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

SECRETARY OF LABOR, Complainant, v. UNITED STATES POSTAL SERVICE, Respondent, and NATIONAL ASSOCIATION OF LETTER CARRIERS, Branch 51, Authorized Employee Representative.	OSHRC Docket No. 04-0316

APPEARANCES:

Howard M. Radzely, Solicitor of Labor; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Charles F. James, Counsel for Appellate Litigation; Daniel J. Mick, Counsel for Regional Trial Litigation; Ronald Gottlieb, Attorney; U.S. Department of Labor, Washington, DC
For the Complainant

Stephen C. Yohay, Esq. and Kristin J. Dunne, Esq., Arent Fox PLLC, Washington, DC; Jeannine H. Turenne, United States Postal Service Law Department, of counsel, Washington, DC
For the Respondent

DECISION

Before: RAILTON, Chairman, ROGERS and THOMPSON, Commissioners.

BY RAILTON, Chairman; THOMPSON, Commissioner:

Before the Commission on review is a decision by Administrative Law Judge G. Marvin Bober, vacating a citation issued by the Occupational Safety and Health Administration ("OSHA") to the United States Postal Service ("Postal Service") at its office in Fall River, Massachusetts. OSHA cited the Postal Service for violating 29 C.F.R. § 1910.132(a)—the general industry standard for personal protective equipment ("PPE")—or, in the alternative, section 5(a)(1) ("the general duty clause") of the Occupational Safety and Health Act ("OSH

Act"), 29 U.S.C. § 654(a)(1), for failing to provide its letter carriers with adequate high visibility "safety apparel" to wear during low-light or dark conditions.

At issue here is whether the judge erred by (1) dismissing the § 1910.132(a) item for lack of applicability to the cited condition; (2) excluding the Secretary's expert witness from testifying; and (3) vacating the general duty clause item. For the following reasons, we affirm the judge.

Background

On November 13, 2003, a letter carrier working out of the Fall River office was crossing a street when a vehicle struck her pushcart.[1] Following the incident, the letter carrier filed a complaint with OSHA, which conducted an inspection of the Fall River office that led to the issuance of the subject citation. At the time of the inspection, the Postal Service made reflective vests available to its letter carriers but did not mandate their use. Each vest had two vertical strips of reflective trim on a brightly colored orange or green background; the trim was at least one-inch wide and ran up the front of the vest, over the shoulders, and down the back. In addition, Postal Service carriers could obtain pants that had ¾ inch-wide reflective strips on the sides of the legs, and jackets that had ¾ inch-wide reflective strips on the trim on the front pocket and along the back.[2] The Secretary claims that the Postal Service's reflective vests and the other clothing with reflective strips are inadequate because they do not comply with American National Standard Institute (ANSI)-International Safety Equipment Association (ISEA) 107-1999 ("ANSI-ISEA 107-1999"). According to the Secretary, to be ANSI-compliant, these garments must provide 155 square inches of reflective material, and the reflective trim must encircle the wearer's torso so as to provide 360-degree visibility. *See* ANSI-ISEA 107-1999, Tbl. 1 and § 5.2.1 ("vests … shall have contiguous areas of retro-reflective material encircling the torso….").

The Postal Service timely contested the citation, and the case was set for hearing. Prior to the hearing, the judge granted the Postal Service's motion to dismiss the § 1910.132(a)

[1] There is inconsistent evidence about whether the vehicle also came into contact with the letter carrier after hitting the pushcart.

[2] These pants and jackets, along with other clothing containing no reflective trim, were chosen through collective bargaining. The reflective vests, however, were provided by the Postal Service as an additional measure of protection.

allegation on the grounds that the standard cannot be read to require the wearing of reflective clothing, and he adhered to his ruling after the Secretary moved for reconsideration.

The Postal Service then filed another pre-hearing motion to preclude the Secretary's expert witness—Jeffrey O. Stull—from testifying, arguing that Stull lacked expertise both in reflective clothing and in the application of ANSI-ISEA 107-1999, and that any testimony he could provide would be irrelevant and unreliable. The Secretary opposed this motion, stating that Stull would testify that the apparel provided by the Postal Service is not ANSI-compliant and that the Secretary's proposed abatement—providing reflective and high visibility apparel that complies with ANSI/ISEA 107-1999—is feasible. The judge first denied without prejudice the Postal Service's motion to preclude the Secretary's expert witness from testifying. However, at the hearing, the judge decided not only to grant the Postal Service's motion to exclude the testimony of the Secretary's expert witness, but also to *sua sponte* exclude the testimony of the Postal Service's own expert witness, based on his finding that both experts' testimony would not assist him in deciding the remaining section 5(a)(1) violation.

In response to these evidentiary rulings, the parties made offers of proof. The Secretary proffered Stull's curriculum vitae and written report and advised the judge that Stull would testify that "high visibility apparel is personal protective equipment because it is an item used to provide protection against a specific hazard." The Postal Service then proffered its expert's report, curriculum vitae and deposition. After considering these proffers, the judge adhered to his original ruling to exclude the testimony of both parties' experts.

Following a hearing on the merits of the alleged violation of the general duty clause, the judge concluded the Secretary failed to establish that her proposed abatement method—providing ANSI-compliant garments—would materially reduce the hazard to which the employees were exposed. On that basis, the judge vacated the alternative section 5(a)(1) violation.

Discussion

I. Application of § 1910.132(a)

We turn first to the judge's dismissal of the § 1910.132(a) allegation. In finding that the standard did not apply to the cited condition, the judge reasoned that § 1910.132(a) encompasses PPE that acts as a barrier against a hazard and does not include reflective or high-visibility garments, which are designed only to warn others of the wearer's presence. The judge also

relied on the specific mention of reflective clothing in other OSHA standards, *e.g.*, 29 C.F.R. §§ 1917.71 (specialized terminals), 1918.86 (cargo handling) and 1926.201 (construction flaggers), which he found demonstrates that the Secretary can expressly include such requirements in a standard when she intends to do so.

We evaluate whether the Secretary has met her burden of proving that a standard applies by first looking to the language of the standard.[3] *See Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1328-29, 2002-04 CCH OSHD ¶ 32,697, p. 51,643 (No. 97-0469, 2003) (consolidated cases). Here, the Secretary argues on review that § 1910.132(a) is ambiguous with regard to whether warning garments can be considered PPE.[4] We agree that the language of § 1910.132(a) standing alone does not indicate whether "protective equipment" includes warning garments such as the reflective clothing and vests at issue here. We reach a similar conclusion in *The Ruhlin Company* (*Ruhlin*), OSHRC Docket No. 04-2049, a case we decide today as well, where we conclude that the phrase "protective equipment" as used in 29 C.F.R. § 1926.95(a)—the construction counterpart to § 1910.132(a)—does not indicate whether it includes high-visibility vests, another type of warning garment.

When the language of a standard fails to provide an unambiguous meaning, we look to the standard's legislative history. *See Oberdorfer Indus. Inc.*, 20 BNA OSHC 1328-29, 2002-04 CCH OSHD at p. 51,643. The legislative history of § 1910.132(a) does not resolve its ambiguity with regard to warning garments. Section 1910.132(a) was enacted under section 6(a) of the OSH Act and was adopted verbatim from the Walsh-Healey Public Contracts Act. *See* Occupational Safety and Health Standards; National Consensus Standards and Established Federal Standards, 36 Fed. Reg. 10,465, 10,593 (May 29, 1971). Neither the statement

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[3] In 1993, OSHA adopted 29 C.F.R. § 1926.95(a), the parallel construction industry standard for PPE, verbatim from § 1910.132(a). *See* Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, 58 Fed. Reg. 35,076 (June 30, 1993).

[4] Section 1910.132(a) states as follows:

> 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.

accompanying the standard's adoption nor the legislative history of the Walsh-Healey Public Contracts Act address "directly and explicitly" whether PPE includes warning garments, such as the warning garments in the case before us. *See* Public Contracts and Property Management Chapter 50—Safety and Health Standards for Federal Supply Contracts, 34 Fed. Reg. 788 (Jan. 17, 1969). *See also Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 2626-27 (2005) (in interpreting the meaning of a statute, the Court looked for a direct and explicit statement in statute's legislative history); *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 627 (1993) (in determining meaning of an ambiguous statute, the Court did not rely on the legislative history where the Court found no direct discussion on a disputed topic). Neither source, therefore, contains the type of explicit statement necessary to resolve whether the PPE standards by their plain terms include warning garments. Because the phrase "protective equipment" is ambiguous, and because the legislative history does not directly and explicitly clarify the issue, we must evaluate whether the Secretary's interpretation of the phrase is reasonable. *See Oberdorfer Indus. Inc.*, 20 BNA OSHC at 1329, 2002-04 CCH OSHD at p. 51,643.

In assessing the reasonableness of the Secretary's interpretation, we consider whether her interpretation 'sensibly conforms to the purpose and wording of the regulation []', taking into account 'whether the Secretary has consistently applied the interpretation embodied in the citations,' 'the adequacy of notice to regulated parties,' and 'the quality of the Secretary's elaboration of pertinent policy considerations.'" *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069, 1997 CCH OSHD ¶ 31,445 p. 44,470 (No. 96-0563, 1997) (citing *Martin v. OSHRC*, 499 U.S. 144, 150, 157-58 (1991)).

Here, we conclude that the Secretary's interpretation is not reasonable. In examining § 1910.132 as a whole, we find that warning garments may not be considered PPE. Section 1910.132(a), the "general requirements" standard for Subpart I (Personal Protective Equipment), requires that PPE be provided and used whenever it is necessary to protect against hazards "capable of causing injury or impairment … through absorption, inhalation or physical contact." None of the types of PPE specifically identified in § 1910.132(a) or in the other sections of Subpart I are types that "warn." *Cf. Carlyle Compressor Co.*, 683 F.2d 673, 675-76 (2d Cir. 1982) (finding it unreasonable to use the phrase "such as" to extend application of a standard to items that are not similar to those specifically enumerated in the cited standard). All sections in

Subpart I, which § 1910.132(a) covers, address items that act as guards or shields; none include items that "warn." Indeed, 29 C.F.R. § 1910.134 applies to respiratory protection; .135 applies to head protection; .136 applies to foot protection; .137 applies to electrical protective equipment; and .138 applies to hand protection. Therefore, we find it unreasonable for the Secretary to claim that warning garments are included in this list.

Moreover, we observe that other OSHA standards specifically identify high visibility or other warning garments when such garments are required. Thus, 29 C.F.R. § 1917.71(e) requires marine terminal employees to wear "high visibility vests," § 1918.86(m) requires cargo-handling personnel to wear "high visibility vests;" and § 1926.201 requires flaggers in the construction industry to wear "warning garments." This demonstrates that OSHA can specifically identify warning garments when it intends to require their use; OSHA's failure to do so either in § 1910.132(a) or any of the more specific standards contained in Subpart I militates against any conclusion that § 1910.132(a) includes such items. *See FTC v. Sun Oil Co.*, 371 U.S. 505 (1962) (when a term is specifically used in a regulation but excluded in another, it should not be implied where excluded).

Finally, we find that the Secretary has failed to consistently interpret the PPE standards to include warning garments. There is nothing to indicate that, at the time § 1910.132(a) was adopted, OSHA contemplated that warning garments would be covered. On the contrary, in 1971, when OSHA adopted standards for specific types of PPE in Subpart I, which are governed by § 1910.132(a), only national consensus standards addressing guards or shields were adopted. *See* Occupational Safety and Health Standards; National Consensus Standards and Established Federal Standards, 36 Fed. Reg. at 10,593. Thirteen years later OSHA announced for the first time that PPE includes warning garments. In July 1984, John B. Miles, Jr., Director of OSHA's Directorate of Field Operations, issued a standard interpretation letter stating that an orange vest was PPE within the meaning of 29 C.F.R. § 1926.28(a)—OSHA's then general PPE standard for the construction industry.[5] This letter, however, fails to explain why OSHA had not previously interpreted any PPE standard to include warning garments

[5] Section 1926.28(a) requires compliance with the specific PPE and lifesaving equipment contained in Subpart E, where § 1926.95(a)—the PPE standard cited in *Ruhlin* that was adopted by the Secretary in 1993—is now located. The language of § 1926.28(a) has not changed since 1984, and states as follows:

The July 1984 letter has served as the basis for subsequent OSHA prosecutions of general industry employers. Specifically, since 1984, OSHA has cited employers under § 1910.132(a) for failing to provide reflective or high visibility vests in five cases, including the present matter, as follows: *AMR Servs., Co.*, 1992 OSAHRC LEXIS 97, *settlement aff'd*, 1991-1993 CCH OSHD ¶ 29,771, p. 40,490 (No. 89-1764, 1992) (airline failed to require ground services employees to wear reflective vests; case settled after judge affirmed the citation); *Farrens Tree Surgeons, Inc*., 15 BNA OSHC 1793, 1991-93 CCH OSHD ¶ 29,770 (No. 90-998, 1992) (without addressing whether standard applies, Commission vacated citation issued under § 1910.132(a) alleging a failure to provide hard hats and warning vests because Secretary did not prove employer knowledge); *Nelson Tree Serv. Inc.*, 19 BNA OSHC 1482, 2001 CCH OSHD ¶ 32,364 (No. 00-1130, 2001) (ALJ) (Commission judge vacated citation issued under § 1910.132(a) where failure to wear reflective vests did not place workers in danger; applicability of standard not an issue); and *United States Postal Service (Anchorage, Alaska)*, OSHRC Docket No. 04-0655, a recent case also involving the Postal Service that settled prior to a hearing.[6]

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

[6] Since 1993 when OSHA copied the language of § 1910.132(a) and applied it to the construction industry under § 1926.95(a), OSHA has issued four citations alleging violations under § 1926.95(a) based on an employer's alleged failure to provide some type of warning garment. *See Nat'l Engin'g & Contracting Co.*, 1996 OSAHRC LEXIS 126 (No. 94-2787, 1996), *rev'd on other grounds*, 18 BNA OSHC 1075, 1997 CCH OSHD ¶ 31,431 (1997) (Commission judge rejected employer's argument that warning vests were not PPE); *AAA Delivery Serv., Inc.*, 21 BNA OSHC 1219, 2005 CCH OSHD ¶ 32,796 (No. 02-0923, 2005) (Commission vacates citation issued for employer's failure to provide warning vests because Secretary failed to prove exposed workers were Respondent's employees); *HWS Consulting Group Inc.*, 21 BNA OSHC 1324, 2004 CCH OSHD ¶ 32,765 (No. 04-1219, 2005) (Commission judge vacates citation because workers were not involved in construction); and *Ruhlin*, OSHRC Docket No. 04-2049. As with the preamble to the revisions made to § 1910.132 in 1994, the 1993 preamble to the adoption of the general industry standards as construction standards failed to indicate that OSHA considered warning garments to be PPE. *See* Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, 58 Fed. Reg. 35,076 (June 20, 1993).

Then, in 1994, after OSHA issued citations in the first two of the above five cases involving § 1910.132(a), OSHA revised 29 C.F.R. Part 1910, Subpart I, to update its provisions. *See* Personal Protective Equipment for General Industry (Preamble to Revisions), 59 Fed. Reg. 16,334 (April 6, 1994). Nevertheless, in revising the standard, OSHA failed to indicate that it now considered warning garments to be covered under § 1910.132(a). *See id.* OSHA's final pronouncement on the issue was made in May 2004, when Russell B. Swanson, the Director of OSHA's Directorate of Construction, issued a standard interpretation letter addressing whether "[c]onstruction employees working on highway/road construction work zones" were required to wear "high-visibility apparel." In the May 2004 letter, the Secretary explained that under § 1926.201(a), such apparel is required for certain flaggers. Noting that Subpart G of Part 1926 —the construction industry Subpart addressing PPE—does not otherwise "address the circumstances in which it is necessary to provide warning garments to protect against the hazard posed by traffic," the Secretary further explained:

> It is well recognized in the construction industry that construction workers in highway/road construction work zones need to be protected from traffic. The MUTCD reflects industry practice with respect to identifying the types of situations where these workers need high-visibility warning garments. In such cases, Section 5(a)(1) requires the use of such garments.

In our decision today in *Ruhlin*, we hold that this letter establishes that § 1926.95(a)—the construction industry's PPE counterpart to § 1910.132(a)—does not apply to another type of warning garment—high-visibility vests. We also conclude that the two interpretative letters at issue—the July 1984 letter indicating that PPE includes warning garments, and the May 2004 letter indicating that it does not—are inconsistent. As we state in *Ruhlin*, the May 2004 letter effectively supersedes the July 1984 letter, thus removing the primary basis of the § 1926.95(a) enforcement policy leading to the citation issued in that case. We reach that same conclusion here, as applied to the Secretary's interpretation of § 1910.132(a), the general industry counterpart and verbatim source of § 1926.95(a). *See* Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, 58 Fed. Reg. 35,076 (June 20, 1993). Accordingly, we conclude that the May 2004 letter effectively removes the primary basis of the Secretary's § 1910.132(a) enforcement policy, which led to the issuance of the citation here. *See Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004). *See also Akzo Nobel Salt Inst. Inc. v. FMSHRC*, 212 F.3d 1301, 1305 (D.C. Cir. 2000) (court refused to pass on permissibility of agency counsel's "advocacy of several different positions," because

inconsistencies suggested the agency had not grappled with the meaning of an ambiguous regulation).

The Secretary tries to explain away the May 2004 letter in a simplistic fashion, arguing that it does not apply because the letter concerns conditions in the construction industry, while the present case concerns conditions in the general industry. This argument, however, is inconsistent with the Secretary's reliance on the July 1984 letter—a letter which also concerns conditions in the construction industry, not in the general industry—as the basis for interpreting § 1910.132(a) to include warning garments. Furthermore, the Secretary has given us no basis for concluding that the PPE standard encompassed by § 1910.132(a) and its identical counterpart, § 1926.95(a), should include warning garments in one industry but not in the other. The Secretary's failure to provide a reasoned basis for her change in positions is an indication she has not only failed to adequately grapple with the policy issues presented, but also to arrive at a rational interpretation.[7] *See Oberdorfer*, 20 BNA OSHC at 1329, 2002-04 CCH OSHD at pp. 51,643-44 (citing *Greater Boston Television Co. v FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

Most troubling, however, is the Secretary's attempt to impose a warning clothing requirement under the guise of interpretation so as to avoid the necessity of putting her new requirement to the test of rulemaking. Here, and in *Ruhlin*, the Secretary would "interpret" her PPE standards as imposing the substantive requirement to use warning clothing. If the Secretary wishes to include such a requirement under either § 1926.95(a), the construction industry standard at issue in *Ruhlin*, or § 1910.132(a) the general industry standard at issue here from which the construction standard is derived, she must resort to rulemaking under section 6 of the Act, 29 U.S.C. § 655.

In 1971, the Secretary had the authority under section 6(a) of the Act, 29 U.S.C. § 655(a), to adopt over the two-year period following the effective date of the Act existing ANSI standards

[7] In her dissent, our colleague appears to believe that the Secretary has explained why she considers warning garments to be PPE. However, the Secretary has never adequately considered the issue, or truly "grappled" with why the standard should be extended to cover warning garments. *See Akzo Nobel Salt, Inst. Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000) ("courts defer to agency interpretations of ambiguous regulations first put forward in the course of litigation, but only where they 'reflect the agency's fair and considered judgment on the matter in question.'" (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997))). In fact, our colleague's description of the May 2004 letter as "confusing" and "obtuse" supports finding that the Secretary has failed to fully grapple with this issue.

and established federal standards containing a warning clothing requirement without adhering to her notice and comment obligations. In fact, the Secretary relied upon that authority to adopt standards of that kind for construction under the Subpart titled "Signs, Signal and Barricades." *See* Part 1926—Safety and Health Regulations for Construction National Consensus Standard, 37 Fed. Reg. 9024-25 (May 4, 1972) (adopting "ANSI Standard D6.1—1971, Manual on Uniform Traffic Control Devices for Streets and Highways as a construction standard and designating it 29 C.F.R. § 1926.201(a)(2)."). At that time, however, she failed to adopt such standards for the general industry.

The Secretary had the opportunity to add such a standard in 1994, when she revised § 1910.132(a), but again she failed to do so. Personal Protective Equipment for General Industry (Preamble to Revisions), 59 Fed. Reg. 16,334 (April 6, 1994). The Secretary also failed to amend either the general industry or the construction PPE standard—§ 1926.95(a), the standard at issue in *Ruhlin*—when she updated the Signs Signals and Barricades subpart of the construction standards to include a later version of the MUTCD in 2002. *See* Safety Standards for Signs, Signals, and Barricades 67 Fed. Reg. 57,722 (Sept. 12, 2002). Thus, rather than subject the issue of including warning garments under the PPE standards to the notice and comment procedures contained in section 6(b) of the Act, the Secretary has chosen to declare her position through inconsistent interpretation letters. We reject the Secretary's attempt, both here and in *Ruhlin*, to avoid her obligation to proceed under the rulemaking provisions of the Act.

Accordingly, we affirm the judge's decision to dismiss the Secretary's allegation that the Postal Service violated § 1910.132(a).[8]

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[8] Our dissenting colleague implies that the majority opinion is contrary to Commission precedent. However, the Commission has never extended the application of any PPE standard to include warning garments. Neither the life vests at issue in *United Geophysical Corp.*, 9 BNA OSHC 2117 (No. 78, 1981), *aff'd without published opinion*, 683 F.2d 415 (5th Cir. 1982), nor the seat belts at issue in *Ed Cheff*, 9 BNA OSHC 1883 (No. 77-2778, 1981), serve as warning garments. On the contrary, both devices offered a direct level of protection well beyond that provided by a warning garment – a life vest prevents its wearer from drowning and a seat belt restrains its wearer from impact.

Our colleague also implies that the May 2004 letter is either not relevant to this case, or is somehow less relevant, because it "*postdates*" the citation here. On the contrary, the May 2004 letter is relevant, even though it postdates the citation. *See, e.g., The Timken Co.*, 20 BNA OSHC 1070, 1072 (No. 97-0979) (in separate opinion, Commissioner Rogers finds that an interpretation issued after the citation "casts doubt" on the consistency of the Secretary's

II. Alleged Violation of Section 5(a)(1) of the OSH Act

We next turn to the Secretary's allegation, cited in the alternative, that the Postal Service's failure to provide adequate reflective vests violated the OSH Act's general duty clause. In vacating this charge, the judge found the Secretary failed to meet that part of her burden of proving a violation of section 5(a)(1), requiring her to show that the abatement method she proposes is feasible and will eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007, 2005 CCH OSHD ¶ 32,756, p. 52,074 (No. 93-0628, 2004) (citing *Pelron Corp.*, 12 BNA OSHC 1833, 1835, 1986-87 CCH OSHD ¶ 27,605 p. 35,871 (No. 82-388, 1986)). He found that the record failed to show that ANSI-compliant clothing would be more effective in reducing the hazard than the reflective clothing already provided by the Postal Service. We agree with the judge that the Secretary failed to establish a violation of the general duty clause.[9]

To show that a proposed safety measure will materially reduce a hazard, the Secretary must submit evidence proving, as a threshold matter, that the methods undertaken by the employer to address the alleged hazard were inadequate. Where the Secretary fails to show any such inadequacy, a violation of the general duty clause has not been established. *See Alabama Power Co.*, 13 BNA OSHC 1240, 1987 CCH OSHD ¶ 27,892 (No. 84-357, 1987) (citation alleging insufficient safety rules vacated where employer's safety program was not inadequate); *Jones & Laughlin*, 10 BNA OSHC 1778, 1981 CCH OSHD ¶ 26,128 (No. 76-2636, 1982).

Here, the hazard identified by the Secretary is the danger that a letter carrier walking on or crossing a roadway in low-light or dark conditions would be struck by an on-coming vehicle.

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interpretation). In fact, it constitutes proof that the Secretary has never truly conducted a reasoned analysis of the issues presented by her interpretation, a failure that our colleague appears to have overlooked.

[9] To prove a violation of section 5(a)(1) of the Act, the Secretary must show: (1) that a condition or activity in the workplace presents a hazard; (2) that the employer or its industry recognized this hazard; (3) that the hazard was likely to cause death or serious physical harm; and (4) that a feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) (citing *Pelron Corp.*, 12 BNA OSHC 1833, 1835, 1986-87 CCH OSHD ¶ 27,605 p. 35,871 (No. 82-388, 1986)). As discussed *infra*, the Secretary failed to address how her proposed abatement method would materially reduce the hazard. Consequently, we do not reach the Postal Service's arguments bearing on the first three elements.

During the period under citation, the Postal Service undertook to protect against this alleged hazard by providing not only garments with reflective strips as part of its carriers' basic uniform, but also reflective vests. Although the Secretary claims that these items are inadequate given the criteria set forth in ANSI-ISEA 107-1999, the Secretary failed to submit evidence to support this claim.[10]

Indeed, the record lacks evidence that any Postal Service employee wearing the reflective garments provided was ever struck by a vehicle due to lack of visibility. Nor is there evidence that any employee wearing these garments—either separate or all together—was ever in danger of being struck due to lack of visibility. Although the record contains numerous reports of accidents involving pedestrian letter carriers struck by motor vehicles, only three of these accidents, including the one that resulted in the inspection in the present matter, occurred during low-light or dark conditions. Of the three accidents that occurred in low-light or dark conditions, the Secretary failed to show how providing ANSI-compliant garments—vest or otherwise—would have avoided the occurrence of any of these three accidents. On the contrary, the evidence relating to these accidents suggests that providing ANSI-compliant garments would not have changed the outcome. For example, in the accident that led to this case, the motorist struck the letter carriers' push-cart and may not have ever struck the letter carrier. In another accident, the letter carrier had placed a large black overcoat over his uniform, and in the third accident, the motorist pinned the letter carrier to her large, white Postal Service van. We fail to see, and the Secretary has not shown, how any of these accident could have been avoided if ANSI-compliant clothing had been provided. Moreover, at least as to the reflective vests the Secretary claims were inadequate, all three accidents occurred before the Postal Service started distributing the vests to its employees.

On review, the Secretary for the first time asserts that two documents submitted into evidence prove that the use of ANSI-compliant clothing would materially reduce the alleged hazard. One document, a letter sent to the Postal Service by a merchant seeking to do business

[10] We note that with respect to the citation issued under § 1910.132(a) only, the Secretary also argues that the Postal Service was in violation because it did not require its letter carriers to wear the vests that it did provide. Based on our decision herein, we do not reach this issue. However, the Secretary's contention suggests that she would otherwise find the reflective vests provided by the Postal Service to be adequate. This undercuts her argument that these same vests were inadequate under the general duty clause, section 5(a)(1) of the OSH Act.

with the organization, states that ANSI-compliant vests provide the best measure for enhancing the visibility of letter carriers. The second document, a letter from a Postal Service safety performance manager that was directed to area managers, states that area managers should decide whether to purchase reflective vests and recommends that, if they do, the vests be ANSI-compliant. While both letters may be read to indicate that their authors believe that providing ANSI-compliant vests may have some bearing on safety, neither one shows that the reflective garments or vests already provided by the Postal Service were inadequate such that they had to be modified or even replaced.

Moreover, even if the Secretary had established that the Postal Service reflective garments or vests were inadequate to address the alleged hazard, the Secretary failed to show how providing ANSI-compliant clothing would effectively reduce or eliminate the alleged hazard. Indeed, there is no evidence to suggest that the differences in the amount of reflective material present on the Postal Service clothing, including the vests, as compared to ANSI-compliant garments were even significant.

Accordingly, we affirm the judge's decision to vacate the Secretary's allegation that the Postal Service was in violation of the general duty clause.

III. Exclusion of Secretary's Expert Witness

On review, the Secretary claims that the judge unfairly prejudiced her case when he precluded her expert from testifying, and then proceeded to find she had failed to establish the very element she intended to prove through her expert. We find no basis on which to conclude that the judge abused his discretion in ruling as he did.

The Commission follows the Federal Rules of Evidence regarding admissibility of expert testimony. *See* Commission Rule of Procedure 71, 29 C.F.R. § 2200.71. Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles or methods, and (3) the witness has applied the principles and methods reliably to the fact of the case.

Fed. R. Evid. 702. This rule affirms the trial court's role as gatekeeper. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The admissibility of expert testimony is also governed by Federal Rule of Evidence 104(a), which places the burden on the proponent of the evidence to establish that the pertinent admissibility requirements have been met. *See* Fed. R. Evid. 702 (Advisory Committee Notes: 2000 Amendments); *Bourjaily v. United States*, 483 U.S. 171, 173 (1987).

When reviewing a preclusion ruling under these evidentiary rules, we note that finders of fact are normally accorded wide latitude in determining whether proffered expert testimony would be helpful, and courts will not overturn an exclusion finding on this basis unless it is shown that the judge abused his discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1993 CCH OSHD ¶ 30,041 (No. 90-1307, 1993); *see also United States v. Sebaggala*, 256 F.3d 59, 65 (1st Cir. 2001) (court refused to reverse judge's decision to exclude expert testimony concerning the linguistic and cultural traits of the Baganda tribe where judge found proffered testimony to be speculative and grounded in anecdotal experiences). Abuse of discretion is more than mere error; it "occurs when a judge's decision is clearly unreasonable, arbitrary, or fanciful, when the decision is based on erroneous conclusions of law, or when the record contains no evidence on which the judge rationally could have based his decision." *Jersey Steel Erectors*, 16 BNA OSHC at 1165 n.5, 1993 CCH OSHD ¶ 30,041, p. 41,218.

We cannot say that the judge abused his discretion here. The Secretary never made it clear to the judge that she intended to place her expert on the stand to testify to the material reduction of the alleged hazard. Federal Rule of Evidence 103(a)(2) states that a party seeking to have error ascribed to an exclusion ruling must show that the "substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked." *See* 1 *Weinstein's Federal Evidence* 2d, §§ 103.20[1]–103.30[4] at 103-33 *et. seq.* (2005). According to the proffer made by the Secretary at the hearing, Stull was to testify that reflective vests are PPE. However, by the time the hearing commenced, the judge had already dismissed the citation item alleging a violation under the PPE standard, § 1910.132(a). This rendered the expert's proposed testimony irrelevant to the remaining case, which was focused on whether the Secretary had established the existence of a violation of the general duty clause. There is nothing in the record to suggest that the Secretary had previously indicated to the judge

that Stull was to testify to material reduction. Neither her opposition papers to the Postal Service's motion seeking to preclude Stull from testifying nor her post-hearing brief to the judge mention that her expert was to testify that providing ANSI-compliant clothing would materially reduce the alleged hazard. Indeed, the Secretary's post-hearing brief to the judge fails to identify any evidence that would support that element.

Moreover, the Secretary's proffer failed to satisfy the elements of admissibility contained in Federal Rule of Evidence 702. Stull's report was admitted solely for purposes of the proffer, and does not identify any "facts or data" that would support finding that the reflective garments provided by the Postal Service were inadequate, or that the Secretary's proposed abatement would effectively reduce the alleged hazard. Nor does his report identify any "reliable principles or methods" on which such an opinion could be based. Thus, even if the Secretary had made known to the judge her intention to place Stull on the stand to testify that the ANSI-compliant clothing offered a material reduction in the likelihood of accidents, the judge would not have erred in precluding Stull from testifying. Under these circumstances, we conclude that the judge acted within his discretion in excluding the Secretary's expert.

Order

For all of the foregoing reasons, we affirm the judge and vacate the citation.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
Horace A. Thompson, III
Commissioner

Dated: November 20, 2006

ROGERS, Commissioner, dissenting:

I respectfully dissent from my colleagues' decision to affirm the judge and vacate the citation alleging a violation of 29 C.F.R. § 1910.132(a). While I agree with my colleagues that the phrase "protective equipment" as used in § 1910.132(a) is ambiguous as to whether it applies to warning garments, I disagree with my colleagues' conclusion that the Secretary's interpretation of the standard to include such garments is unreasonable. Accordingly, I would defer to the Secretary's reasonable interpretation and find that § 1910.132(a) applies to warning garments, such as the reflective vests at issue here.

It is well-settled that, where the meaning of a standard cannot be plainly determined from the text or structure of the standard, deference must be given to the Secretary's interpretation, provided that interpretation is reasonable. *See CF & I Steel Corp.*, 499 U.S. 144 (1991); *Hackney Inc.*, 16 BNA OSHC 1806 (No. 91-2490, 1994). It is also well-settled that an interpretation is reasonable if it sensibly conforms to the "purpose and wording" of the standard. *See CF&I Steel Corp.*, 499 U.S. at 150 (citing *N. Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of Am. Inc.*, 423 U.S. 12, 15 (1975)).

Here, I find that the Secretary's interpretation sensibly conforms to both the purpose and the wording of § 1910.132(a). Section 1910.132(a)—as well as its construction industry counterpart, 29 C.F.R. § 1926.95(a), at issue in *The Ruhlin Company (Ruhlin)*, OSHRC Docket No. 04-2049—expressly identify "protective clothing" as a type of "protective equipment" separate and apart from "protective shields and barriers." 29 C.F.R. §§ 1910.132(a), 1926.95(a). In my view, the term "protective clothing" may reasonably be read to include the reflective vests at issue here. The vests clearly constitute clothing designed to "protect" by virtue of their reflective nature. Indeed, it is not unreasonable to construe the term "protective" to include warning garments or devices. The Supreme Court has twice used the term "protect" to apply to warning devices that increase visibility. *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 354 (2000); *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 669 (1993). In addition, as the Secretary notes in her brief, the definition of "protective" contained in Webster's Third New International Dictionary supports her interpretation of the term as including warning garments. *See* Webster's Third New International Dictionary, Unabridged 1822-23 (1986) (offering as an example of usage, ". . . many shore animals have [protective] color and patterns which enable them to blend with their surroundings."). Because "protective equipment" is not as limited a term as my

colleagues suggest in the majority opinion, I believe that it includes warning garments, such as the reflective vests at issue here. Therefore, I conclude that the Secretary's interpretation of both § 1910.132(a) and § 1926.95(a) reasonably conforms to the "wording" of these standards.

I also conclude that the Secretary's interpretation reasonably conforms to the "purpose" of these standards, which require an employer to provide equipment that is necessary "by reason of the hazards of the … environment" to protect employees from injury or impairment caused by "absorption, inhalation or physical contact." 29 C.F.R. §§ 1910.132(a) & 1926.95(a). The hazard alleged here is the danger that letter carriers whose routes require them to cross roadways in low-light or dark conditions may be struck by motor vehicles. This hazard is clearly a part of the working environment of these Postal Service employees, and the resulting injury or impairment would be caused by the physical contact made when a vehicle strikes a letter carrier. In my view, therefore, the Secretary's interpretation is reasonable.

My colleagues reject the Secretary's interpretation on four grounds. Three of these grounds can be easily dispensed with. The fourth bootstraps a confusing and obtuse interpretation letter—which *postdates* the citation in this case and is not even directly on point—from a document which has fair notice ramifications into a basis for denying deference.

First, my colleagues rely on the fact that the remaining sections in 29 C.F.R. Part 1910, Subpart I, address items that act as guards or barriers, not warning devices. As my colleagues see it, these sections make it unreasonable to include under § 1910.132(a)—also a section within Subpart I—any equipment that provides only a warning form of protection, thus relying on *Carlyle Compressor Co.*, 683 F.2d 673, 675-76 (2d Cir. 1982) (*Carlyle*), for support. This argument ignores the plain language of the standard at issue. The standard, § 1910.132(a), *by its very terms*, applies to types of equipment other than "protective shields and barriers," including "protective clothing." *See Hackney Inc.*, 16 BNA OSHC at 1808 (standard's list illustrative, not exhaustive).[11] By contrast, the standard at issue in *Carlyle* applies only to hazards that were similar to those enumerated.

[11] My colleagues' argument fails to come to grips with other Commission precedent, such as *Ed Cheff*, 9 BNA OSHC 1883 (No. 77-2778, 1981) and *United Geophysical Corp.*, 9 BNA OSHC 2117 (No. 78-6265, 1981), *aff'd without published opinion*, 683 F.2d 415 (5th Cir. 1982), where the Commission held that the listing of various types of personal protective equipment in the standard at issue here "was intended only as an example of some kinds of protective equipment, not as a limitation on the scope of the standard." *Id.* at 2121. Indeed, in *United Geophysical*

Second, my colleagues conclude that because OSHA standards specifically identify warning garments when such garments are required, the Secretary could not have intended to include them within the scope of § 1910.132(a). This argument is without merit. Section 1910.132(a) is a general standard which requires protective equipment in the case of particular generic hazards. *See Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th Cir. 1979) (general standards fill "those interstices necessarily remaining after the promulgation of specific safety standards"). This standard—"a broadly-worded standard of general application governing numerous possible hazardous conditions and types of injury"—does not presume a hazard and, accordingly, the Secretary bears the burden of proving in each case that a reasonable person would recognize that a hazard exists (if the employer lacked actual notice of a need for protective equipment). *See Weirton Steel Corp.*, 20 BNA OSHC 1255, 1264 (No. 98-0701, 2003). In contrast, with respect to the specific standards my colleagues cite, the Secretary has already determined, as part of the rulemaking process, that a specific hazard requiring the wearing of protective garments exists in very specific, predetermined contexts, such as with respect to employees working in the area of container handling equipment.[12] Thus, under the standards my colleagues cite, a hazard is presumed and the Secretary does not have the independent burden of showing a hazard. *See Pyramid Masonry Contractors Inc.*, 16 BNA OSHC 1461, 1464 (No. 91-0600, 1993). Under my colleagues' logic, other types of personal protective equipment, not covered by specific standards in Subpart I but addressed by specific standards elsewhere in specific contexts, could not be covered within the scope of § 1910.132(a), a general protective standard. Surely that cannot be. *See Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 n.11 (4th Cir. 1979) ("[l]acking the omniscience to perceive the myriad conditions to which specific standards might be addressed . . . the Secretary, in an effort to insure the safety of employees as required by the Act, must at times necessarily resort to the general safety standards.").

Corp., the Commission held that a flotation device—neither a shield nor a barrier—fell within the definition of personal protective equipment. *Id.* at 2122. And these cases predated *CF & I Steel Corp.* and its deference case law by ten years.

[12] Indeed, in the rulemaking proceeding leading to the revision of the longshoring and marine terminal standards, the Secretary specifically described high-visibility vests as "personal protective equipment." 62 Fed. Reg. 40,142, 40,179 (1997).

The third reason my colleagues offer is that, in revising § 1910.132 in 1994, the Secretary failed to indicate that she now considered warning garments to be covered under § 1910.132. This argument is also unpersuasive. In proposing the rulemaking, the Secretary made clear that existing paragraphs (a), (b) and (c) of section 1910.132 were "not proposed for revision." 54 Fed. Reg. 33,832, 33,835 (1989). *See also* 59 Fed. Reg. 16,334, 16,336 (1994). Since the Secretary took the position that warning garments were already covered under the standard, there was no need for her to engage in rulemaking.

Finally, my colleagues cite to the May 2004 interpretative letter issued by Russell B. Swanson, which *postdated* the citation in this case by nearly four months. I do not mean to suggest that inconsistent interpretations—even subsequent inconsistent interpretations—have absolutely no bearing on reasonableness. *See Timken Co.*, 20 BNA OSHC 1070, 1072 (No. 97-0970, 2003) (Rogers, Commissioner, separate opinion) (subsequent interpretation letter addressing cited standard casts doubt on consistency of Secretary's interpretation, where Secretary's interpretation was not otherwise reasonable). The Commission has held that one factor bearing on the issue of reasonableness is the consistency with which the Secretary has applied her interpretation. *See Arcadian Corp.*, 17 BNA OSHC 1345, 1350 (No. 93-3270, 1995). Nevertheless, the Commission has never held that a consistently espoused, reasonable interpretation of an ambiguous standard is rendered unreasonable by one potentially contrary interpretation letter. Indeed, here, the May 2004 interpretation letter is not even directly on point to the cited standard, focuses on construction standards, was authored by the head of the Construction Directorate, not by the agency head or by anyone charged with the interpretation of general industry standards, and, because of its somewhat confusing and obtuse nature, cannot even be considered a change in position.[13] Furthermore, even a directly contrary interpretation

[13] My colleagues also take the view—which appears to simply ignore *CF & I Steel Corp.*—that while the standard is ambiguous, the Secretary has no power to interpret it. As the Supreme Court explained in *CF & I Steel Corp.*, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers. . . . the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." 499 U.S. at 151, 157. Moreover, public statements issued by the Secretary together with the regulations themselves can provide notice of what standard the Secretary expects an employer to meet. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citing *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649

does not necessarily defeat reasonableness, although it may indicate that the regulated party lacked fair notice of the purported interpretation. *See Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699-700 (2005) (explained change in view does not invalidate an otherwise reasonable interpretation); *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995); *Rollins Envtl. Servs., (NJ), Inc.*, 937 F.2d 649 (D.C. Cir. 1991).[14]

As my colleagues concede, the Secretary here has interpreted § 1910.132(a) to apply to warning garments in at least four cases in addition to this one: *AMR Servs. Co.*, 1992 OSAHRC LEXIS 97, *settlement aff'd,* 1991-1993 CCH OSHD ¶ 29,771, p. 40,490 (No. 89-1764, 1993); *Farrens Tree Surgeons, Inc*., 15 BNA OSHC 1793, 1991-93 CCH OSHD ¶ 29,770 (No. 98-998 1992); *Nelson Tree Serv. Inc.*, 19 BNA OSHC 1482, 2001 CCH OSHD ¶ 32,365 (No. 00-1130, 2001) (ALJ); *AMR Servs., Co*., (No. 89-1764 1992); and *United States Postal Service (Anchorage, Alaska)*, OSHRC Docket No. 04-0655, another case against the Postal Service, but which settled before the hearing. Similarly, the Secretary has interpreted § 1926.95(a)—the standard at issue in *Ruhlin* and the construction industry counterpart to § 1910.132(a)—to include warning garments in at least four cases: *Nat'l Engin'g & Contracting Co.*, 1996 OSAHRC LEXIS 126 (No. 94-2787, 1996), *rev'd on other grounds*, 18 BNA OSHC 1075 (1997); *AAA Delivery Serv. Inc.*, 21 BNA OSHC 1219, 2005 CCH OSHD ¶ 32,796 (No. 02-0923, 2005); *HWS Consulting Group Inc.*, 21 BNA OSHC 1324. 2004 CCH OSHD ¶ 32,765 (No. 04-1219, 2005), and *Ruhlin*, OSHRC Docket No. 04-2049. Thus, for more than ten years, the Secretary has consistently interpreted these standards to require warning garments. I find,

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(5th Cir. 1976)). My colleagues' "straitjacket" view of the Secretary's authority is simply not a fair reflection of the law and is very troubling in its implications for OSHA's ability to fairly and efficiently carry out its statutory mission. This is especially the case with a general standard such as 1910.132(a), which by its very terms can reasonably be read to include a requirement for warning garments. *See Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 n.11 (4th Cir. 1979) ("utterly unreasonable to expect the Secretary to promulgate specific safety standards" for "every conceivable hazardous condition"; thus, general standards intended to address myriad conditions).

[14] The latter two decisions are particularly instructive, in light of the fact that the Postal Service has its principal office in the District of Columbia, 39 C.F.R. § 2.3, and, on that basis, the Secretary could appeal this matter to the District of Columbia Circuit. 29 U.S.C. § 660(b). Of course, the Authorized Employee Representative could also appeal to the District of Columbia Circuit. 29 U.S.C. § 660(a).

therefore, that the factors discussed above, that support the reasonableness of the Secretary's interpretation of § 1910.132(a) far outweigh the effect of the obtuse May 2004 letter.[15]

As I state in *Ruhlin*, however, the May 2004 letter does have bearing on whether an employer such as the Postal Service would have notice of the Secretary's interpretation of her personal protective equipment standards. In *Ruhlin*, I have agreed that the employer lacked fair notice of the Secretary's interpretation of § 1926.95(a) based on her comments in the May 2004 letter. *See Gen. Elec. Co. v. EPA*, 53 F.3d. at 1332. Here, however, the subject citation was issued to the Postal Service nearly four months before the May 2004 letter was released. Therefore, in contrast with my conclusion in *Ruhlin*, the May 2004 letter did not deprive the Postal Service of adequate notice of what I find to be a reasonable interpretation of § 1910.132(a).

For all of the above reasons, I respectfully dissent from my colleagues' decision to affirm the judge's dismissal of the § 1910.132(a) item. Because I would conclude that § 1910.132(a) applies to the cited condition, I do not reach any of the issues relating to the Secretary's alternative allegation under the general duty clause, section 5(a)(1) of the OSH Act.

/s/_____
Thomasina V. Rogers
Commissioner

Dated: November 20, 2006

[15] My colleagues cite to *Akzo Nobel Salt Inst. Inc. v. FMSHRC*, 212 F.3d 1301, 1305 (D.C. Cir. 2000), as an example of a case where a Circuit Court addressed inconsistencies in an agency's interpretation. But it is interesting to note that in that case, the D.C. Circuit remanded the case to our sister agency, the Federal Mine Safety and Health Review Commission, to give the Secretary an opportunity to "grapple[] with" the meaning of an ambiguous regulation and provide "an authoritative interpretation," as opposed to simply vacating the citation.

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

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET No. 04-0316
UNITED STATES POSTAL SERVICE., Respondent	:	
AND	:	
NATIONAL ASSOCIATION OF LETTER CARRIERS, Branch 51 Authorized Employee Representative.	:	

APPEARANCES:

Merle D. Hyman, Esquire Boston, Massachusetts	Stephen Yohay, Esquire Kristine Dunne, Esquire Washington, D. C.	Jeannine H. Rice, Esquire Windsor, Connecticut United States Postal Service
For the Complainant.	For the Respondent.	For the Respondent.

Stephen Joseph Herbert
Tibbedon, RI 02878
For the Authorized Employee Representative.

BEFORE: G. Marvin Bober
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case is before the Occupational Safety and Health Review Commission ("the Commission"), pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review (1) a citation issued by the Secretary of Labor ("the Secretary") and (2) a proposed assessment of penalty therefor. The Occupational Safety and Health Administration ("OSHA") conducted an inspection of the facility of Respondent, Unite States Postal Service, ("Respondent" or "USPS"), located in Fall River, Massachusetts, from November 21, 2003 through January 1, 2004. As a result of the inspection, on January 23, 2004, OSHA issued to USPS a one-item serious citation alleging a violation of 29 C.F.R. 1910.132(c) with a total proposed penalty of $2,625.00. Respondent filed a timely notice of contest. The Secretary filed her complaint and Respondent filed its answer.

On October 24, 2004, the Secretary filed her Motion To Amend Complaint. The Secretary sought to amend the Complaint to allege a violation of 29 C.F.R.1910.**132(a)** instead of 1910.**132(c)** and, in the alternative, allege a violation of Section 5(a)(1) of the Act. (The Respondent failed to furnish each of his/her employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.) On November 3, 2004, the Secretary's motion was granted.

The trial was held in Providence, Rhode Island, from December 7 through 9, 2004. Both parties have submitted post-trial briefs.

Jurisdiction

The parties agree that USPS is an employer within the meaning of section 3(5) of the Act and that the Commission has jurisdiction over this matter. (Tr.370).

Exclusion of Expert Witnesses Testimony and Reports

During the course of the administrative trial, the Secretary and the Respondent sought to introduce their expert witnesses' testimony and reports. They were marked as Complainant's Exhibit C-6 and Respondent's Exhibit R-5. They were admitted into the record but not considered as the undersigned did not "believe it will assist the trier of fact to understand the evidence or to determine a fact in issue." (Transcript "Tr." pages 18-19 and 377-385).

In its landmark decision governing the admissibility of scientific expert witness testimony, the Supreme Court held that the admissibility of such testimony is governed by Rule 702 of the Federal Rules of Evidence (FRE) *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 113

S.Ct. 2786 (1993) ("*Daubert*").[1] The Court also stated that Rule 702 FRE superceded the "Frye Test" - admissibility of expert testimony excluded unless the "technique" earned "genuine acceptance" as reliable in the relevant scientific community. *Frye v. United States*, 293 F. 1013 (D.C. Cir 1923).

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Daubert*, the Court discussed Rule 702 and the trial judge's "factfinder"/"gatekeeper"(hereinafter referred to as "factfinder") responsibility. The Court stated that the trial judge when faced with the proffer of expert witness testimony/report, must determine at the outset (to rule on a (a) motion in limine, (b) an objection during the trial, or (c) on a post trial motion or on its volition) whether the expert witness (1) is qualified and (2) has specialized knowledge that will assist the trial judge to understand the evidence or to determine a fact in issue. *Daubert*, 113 S.Ct. at 2796. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995). ("*Daubert I"). General Electric v. Joiner*, 118 S. Ct. 512 (1997) (under *Daubert* the trial judge should not determine the scientific validity of the conclusions offered by the expert; rather the trial judge should decide, among other factors, whether the expert's testimony/report will assist the trier of fact to understand the evidence or to determine a fact in issue.).

In *Kumho Tire Co., Ltd. v. Carmichael*, 119 S.Ct. 1167, 1169 (1999) ("*Kumho*"), the Supreme Court extended the *Daubert* "factfinder" responsibility to apply not only to scientific testimony, but to all expert testimony (specialized, technical, or scientific.), and stated that "[t]he trial court must have [discretionary] latitude" in fulfilling this function. *Kumho*, 119 S.Ct at 1176.

Expert testimony is helpful to the court when it elucidates a relevant field of specialized knowledge that will or will not assist the trial judge to understand the evidence or to determine a fact in issue. The trial judge has wide latitude in deciding whether to admit or exclude the testimony/report. *U.S. v. Sebaggala*, 256 F.3d 59, 65 (1st Cir. 2001). *United States v. Mansoori*, 304 F.3d 635, 653-654 (7th Cir. 2002) (expert testimony is useful to the trial judge/jury if it concerns a topic over and above their understanding, assists the judge/jury in understanding facts in issue or puts facts in context.).

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[1]The admissibility of expert testimony is an issue to be resolved under Rule 104(a) of the FRE. *Daubert*, 113 S.Ct. at 2795.

Applying these principles, to the issues in this case, the undersigned is of the opinion that the expert witnesses and their reports would not have assisted him understand the evidence or to determine a fact in issue. To the extent that the proffered testimony/reports concerned high visibility clothing, the connection between it and the issues in this case unnecessary as "reflected" in the decision. Thus, Complainant's Exhibit C-6 and Respondent's Exhibit R-5 remain excluded from consideration.

Discussion

On November 13, 2003, at twilight, Evelyn Medeiros, a United States Postal Service employee, was struck by a car while crossing the street at a stop sign while delivering mail on her postal route in Fall River, Massachusetts. After the accident, the driver told Ms. Medeiros that he didn't see her. (Tr. 214-215) At the time of the accident, Ms. Medeiros was wearing Postal Service issued bomber jacket and rain pants. (Tr. 209-210) Five days after the accident, a formal complaint was filed with OSHA on the behalf of letter carriers in Fall River, Massachusetts alleging that the USPS required employees to deliver mail after dark without supplying them with reflective clothing that made them easily visible in the dark to vehicular traffic.

Following an OSHA inspection, the Secretary issued the instant citation. As amended, the citation alleges a violation of section 5(a)(1) of the Act as follows:

> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to motor vehicle struck by hazards while delivering mail in low light and dark.
>
> Fall River mail carrier routes: Adequate high visibility safety apparel such as fluorescent and retroreflective clothing, vests, jackets, and/or hats were not provided for carriers delivering mail on city streets to improve visibility and prevent carriers from being struck by motor vehicles.
>
> Among other methods, one feasible and acceptable abatement method to correct this hazard is to require the wearing of safety apparel that complies with ANSI/ISEA 107-1999.

To prove a violation of section 5(a)(1) of the Act, the Secretary must show (1) that condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628,

2004); *Well Solutions, Inc.* 17 BNA OSHC 1211, 1213 (No. 91-340, 1995); *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986)

That crossing or walking in a street during low light or dark conditions increases a pedestrian's risk of being hit by a motor vehicle is a matter of common knowledge. *See Litton Systems, Inc., Ingalls Shipbuilding Div.*, 10 BNA OSHC 1179, 1182 (No. 76-900, 1981). Moreover, there is ample evidence that the USPS itself recognized the hazard. Reflective stripes have long been part of the regular postal uniform. Pants have a reflective stripe going down each leg and the bomber jackets have reflective strips. (Tr. 159, 164) Also, USPS issued parkas, vests, windbreakers and rain gear all have reflective trim. (Ex. R-6) Also, on December 3, 2002, a letter carrier was killed by a car while crossing the street after dark in Kansas City, Missouri. As a result of the accident, the USPS conducted an investigation. In the Serious Accident Investigation Board Report (Ex. C-24), the Investigation Board approved steps taken by local management to prevent a recurrence. Among the actions endorsed by the Board was the following:

> Reflective vests have been purchased and issued to all stations and branches in the Kansas City, Mo Post Office for use on routes as needed. . . .
>
> Carriers have been instructed to call the station by 3:00 p.m. for help if it becomes obvious they cannot finish the route before dark.
>
> (Ex. C-4)

Also a result of this accident, Respondent, through its Joint Labor Management Uniform Committee investigated visibility issues related to the postal uniform. (Tr. 270) In January 2003, committee members Fred Rolando, the director of city delivery for the National Association of Letter Carriers, and Jackie Adona, representing the USPS attended a uniform manufacturer convention where they attended a workshop on high visibility safety apparel. (Tr. 271) After the convention, Mr. Rolando and Ms. Adona continued to explore methods of increasing visibility, including altering the placement of reflective strips that were already part of the postal uniform. (Tr. 280-85) Clearly, the USPS recognized that having its letter carriers cross the street under low light or dark conditions constituted a hazardous condition.

There is also substantial evidence that Respondent knew that its employees were required to cross or walk on streets in low light or dark conditions and, therefore, were exposed to the recognized hazard.

The evidence demonstrates that during the winter months, postal employees frequently deliver mail after sunset. At the trial, the Secretary produced several letter carriers who testified that they often delivered mail after sunset. Letter Carrier Paul Knarr testified that until recently, when sidewalks were installed, he had one street on his route where he had to

walk in the street after dark. (Tr. 94). Carrier Matthew Legar testified that he had to cross some streets that were not well lit. Carriers Legar and Keith Schmidt both testified that during snowstorms when the sidewalks were covered in snow, they occasionally had to walk in the street. (Tr.127-129). Letter Carrier David Boudria testified that from November 2003 to January 2004 he would finish his route between 5:00 and 5:30. (Tr. 184) After finishing his route, he would return to the post office by crossing a heavily traffic street with no traffic lights where cars would race by at speeds of up to 75 m.p.h. (Tr. 186-187) Evelyn Medeiros, whose accident ultimately led to these proceedings, testified that she also had to deliver mail after dark[2]. There is no question that the USPS knew that, during the winter months, its employees had to deliver mail after sunset. USPS letter carriers regularly scan their times on their routes with a bar code scanner against bar code labels that are placed on mailboxes at various points throughout their route. (Tr. 67-68) These scans are used to keep track of how long it takes the carriers to get to various points along his or her route. (Tr. 67-68). They also conduct a scan when they finish their routes and return to the office. (Tr. 72) Printouts of these scans clearly show that employees regularly finished their tours after dark during the late fall and winter months. (Exs. C-2, C-7-9, C-13, C-16, C-19-22)

Although the Secretary established that postal letter carriers were exposed to the recognized hazard of crossing streets in low light and dark conditions, the evidence fails to demonstrate that there was a feasible method of eliminating or materially reducing the hazard. The Secretary introduced several accident reports to establish that letter carriers are occasionally hit by oncoming traffic. The issue, however, is not whether such accidents happen, but whether they are the result of low light or dark conditions and whether the likelihood of their occurrence could be materially reduced by the use of ANSI-complaint fluorescent or retroreflective outer gear. In that respect, these accident reports fall short. For example, even though one of its recommendations was the use of high visibility vests, it is clear from the USPS Serious Accident Investigation Board Report for the accident that occurred in Kansas City, that lack of visibility played no part in the accident:

> The cause of the accident was inattention on the part of both the operator of the vehicle, Ms. Overbay, and Mr. Fussell. There were no sight obstructions. Ms. Overbay was not operating her vehicle at a high rate of speed. Even though it was after dark Ms. Overbay had her headlights on and therefore, if she had looked, she should have been able to see Mr. Fussell. On the other hand, since the headlights were on there is no reason why Mr. Fussell could not have seen the approaching vehicle if he had been attentive and alert. Even though it was

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2 While she expressed her discomfort with the situation to her supervisor, her testimony indicates that she was primarily concerned about robberies that had taken place on her route and that she could not see either people or dogs that approached her. (Tr. 204-207)

dark and Mr. Fussell was wearing dark clothes Ms. Overbay still could have seen him and he certainly should have seen the oncoming vehicle.
(Ex. C-24 at p. 2)[3]

On January 10, 2003 at 4 p.m., in Oak Ridge, Tennessee, a postal employee was struck by a car while retrieving mail from the back of his postal truck. According to the accident report, the accident was the result of the driver not paying attention since she was driving and reading her mail at the same time. To prevent future occurrences, the report recommended installing strobe lights on postal vehicles, and informing the public to be on the lookout for postal vehicles. (Ex. C-25). Again, there is no suggestion that high visibility clothing would have done anything to prevent the accident.

Finally, on November 13, 2003, letter carrier Evelyn Medeiros was struck by a vehicle while crossing a street at a 4:55 p.m.(Ex. C-29) A vehicle at the intersecting street had stopped at the stop sign then entered the intersection and struck Ms. Medeiros cart which hit her as the vehicle rolled over her right foot. (Tr. 214-215) At the time, Ms. Medeiros was wearing the postal bomber jacket and postal rain gear pants[4]. (Tr. 209). As noted earlier, after the accident, the driver claimed that he did not see her. It bears noting, however, that the driver failed to see the reflective stripes on the bomber jacket and rain pants and nothing in the record suggests that the driver would have seen her had she been wearing a high visibility vest.[5]

Besides these accident reports, the Secretary failed to offer any testimony or introduce any evidence to establish that the provision of ANSI-compliant clothing would materially reduce the hazard of crossing streets in low light or dark conditions. Particularly, there is nothing in evidence to establish that ANSI-compliant clothing would be more effective in reducing the hazard than the clothing with reflective stripes already provided by the UPS.(Tr. 392) The Secretary did produce witnesses regarding attempts by the Joint Labor Management Uniform Committee to agree on high visibility clothing. (Tr. 279-283, 426). Neither of these witnesses, Mr. Fred Rolando and Ms. Jacqueline Adona, demonstrated a level of education or

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3 We also note that, as stated in the accident report, the carrier was wearing dark clothing, including a black overcoat over his postal uniform. (Ex 24, p.1) Therefore, the reflective stripes that are part of the postal service bomber jackets were not visible.

4 Rain pants contain vertically oriented silver reflective materials measuring 19.5 inches long.

5 The Secretary introduced three other accident reports. One of these accidents occurred at 2:40 p.m. (Ex. C-26), one at 11:35 a.m. (Ex. C-27), and the third on November 3 at 3:35 p.m. (Ex. C-28) Thus, none of these accidents occurred in low light or dark conditions.

experience that would render them qualified to testify that ANSI-compliant clothing would materially reduce the hazard. Similarly, the Secretary produced a document from the Spiewak Company that cites figures from the US Department of Labor, Bureau of Labor Statistics that indicates that from 1995 to 2001, there were 12 deaths involving postal workers being struck by vehicles. More specifically, the figures for 2001 state that, out of 350,000 postal workers, two were killed after being struck by vehicles. (Ex. C-34). The document concludes that these figures demonstrate an average of two postal letter carriers "losing their lives a year do [sic] to low visibility." We note, however, that as used by the Spiewak Company, these statistics are wholly unreliable. Its conclusion that all these accidents were the result of low visibility issues is not supported. As seen in the accident reports produced by the Secretary, most of these accidents are the result of the inattention of the driver or letter carrier or occurred during normal daylight conditions. Moreover, the document is a sales promotion for a company selling high visibility garments and can be expected to interpret statistics in a manner most favorable to its sales pitch. (Tr. 300). What is relevant, however, is that with over 350,000 employees, the Secretary failed to introduce evidence of an accident where it could be concluded with any degree of certainty that the accident could have been avoided had the carrier been wearing ANSI-compliant garments. Thus, even if I were to consider the Secretary's Exhibit C-6 to establish that ANSI-compliant garments would have increased the visibility of the letter carriers, there is still no evidence that such increased visibility would have materially reduced the hazard below levels achieved by the current USPS uniform with its reflective stripes. Accordingly, on this record it cannot be concluded that the use of high visibility vests would have materially reduced the recognized hazard. *Alabama Power Co.*, 13 BNA OSHC 1240, 1246 (No. 84-357, 1987)(Secretary failed to present evidence that company should have more effectively protected its employees where employer suffered no injuries over period of 24 years prior to fatality)[6]

The Secretary seemed to concentrate on the feasibility of providing this ANSI-complaint clothing to letter carriers. (e.g. Exs. C-33 and C-34). However, failing to establish that such clothing would materially reduce the hazard, the feasibility of providing it is irrelevant.

The Secretary also suggests that the USPS could either hire additional carriers to enable the mail routes to be completed earlier, or have the carriers begin their routes earlier. A criteria for determining whether an abatement measure is feasible is whether the proposed measure is cost prohibitive. Among the relevant considerations are whether the measure would threaten the company's economic viability, jeopardize its long-term profitability and competitiveness and whether it can pass the cost on to the consumer. *Waldon Healthcare*

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6 The Secretary also suggests that increasing the placement of reflective strips on the official postal uniform could abate the hazard. As with ANSI-compliant vests, however, there is no evidence that such measures would materially reduce the hazard.

Center, 16 BNA OSHC 1052, 1063 (No. 89-2804, 1993) While measures that take employees completely off the streets before sunset would certainly eliminate the hazard created by low light or dark conditions, there is no evidence in the record to suggest that such measures would be economically feasible[7]. Accordingly, the Secretary failed to meet its burden by establishing the feasibility of implementing these alternative measures.

Order

Based on the foregoing, it is ORDERED that the citation for a violation of section 5(a)(1) of the Act and the penalty proposed therefore are VACATED.

/s/

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Dated: July 25, 2005

7 That the USPS is a federally chartered business does not mean that it is immune from normal business economics.