OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 19TH Street, Room 407
Denver, CO 80202-2517

SECRETARY OF LABOR, **Complainant,** **v.** **CARGILL MEAT SOLUTIONS CORP.,** **Respondent,** **and** **UFCW Local No. 2,** A**uthorized Employee Representative.**	**OSHRC DOCKET NO. 10-1156**

APPEARANCES:

Andrea C. Luby, Esquire, Susan J. Willer, Esquire
U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri
For the Complainant.

Rodney L. Smith, Esquire, Patrick J. Miller, Esquire
Sherman & Howard, LLC, Denver, Colorado
For the Respondent.

Jacqueline Nowell, Director, Occupational Safety and Health Office
United Food and Commercial Workers International Union, Washington, D.C.
For the Authorized Employee Representative.

BEFORE: James R. Rucker, Jr.
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On January 13, 2010, the Occupational Safety and Health

Administration ("OSHA") commenced an inspection of a facility of Respondent, Cargill Meat Solutions Corp. ("Respondent" or "Cargill"), located in Dodge City, Kansas. The inspection came about due to a complaint OSHA received about the facility. As a result of the inspection, on May 4, 2010, OSHA issued to Cargill a serious citation alleging a violation of 29 C.F.R. § 1910.132(h)(1). Cargill filed a timely notice of contest, and the hearing in this matter was held in Wichita, Kansas, on July 19, 20 and 21, 2011. Both parties have filed post-hearing briefs.

Jurisdiction

The parties have stipulated that Respondent Cargill has a workplace in Dodge City, Kansas that is, and at all relevant times was, engaged in meat processing. The parties have also stipulated that Cargill utilizes goods, equipment and materials shipped from outside the State of Kansas and that it is engaged in a business affecting commerce. (Stip. Nos. 1, 2). Further, Cargill employs approximately 30,000 people at more than 70 locations in the United States and Canada. (Tr. 561-62). I find that Cargill is an employer with employees under the Act and that the Commission has jurisdiction of the parties and the subject matter of this proceeding.

Background

Respondent Cargill operates a meat processing facility in Dodge City, Kansas. The process begins with the slaughtering of cattle on the Kill Floor. The carcasses go to the "hot box," where they are stored for two weeks, and certain by-products go to the Rendering Department, where they are cooked and processed. The carcasses next go to the Fabrication Department for butchering. The various cuts of meat go on to the Packaging and Shipping/Sales Departments. These processes result in blood, fat and pieces of meat being on the floors, which causes the floors to be slippery. The floors are cleaned regularly with water, which also contributes to the floors being slippery. Because of the condition of the floors, employees who work on the Kill Floor and in the Rendering, Fabrication, Packaging and Shipping/Sales Departments are exposed to slipping hazards. Cargill requires the employees who work in these areas to wear work boots that cover the ankle, are water resistant, and have slip-resistant soles. It also requires the employees who work in these areas to pay for their boots, although it provides boots to its managers free of charge. While Cargill has boots for sale at the facility, the boots it sells include steel-toed rubber boots that are only required for certain jobs or areas; when Cargill

requires these boots, it pays for them.[1] These particular boots are not required to be worn on the Kill Floor or in the other departments noted above, although some employees buy these boots to wear in those areas.[2] Employees who work on the Kill Floor and in the other noted departments also buy their boots at local stores, such as Wal-Mart and stores named "Long's" and "Brown's Footwear." Cargill does not specify the brand of boot employees must buy, and employees buy a variety of boots. Cargill also does not require that the boots the employees purchase stay at the facility; most employees wear their boots home or take their boots with them. (Tr. 47-49, 54-56, 62-68, 72-74, 126-29, 251-52, 259, 284, 293-95, 303, 307, 376-78, 383-86, 584-87, 607-09, 612-27, 634, 639; RX-1, CX-4-24, CX-26-29). *See also* Stip. Nos. 3-18.

The OSHA inspection in this case came about after the UFCW, the union representing employees at the facility filed a complaint.[3] The complaint alleged that Cargill was in violation of 29 C.F.R. § 1910.132(h)(1), which requires the employer to provide personal protective equipment ("PPE") at no cost to employees. Specifically, the complaint alleged that:

> Cargill requires production employees in this meatpacking plant (approximately 2200 workers are employed at this location) to wear specialty protective footwear and is NOT providing it free of charge.

See CX-1, p. 5 (emphasis in original). John Trussell is the OSHA Compliance Officer ("CO") who inspected the Dodge City facility. During his inspection, he determined that employees who worked in various departments were exposed to slipping hazards because of the condition of the floors. He also determined employees had been injured from slipping and falling in the course of their work, due to the condition of the floors. The CO concluded the work boots the employees wore in the areas he observed were specialty boots, due to the requirements that the boots be, among other things, water resistant and slip resistant. He further concluded that because Cargill was not providing the boots free of charge to employees, it had violated the above-noted standard.[4] Brian Drake, the Occupational Safety and Health Manager for OSHA Region VII, also concluded that the boots Cargill required employees to wear were specialty boots, in view of

[1] Cargill also requires other types of boots, such as steel-toed boots and arc flash boots, for particular positions and/or work areas; when it requires these boots, it pays for them. (Tr. 374-78, 584-86, 594).
[2] The Secretary asserts that Cargill required some employees who worked on the Kill Floor and in other departments to buy the steel-toed rubber boots it sold. S. Brief, pp. 31-32. This assertion is addressed at the end of this decision.
[3] The UFCW filed essentially identical complaints against five other Cargill facilities. *See* CX-1, pp. 1-6.
[4] The CO found no problems with any of the boots he saw being worn during his inspection. He also found no problems with Cargill's housekeeping procedures or its hazard assessment forms. (Tr. 91-95, 134).

their additional safety attributes, that is, they were water resistant and had slip-resistant soles. (Tr. 30-74, 102-03, 408-09, 421-25). This is a case of first impression before the Commission.

The Alleged Violation

Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1910.132(h)(1), in that "[t]he employer did not provide the protective equipment, including personal protective equipment (PPE) used to comply with this part, at no cost to employees." The citation goes on to allege:

> This employer requires employees to use [PPE], specifically specialty protective footwear meeting the employer's parameters, due to hazards such as slipping and falling on wet floors, as well as animal remnants, such as fat and other protein material, and prolonged water and fluid exposure to the feet, and does not provide the equipment at no cost to employees….

The citation then sets out the five specific departments where the alleged violation occurred, that is, the Fabrication Department, the Kill Floor, and the Rendering, Packaging and Shipping/Sales Departments. The citation also sets out some of the job positions in which employees are exposed to the cited hazard in each of the noted departments. For each cited department, the citation contains the following sentence:

> These employees are required to provide their own water-resistant boots, having a slip resistant sole, for protective footwear at their own cost.

The Applicable OSHA Regulations

> 29 C.F.R. § 1910.132(a) *Application*. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

> 29 C.F.R. § 1910.132(d) *Hazard Assessment and Equipment Selection*. (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall: (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment; (ii) Communicate selection decisions to each affected employee; and, (iii) Select PPE that properly fits each affected employee….(2) The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the

> evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.
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> 29 C.F.R. § 1910.132(h) *Payment for Protective Equipment*. (1) Except as provided by paragraphs (h)(2) through (h)(6) of this section, the protective equipment, including personal protective equipment (PPE), used to comply with this part, shall be provided by the employer at no cost to employees. (2) The employer is not required to pay for non-specialty safety-toe protective footwear (including steel-toe shoes or steel-toe boots) … provided that the employer permits such items to be worn off the job-site….(4) The employer is not required to pay for: … (ii) Everyday clothing, such as … normal work boots….
>
> The Final Rule relating to 29 C.F.R. § 1910.132(h) states as follows:
>
> OSHA has decided to continue to exempt non-specialty safety shoes from the employer payment requirement. OSHA, however, also wants to make clear that this exemption applies only to non-specialty safety-toe shoes and boots, and not other types of specialty protective footwear. Any safety footwear that has additional protection or is more specialized, such as shoes with non-slip soles used when stripping floors, or steel-toe rubber boots, is subject to the employer payment requirements of this standard. Put simply, the exempted footwear provides the protection of an ordinary safety-toe shoe or boot, while footwear with additional safety attributes beyond this (*e.g.*, shoes and boots with special soles) fall under the employer payment requirement. (OSHA also notes that normal work boots are exempted from employer payment under a different provision of the final rule, discussed later in this section.)

72 Fed. Reg. 64348 (2007). *See* CX-37, p. 64348, and RX-27, p. 64348.

The Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) its terms were not met; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

The Parties' Positions

The Secretary contends that she has met the elements above to establish her prima facie case. She notes that there is no dispute that the cited standard applies, in that Cargill's job hazard assessments and its footwear policy require employees to wear protective footwear that is water resistant and has slip-resistant soles. *See* CX-36, RX-1. She also notes that Cargill violated the

standard by not paying for the footwear it requires, except in certain instances.[5] The Secretary further notes that employee exposure exists; injuries have occurred due to slips and falls on the floors, and most of the employees wear slip-resistant, water-resistant boots that they pay for. *See, e.g.*, CX-2, p. 227. Finally, the Secretary notes that employer knowledge is established, as Cargill knew it was not paying for the protective footwear that most of its employees were wearing. In this regard, the Secretary points out that the UFCW advised Cargill in September 2009 of its position that Cargill was required to pay for the footwear at issue. (CX-1, pp. 11-12). The Secretary observes that, as she has shown the alleged violation, the burden shifts to Cargill to prove that one of the exceptions to the standard applies. S. Brief, pp. 15-17. In this regard, the Secretary asserts that deference should be given to OSHA's interpretation of the cited standard, based on the language of the standard, the explanation in the Final Rule, interpretive letters and enforcement directives, and relevant case law. S. Brief, pp. 17-24.

Cargill contends that the general boots it requires, *i.e.*, those that are water resistant and slip resistant, are not items it must pay for under the cited standard. In support of its position, Cargill notes the "plain language" of the standard and the exemption for "normal work boots." It also notes the language of the Final Rule and the testimony of its expert, Russell Kendizor, that the boots Cargill requires are "normal work boots" and not "specialized" or "specialty" footwear. R. Brief, pp. 12-18. Cargill asserts that even if the language of the standard were ambiguous, the legislative history of section 1910.132(h) shows that the boots at issue are "normal work boots" under the exemption set out in section 1910.132(h)(4)(ii). R. Brief, pp. 19-27. Finally, Cargill asserts that neither OSHA's litigation position nor its interpretation of the standard is entitled to deference in this case. R. Brief, pp. 31-49.

Discussion

I agree with the Secretary that she has met her burden of establishing her prima case with respect to the alleged violation. I also agree that, as a result, the burden shifts to Cargill to prove that the boots at issue meet one of the exceptions to the cited standard. *See Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), and cases cited therein. Cargill, as noted above, contends that the water-resistant, slip-resistant boots it requires most of its employees to wear are "normal work boots" under section 1910.132(h)(4)(ii).

[5] *See* pages 2-3 of this decision. *See also* Cargill's collective bargaining agreement with the UFCW, which sets out the boots it furnishes to employees. (RX-4, Article 13, ¶¶ B, C and I).

Cargill's corporate policy has the following five requirements for its general work boots:

> 1. Footwear must be water resistant for food safety purposes. Water resistant would be defined as smooth leather or rubber.
> 2. Footwear must cover the ankle (not just part of the ankle).
> 3. Tennis shoe style footwear will not be allowed.
> 4. Any color, other than white, is acceptable provided it can be properly cleaned as stated above.
> 5. Slip resistant soles are required, slick soles, tennis shoe type soles and high heels will NOT be permitted.

RX-1. Robert Loveall, Cargill's corporate safety director, wrote the above policy with the assistance of a subordinate. He testified that the policy comprises the minimum footwear requirements at all Cargill facilities. As he explained, water resistance is required by the USDA for food safety.[6] This means boots have to be smooth leather or rubber that can be easily washed.[7] The boots do not have to be waterproof. The second requirement is to provide support for the employee's ankle. Tennis shoes are prohibited for food safety purposes, and tennis shoes often have hard soles. White boots are prohibited because white boots are required by the USDA for "gutter table" work, and Cargill does not want white boots to be worn in other areas. Slip resistance is to prevent slips and falls. Cargill does not define that term or require that employees wear boots with soles made of a specific material or that have tread of a particular type, pattern or depth. Except for boots that have hard or smooth soles, the company accepts almost all work boots that employees can purchase on their own. Loveall testified that Cargill is "just looking for a work boot." (Tr. 568-81, 677-78). Tony Santos, a safety manager at the cited facility, testified that what Cargill requires is "[j]ust a sturdy regular work boot." (Tr. 366).

The Dodge City facility also has two additional policies that relate to footwear. Its PPE program states that "[a]ll production areas of the plant require the use of a heavy work boot." *See* RX-2, p. 189.[8] Its employee handbook states that "[a]ppropriate footwear for the production areas in this plant need to be sturdy boots or shoes made of leather, rubber, or some other non-porous material. The footwear should have soft rubber bottoms or soles that are oil or skid

[6] Lovell also explained that water-resistant boots keep employees' feet dry and protect them from blood and other liquids at the facility. (Tr. 656-58).

[7] The record shows that employees wash their boots regularly with water heated to 180 degrees; they also clean their boots by walking through a chemical foam solution. The record also indicates that leather boots must be treated to be water resistant to withstand these cleaning processes. (Tr. 74-76, 314-16, 571).

[8] RX-2, p. 189, also states that footwear must comply with ANSI Standard Z41-199. This applies where Cargill requires steel-toed boots but does not apply to the general boots employees wear. (Tr. 379). CO Trussell agreed that Cargill does not require its general work boots to meet standard specifications such as ANSI or ASTM. (Tr. 127-28).

resistant."[9] *See* RX-3, p. 26. CX-34 is a visual aid training tool that is used during new hire orientation. It sets out Cargill's footwear policy and depicts examples of inappropriate and appropriate footwear. Inappropriate footwear includes tennis shoes, shoes with hard soles, hiking boots, and boots with hard plastic soles that have no traction. (Tr. 311-12).

Whether the Subject Boots are "Normal Work Boots" under the Plain Terms of the Standard

As Cargill notes, one of the exceptions to the cited standard is "[e]veryday clothing, such as … normal work boots." 29 C.F.R. § 1910.132(h)(4)(ii). As Cargill also notes, Commission precedent is well settled that the plain meaning of an unambiguous standard is given controlling weight. *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003), citing to *Unarco Commercial Prod.*, 16 BNA OSHC 1499, 1502-03 (No. 89-1555, 1993). The Tenth Circuit has stated that "[w]hen the meaning of a regulatory provision is clear on its face, the regulation must be enforced in accordance with its plain meaning." *Walker Stone Co., Inc., v. Secretary of Labor,* 156 F.3d 1076, 1080 (10th Cir. 1998). And the Supreme Court has stated that whether or not language is ambiguous "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). R. Brief, pp. 12-13.

Cargill contends the term "normal work boots" is not ambiguous and applies to the boots at issue here. It points out that OSHA did not attempt to define the term and in fact did not need to because a "normal work boot" is a matter of common understanding. It further points out that the many types of boots in use at the facility are not in any way "special" boots serving some narrow function but are rather boots that can be used for various functions, such as shoveling snow in a driveway, working in the yard, or working in a meatpacking plant. In this regard, Cargill notes that both CO Trussell and Russell Kendizor, Respondent's expert, testified that there is no boot that is specifically designed for meatpacking. (Tr. 128, 711). R. Brief, 13-14.

As set out above, CO Trussell and Brian Drake, the OSHA official from Region VII, concluded the boots that Cargill required its employees to purchase and wear were specialty boots due to the requirements that they be water resistant and slip resistant. (Tr. 102-03, 421-25). Russell Kendizor, on the other hand, testified that the two common denominators of a "normal work boot" are a "slip-resistant sole and a water-resistant upper." (Tr. 709).

[9] Loveall and two safety managers at the Dodge City facility testified that it was unclear why the oil resistance requirement was in the handbook; they also testified that that requirement was not enforced. (Tr. 332, 370, 618).

Russell Kendizor was accepted as an expert with respect to industry knowledge of footwear and what terms like "water resistant," "slip resistant" and "normal work boots" mean.[10] (Tr. 700-02). He testified that he had helped to design a shoe, known by the brand name of Traction Plus Tred Safe, which was designed with a sole pattern that helps prevent slips and falls in various settings. Kendizor said there is no definition of "slip resistance" in the footwear industry; the term is more of a marketing phrase "used to communicate a perceived benefit to the consumer of safety." He also said there is no recognized method in the industry for testing the "water resistance" of footwear; again, the phrase is a term used for the perceived benefit of the customer.[11] Kendizor testified that all work shoes have these two characteristics. (Tr. 704-08). When asked his opinion as to the meaning of the term "normal work boot," he answered:

> Well, a normal work boot is kind of a generic term that kind of includes, if you will, two common denominators. Now, the two aspects of a normal work boot are a slip-resistant sole and a water-resistant upper. That's what a work boot or work shoe is. (Tr. 709).

Kendizor further testified that "specialty" footwear is a term that denotes "very specific characteristics of a shoe that's specific to a job duty or a job responsibility." He gave as examples footwear that is static dissipative, or puncture resistant, or firemen's knee boots. Another example of a highly-specialized shoe is the kind used for stripping floors. Kendizor noted that the detachable sole on such shoes is made of the only kind of material that has been found to have the ability to perform well on the surfaces encountered in floor-stripping work. He also noted that these shoes are not sold at stores like Wal-Mart or a Red Wing shoe store; rather, they are generally available at specialty stores. (Tr. 711-16, 720-21).

Kendizor did not view the boots at issue as "specialty" footwear. He spent two days at the Dodge City facility and saw over 100 pairs of boots that the employees wore in the production areas. He also examined various examples of employee footwear at the hearing. These consisted of: (1) RX-8 – a Doc Marten boot with a heavy lug sole, very commonly available; (2) RX-10 –

[10] Kendizor is the president and founder of a company that manufactures, among other things, slip-resistant footwear; one division of his company provides expert testimony, training and consulting in regard to slip, trip and fall issues. Kendizor is currently the secretary of the ANSI committee on slip, trip and fall prevention, and he helped found the National Floor Safety Institute, which is a world leader in the prevention of slips, trips and falls. Kendizor serves on six different committees of the ASTM, and he has been qualified to testify as an expert in numerous cases, including eight to ten cases that involved footwear. He has also testified before OSHA in regard to a proposed rule on walking and working surfaces. In his career, Kendizor has inspected various types of footwear in numerous industries, including meatpacking. (Tr. 679-700).

[11] The primary benefit of water-resistant footwear is that it is less likely to stain and easier to clean. (Tr. 707-08).

a Red Wing boot with a cowhide upper and a heavy lug sole, good in cold temperatures, similar to a World War II combat boot, very commonly available; (3) RX-12 – a "farmhand" type boot with a cowhide upper, worn in agriculture, trucking, and production facilities, very commonly available; (4) RX-14 – a molded rubber boot called a "knee boot" or a "Wellington," very commonly available; and (5) RX-16 – a conventional cowhide work boot with ankle protection and a Vibram sole (a flat sole with a lot of contact area between the floor and the shoe), a typical work boot.[12] Kendizor described all of these boots as being slip resistant and water resistant; he also described all of them as "normal work boots." (Tr. 716-25).

Kendizor reviewed RX-1, Cargill's corporate footwear policy, and the relevant portions of RX-2 and RX-3, the facility's PPE program and employee handbook, respectively, at the hearing. After discussing the requirements in these documents, he concluded that the policies require normal work boots. As to language in the policies such as "heavy" and "sturdy" work boots, he said such terms refer to qualities of "normal" work boots. (Tr. 729-33).

Based on the foregoing, I find that the general work boots that Cargill requires most of its employees to wear at the Dodge City facility are "normal work boots," as set out in 29 C.F.R. § 1910.132(h)(4)(ii). I have considered the Secretary's arguments to the contrary and find them unpersuasive. S. Brief, pp. 15, 30. Those arguments are therefore rejected.

Whether the Legislative History Shows that the Boots are "Normal Work Boots"

As indicated above, Cargill contends that the legislative history of the standard supports its position in this matter. It notes that, as the Commission has stated, "[i]f the meaning [of a standard] is ambiguous, consideration should be given to any contemporaneous legislative history." *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003). It also notes that 29 C.F.R. § 1910.132, as originally promulgated, did not have an explicit requirement for employers to provide required PPE at no cost to employees. The Commission so found, in *The Budd Co.*, 1 BNA OSHC 1548, 1549 (Nos. 199 & 215, 1974). R. Brief, p. 19.

On October 18, 1994, OSHA issued a memorandum ("Memo") to its field staff to clarify when employers are required to pay for PPE under sections 1910.132 through .138. *See* Exh. B, p. 1, to R. Brief. The Memo stated that "[w]here equipment is very personal in nature and is usable by workers off the job, the matter of payment may be left to labor-management

[12] Loveall observed employees wearing these boots at the facility, and he himself purchased the boots, for use at the hearing, at local stores like Wal-Mart, Brown's, and Long's Footwear. In testifying about these boots, Loveall described all of them as being water resistant and having slip-resistant soles. (Tr. 609, 613-36).

negotiations." *Id*. OSHA gave, as examples of PPE that would not normally be worn away from the job site, specialty foot protection such as metatarsal shoes and linemen's shoes with built-in gaffs. *Id*. OSHA listed "safety shoes" as an example of PPE that "is personal in nature and often used away from the worksite." *Id*. On June 16, 1995, OSHA issued STD 01-06-006 ("Directive") to assist COs in inspections involving PPE standards. The Directive repeated OSHA's position as set out in the Memo, *i.e.*, that specialty foot protection was subject to employer payment but that non-specialty safety shoes were not. *See* Exh. C, pp. 3-4, to R. Brief.

OSHA's position that employers must pay for PPE that is not personal in nature and that cannot be worn away from the job was at issue in *Union Tank Car Co.*, 18 BNA OSHC 1067 (No. 96-0563, 1997). There, the Commission held that the Secretary's interpretation of requiring employer payment of the welding gloves, safety shoes and metatarsal guards in that case was unreasonable. The Commission also noted that OSHA had not consistently applied the interpretation of the standard that was set out in the citation. *Id*. at 1069-70. The *Union Tank Car* decision led to OSHA proposing the employer payment standard at issue here. 64 Fed. Reg. 15402, 15408 and 15433 (1999). *See* Exh. A, pp. 15408 and 15433, to R. Brief. The Proposed Rule sought to "resolve this issue by clearly identifying, through regulation, who is required to pay for PPE." Exh. A, p. 15408. The standard as originally drafted read as follows:

> § 1910.132(h) *Payment for protective equipment*. All protective equipment, including [PPE] required in this part, shall be provided by the employer at no cost to employees. *Exception*: The employer is not required to pay for the logging boots required by 29 CFR § 1910.266(d)(1)(v). The employer is also not required to pay for safety-toe protective footwear, or for prescription safety eyewear, provided that all three of the following conditions are met:
> (1) The employer permits such footwear or eyewear to be worn off the job-site;
> (2) The footwear or eyewear is not used at work in a manner that renders it unsafe for use off the job-site (for example, contaminated safety-toe footwear would not be permitted to be worn off a job-site); and
> (3) Such footwear or eyewear is not designed for special use on the job.

Exh. A, p. 15440. In the Proposed Rule, OSHA stated that it "considers safety shoes to be personal in nature," noting that such shoes "are not used by different employees," but, rather, "are used by, and sized to fit, only one individual employee." *Id.*, p. 15415. OSHA also noted that such shoes "are widely available and are not difficult for the employee to select and purchase." *Id*. As to the footwear that would not be covered by the proposed exception, OSHA stated that:

> [T]he proposed exception would not apply to metatarsal protection (metatarsal guards or protective footwear that incorporates metatarsal protection) or special cut-resistant footwear because these kinds of footwear are not generally used off the worksite, and employers often re-issue metatarsal guards and cut-resistant footwear to subsequent employees. Also, the proposed exception would not apply to any safety-toe safety shoe that cannot safely be worn off the worksite. For example, the exception does not include safety shoes that have been worn in a regulated area where they may have been contaminated with a toxic substance.

Id.

The Final Rule, issued eight years later, expanded the list of items that employers need not provide to employees at no cost. The added exemption, for "[e]veryday clothing, such as long-sleeve shirts, long pants, street shoes, and normal work boots," is set out at 29 C.F.R. § 1910.132(h)(4)(ii). OSHA added this exemption because of commentators who had asked about these items and had requested that OSHA clarify its position. *See* RX-27, p. 64349. One commentator noted that OSHA's rationale for exempting safety-toe boots (they are uniquely personal in nature) was sound, but that "the proposed exception must be broadened to also exclude from required employer payment non-safety-toe work boots/shoes, for the very same reasons that safety-toe shoes are proposed to be exempted: these are uniquely personal items, ubiquitously worn by arborist employees as much on the job as off the job." Exh. D, p. 4, to R. Brief. Because of this and other comments, OSHA stated that it was explicitly excluding "normal work clothing from the employer payment requirement." RX-27, p. 64347. OSHA noted its belief "that this reflects the original intent of the proposal." *Id*. Further, OSHA specifically identified "[s]turdy work shoes" as an example of exempted PPE. *Id*., p. 64349 (Table V-1).

In sum, OSHA excluded "normal work boots" from the standard for the same reasons that it excluded "non-specialty safety-toe protective footwear." One of the reasons for excluding the latter footwear was because it "cannot be easily transferred from one employee to the next. RX-27, p. 64348. In this regard, OSHA noted that:

> Unlike other types of safety equipment, the range of sizes of footwear needed to fit most employees would not normally be kept in stock by an employer and it would not be reasonable to expect employers to stock the array and variety of safety-toe footwear necessary to properly and comfortable fit most individuals.

Id. OSHA also noted that "[e]mployees who work in non-specialty safety-toe protective footwear often wear it to and from work," while "employees who wear specialized footwear such as boots incorporating metatarsal protection are likely to store this type of safety footwear at work, or carry it back and forth between the work and home instead of wearing it. *Id*.

I agree with Cargill that the record in this case clearly supports a finding that the boots at issue fall into the non-payment category. As the evidence in this matter establishes, there is no dispute that the Dodge City employees routinely wear or take their boots home with them, that their boots are personal to them, and that they can purchase them at various locations. Cargill concludes, as do I, that the subject boots are the types of boots meant to be exempted as "normal work boots." R. Brief, p. 25. In reaching this conclusion, I have considered the Secretary's reliance on the portion of the Final Rule set out on page 5 of this decision. *See* RX-27, p. 64348. S. Brief, pp. 17-18. My reading of this part of the Final Rule, however, convinces me that it relates to the exemption for non-specialty safety-toe shoes and boots. This finding is supported by the fact that the last sentence in the provision states, in parentheses: "OSHA also notes that normal work boots are exempted from employer payment under a different provision of the final rule, discussed later in this section." For this reason, and for all the reasons discussed above, Cargill has met its burden of demonstrating that the boots at issue are normal work boots under the exemption set out at 29 C.F.R. § 1910.132(h)(4)(ii).

Whether Deference is due to OSHA's Interpretation of the Standard

Cargill contends that deference should not be given to OSHA's interpretation of the standard in this matter. R. Brief, pp. 31-49. I agree, for the following reasons.

As noted above, CO Trussell concluded that the boots at issue were specialty footwear due to the requirements that they be, among other things, water resistant and slip resistant. In reaching this conclusion, the CO relied on an interpretation letter OSHA sent to Jacqueline Nowell, the director of the Occupational Safety and Health Office of the UFCW, on May 11, 2009. The letter, CX-39, was written by Richard Fairfax, the director of OSHA's Directorate of Enforcement Programs, and responded to the question of whether "steel-toed rubber boots" are considered "specialty footwear" and whether employers are required to pay for them. CX-39, p. 1. The CO agreed that CX-39 referred only to rubber steel-toed boots used in meatpacking. He nonetheless stated that the use of the word "specialty" in the "reply" to Question 2 supported his conclusion that Cargill was required to pay for the boots at issue. (Tr. 102-03, 120-24).

As also noted above, Brian Drake, the OSHA official in Region VII, also concluded that the subject boots were specialty footwear because of the requirements they be water resistant and

slip resistant.[13] He testified that OSHA's decision to cite Cargill was affected by certain language in the Final Rule.[14] In particular, the boots Cargill required had the additional safety attributes of being water resistant and having slip-resistant soles. Drake further testified that OSHA relied upon CX-39 in deciding to issue the subject citation. Drake said the language in CX-39, which quoted from the Final Rule, supported OSHA's position as "the boots that they were requiring the employees to have at that facility had a sole which was – had more traction than your normal, everyday shoe or boot."[15] C-39 also supported OSHA's interpretation because "the rubber or the water resistance of the boots made it a specialty boot" as that is "an additional safety attribute." Drake noted that OSHA's position is that the presence of either quality, that is, slip resistance or water resistance, would subject footwear to employer payment. (Tr. 420-228, 455).

At the hearing, the Secretary's counsel read certain parts of CX-38 and CX-40 into the record. CX-38 and CX-40 are a 2008 OSHA interpretation letter and a 2011 OSHA directive, respectively. Both address payment of PPE and state that the "employer is not required to pay for non-specialty shoes that offer some slip resistant characteristics but are otherwise ordinary clothing in nature." (CX-38, p. 1, CX-40, p. 36). Drake said the boots Cargill required are different from shoes that have "some slip-resistant characteristics." He then said the boots Cargill required "had very deep gouges or troughs or – I guess, a lot of traction." (Tr. 438-39). As Cargill notes, Drake's opinion was not based on his examining the boots at issue or comparable boots worn in the industry. Instead, he based his opinion on photographs he had seen, before the hearing, of the boots Cargill requires at the facility, which have, as he put it, "deeper tread" and more traction than the boots he has at home. Drake described his boots at home as "normal work boots," noting they were leather, sturdy, water resistant, and had a sole with tread. Drake was unable to point to any standards, definitions or criteria which would help him to differentiate the tread on his "normal work boots" from those Cargill requires. (Tr. 440-42, 478, 498-501).

[13] Drake has been with OSHA since 1997 and has been Region VII's safety specialist since 2004. He has B.S. and M.S. degrees in safety management, and he is a certified safety professional. Drake oversaw the inspection, and he reviewed the recommended citation before it was issued. He did not visit the facility or review the case file in this matter, and he was not familiar with the facility's footwear policy. He is not an expert in footwear and has no specialized training in that regard. (Tr. 408-16, 440-43).

[14] The relevant part of the Final Rule is set out on page 5 of this decision and is discussed at the top of page 13.

[15] The language in the Final Rule Drake referred to states: "exempted footwear provides the protection of an ordinary safety-toe shoe or boot, while footwear with additional safety attributes beyond this (e.g., shoes and boots with special soles) fall under the employer payment requirement." (Tr. 427; CX-39, p. 1).

As Cargill notes, an agency's interpretation of its own standard is entitled to deference only if the interpretation is reasonable. *Martin v. OSHRC*, 499 U.S. 144, 158 (1991). In assessing the reasonableness of the Secretary's interpretation of a standard, the Commission evaluates whether the 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." *United States Postal Serv.*, 21 BNA OSHC 1767, 1770 (No. 04-0316, 2006) (citation omitted). R. Brief, p. 36.

With respect to whether the Secretary's interpretation in this case "sensibly conforms to the purpose and wording of the regulation," I find it does not. As discussed above, her position that the boots at issue are subject to employer payment is contrary to the plain meaning of the term "normal work boots" set out in the section 1910.132(h)(4)(ii) exemption. Kendizor, the only expert in this matter, testified as to what the term means and that the boots at issue are in fact "normal work boots." The Secretary did not rebut this testimony.

The Secretary's interpretation is likewise inconsistent with the purpose of the exceptions to the employer payment requirement. OSHA included the exception for normal work clothing because it "believe[d] that this reflects the original intent of the proposal." *See* RX-27, p. 64347. That intent was to exempt ordinary clothing because "[t]he principle of employer payment cannot be stretched so far that it applies to all protective equipment, in all circumstances, at all times." *Id*., p. 64381. R. Brief, p. 37.

Particularly unfounded is the Secretary's assertion that the language in the Final Rule, set out on page 5 of this decision and addressed *supra*, supports her position. As discussed above, Drake indicated that the language of the Final Rule bolstered a conclusion that the water-resistant and slip-resistant qualities of the subject boots were "additional safety attributes" that precluded those boots from being exempted. On page 13 of this decision, I specifically found that the language of the Final Rule the Secretary relied upon relates to the exemption for non-specialty safety-toe shoes and boots and not to the exemption for "normal work boots."

As to whether the Secretary "has consistently applied the interpretation embodied in the citations," I find that she has not. First, CX-39, the interpretation letter dated May 11, 2009, does not support the Secretary's position in this case. As noted above, CO Trussell agreed that CX-39 related only to rubber steel-toed boots used in meatpacking, yet he concluded the use of the word

"specialty," in the "reply" to Question 2 in C-39, supported the citation. (Tr. 120-24). And Drake's conclusion, that the water-resistant and slip-resistant qualities of the subject boots made them "specialty" footwear, as set out in CX-39, is equally flawed. (Tr. 426-28). My review of CX-39 convinces me that the letter applies only to rubber steel-toed boots used in meatpacking. CX-39 therefore has no relevance to the boots at issue, other than to support Cargill's position.

Second, other OSHA interpretation letters in evidence do not bolster the Secretary's position. CX-38, the 2008 interpretation letter addressed *supra*, states that "the employer is not required to pay for non-specialty shoes that offer some slip resistant characteristics but are otherwise ordinary clothing in nature." RX-23, an additional interpretation letter issued the same day as CX-38, states that employers in the restaurant industry do not have to pay for shoes with non-slip soles "that offer some slip resistance but are basically standard work shoes." CX-38 and RX-23 are at odds with Drake's opinion that the single characteristic of being slip resistant would render a shoe or boot payable by the employer. (Tr. 455). An interpretation letter dated March 19, 2009, states that static-dissipative safety-toe shoes are payable by the employer because they provide "additional protection to the employee beyond that of an ordinary safety-toe shoe and [are] designed for special use on the job." *See* Exh. E to R. Brief. I agree with Cargill that this letter indicates that for shoes to be payable by the employer, they have to have additional safety attributes and be designed for special use on the job. I also agree that this letter does not support the position the Secretary has taken in this matter. R. Brief, pp. 41-42.

Third, on February 10, 2011, OSHA issued CX-40, CPL 02-01-050 ("Directive"), which sets out enforcement guidance for PPE in general industry. As noted above, CX-40 states that the "employer is not required to pay for non-specialty shoes that offer some slip-resistant characteristics but are otherwise ordinary clothing in nature." (CX-40, p. 36). Even more significant, CX-40 contains a list of items that are exempt from employer payment; one of these is "[n]on-specialty slip-resistant, non-safety-toe-footwear." *Id.*, p. 30. This document thus demonstrates, contrary to Drake's testimony, that slip resistance is not a quality that renders a boot "specialty." This document also seriously undermines the Secretary's position

As Cargill notes, the Secretary attempted at the hearing to distinguish CX-40 from the facts in this case with Drake's testimony that "[t]he difference would be that almost every shoe has some slip-resistant characteristics … but that "the boots required at Cargill had very large gouges or troughs or – I guess, a lot of traction" and soft soles. (Tr. 430, 438-39). The Secretary,

however, introduced no footwear to bolster her argument that a "normal work boot" was different from the work boots Cargill required. In fact, as Cargill points out, the only evidence the Secretary presented in this regard was Drake's testimony about the "normal" boots he had at home. This attempt to distinguish the guidance in CX-40 from the facts of this case does not account for the fact that OSHA has clearly stated that "[n]on-specialty slip-resistant, non-safety-toe footwear" is exempted from the employer payment requirement. Drake's testimony differentiating the tread on his own work boots from the tread on Cargill's required boots that supposedly had "very large gouges" is simply not reflected in the straightforward exemption for "non-specialty slip-resistant, non-safety-toe footwear. As Cargill notes, this case is similar to *United States Postal Serv., supra*. There, the Commission vacated the citation because OSHA had issued an interpretation letter that superseded an inconsistent letter upon which the citation was based. 21 BNA OSHC at 1771-72. Here, OSHA issued a directive *after* the citation that contradicts the reasoning OSHA has offered to support the citation. R. Brief, pp. 43-44.

Turning to the adequacy of notice to regulated parties, I find that Cargill did not have fair notice of the Secretary's interpretation of the cited standard. Cargill points out that it reviewed the language of the standard and the Final Rule to determine whether the work boots it requires are subject to employer payment. Cargill's conclusion that it was not required to pay for the boots was reasonable and consistent with the language of the standard and the Final Rule. Cargill also points out that OSHA has had ample opportunity to correct any ambiguities in the standard but has not done so. In fact, as discussed above, after the citation in this case was issued, OSHA issued CX-40, the Directive that not only does not support the Secretary's position but, rather, contradicts it. As Cargill indicates, the Commission vacated the citations in a case where it could not find that the employer "was afforded fair notice of the Secretary's interpretation." *Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1329 (Nos. 97-0469 & 97-0470, 2003). I agree with Cargill that, if OSHA seeks to hold employers liable for payment of footwear when they require work boots that are water resistant and slip resistant, then it should promulgate a standard that clearly says so. R. Brief, pp. 46-49.

Finally, as to whether the Secretary has elaborated any pertinent policy considerations that support her interpretation of the standard in this case, I find that she has not. As Cargill notes, there is no indication here that OSHA has "grapple[d] with the policy issues presented." *See United Postal Serv., supra*, at 1772. As Cargill further notes, there was no indication in

anything presented at the hearing that OSHA actually reflected upon or took into account any relevant policy considerations that would support the position it has taken in this matter. R. Brief, p. 49. For this reason, and all of those set out above, the Secretary's interpretation of the standard at issue is not entitled to deference.[16]

Other Arguments of the Secretary

Cargill notes that during the hearing, the Secretary elicited testimony that employees had been disciplined for wearing inadequate footwear. Martin Rosas, the secretary/treasurer of the UFCW's Local No. 2, is responsible for handling grievances at the subject facility. (Tr. 192-96). He testified that he knew of an instance where Ron Jensen, the facility's regulatory safety manager, sent an employee home for not wearing proper footwear; he knew of another instance where Jensen gave an employee a verbal warning for wearing Doc Marten boots that were not acceptable. Rosas also testified that an employee told him that Jensen's problem with her footwear was that she bought it at Wal-Mart. (Tr. 199-206, 238). Jenson testified that he did not recall any of these instances, but he said there had been times when he had inspected footwear and found it noncompliant. He said this was not common, however, and that he had not disciplined employees in this regard. He also said there was one particular type of boot sold at Wal-Mart that was unacceptable because it had a hard plastic sole. (Tr. 324-27).

As Cargill indicates, the foregoing does not establish the facility disciplined employees for wearing inadequate footwear. Even if it did, however, that Cargill enforces its footwear policy does not help the Secretary's case. As Cargill points out, employers must ensure that where, as here, employees provide their own protective equipment, the equipment is adequate. *See* 29 C.F.R. § 1910.132(b). R. Brief, pp. 50-53. I agree with Cargill that the record shows only that the facility enforces its footwear policy, as the standard requires at section 1910.132(b).

Cargill further notes that the Secretary alleges that it required some employees to pay for the rubber steel-toed boots they had to wear for their positions. According to the Secretary, some employees were told during orientation that they had to purchase the rubber steel-toed boots the facility had in its warehouse. S. Brief, pp. 31-32. Rosas testified that new hires, as part of their

[16] In reaching this conclusion, I have noted the Secretary's citing to *Tierdael Constr. Co. v. OSHRC*, 340 F.3d 1110 (10th Cir. 2003), in support of her position in this case. S. Brief, pp. 22-23. There, the court gave deference to the Secretary's interpretation of the asbestos standard based on the language of the standard and the purposes of the Act. In so doing, it noted deference was due even if the interpretation was advanced for the first time in adjudication. *Id.* at 1115-18. The circumstances of this case are quite different. Here, the Secretary's interpretation has been found to be contrary to the standard's plain language and inconsistent with the interpretations she has issued.

orientation, are taken to the warehouse and told they have to buy the boots there, which are steel-toe rubber boots.[17] He said he himself was told by a trainer that he had to buy these boots from the facility; this was on July 19, 1989, when Rosas first began to work at the plant. Corky Rosas, another employee, told Rosas in January 2010 that a trainer named Octavio Gonzalez told him he had to buy the steel-toe rubber boots the facility had. Despite his position with the UFCW, Rosas neither spoke to Gonzalez about this matter nor filed a grievance over it. (Tr. 247-51).

Two employees were called to testify in this regard. Veronica Mendoza, who works on the Kill Floor, testified she had been hired twice and had been through two orientations; at each one, she was told she had to wear steel-toed boots that were waterproof and nonslip. After the orientation, she was taken to the warehouse, where she purchased her boots. Mendoza further testified that she does not always buy her boots from the warehouse; sometimes she obtains them from an outside store. (Tr. 253-68). Oscar Marino, who works in Fabrication, testified he had been through three orientations and had been told he had to wear nonslip steel-toed boots; he does not buy his boots from the warehouse, but, rather, at Long's. (Tr. 278-85, 293-94).

CO Trussell testified, upon reviewing his inspection notes, that various employees told him that Cargill required them to buy their own steel-toed rubber boots. (Tr. 142-52). On cross-examination, the CO agreed that he had stated at his deposition that he had not received any complaints from employees or the UFCW as to the payment issue. (Tr. 171-72). Also on cross-examination, and after a closer review of his notes, the CO's testimony showed that none of the employees he interviewed clearly stated that they were told that they were required to wear steal-toe rubber boots for their work and had to pay for them. (Tr. 173-85).

In my view, the foregoing evidence is inadequate to support a finding that Cargill requires its employees to wear and pay for steel-toed rubber boots.[18] Rosas' testimony was contradictory, and, as set out above, he never spoke to the trainer or filed a grievance in the matter involving Corky Rosas. Both Mendoza and Marino testified they were told they had to wear nonslip steel-toe boots, but their testimony shows they were not required to buy the boots Cargill had in its warehouse. Further, it was clear from their testimony that their communication skills were less than proficient. Their testimony is thus given little weight. Finally, the CO's

[17] Rosas stated that all employees at the facility had to wear steel-toed rubber boots and had to buy them from the warehouse; he also stated, however, that some employees wore leather boots and not all employees bought their boots from the warehouse. (Tr. 249-51).

[18] My findings as to the facility's policies in regard to employee work boots, including payment for those boots, are set out on pages 2 and 3 of this decision.

testimony with respect to his inspection notes, especially on cross-examination, was simply not sufficient to establish the Secretary's allegation. That allegation is accordingly rejected.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. 1910.132(h)(1), is VACATED.

/s/
James R. Rucker, Jr.
Judge, OSHRC

Dated: April 6, 2012
Denver, Colorado