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.

CSA EQUIPMENT COMPANY, LLC,

Respondent.

OSHRC Docket No. 12-1287

ON BRIEFS:

Alexander M. Kondo, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

McCord Wilson; Rader & Campbell, Dallas, TX; Ron Signorino; The Blueoceana Company, Inc., Basking Ridge, NJ
For the Respondent

DECISION

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

After an employee of CSA Equipment Company, LLC—a stevedoring company that handles cargo at the Port of Mobile, Alabama—was struck by a forklift and subsequently died from his injuries, the Occupational Safety and Health Administration issued CSA a one-item serious citation alleging a violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1), with a proposed penalty of $6,300.[1] The citation alleges that CSA

[1] This provision, known as the general duty clause, states: "Each employer . . . shall furnish to each of his 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." 29 U.S.C. § 654(a)(1).

"failed to provide a clear view of the designated path of travel for the [forklifts], exposing employees to crushing hazards while materials are checked into the warehouse" and lists three alternative abatement methods.[2] After a hearing, Administrative Law Judge Sharon D. Calhoun issued a decision affirming the citation. She concluded that the citation's third abatement method—setting up a separate "safe area" where employees could check materials free from forklift struck-by hazards—was feasible based on her finding that, after the accident, CSA had implemented that method. CSA sought review of the judge's decision, and the case was directed for review.

In its decision, the Commission did not address the merits of the alleged violation but remanded the case to the judge to "determine, based on all of the evidence in the record, whether the [proposed abatement] method of separating [employees] and the forklifts . . . will materially reduce or eliminate the cited hazard, taking into account whether implementing that method of abatement would create safety consequences so adverse as to render its use infeasible."[3] On remand, the judge again found the Secretary had established a feasible means of abatement and affirmed the citation. CSA again petitioned for review of the judge's decision. For the reasons discussed below, we affirm the citation.

BACKGROUND

The accident that led to the citation at issue involved one of CSA's longshoremen who was working as a coil-checker or "clerk." CSA's clerks are responsible for checking cargo as it is unloaded from a vessel; this cargo, which was destined for CSA's warehouse, included large steel coils. On the day of the accident, the clerk was checking a coil when he was struck by a forklift and crushed between the counterweight of the forklift and the steel coil.

When checking steel coils, the clerks first retrieve the identification number from each coil unloaded from the vessel and check it against the bill of lading, manifest, or check sheet. The clerks then check the condition of the coil, such as gouging in the metal, dents, condensation,

[2] Neither the parties nor the judge rely on the citation's reference to "crushing hazards" and treat the allegation, as well as the abatement at issue, as solely addressing employee exposure to struck-by hazards posed by the forklifts.

[3] The Commission also instructed the judge to consider the other two methods of abatement identified in the citation in the event she concluded the Secretary did not establish the feasibility of the third method. The Secretary conceded on remand that the evidence in the record did not support the other two methods of abatement. Therefore, we do not address those methods here.

missing wrappers, and missing bands. This checking process can require the clerks to bend or crouch down, particularly to read the label with the identification number. After checking the coil, the clerks write the coil's storage location on the coil so a forklift operator will know where to place it in the warehouse.

When transferring steel coils from the unloading area to the clerk and from the clerk to the storage location in the warehouse, forklift operators drive their forklifts in reverse. This is because the coils are large and obstruct the forward view of the operator. The forklift's counterweight, however, creates a blind spot directly behind the forklift, which is equipped with a backup alarm that sounds constantly when the forklift is operated in reverse. CSA trains its clerks to be aware of the blind spot behind the forklift and to be aware of and avoid the rear of the forklift. CSA also trains its forklift operators to watch out for clerks during the coil-checking operation. There are no designated paths for the forklifts in the warehouse because the forklift route varies depending on the load, the way the warehouse is stacked, and where the clerks are in proximity to the forklifts.

Coil-Checking Procedure at Time of Accident

On December 29, 2011, the day of the accident, CSA was unloading steel coils from three hatches on a vessel and transporting them into three entrances to the warehouse. Three clerks were working inside the warehouse, one at each entrance, and six forklifts were transporting the coils. Typically, three forklifts operated inside the warehouse and three operated outside, but the number of forklifts operating inside and outside the warehouse could vary, depending on the amount of cargo piling up inside the warehouse.

This coil-checking procedure was in use for about a year prior to the accident. Under this procedure, clerks stood near or just inside the doorway to the warehouse. An outside forklift operator placed a coil on the ground near the clerk, then immediately returned to the dock to retrieve another coil. The exact area where the coils were placed fluctuated throughout the shift as the warehouse filled up with cargo. At times, depending on how quickly the outside forklifts brought coils into the warehouse, ten or more coils might be piled up in a clerk's work area. In those situations, an inside forklift would approach the clerk's pile to pick up coils that had already been checked while the clerk was inspecting other coils in the same pile. There was no requirement that the inside forklift operator wait for the clerk to signal that the forklift could come pick up the coil. If one of the outside forklifts was helping to move backed-up cargo, a clerk could have at least two forklifts accessing his or her pile of coils at the same time.

On the day of the accident, coils were piling up in the clerks' work areas. In some situations, the inside forklifts would come forward to pick up the coils and then back away from the clerk to store the coils in the warehouse. In other situations, however, some of the inside forklifts had to back up into a clerk's work area in order to reposition themselves to move into the interior of the warehouse to store the coils.

Pre-December 2010 Coil-Checking Procedure

The coil-checking procedure in place at the time of the accident differed from the procedure CSA had used until sometime before December 2010.[4] Under this earlier procedure, clerks would stand near yellow safety posts at the doorways to the warehouse but would not be in the direct driving path of the forklifts. An outside forklift would deliver a steel coil to a clerk one at a time. The clerk would check the coil, then once he or she finished, would signal for an inside forklift to retrieve the coil and take it to the proper place in the warehouse. The inside forklift could not retrieve the coil until the clerk signaled the forklift operator and let the operator know where to place the coil. There was never a situation under this procedure where a clerk would have several coils piling up and several forklifts maneuvering around him or her to pick up checked coils.

Post-Accident Coil-Checking Procedure

After the accident, CSA changed its coil-checking procedure by moving the clerks out of the warehouse and positioning them at the dock to check the steel coils before they are brought into the warehouse. As soon as up to four coils are lowered from the vessel to the ground by a crane and the crane moves away, the clerks begin to check the coils. Once the clerks finish, they move out of the way by walking over to where other longshoremen are waiting. Forklifts do not approach the area to pick up the coils and move them to the warehouse until all of the coils on the dock are checked and the clerks have moved out of the way. There are other vehicles that operate

[4] In approximately December 2010, the president of the International Longshoremen's Association Local 1410 learned that CSA had altered its coil-checking procedure to the one in place at the time of the accident. He informed CSA's superintendent that he believed the changed procedure was unsafe. According to the union president, CSA's superintendent admitted CSA had changed the procedure following a client request to speed up the checking process, but he declined to change it back to the pre-December procedure. The Secretary issued several subpoenas to CSA to produce the superintendent at the hearing, but CSA failed to do so. *See* discussion *infra* note 10. Accordingly, the judge granted the Secretary's request that she draw an adverse inference that the superintendent would have testified that the coil-checking procedure was changed to the one in place on the day of the accident to appease a client who wanted the process done faster.

on the dock, such as over-the-road trucks, flatbed trucks, and smaller forklifts. If a vehicle will be coming through the area, the clerks are notified so they can either move out of the way or check the coils before the equipment comes through.

DISCUSSION

Section 5(a)(1) of the Act requires each employer to "furnish to each of his 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." 29 U.S.C. § 654(a)(1). To prove a violation of this provision, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard.[5] *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The only element in dispute on review is whether the Secretary proved a feasible means existed to eliminate or materially reduce the hazard. Before turning to that question, we first address an issue remaining from the Commission's remand order to the judge and challenged by CSA on review: the judge's rejection of testimony from CSA's expert, Eustis John Faulk.

A. Testimony of CSA's Expert

The Commission remanded this case to the judge in part for her to reconsider Faulk's testimony with respect to whether the Secretary's proposed abatement method would cause adverse consequences that would render its use infeasible. *See* discussion, *infra*, at section C. In her original decision, the judge found Faulk's testimony on this point "unreliable" because she viewed his opinion that "you couldn't conduct cargo handling operations unless you had people on the ground and you had machines in the immediate area," as in conflict with her factual finding that CSA had "in fact" separated the clerks from the forklifts at the dock under its post-accident checking procedure.

In her decision on remand, the judge again considered Faulk's testimony, along with the rest of the record, and found that his testimony was "speculative, hyperbolical, and not grounded

[5] The Secretary must also prove the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished). This element is not in dispute on review.

in the facts established by the undisputed testimony of the eyewitness who actually observed and experienced the pre-accident and post-accident operations at issue." Specifically, the judge found that Faulk—who did not observe any of CSA's coil-checking procedures—continually mischaracterized the procedure used at the time of the accident by describing it in "idealized terms" and ignoring the testimony of two eyewitnesses—a clerk and the president of the International Longshoremen's Association Local 1410—who stated that coils frequently backed up in the clerks' work areas. The judge also found that Faulk ignored the eyewitness testimony of the clerk, the union president, and CSA's Director of Loss Control with respect to the post-accident coil-checking procedure performed on the dock by again "substitut[ing] his own version of reality," testifying that under the procedure not only do clerks stand under the crane as it is unloading cargo and fail to move out of the way when the forklifts pick up the coils, but additional vehicles pass close to the clerks while they are checking the coils. Describing Faulk as "manifest[ing] a stubborn refusal to acknowledge the actual pre-accident and post-accident operations as established by eyewitnesses," the judge credited the testimony of CSA's Director of Loss Control, the clerk, and the union president regarding the coil-checking procedures at the time of, and after, the accident over that of Faulk.

The Commission's reviewing authority includes the authority to decide all issues it could decide as the initial decision-maker. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1185 (No. 89-2883) (consolidated) (citing *Stevens Equip. Co.*, 1 BNA OSHC 1227, 1229 (No. 1060, 1973); Administrative Procedure Act, 5 U.S.C. § 557(b)). The Commission will ordinarily defer, however, to a judge's findings regarding the credibility of a witness if those findings are based on the demeanor of the witness or other factors peculiarly observable by the judge. *Metro Steel Constr. Co.*, 18 BNA OSHC 1705, 1706 (No. 96-1459, 1999); *see also Asplundh Tree Expert Co.*, 6 BNA OSHC 1951, 1954 (No. 16162, 1978) (the judge "must fairly consider the entire record and must adequately explain his findings"; it is "not sufficient for the [j]udge to merely state his ultimate findings and conclusions . . . [as he] must set forth sufficiently detailed findings and reasons"). Although the judge here explained in detail her rationale for rejecting Faulk's testimony, her credibility findings are not demeanor-based.[6] Accordingly, the Commission need not defer to the judge's credibility findings.

[6] The closest the judge comes to assessing Faulk's demeanor is her characterization of his refusal to acknowledge the testimony of the three eyewitnesses as "stubborn," but we find that description

These findings, however, are supported by the record. As the judge explained in sufficient detail in her remand decision, CSA's expert did not personally observe any of the coil-checking procedures in place at any time at CSA's facility. When questioned, Faulk ignored contradictory testimony from the three eyewitnesses, all of whom had personally observed the coil-checking procedures. In fact, his description of the coil-checking procedure in place at the time of the accident more accurately describes the coil-checking procedure as it existed before December 2010. Faulk's testimony regarding the post-accident coil-checking procedure was also based on his inaccurate understanding of how that procedure was performed; particularly, his (inaccurate) insistence that clerks worked underneath the crane carrying a load and could not move away from the forklifts, as well as his claim that vehicles passed close to the clerks while they were checking coils. Thus, we find that the judge reasonably concluded that the testimony of eyewitnesses who actually observed the procedures should be credited over that of Faulk. Accordingly, we reject CSA's contention that the judge erred in discrediting this testimony.

B. Secretary's Proposed Abatement Method

The method of abatement proposed by the Secretary and found by the judge to have been implemented by CSA is establishing "a safe area . . . separate from the forklift operating areas where the [coil-]checker/clerk employees could perform their duties free from forklift struck-by hazards." We find that both the pre-December 2010 procedure and post-accident procedure used by CSA are consistent with the Secretary's proposed method.

In assessing the Secretary's proposed abatement and whether CSA had implemented it, the judge found in her initial decision that "[t]he issue is not whether [clerks and forklifts] *always* can be separated, but whether they can be separated during the coil[-]checking operation so that they are not exposed to the hazard of being struck by a forklift." (Emphasis added.) She explained further in her decision on remand that "while the area where employees now check the coils is not geographically separate from the area where the forklifts pick up the coils (the coils are in the same location for both activities), the [clerks] and forklifts are *temporally separated* under the [post-accident] procedure." (Emphasis added.)

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falls short of the sort of demeanor-based credibility determination to which the Commission would typically defer. *See, e.g.*, *L & L Painting Co.*, 23 BNA OSHC 1986, 1990 (No. 05-0055) (finding no basis to disturb judge's credibility findings because he analyzed the witnesses' demeanors, including their facial expressions and body language).

We agree with the judge that the Secretary's proposed abatement does not require complete physical separation between the clerks and the forklifts at all times. As the Secretary himself points out, such separation would only be possible if the coils were transported between the clerks and forklifts by some intermediate mechanism, which no one has suggested. Both parties acknowledge that the clerks and forklifts must *at some point* occupy similar space near the steel coils. At the very least, forklifts must pick up the coils from the same location where the clerks check the coils; if the coils are not unloaded directly onto the dock, then forklifts must also deposit coils in the checking location. This does not mean, however, that the clerks and forklifts must occupy the same location at the same *time*. As the judge stated, clerks and forklifts can be "temporally separated."

The record also reflects both the Secretary's intent to refer to a temporal separation and an understanding by CSA that such temporal separation comports with the Secretary's proposed method of abatement. Indeed, the compliance officer who inspected the worksite described the pre-December 2010 coil-checking procedure as separating the clerks from the forklifts:

> [CSA] conducted operations prior to the accident that *had the checker separated from the forklift* in that the forklift would be dropping off one coil at a time in front of the door … where the checker would check it. And then the [checker or clerk][7] would call him in when he was ready for the forklift to come and stack the load.

(Emphasis added.) The Secretary's attorney then asked, "you thought [that operation] was safer than what was being done on the day of the accident?" The CO responded: "Anytime you could separate the forklifts from the pedestrians is – is safer. Yes."

Faulk had the same understanding as he consistently stated that CSA had implemented the post-accident coil-checking procedure *because* it was a suggested abatement method.[8] The

[7] The CO actually said "inside forklift" but in context it is apparent the CO meant "checker" or "clerk."

[8] CSA argues it moved the checking procedure out to the dock at the urging of the CO at the time of the inspection—that is, prior to the issuance of the citation. While it is undisputed CSA implemented the post-accident checking procedure before the citations were issued, there is no evidence supporting CSA's assertion that the CO urged CSA to move the checking procedures to the dock at the time of the inspection. Without support, CSA simply repeats in all of its filings before the judge and the Commission its claim that "[a]fter the accident, at OSHA's urging, the coil checking procedure was changed." Although one could infer that the change in procedure coincided with the time of the inspection, the record is unclear as to exactly when CSA implemented this change. The clerk testified that the post-accident procedure was implemented right after the December 29, 2011 accident, while CSA's Director of Loss Control said the

Secretary's attorney asked Faulk, "[a]nd you understand that the company has implemented one of the suggested methods of abatement that—that OSHA suggested to them. They've already implemented that. You understand that?" To which Faulk replied, "[r]eluctantly I believe they have. Yes." He also explained that the company is using the post-accident coil-checking procedure because "that's one of [OSHA's] abatement recommendations." Questioning throughout the hearing also focused on comparing the post-accident coil-checking procedure with the coil-checking procedure in place at the time of the accident, as well as with the pre-December 2010 coil-checking procedure, with particular emphasis on whether forklifts entered the clerks' areas at the same time that the clerks were checking the coils.

Accordingly, we find the record establishes that both parties understood the Secretary's use of the term "separate" in the proposed abatement method as meaning an area where the clerks could work without forklifts *simultaneously* operating in the same area. Given "the familiar rule that administrative pleadings are very liberally construed," *Nat'l Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973), and the evidence of the post-accident coil-checking procedure and pre-December 2010 coil-checking procedure introduced at the hearing, we find the language of the citation sufficed to include any measure that temporally separated clerks from forklifts. *See Erickson Air-Crane, Inc.*, No. 07-0645, 2012 WL 762001 at *2 (O.S.H.R.C., Mar. 2, 2012) ("It is well-settled that pleadings are to be liberally construed and easily amended."); *Gen. Dynamics Land Sys. Div.*, 15 BNA OSHC 1275, 1279-80 (No. 83-1293, 1991), *aff'd*, 985 F.2d 560 (6th Cir. 1993) (same). We also find that both CSA's post-accident procedure and the one it used prior to December 2010 accomplish that goal.

As to the post-accident coil-checking procedure, the coils are unloaded directly onto the dock and the clerks do not approach the coils to check them until they have been unhooked from the crane and the crane moves away. The forklifts do not approach the area to move the coils into the warehouse until the clerk finishes checking all of the coils, moves away, and signals the forklift operator. When the forklifts approach, the clerk is "done with all of his coils and he's out of the way." Clerks stay at least ten feet away from the forklifts at this time because before the forklifts approach, the clerks "move off . . . to the side of the [warehouse] doorway in the area where [they are] working." This means that the forklifts do not come anywhere near the clerks while they are

operation had been in place since January or February of 2012. The CO started his inspection on January 30, 2012, about a month after the accident occurred.

checking the coils.[9] Thus, CSA's post-accident procedure temporally separates the clerks from the forklifts.

As to the pre-December 2010 coil-checking procedure,[10] the clerks stood outside the driving path of the forklifts, either on the side of or just inside the door of the warehouse. The clerk only approached the steel coil to check it after an outside forklift operator placed the coil on the ground in the doorway. Coils were delivered one at a time; the forklift could not pick up the coil until the clerk had signaled the forklift to retrieve it and no new coil could be delivered until the old coil was retrieved. This process ensured clerks stepped away from the coil before it was picked up and stayed out of the way while the new coil was delivered. Therefore, CSA's pre-

[9] By contrast, under the procedure in place at the time of the accident, clerks did not move away and remained "in the general area" when the forklift came to move the coils.

[10] The judge described this procedure in her original decision but did not discuss in either decision whether that procedure was consistent with the proposed abatement method. We reject CSA's argument that the Commission cannot consider whether returning to the pre-December 2010 procedure would be an acceptable means of abatement on grounds that the Secretary failed to raise this argument earlier in the proceeding. In fact, the Secretary argued in his post-hearing brief that the pre-December 2010 procedure would be consistent with the proposed means of abatement. We also reject CSA's argument that the Secretary neither proposed that procedure as a method of abatement in the citation nor suggested it at the hearing. The proposed means of abatement simply references separating clerks and forklifts—it does not (and need not) identify a specific method of separation. Accordingly, any coil-checking procedure that results in temporally separating the clerks and forklifts would be consistent with the proposed abatement method.

We also reject CSA's argument that the pre-December 2010 procedure was "not fully fleshed out at trial." The Secretary attempted to elicit testimony about that procedure from CSA's superintendent in charge of the steel coil operation by subpoenaing him twice. The Secretary sent the first subpoena a few days before December 20, 2012 (the first day of the hearing), but the superintendent was unable to appear as he was on vacation and unreachable. That subpoena remained in effect at the time of the second day of the hearing on January 23, 2013 (which was scheduled at the close of the first day of the hearing), putting CSA on notice the Secretary wanted the superintendent to testify. Nevertheless, as a courtesy, a second subpoena was sent more than a week before the second day of the hearing, but CSA again failed to produce its superintendent. As previously noted, the Secretary asked the judge to infer that the superintendent's testimony would have corroborated the existing testimony regarding the pre-December 2010 procedure, which the judge did. *See Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1986, 2003) (Commission drew adverse inference from employer's "failure to present testimony from either of the two supervisory employees who were present," concluding this failure "suggests that neither of them would have been able to contradict" the Secretary's evidence), *aff'd*, 391 F.3d 56 (1st Cir. 2004).

December 2010 coil-checking procedure also temporally separated the clerks and the forklifts in that they did not occupy the same space at the same time.

Because both the post-accident coil-checking procedure, as implemented, and the pre-December 2010 procedure temporally separate the clerks and the forklifts, we find that both procedures are consistent with the abatement method proposed by the Secretary in the citation.[11]

C. Feasibility of Secretary's Abatement Method

Having found that these two procedures are consistent with the Secretary's proposed method of abatement, we now turn to whether the Secretary has shown that his proposed method is feasible. An abatement method is feasible under section 5(a)(1) if the Secretary "demonstrate[s] both that the measure[] [is] capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard." *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1190 (No. 91-3344, 2000) (consolidated); *see Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979) ("It is the Secretary's burden to show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred."). If the proposed abatement "creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility . . . ." *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1875 n.19 (No. 92-2596, 1996); *Royal Logging Co.*, 7 BNA OSHC 1744, 1751 (No. 15169, 1979) (finding it proper to reject proposed abatement

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[11] CSA claims that it complied with an additional method of abatement the Secretary "publicly proposed" in an OSHA publication titled "Traffic Safety in Marine Terminals," which discusses safe driving and how to walk safely in marine terminals. Specifically, CSA points to the following paragraph as addressing the basis for the citation here—the forklift's blind spot:

> Pedestrians should be aware that drivers cannot see them when they are in a vehicle's "blind spot." Pedestrians should avoid these blind spots whenever possible. When approaching or walking near vehicles, it is essential that they make eye contact with the operator and be sure the operator acknowledges them.

CSA maintains that it followed this guidance, as acknowledged by the CO, and even exceeded it by training its forklift operators to look out for clerks during the coil-checking operation. Accordingly, CSA questions how it can be cited when it followed this guidance "to the letter."

We agree with the Secretary that CSA's argument does not relate to the abatement issue but relates instead to whether CSA's purported compliance with the document means there was no violation. Regardless of whether CSA's training program addresses the document's recommendations, the document is geared towards pedestrians walking in a marine terminal and does not address the hazard at issue here—stationary employees who can be struck by a forklift while they are checking steel coils. Therefore, we find that CSA's claim lacks merit.

methods that "cause consequences so adverse as to render their use infeasible"), *aff'd*, 645 F.2d 822 (9th Cir. 1981).

The judge found the Secretary's proposed abatement method was feasible based on CSA's implementation of its post-accident coil-checking procedure, which temporally separated the clerks from the forklifts. She pointed out that the post-accident procedure reduced by half the number of forklifts operating during the checking operation because forklifts no longer deliver the coils to the clerks for checking. She also found that while the record establishes that there is more vehicular traffic on the dock than in the warehouse, it does not establish that employees are exposed to more struck-by hazards on the dock. In addition, she noted that none of the three witnesses with personal knowledge of both the post-accident procedure and the procedure in place at the time of the accident—including CSA's Director of Loss Control—testified that the additional vehicular traffic increased struck-by hazards to the clerks.[12]

We agree with the judge. As we have already found, the Secretary's proposed abatement method is consistent with both the post-accident and pre-December 2010 coil-checking procedures used by CSA. That these procedures were either previously used by CSA, or are currently being used, is prima facie evidence that both procedures were capable of being put into effect at the time of the accident. *See Sugar Cane Growers Coop. of Fla.*, 4 BNA OSHC 1320, 1324 (No. 7673, 1976) (in section 5(a)(1) case, fact "respondent, and the sugar cane industry, have agreed to use, and have been installing fixed seats in open vehicles, and now use buses to transport . . . farm workers . . . tend to show that the use of these measures is [technologically and economically] feasible"); *cf. Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429, 1434 (No. 90-1349, 1993) (rejecting infeasibility defense because employer "proved the technological feasibility of [abatement] by eventually developing and installing [the subject devices]" after the citation date); *FMC Corp.*, 12 BNA OSHC 2008, 2012 n.5 (No. 83-488, 1986) (consolidated) ("Under . . . Fed. R. of Evid. 407, evidence of post-accident measures [is] admissible to establish feasibility."). Although CSA

[12] The judge also found that the clerks are not exposed to the additional hazard of overhead crane loads, as alleged by CSA's expert, noting that Faulk had never observed the operation at issue and witnesses who did stated that the clerks are not in the coil-checking area while the cranes are in operation. The judge's finding in this regard is supported by the record. In any event, CSA does not argue on review that the clerks face the additional hazard of overhead crane loads, so we also find that CSA has abandoned this argument.

stopped using the pre-December 2010 coil-checking procedure, it did so, not because of safety concerns, but in an effort to finish the checking operation more quickly.

In addition, the record establishes that the Secretary's proposed abatement method would be effective in materially reducing the incidence of the struck-by hazard posed by the forklifts during the coil-checking procedure. Using this abatement method means the clerks and the forklifts do not occupy the same location at the same time. Indeed, as described above, under both the post-accident and the pre-December 2010 coil-checking procedures, forklifts approach the coils only after the clerk finishes inspecting the coil, signals the forklift, and moves away from the coil.[13] Under the post-accident procedure, clerks are able to stay 10 feet away from forklifts while the forklifts pick up the coils, and under the pre-December 2010 coil-checking procedure, clerks and forklifts were separated at the warehouse door.

As noted, a proposed abatement method may nonetheless be considered infeasible if it creates additional hazards, *Kokosing Constr.*, 17 BNA OSHC at 1875 n.19; *Royal Logging*, 7 BNA OSHC at 1751, but that has not been shown to be the case here. CSA claims only that the post-accident coil-checking procedure exposes its employees to additional hazards due to increased traffic on the dock—it makes no such argument with respect to its pre-December 2010 coil-checking procedure, which separated clerks and forklifts at the warehouse door, a location that does not have the additional traffic present on the docks. In fact, CSA argues on review that it wanted the checking procedure to remain in the warehouse, claiming that the company "did not want to move its checking procedures out to the dock."[14] Accordingly, we find the pre-December

[13] The judge's finding that only half as many forklifts are in operation during the post-accident coil-checking procedure is not supported by the record. Although the record is clear that forklifts no longer bring the coils to the clerks because the clerks check the coils right where the coils are unloaded by crane, it is silent on how many forklifts operate to take the coils from the dock to the warehouse. This error is harmless, however, because the clerks now move away from the coils before forklifts approach, so there is no exposure to the alleged struck-by hazard.

[14] Faulk also acknowledged that the pre-December 2010 procedure was safe by in effect describing it when he inaccurately described the coil-checking procedure in place at the time of the accident as being "in a much [more] open area inside the door of the warehouse" and noted that the clerk is "in an open safe location—much safer than where he is now, believe me." In addition, the union president was troubled by the change from the pre-December 2010 coil-checking procedure, which he also considered safer, testifying that he told CSA's superintendent the clerks were now in "harm's way" and said, "I don't think [the revised procedure]'s safe."

2010 coil-checking procedure, which, as discussed above, is consistent with the Secretary's proposed abatement method, is feasible.

We reach the same conclusion with regard to the post-accident coil-checking procedure. The Secretary has the initial burden of proving "that an abatement method exists that would provide protection against the cited hazard. The burden then shifts to the employer to produce evidence showing or tending to show that use of the method or methods established by [the Secretary] will cause consequences so adverse as to render their use infeasible." *Royal Logging*, 7 BNA OSHC at 1751. Here, we have already found that the Secretary has proven his proposed abatement method's effectiveness. The burden shifts, therefore, to CSA to rebut that prima facie showing by demonstrating that the proposed method creates other hazards rendering it infeasible.[15]

It is undisputed that there is additional traffic on the dock that is not present in the warehouse. CSA's Director of Loss Control, the union president, and the clerk all testified that there is more vehicular traffic on the dock where the clerks now check the coils than in the warehouse where they had previously checked them. The evidence also shows, however, that this additional traffic generally does not come near the clerks, or, if it does, that the clerks are warned and move out of the way. As the clerk explained, "while we're checking . . . if [other vehicles] are moving, they're moving [at some distance] behind [the clerk]. [The other vehicles] won't be near the coil." He also explained the clerks would "get notice if [other vehicles] were coming through" and stated the clerks would "move away" from the area before any equipment came through. Finally, he noted that under the post-accident operation, "I find that you can stay away from [vehicles] better with—you have more eyes on you to let you know what's going on."

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[15] We note that the judge erred in treating this issue as an alleged "greater hazard" defense. In cases in which the Secretary alleges a violation of an OSHA standard, the employer may assert the "greater hazard" defense, which requires proof that "the hazards created by complying with the standard are greater than those of noncompliance." *Spancrete Ne., Inc.*, 16 BNA OSHC 1616, 1618 (No. 90-1726, 1994), *aff'd*, 40 F.3d 1237 (2d Cir. 1994) (unpublished). In general duty clause cases, however, "it is not the employer's burden to establish an affirmative defense of greater hazard." *Kokosing Constr.*, 17 BNA OSHC at 1875 n.19 (citing *Royal Logging*, 7 BNA OSHC at 1751). Rather, "if [the] proposed abatement method creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility." *Id.* Thus, "evidence which would be relevant to the affirmative defense of 'greater hazard' under [section] 5(a)(2) is properly treated as rebuttal evidence to the Secretary's case [for a section 5(a)(1) violation]." *W. Mass. Elec. Co.*, 9 BNA OSHC 1940, 1945 n.11 (No. 76-1174, 1981) (citing *Royal Logging*, 7 BNA OSHC at 1751).

We find that the clerk's testimony, though lacking in quantitative information (such as how many trucks were present on the dock), is sufficient to show that the traffic present on the dock did not come close enough to the clerks to pose additional struck-by hazards. Indeed, he was the only person who testified about the distance between the clerks and the forklifts; his testimony shows not only that the additional traffic does not come near the clerks but that they are alerted to traffic so they can move out of the way. Moreover, the clerk testified he feels safer working on the docks and agreed forklifts "can consistently stay away from [clerks] that may be out on the dock checking cargo." Although the union president testified that other traffic "could" get close to the clerks who are checking coils and said "it's hard to say" if "anything [is] done to prevent traffic from getting close to the clerks," he agreed the post-accident coil-checking procedure was "improved" and "better" than the one in place on the day of the accident. Only CSA's Director of Loss Control was equivocal on the subject of safety, testifying, "At this particular time, I really don't know if it's any safer or any less safer [sic]."[16] He confirmed, however, that if CSA truly thought its employees were exposed to a greater hazard, CSA would have shut down the operation or made the necessary changes to the post-accident procedure. Accordingly, we find the post-accident coil-checking procedure also demonstrates the feasibility of the Secretary's proposed abatement method.

[16] CSA's Director of Loss Control did not testify regarding how close the traffic comes to the clerks or if anything is done to prevent the traffic from approaching the clerks.

Because both the post-accident and pre-December 2010 coil-checking procedures are consistent with the Secretary's proposed abatement method and demonstrate the feasibility of that abatement method, we affirm the citation as serious and assess the proposed penalty of $6,300.[17]
SO ORDERED.

/s/
Heather L. MacDougall
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
James J. Sullivan, Jr.
Commissioner

Dated: March 19, 2019

[17] On review, CSA does not challenge either the characterization of, or penalty assessed for, this citation item. Therefore, we see no reason to disturb the judge's findings on these issues. *See, e.g.*, *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty where neither in dispute).

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. CSA Equipment Company, LLC., Respondent.	OSHRC Docket No. **12-1287**

Appearances:

Amy Walker, Esquire, U.S. Department of Labor, Atlanta, Georgia
For the Complainant

McCord Wilson, Esquire, Rader & Campbell, P.C., Dallas, Texas, and
Ronald L. Signorino, Consultant, The Blueocean Company, Inc., Basking Ridge, New Jersey
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER ON REMAND

On June 4, 2012, the Secretary issued a one-item Citation and Notification of Penalty to CSA Equipment Company, LLC, following an inspection conducted by Compliance Safety and Health Officer (CSHO) Eliseo Hernandez at the Port of Mobile, Alabama. CSA is a stevedoring company. Its work includes unloading cargo from vessels, as well as checking and transferring large steel coils. The CSHO's inspection resulted from an accident that occurred on December 29, 2011, when a forklift struck a CSA employee who was checking a coil. The employee later died from his injuries.

The Secretary alleged CSA committed a serious violation of § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §654(a)(1), for failing "to provide a clear view of the designated path of travel for the powered industrial trucks, exposing employees to crushing hazards while materials are checked into the warehouse." Item 1 listed three alternative abatement methods. On November 19, 2013, the undersigned issued a Decision and Order in this proceeding affirming Item 1 of the Citation and assessing a penalty of $6,300.00. The undersigned found the third listed abatement method—setting up a separate 'safe area' where employees could check

coils free from forklift struck-by hazards—was feasible because CSA had already implemented that method when it moved its coil-checking operation from the warehouse to the dock after the accident. CSA petitioned for review, contending this proposed abatement method is not feasible.

On March 26, 2014, the Commission remanded this case to the undersigned with instructions to determine "whether the method of separating the checkers and the forklifts proposed by the Secretary will materially reduce or eliminate the cited hazard, taking into account whether implementing that method of abatement would create safety consequences so adverse as to render its use infeasible. If the judge concludes that the Secretary did not establish this as a feasible method of abatement, she shall determine whether the other two methods of abatement proposed by the Secretary are feasible." (Remand Order, p. 4.)

In its Brief on Remand, the Secretary "concedes that the evidence at trial did not support his argument that the other two means of abatement identified in the Citation are feasible under the circumstances presented at this worksite." (Secretary's Brief, p. 5, n. 2.) Thus, only the feasibility of one method, separating the checkers from the forklifts, is at issue. For the reasons that follow, the undersigned finds the Secretary's proposed method of separating the checkers and the forklifts materially reduces the struck-by hazards created by the operation of the forklifts. This method does not create adverse safety consequences. Item 1 of Citation No. 1 is, once again, AFFIRMED.

The Commission's Instructions

The Commission states the undersigned "refused to consider testimony from CSA's expert, John Faulk, who testified that implementing the abatement method exposed CSA employees to other hazards." (Remand Order, p. 3). The Commission states the undersigned should have considered Faulk's contention that implementation of the proposed method of abatement creates two adverse consequences: "(1) checkers are still exposed to the 'immediate area' where the forklifts operate, and (2) checking coils on the dock presents additional hazards, specifically increased traffic from other moving vehicles such as small forklifts, 18-wheeler trucks, and road trucks, as well as hazards posed by overhead crane loads." (*Id.*).

Although the original decision did not address it in detail, the undersigned did consider Faulk's testimony. Nevertheless, consistent with the Remand Order, the undersigned has again carefully considered the testimony, along with the rest of the record, and finds it not reliable. For

the reasons that follow, the undersigned finds the testimony of CSA's expert is speculative, hyperbolical, and not grounded in the facts established by the undisputed testimony of the eyewitnesses who actually observed and experienced the pre-accident and post-accident operations at issue.

Eyewitness Testimony

Thomas Repoll Jr. is CSA's regional director of loss control (Tr. 22). Repoll was not at the worksite the day of the accident, but he had observed CSA's operations at the Port of Mobile both before and after the accident (Tr. 321, 324). Repoll described the pre-accident operation:

> [The clerks] were usually stationed right by the doorway. Once the coil was loaded from the vessel to the dock, a lift machine would bring it to the doorway and go back to the ship to get another coil. And you had machines inside the warehouse that would get the coil after it had been checked and bring it to the piles. The clerk was usually in the vicinity of the doorway of the warehouse.

(Tr. 41).

Repoll acknowledged that in the pre-accident operation there was "no set area where only the clerks [were] and the forklift doesn't enter into." (Tr. 42). With regard to the forklift traffic, Repoll stated, "[T]here's really no designated path. They start with a particular traffic pattern. And as the work progresses, as the warehouse fills up with cargo, they have to change their . . . traffic pattern." (Tr. 47).

The post-accident operation eliminates the step of forklifts bringing the coils from the dock to the warehouse. Now the checkers check the coils on the dock after they have been set down by crane. Repoll testified, "[F]rom the point of rest on the dock, the clerk checks [the coil] off. He motions to the driver once it's been checked off on his clipboard to come get the coil. The driver comes to get the coil, he brings it in the house to where it's stored in the bay inside the warehouse." (Tr. 323). Unlike the pre-accident operation, during which clerks were in the "general area" when the forklifts were dropping off or picking up the coils, in the post-accident operation, the clerk is "done with all of his coils and he's out of the way and he's standing next to the two guys that actually unhook the coil before the clerk checks it off." (Tr. 331-332).

At the time of the hearing, the post-accident operation had been implemented for approximately one year. Repoll testified there is more vehicular traffic on the dock where the checkers now check the coils than in the warehouse where they had previously checked them (Tr. 329). He was equivocal when asked his opinion of the safety of the post-accident operation compared to the pre-accident operation:

> Q. How is the current operation working?
>
> Repoll: I mean, we haven't had any injury with -- with clerks since then, but you know, we're -- we're still putting more people out -- out on -- out on the dock where there's more -- more congestion. So it's tough to say. Is it any safer? We don't -- we don't know. We've got more exposure to have, you know -- once we get people next to ship side, so I don't – I don't know if it's safer or not.
>
> Q. So you're not alleging that it creates a greater hazard for these employees now that they're out on the dock; is that right?
>
> Repoll: I mean, you always have a hazard when you have employees around lift machines.
>
> Q. Do you think the current operation is less safe than the way it was being done on the date of the accident?
>
> Repoll: At this particular time, I really don't know if it's any safer or any less safer.
>
> Q. If you felt it was less safe, I'm assuming you would certainly make a change and would not let your employees be exposed . . .to a greater hazard being out on the dock; would you?
>
> Repoll: Right. Our superintendents would have that authority to shut a job down and to change anything they see deemed -- that was unsafe.
>
> Q. And they would certainly do so if they felt this operation was unsafe, correct?
>
> Repoll: Right.

(Tr. 325-326).

Mark Bass is president of the International Longshoreman's Association (ILA), Local 1410 (Tr. 122). He observed the checkers' operations as performed before the December 29, 2011, accident and after it. Bass was called to the worksite the day of the accident (Tr. 127).

Bass testified he had responded previously to complaints about forklift operators driving recklessly in the warehouse. Approximately a year before the December 2011 accident, Bass had gone to the warehouse in response to a complaint and noticed the clerks "had coils all over the place and they were trying to keep up." (Tr. 138). Bass called Miles Covington, CSA's general superintendent, and relayed his concerns, stating, "I noticed that [the forklift operators] were driving all the coils on the inside of the door, and the clerk and checker is in harm's way." (Tr. 140). Bass testified the checkers were exposed to a hazard because the forklift operators were

> constantly bringing coils in and they—they weren't giving them an opportunity to move the coils. And the way they have to stack the coils or put the coils in the right place, it—it wasn't—it wasn't providing enough time. It wasn't providing enough time for them to keep up. And then you have all the lift driving. The lift has a big counterweight on the back, so they have to back up with those—they move forward and then have to back up with the operation. So it was just dangerous.

(Tr. 140-141).

Bass stated the post-accident operation, requiring forklift operators to wait for a signal from the checker checking the coils on the dock before approaching to transport the coils into the warehouse, is an improvement over the pre-accident operation (Tr. 149). He stated the post-accident operation "is better than what the situation with [the decedent] was. . . because at the end of the day, the clerks are standing over against the warehouse waiting for the discharge. Nobody can move any coils until he does his job—he or she does their job and then comes back out of the way. And then the coil is moved. " (Tr. 162-163). Bass stated that the checkers on the dock were exposed to other vehicular traffic while on the dock (Tr. 167-168).

Michael Crismon works as a checker for CSA (Tr. 78). Of the witnesses, he was the only one who observed and worked during both the pre-accident and post-accident operations and who was onsite at the time of the December 29, 2011, accident (Tr. 81-82). Crismon stated that at times while working during the pre-accident operation in the warehouse, coils would back up and forklift operators would move into the area in which he was working to drop off or pick up coils (Tr. 84). At times he had "10 or more" coils backed up in his area and more than one forklift accessing his area (Tr. 85-86). Backups of coils were frequent under the pre-accident operation (Tr. 98). On the day of the accident, three forklifts were bringing coils in from the dock and three forklifts were moving the checked coils from the checkers' areas to their designated bays. The number of forklifts in the warehouse at any given time fluctuated. Crismon thought there might have been some over-the-road trucks in the warehouse that day (Tr. 88). He stated it was usual for there to be over-the-road trucks and 18-wheelers operating in the warehouse at the same time the forklifts were operating (Tr. 91). Forklift operators routinely backed into the areas occupied by the checkers to drop off or pick up coils (Tr. 94).

Although Crismon testified that "there is more traffic [with] the new procedure" on the dock (Tr. 117), he stated the checkers are notified if vehicular traffic comes through (Tr. 96). He stated that under the new operation, "I find that you can stay away from [industrial trucks] better with—you have more eyes on you to let you know what's going on." (Tr. 99). Crismon testified he feels he is safer under the new procedure and that the industrial trucks "can consistently stay away from the checkers that may be out on the dock checking cargo." (Tr. 99-100). When asked if the vehicular traffic is near the checkers, Crismon stated, "Not while we're checking. We're—they're moving—if they are moving, they're moving a little further behind going up. They won't

be near the coil." (Tr. 118). Crismon responded, "Correct," to the statement, "So, [the industrial trucks are] not coming anywhere near your area while you're checking coils." (Tr. 118).

Crismon also stated he believes the new procedure is faster and more efficient because "as soon as the coils get dropped onto the dock, instead of having one truck grab it, put it inside, and then another truck grab it, you have them grabbing straight from the dock. So it's not—it's not as much movement. . . They don't have to handle the coil as much." (Tr. 100). After the coils are checked, the checkers signal the forklift operators to pick up the coils. Then, Crismon stated, "We move off with the rest of the longshoremen to the side of the doorway in the area where we're working." (Tr. 101).

Testimony of CSA Expert John Faulk

John Faulk testified it is not feasible to set up a separate 'safe area' where employees could check coils free from forklift struck-by hazards because "[y]ou couldn't conduct cargo handling operations unless you had people on the ground and you had machines in the immediate area." (Tr. 462). It is clear from the record, however, that, while the area where employees now check the coils is not geographically separate from the area where the forklifts pick up the coils (the coils are in the same location for both activities), the checkers and forklifts are temporally separated under the new procedure. All three witnesses who actually observed and worked with the new procedure testified without contradiction that the checkers check the coils, signal to the forklift operators, and then retreat from the area where the coils are located until after the forklifts pick up the coils and transport them to the warehouse. The checkers and the forklifts do not occupy the same area at the same time; in this way the checkers and forklifts are separated.

Faulk continually mischaracterized the pre-accident operation as it occurred in the warehouse. Despite the testimony of Bass and Crismon, who stated that coils frequently backed up in the checkers' areas, Faulk described the warehouse procedure in idealized terms. "This clerk with nothing around him checks the coil for damage and marks it, then signals for the lift truck operator inside the warehouse to drive up and pick up the coil and store it in the warehouse . . . You have one machine feeding him, one machine taking it, storing it, using an open clear area." (Tr. 466-467). "He's in an open area, in an open aisle with just one machine working this way and one that way." (Tr. 494). "It was in a much open area inside the door of the warehouse in at least a 20-foot aisle-way. And the warehouse lift machine wouldn't come get the coil till he was finished checking it and then store it. The -- the lift machine from the ship would bring it, set it down, back

away. The clerk wasn't even on that side. He -- he would check it, then signal. So he was in an open safe location – much safer than where he is now, believe me." (Tr. 498). The Secretary's counsel questioned Faulk about his seeming certainty regarding an operation he never personally witnessed and which runs counter to the testimony of the witnesses who had witnessed it:

> Q. Mr. Faulk, where are you getting this information regarding how the operation was done? What are you basing that on?
>
> Faulk: I'm basing it on the documents that I read in the OSHA citation.
>
> Q. And you're also inc –
>
> Faulk: In my experience seeing this operation being conducted both ways for 43 years during my career.
>
> Q. Mr. Faulk, were you onsite on the day that this accident occurred?
>
> Faulk: No. I wasn't onsite. No.
>
> Q. Had you observed yourself what the operation was like?
>
> Faulk: I've seen that type of operation hundreds of times.
>
> Q. Were you onsite at the Respondent's location? Did you observe the way the operation was done on the date of the accident?
>
> Faulk: No. I wasn't there the day of the accident.

(Tr. 498-499).

> Faulk: If he's inside the shed, there's no lift machines by him while he's bending down checking. One's already put the coil down, went back to get another one. And the other one's not going to come get the coil till he signals him.
>
> Q. So you're talking about hypothetically that's the way it was done in the warehouse?
>
> Faulk: No. That's the way it was done. I've seen it done hundreds of times like that.
>
> Q. Do you know that that's the way it was done on the day of the accident?
>
> Faulk: It's the way it's typically done in ports throughout the United States and done throughout the world in ports that way. It's been done like that for decades safely. It's a simple operation.

(Tr. 502-503).

When confronted with the testimony of the eyewitnesses that established the coils backed up (as many as ten deep) and forklifts accessed the checkers' areas while the checkers were working, Faulk doubled down on his interpretation of the procedure he never personally observed:

> Well, it depends on how fast one machine could stack them and one can deliver. But if – even if there's three coils, and in his area there might have been. But the way I understand, it was one coil in this area. Maybe in his it was backed up. Maybe he was -- maybe he had damage on a coil. It took him longer to -- to check it. In the meantime, the machine from the ship brought another coil, so they may stack up. But he's checking one coil at a time. But still the warehouse forklift operator doesn't come and get the coil until he signals him to come get it. So he's aware of the two machines.

(Tr. 495-496).

When asked about the current checking procedure performed on the dock (which Faulk "reluctantly" agreed CSA has implemented), Faulk again rejected the eyewitness testimony of Repoll, Bass, and Crismon and substituted his own version of reality:

> Q. So they currently -- the way it's being done is that the coils are dropped on dockside, the checkers check it, they move out of the way, and then the forklift comes to get the coil. Do you agree with that? Do you understand that?
>
> Faulk: Well, you say "move out of the way." There might be four or five coils there where he's checking one of the other, so "moving out of the way" is just something that doesn't happen. He -- he might have four coils discharged at one time. He's checking one at a time now. So he's not going to be -- there's no safe place under the hook or under the crane or the whip we call it. If a sling should break and there's four coils coming out, they're not going to fall straight down. They're going to scatter. So you have -- you have now three people. The hook-on men are always in danger of being struck by falling cargo. Now you have three people that's in danger of being struck by falling cargo should something fail. Not only that, you have an additional person exposed to numerous vehicles passing up and down a narrow warehouse apron where before you didn't have that.

(Tr. 497-498).

Having reconsidered Faulk's testimony, the undersigned finds, again, that it is unreliable and deserving of little weight. Faulk manifested a stubborn refusal to acknowledge the actual pre-accident and post-accident operations as established by eyewitnesses and instead engaged in speculation about hypothetical operations that were unlike either of the ones attested to by the witnesses who worked on the site in question. The testimony of Repoll, Bass, and Crismon regarding the pre-accident and post-accident operations of the checkers is credited over that of Faulk.

Purported Adverse Consequences:

Checkers Still Exposed to "Immediate Area" Where Forklifts Operate

Based on the testimony of Repoll, Bass, and Crismon, the undersigned finds CSA's checkers are not exposed to the "immediate area" where forklifts operate. All three eyewitnesses

stated the checkers approach the coils after they have been set down by crane on the dock, check the coils, signal to the forklift operators to commence pickup, and then retreat from the area while the forklifts are retrieving the coils. Except for Faulk, who did not observe the operation, no one disputed that the new procedure successfully separates the checkers from the forklifts, thereby materially reducing struck-by hazards.

In addition to separating the checkers from the forklifts during the time the forklifts are retrieving the coils, CSA's new procedure reduces by half the number of forklifts operating during the checking operation. It is undisputed that under the old system, drivers were operating six forklifts every time the checkers were checking the coils. If the coils were backed up, a checker could experience more than one forklift entering his or her area, both delivering coils and retrieving checked coils. Under the new procedure, forklifts no longer deliver the coils. Three forklifts are used to retrieve the coils once they are checked (and once the checkers retreat from the area). The reduction in struck-by hazards can be quantifiably measured: the number of forklifts involved during the checking operation is reduced from six to three. A reasonable person would concede that a reduction by one-half is, objectively speaking, a material reduction.

Checkers Exposed to Additional Hazard of Increased Traffic

CSA's main argument for disputing the feasibility of separating the checkers from the forklifts is that it introduces the employees to new hazards. The record does not support this argument. CSA contends the checkers are exposed to more vehicular traffic under the new procedure. While the record establishes there is more vehicular traffic on the dock than in the warehouse, it does not establish the employees are exposed to more struck-hazards while on the dock.

Repoll, Bass, and Crismon stated there was more traffic on the dock than in the warehouse (Tr. 117, 167-168, 329). None of them, however, testified that the increased vehicular traffic created more struck-by hazards. Crismon, the only witness who worked as a checker, stated that he felt safer under the new procedure and that the traffic on the port is not near the landed coils (Tr. 99-100). Repoll is CSA's regional director of loss control. As such, he is a representative of CSA's upper management and the employee witness most likely to further the defense of his employer by asserting the increased traffic creates a greater hazard. Yet when the question was put to him, he stated only that it is hazardous for employees to work around forklifts, which is the

same hazard that existed in the warehouse under the previous procedure. He declined to state that the new procedure is more dangerous than the previous procedure:

> Q. So you're not alleging that it creates a greater hazard for these employees now that they're out on the dock; is that right?
>
> Repoll: I mean, you always have a hazard when you have employees around lift machines.
>
> Q. Do you think the current operation is less safe than the way it was being done on the date of the accident?
>
> Repoll: At this particular time, I really don't know if it's any safer or any less safer.

(Tr. 325).

CSA's regional director of loss control, who has personal knowledge of the pre-accident and the post-accident procedures, refused to state that the new procedure is more hazardous when directly asked about it. CSA provided no empirical evidence showing how close to the coil checking area the vehicular traffic normally ran. CSA adduced no evidence quantifying either the amount of vehicular traffic or the distance between the traffic and the coil landing area. In its Remand Order, the Commission directs the judge to consider Faulk's testimony with regard to alleged adverse consequences caused by implementing the abatement method

> along with other evidences indicating that the proposed abatement method fails to materially reduce the cited hazard and in fact, introduces other hazards to which the checkers are exposed. *See also Kokosing*, 17 BNA OSHC at 1875 n.19, 1995-1997 CCH OSHD at p. 43,727 n.19 3 (Secretary has the burden of rebutting evidence that abatement method presented a greater hazard); *Western Mass. Electric Co*., 9 BNA OSHC 1940, 1945 n.11, 1981 CCH OSHD ¶ 25,470, p. 31,766 n.11 (No. 76-1174, 1981) (referring to principle articulated in *Royal Logging Co*. that there is no greater hazard defense per se in case arising under section 5(a)(1), i.e., "evidence which would be relevant to the affirmative defense of 'greater hazard' under § 5(a)(2) is properly treated as rebuttal evidence to the Secretary's case [for a § 5(a)(1) violation].").

(*Id.,* pp. 3-4).

The undersigned discussed the consideration of Faulk's testimony and the reasons for finding it unreliable above. The undersigned now finds, with regard to CSA's assertion that the abatement method it is currently using presents a greater hazard to its checkers due to increased vehicular traffic, that CSA's assertion is unsupported by the record. To the extent CSA has put forth a case that the increased vehicular traffic creates a greater hazard, the Secretary successfully rebutted that case. None of the three witnesses who had personal knowledge of both procedures, including CSA's regional director for loss control, testified that the increased vehicular traffic

increased struck-by hazards to the clerks. No evidence was adduced to show the distance between the vehicular traffic and the area where the checkers check the coils. The only checker who testified stated vehicles "stay away from the checkers that may be out on the dock checking cargo" (Tr. 100) and "won't be near the coils." (Tr. 118).

Checkers Exposed to Additional Hazard of Overhead Crane Loads

Faulk, who did not observe either the pre-accident or post-accident operations of CSA's checkers, stated the checkers were exposed to struck-by hazards from overhead crane loads.

> [Y]ou've got loads being swung out over the hull over these, this area being lowered. You're exposing him now to being struck by cargo that could possible fall from a suspended load. There's no place to give—you have two other men out there already-longshoremen that's hooking up and unhooking cargo. There's no safe place for these people to stand. He was safer in this open area where he had one machine feeding him and one taking it away.

(Tr. 468).

As discussed above, Faulk is again ignoring the new checking procedure as it is actually performed and is substituting his own version of reality. The undisputed testimony of the eyewitnesses establishes the checkers were not exposed to struck-by hazards from overhead crane loads when the cranes were in operation. Bass testified that he complained to CSA when he first observed a coil operation occurring near a steel plate operation (Tr. 163). CSA changed its operation so that it does not occur at the same time as the steel plate operation (Tr. 165). Now when loads are "discharging, [the checkers] can't go out there to check the coils. They have to wait till whatever commodity is landing and then they go out." (Tr. 167).

Crismon likewise testified the checkers are not exposed to struck-by hazards from overhead crane loads. He stated that the checkers do not approach the coils until they have been landed on the dock and "I don't go up until after the crane already started moving away." (Tr. 116).

As with the increased vehicular traffic allegation, CSA bases its case on the unsupported assertion of its expert witness, who never observed the operation at issue and who ignored the undisputed testimony of the eyewitnesses. The Secretary successfully rebutted CSA's assertion by adducing testimony from witnesses who have observed the operation at issue and who stated that checkers are not in the coil checking area while cranes are in operation, and thus they are not exposed to struck-by hazards from overhead crane loads.

Conclusion

In accordance with the Commission's Remand Order, the undersigned has determined, based on all of the evidence in the record, that the method of separating the checkers and the forklifts proposed by the Secretary materially reduces the cited hazard and does not create safety consequences so adverse as to render its use infeasible. Accordingly, as before, Item 1 is affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the foregoing Decision, it is hereby ORDERED that Item 1 of Citation No. 1, alleging a serious violation of § 5(a)(1) of the Act, is affirmed and a penalty of $6,300 is assessed.

SO ORDERED.

Date: December 16, 2014

/s/
Sharon D. Calhoun
Judge