The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary.' <u>However, it would be error totally to ignore or fail to consider prevailing industry standards.</u>

Id. at 1080. (citations and footnotes omitted) (emphasis added).

As noted above, a safety policy alone cannot be used to establish the employer's knowledge of an alleged hazard. *Envision Waste Serv., LLC*, 27 BNA OSHC at 1006.

However,

> [a]n employer's voluntary safety efforts may properly be considered *in conjunction with other evidence* demonstrating that the employer or its industry recognized the hazard in question…Evidence concerning equipment used by other employers is relevant to hazard recognition because the evidence demonstrates a broad perception, throughout an industry, that protection was necessary in the circumstances.

Trinity Indus., Inc., 15 BNA OSHC at 1485 n.8 (emphasis added) (citations omitted).

Here, it is undisputed that Respondent went "above and beyond the industry norm," when it provided bullet-proof vests, at no charge, to its armed security guards. (Tr. 151, 188, 191, 204, 209, 232, 243). The evidence regarding incidents on the PA Turnpike detail reveals that there have been zero instances over nearly 20 years involving thousands of PA Turnpike trips. (Jt. Pre-Hr'g St. at ¶ 19). Against this, the Secretary has cited a litany of outside caselaw and a congressional hearing record, outside of this record, to establish that the hazard here was "readily apparent." (Sec'y Br. at 19). The Secretary then states that "judges 'do not check [their] common sense at the courthouse door.'" (Sec'y Br. at 19). The Secretary, however, has failed to connect the cited cases and congressional hearing record to the particular worksite in this case.

The Secretary introduces testimony regarding Respondent's armed security guards preferring to wear the bulletproof vests that Respondent provided. When asked whether they wore their issued vests whenever they wore Respondent's uniform, Respondent's armed security guards Titus and Allman testified "always." (Tr. 78, 99). Respondent's armed security guards Spadafora and Aster did not wear their vests when it was hot. (Tr. 50-54, 90). As the Secretary notes, other armed security guards told CO Ritner that they wore their bulletproof vest. (Sec'y Br. at 24-25 citing Tr. 53, 55). Lenahan testified that one of his armed security guards, Stover, wore his vest "religiously." (Tr. 145). The record also shows that

[redacted] did not wear his vest on March 20, 2016, even though he had one that Respondent provided to him. When asked why, Mr. Lenahan told CO Ritner that "the older element didn't prefer to wear them because of comfort." (Tr. 46).

As noted above, the severity of gun violence at the worksite is not in dispute. It is also not disputed that companies like Respondent in the security industry do not provide bulletproof vests. Indeed, counsel for the Secretary stated at trial: "I don't think we're denying that the industry itself doesn't have any mandates." (Tr. 231). The Secretary has not overcome this evidence with contrasting evidence specific to Respondent and the PA Turnpike detail. Because of this, the only evidence that the Secretary has, specific to Respondent's workplace, is Respondent's choice to provide its armed security guards with bulletproof vests and that some of its armed security guards prefer to wear them. (Sec'y Br. at 14-15 *citing Owens-Corning Fiberglas Corp.*, 7 BNA OSHC 1291, 1295-96 (No. 76-4990, 1976), *aff'd*, 659 F.2d 1285 (5th Cir. 1981)). As this is the only evidence that the Secretary has specific to Respondent's workplace, the Court cannot find that the Secretary carried his burden showing that a reasonably prudent employer recognized the existence of the hazardous violative condition alleged in the citation.

This is not a situation where other employers in Respondent's industry provide the subject PPE. *Trinity Indus., Inc.*, 15 BNA OSHC at 1485 n.8; *Voegele Co. v. Occupational Safety & Health Review Comm'n*, 625 F.2d at 1080 ("However, it would be error totally to ignore or fail to consider prevailing industry standards."). Indeed, a ruling in favor of the Secretary on this issue, based on these facts, would affect more companies than just Respondent in the security industry. Similarly, this is also not a situation where the company knew for decades that "many, if not most," of its employees were actually physically affected

by the hazard as the Fifth Circuit noted on appeal in *Owens-Corning Fiberglass Corp. v. Donovan*, 659 F.2d at 1288-89 (citations omitted) (relying in part on showing of "fiberglass itch" developed by "many, if not most" employees when not using gloves). Here, Respondent has had zero instances of armed robberies and violent assaults for 45 years, despite daily details from 7:00 a.m. to 12:00 p.m. on the PA Turnpike for the past near 20 years. As noted above, all of Respondent's security officers had documented law enforcement officer experience as a prerequisite to being hired as an armed security guard for Respondent. (Tr. 47). The Court has also found that the use of an unmarked van on the PA Turnpike detail, along with Respondent's 45-year assault free history, affected the likelihood assessment of the risk of the hazard its armed guards faced. Based on these factors, the Court finds that Respondent "could reasonably believe that, either because of other safety precautions or because of the skill of its employees, the risk of injury was insufficient to require the mandatory use of personal protective equipment." *Id.* at 1289.

The Court finds that the Secretary has not established that a reasonable person familiar with the circumstances surrounding Respondent's worksite, including any facts unique to the particular industry, would recognize a hazard requiring the use of bulletproof vests. *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC at 1400-01.

The Court concludes that the Secretary has not established that the cited standard applies to the facts of this case.

Notice

Even if the Secretary had established applicability of the cited standard here, the Court finds that the Secretary provided insufficient notice of the requirements of the standard such

that Respondent would be deprived of due process if held accountable under the standard. As noted above, Respondent has had a 45-year armed robbery and violent assault free history.

An employer cannot be held in violation of the Act if it fails to receive prior notice of what is required. *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC at 2287.

> While "(t)he goal of the Act is to prevent the first accident," and "the Act does not establish as a sine qua non any specific number of accidents or any injury rate," a very low injury rate has a definite bearing on the question whether an employer has notice that personal protective equipment is necessary under a general regulation such as [section] 1910.132(a). An employer may be aware of a possible hazard, yet still lack notice that mandatory personal protective equipment is necessary, if the hazard has never given rise to an injury.

Owens-Corning Fiberglass Corp. v. Donovan, 659 F.2d at 1290 (emphasis added). The Third Circuit has determined that "'ascertainable certainty' [i]s the applicable standard for fair notice." *Sec'y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193, 202 (3d Cir. 2008) (finding fair notice when the Secretary "has not given 'conflicting interpretations' of [the standard at issue] and has provided 'a sufficient, publicly accessible statement of [his] interpretation' prior to the issuance of [the citations] in question") (citations omitted).

The Secretary claims that Respondent's obligations were "abundantly clear" based on the language of the cited standard, a 2013 OSHA LOI, and previous citations in 2014 and 2015 to other employers, all allegedly showing that OSHA interprets the cited standard to include bullet-proof vests as a form of PPE. (Sec'y Br. at 28-30). The Secretary further states that, "in any event," these documents provided "fair and reasonable warning to Respondent," such that it "could have made an inquiry to OSHA." (Sec'y Br. at 30). The failure to make such an inquiry in this instance, according to the Secretary, undermines Respondent's fair notice argument. (*Id.*).

Respondent argues that "[t]he Regulation does not clearly invoke a legal obligation to provide ballistic-resistant vests and now enforcing such an interpretation in hindsight is a violation of Respondent's due process right of fair notice." (Resp't Br. at 14). Respondent claims that the 2013 LOI and previous OSHA citations contained in Exhibits 11 through 15 fail to provide adequate notice. (Resp't Br. at 2-3, Resp't Reply Br.at 2-3).

The Court agrees with Respondent. The Secretary has provided insufficient notice to Respondent that bullet-proof vests were required to be worn by its armed security guards at the PA Turnpike worksite. The Secretary's arguments regarding whether bullet-proof vests are considered PPE are not persuasive. Yes, just as being shot is undisputedly a severe hazard, a bullet-proof vest is a form of PPE. The question, however, is whether Respondent had notice that they were required to be worn by its armed security guards at its worksite on March 20, 2016.

Even the 2013 OSHA LOI states the same thing: OSHA considers bullet-proof vests a form of PPE and states that they must be adequate <u>if</u> employers provide them. It does not state employers must, and when, provide them. This LOI itself leaves discretion to the employer, unlike the letter constituting sufficient notice in *Sec'y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193, 202 (stating that "[transportation cost[s] must be covered by the employer" and that "employees must be considered 'on-duty'" when receiving post-exposure treatment."). Here, as Respondent states, the 2013 OSHA LOI "does not withstand grammatical analysis," with regard to adequately conveying whether Respondent was required to provide vests in the first place to its armed security guards and mandate their wear at the worksite. (Resp't Br. at 13-14.)

The LOI, moreover, is entirely consistent with the undisputed testimony in the record: that companies like Respondent do not believe that they are under a mandate to provide bullet-proof vests to their armed security guards and mandate their wear. Therefore, the Court finds that the Secretary has not provided a clear "sufficient, publicly accessible statement of [his] interpretation' prior to the issuance of [the citations] in question." *Sec'y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d at 202. Under these circumstances, the Court does not find that Respondent was under any obligation to contact OSHA to see if it was required to provide bullet-proof vests to its armed security guards and mandate their wear at the PA Turnpike worksite.[35]

The Court also agrees with Respondent regarding Exhibits 11-15, the previous OSHA citations issued to other employers, not Respondent, for allegedly violating the cited standard at issue here by not providing bullet-proof vests. (Resp't Reply Br. at 2; Exs. 11-15). Those facts are not before this Court, and the citations themselves contain an insufficient set of facts from which to compare the facts that are at issue here. *Owens-Corning Fiberglass Corp. v. Donovan*, 659 F.2d at 1288 ("Due process requires that employers be given reasonably clear advance notice of what is required of them [under generally worded standards].").

Accordingly, the Court concludes that the Secretary has not established a violation of 29 C.F.R. § 1910.132(a) and has not provided adequate advanced notice to Respondent that it was in violation of 29 C.F.R. § 1910.132(a) in this case.

[35]*See also Owens-Corning Fiberglass Corp. v. Donovan*, 659 F.2d at 1288 ("The 29 C.F.R. § 1910.132(a) standard is a general federal admonition providing "little guidance to employers concerning the circumstances in which personal protective equipment is required[.]").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based on these findings of fact and conclusions of law, it is **ORDERED** that:

1) Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1910.132(a), is **VACATED**.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: November 13, 2018
Washington, D.C.