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. U.S. POSTAL SERVICE, Respondent.	OSHRC Docket No. 22-0016

DECISION AND ORDER

APPEARANCES:

For the Complainant:

Terrence Duncan, Esq.
Susannah Kroeber, Esq.
U.S. Department of Labor
New York, New York

For the Respondent:

Mark J. Manta, Esq.
United States Postal Service
Eastern Area Law Office
Philadelphia, Pennsylvania

Sydney M. Snyder, Esq.
United States Postal Service
National OSHA Unit
Denver, Colorado

BEFORE: Carol A. Baumerich
Administrative Law Judge

I. HISTORY

In early September of 2021, due at least in part to record rainfall in the area from tropical storm Ida, the roof collapsed at a processing and distribution center operated by Respondent, the

United States Postal Service (USPS), in Newark, New Jersey (Newark Facility). (Tr. 29, 165, 210-11, 268-69, 302, 354-56). The roof collapse forced the closure of the Newark Facility, thus requiring Respondent to reroute the packages that would normally be processed there to Respondent's Northern Metro facility in Teterboro, New Jersey (Teterboro Plant). (Tr. 29, 164-65, 210-11, 268-70, 289-90). This reroute nearly doubled the number of packages that needed to be sorted and processed at the Teterboro Plant. (Tr. 268, 270). Moreover, while the Newark Facility was equipped with machines to process larger packages, which comprised most of the packages being rerouted from the Facility, the Teterboro Plant had no machinery and indeed no system at all in place to handle these larger packages. (Tr. 165, 167, 187, 192, 210-11, 270). Further still, many displaced employees from the Newark Facility were relocated to the Teterboro Plant but were not familiar with processing the types of mail or packages normally handled there. (Tr. 123-24, 165, 169-70, 211, 213, 273).

As soon as the extra packages started being rerouted to the Teterboro Plant, the Plant's management began to implement new processing methods and to train their employees in those methods. (Tr. 123-24, 148, 165-70, 192-93, 223, 271-73). However, the Plant's employees demonstrably were unable to keep pace with the increased volume being brought into the Plant, resulting in mail, packages, and associated processing materials being stored, even if only temporarily, in exit routes in the Eastern Section in the Plant. (Tr. 28, 33-56; JX-2, CX-1, at 7-12, 8a-12a). Additionally, access to at least one wall-mounted fire extinguisher was obstructed by a "gaylord"[1] of mail. (Tr. 57, 64-69; CX-2, at 9-11, 9a-11a).

In response to a complaint about these issues, on September 10, 2021, the United States Occupational Safety and Health Administration (OSHA) sent Compliance Safety and Health

[1] A gaylord is a box, 48 inches cubed, "rested or nested on a pallet" and used to store mail and packages. (Tr. 166; CX-2, at 10-12).

Officer (CSHO) Boris Plakalovic to inspect the Teterboro Plant. (Tr. 26-27, 157, 170; JX-2). CSHO Plakalovic observed one aisleway in the Eastern Section of the Plant, which served as an exit route in both directions, blocked by pallets and boxes of mail and other materials. (Tr. 28, 33-56; JX-2, CX-1, at 7-12, 8a-12a). In the same section of the Plant, CSHO Plakalovic also observed the fire extinguisher obstructed by the gaylord of mail. (Tr. 57, 64-69; CX-2, at 9-11, 9a-11a).

On November 24, 2021, based on the CSHO's observations during his September 10th inspection, as well as an earlier, unrelated inspection occurring on June 3, 2021, OSHA issued a two-item, repeat Citation to Respondent alleging violations of safety standards promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the OSH Act).

Citation 1, Item 1 alleged a repeat violation of 29 C.F.R. § 1910.37(a)(3) for failing to keep access to the aisle along the southeastern wall of the Teterboro Plant free and unobstructed on September 10, 2021.

Citation 1, Item 2 alleged repeat violations of 29 C.F.R. § 1910.157(c)(1) for failing to keep fire extinguishers in the Teterboro Plant readily accessible to employees. This item alleged two instances of the violation, one occurring on June 3, 2021, in the Eastern Section of the Plant, and one occurring on September 10, 2021, in the Plant's Eastern Section near the loading dock.

The Citation proposed a total penalty of $96,542.

On December 15, 2021, Respondent filed a Notice of Contest with OSHA, thereby bringing this matter before the Occupational Safety and Health Review Commission (Commission).[2]

The Secretary filed her Complaint on February 22, 2022, and Respondent filed its Answer

[2] The Commission is an independent adjudicatory agency and is not part of the Department of Labor or OSHA. 29 U.S.C. § 661. It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the OSH Act and has no regulatory functions. *Id.* § 659(c).

on March 10, 2022. A virtual hearing was held on November 17 and 18, 2022. [3] Both parties filed Post-Hearing Briefs and Reply Briefs. [4]

The key issues for decision are as follows:

(a) Whether the Secretary has established all of the elements of a violation of 29 C.F.R. § 1910.37(a)(3).

(b) Whether the Secretary has established that the violation of 29 C.F.R. § 1910.37(a)(3) was a repeat violation.

(c) For the violations of 29 C.F.R. § 1910.157(c)(1), whether the Secretary has established that this subsection applied to the Teterboro Plant.

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and arguments of counsel, the undersigned issues this Decision and Order as the findings of fact and conclusions of law. Based on the analysis that follows, the Secretary has met her burden of establishing all elements of the violation of 29 C.F.R. § 1910.37(a)(3) by a preponderance of the evidence. The Secretary has also proven that this violation was a repeat violation. However, the Secretary has not met her burden to show that the requirements of 29 C.F.R. § 1910.157(c) were applicable to the Teterboro Plant.

Based on these findings, Citation 1, Item 1 is AFFIRMED while Citation 1, Item 2 is VACATED. A penalty of $64,361 is assessed against Respondent.

II. JURISDICTION AND COVERAGE

[3] The Secretary called the following witnesses on direct: (1) CSHO Boris Plakalovic; (2) OSHA Assistant Area Director (AAD) Paul Mesuk; (3) Michael Ford, Maintenance Manager at the Teterboro Plant; (4) Sharon Reid, Plant Support Manager at the Teterboro Plant; and (5) Steven Laird, Acting Plant Manager at the Teterboro Plant.

In its defense, Respondent recalled: (1) Maintenance Manager Ford; (2) Plant Support Manager Reid; (3) Acting Plant Manager Laird; and (4) CSHO Plakalovic.

[4] Respondent asserted multiple affirmative defenses in its Answer. Any defenses not pursued at hearing or in post-hearing briefing are deemed abandoned. *See Ga.-Pac. Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

The Commission gains jurisdiction to adjudicate an employer's alleged violation of the OSH Act if the employer is engaged in a business affecting commerce within the meaning of section 3(5) of the OSH Act, and, if the employer timely contests the citation. 29 U.S.C. §§ 652(5), 659(c). The parties have stipulated, and the record supports, that Respondent was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the OSH Act. 29 U.S.C. § 652(5); (Jt. Pre-Hr'g Stmt. ¶¶ 4(3) & (4); 5(2); Tr. 9). Respondent also timely filed a notice of contest to the Citations in this case. (Jt. Pre-Hr'g Stmt. ¶ 4(5); Tr. 9). The undersigned concludes that Respondent is covered under the Act and that the Commission has jurisdiction over this matter. (Jt. Pre-Hr'g Stmt. ¶¶ 4(1); 5(1); Tr. 9).

III. FACTUAL BACKGROUND

The Teterboro Plant

The USPS employs approximately 600 people at the Teterboro Plant. (Jt. Pre-Hr'g Stmt. ¶ 4(2); CX-1, at 2; CX-2, at 1; Tr. 187). The main activities conducted at the Teterboro Plant involve "mail and package sorting and delivery." (Jt. Pre-Hr'g Stmt. ¶ 4(2)). More specifically, the Teterboro Plant is designed to handle "letters, flats" and smaller, machine-sortable "packages [and] parcels." (Tr. 151, 167, 192, 211). Prior to the events occurring in September of 2021, the Plant had no system in place to handle "non-machinable" packages, i.e., packages too large to be handled by standard package-sorting machines. (Tr. 167, 192, 270).

The Teterboro Plant handles both "originating mail," mail received from local sources which is then sorted and sent out for delivery "to the rest of the world"; and "destinating mail," inbound mail which is sorted and delivered to locations in New Jersey. (Tr. 166, 212). Approximately 350 trailers of packages, representing 200,000 individual packages, are processed daily at the Teterboro Plant. (Tr. 270).

The two inspections leading to the Citation both took place in the "Eastern Section" of the Teterboro Plant. (JX-2 ("[A]s the east side of the building came into view [,] areas leading to the exits were very congested."); (*see also* CX-1, at 2; CX-2, at 2). As depicted in the CSHO's photographs taken during his inspections, this section of the Plant is a large, industrial warehouse space. (CX-1, at 7-12; CX-2, at 9-12). Along the southeastern wall of the Eastern Section is an aisleway that runs between two blue openings used to access the loading dock and a grey exit door (Southeast Aisleway).[5] (Tr. 33-35, 37-41, 43-56; CX-1, at 7, 8, 8a, 10-12, 10a-12a). Employees, including forklift drivers, use the blue loading dock openings to enter and exit the Eastern Section of the Plant. (Tr. 28, 33-56). The blue openings to the loading dock provide an alternative way to exit the building in an emergency, as there are exit doors from the facility in the loading dock. (Tr. 47-50). There is an emergency "EXIT" sign on the Southeast Aisleway, located to the right of a red fire extinguisher sign, which points in the direction opposite from the loading dock doors toward the grey exit door. (Tr. 37-41, 43-56; CX-1, at 8, 8a, 11, 11(a)). In certain photographs the grey exit door is not shown, rather the grey exit door is to the right of the Plant floor shown in the photo. (Tr. 45-47, 50-51; CX-1, at 11, 11(a), 12, 12(a)). On the Southeast Aisleway, there is another emergency "EXIT" sign, located to the left of another red fire extinguisher sign, which points in the direction of the blue loading dock openings. (Tr. 93-97; CX-2(a), at 11, 11(a))

Fire extinguishers are mounted approximately every fifty feet on the walls of the Eastern Section and are marked by a red-and-white painting of a fire extinguisher on the wall at the extinguishers' respective locations. (Tr. 184, 286).

Respondent's Emergency Action Plan & Other Safety Policies

Emergency Action Plan

[5] The grey exit door in the Eastern Section of the Plant is located to the left of a red fire extinguisher sign. (CX-1, at 7). In the photograph of the grey exit door the blue loading dock openings are not visible. *Id.*

In June and September of 2021, the Teterboro Plant had an operative Emergency Action Plan (EAP) addressing, among other safety concerns, fire prevention and protection.[6] (Tr. 218-20; JX-6, at 8, 21-26). Generally, the EAP describes its purpose as "document[ing] workplace emergency action procedures for workplace emergencies, including fire" and "outlin[ing] procedures for use by evacuees — employees, contractors, and other tenants at the installation." (JX-6, at 5). The EAP goes on to state that "[i]n an emergency, or when an emergency evacuation drill occurs, **all USPS employees, contractors, and other building tenants must evacuate** the building in a rapid but orderly manner." (*Id.*) (emphasis added). The EAP then goes on to outline general procedures employees should follow in the event of an emergency, including a fire. Of particular focus to the parties, the EAP contains the following direction for the "First at Scene Person," i.e., "the first person within the installation to encounter the emergency": . . . "If the emergency is a first stage fire and is well controlled, **if trained and safe to do so**, try to put out the fire with an appropriate fire extinguisher." (*Id.* at 8) (emphasis added).

Attachment A to this EAP served as the Teterboro Plant's Fire Prevention Plan (FPP) at the

[6] The parties submitted the Teterboro Plant's EAP as Joint Exhibit 6. Along with this EAP, which indicates it was updated as of January 2, 2021, the parties also submitted another EAP as Joint Exhibit 4, which indicates that it was updated as of December 16, 2021. Because this post-dates both inspections at issue in this case and no witness at the hearing offered any testimony on this EAP or whether any material portion of its contents changed from the time of the inspections until December 16, 2021, the undersigned gives it limited weight in determining what safety policies were actually in place at the Teterboro Plant at the time of those inspections. However, this EAP contains similar instructions as the EAP in place during the time period at issue in this case. For example, this EAP states "[t]here will be no delay if a fire alarm is activated, as all personnel will immediately evacuate the facility when a fire alarm is sounded …." (JX-4, at 6). This EAP goes on to state "[u]nder no circumstances shall an employee attempt to fight a fire ... They should evacuate through the nearest emergency exit." (*Id.*).

Additionally, the Secretary submitted pages from a Postal Employee's Guide to Safety, dated July 2020, and which states that it is from Handbook EL-814. (CX-7). This Guide contains the following statements on Fire Prevention and Protection: "Attempt to put out first-stage fires only if you have received training on how to use fire extinguishers and if you believe you can do so safely. If you have any doubt about your ability to extinguish the fire, leave the area. Remember that your own safety comes first." (*Id*. at 8, 9). As noted at the hearing, these pages are clearly part of a larger document, and no witness discussed this exhibit at the hearing. (Tr. 352-54). Thus, nothing in the record suggests this document represented any safety policy in place at the Teterboro Plant at time of the CSHO's inspections. The undersigned therefore gives no evidentiary weight to this document in terms of its representation of safety policies at the Teterboro Plant.

time of the CSHO's inspections.[7] (*Id.* at 21-26). The self-described purpose of the FPP is to "outline[] procedures for use by evacuees — employees, contractors, and other tenants at the installation." (*Id.* at 21). Like the EAP, the FPP directs that "[d]uring an emergency, or when an emergency evacuation drill occurs, all USPS employees, contractors, and other building tenants must evacuate the building in a rapid but orderly manner." (*Id.*). In line with this policy, the FPP further directs that "[i]n the event that a fire emergency requires building evacuation, occupants should … us[e] the nearest available exit" and "get out of the building …" (*Id.* at 21). In a table addressing various types of emergencies, the FPP calls for a "FULL" evacuation for fire emergencies. (*Id.* at 22).

EAP Training

Michael Ford, the Maintenance Manager at the Teterboro Plant, is partly responsible for training employees on Respondent's policies regarding fire safety including the policies outlined in the EAP. (Tr. 163-64). This training includes an onboarding process during which new employees are given a tour of the facility, familiarized with the EAP, and shown the exits and rally points for when the Plant is evacuated. (Tr. 164). Maintenance Manager Ford also trains employees on the contents of the EAP by holding "safety talks," during which he discusses documents related to the Plant's EAP from the USPS's "safety toolkit." (Tr. 163-64; JX-3, at 5, 11). Employees are also given a "standard work instruction" to inform them of the Plant's EAP

[7] As noted, the Teterboro Plant's FPP was included as an attachment to Joint Exhibit 6, the Teterboro Plant's EAP which was updated as of January 2, 2021. The parties also submitted Joint Exhibit 5, which is a separate FPP, and which indicates that it was updated as of December 16, 2021. This document was only briefly discussed at the hearing. (Tr. 215-16). As is the case with the second EAP submitted, the undersigned gives this second FPP limited weight in determining what safety policies were actually in place at the Teterboro Plant at the time of the inspections at issue in this case because it post-dates both inspections and no witness at the hearing offered any testimony on whether any material portion of its contents changed between the time of the inspections and December 16, 2021. Moreover, this FPP only addresses issues related to fire prevention, like avoiding clutter and ensuring electrical equipment does not pose a fire hazard. (*Id.* at 5). As to what an employee should do in the event of an actual fire emergency, this FPP redirects the employee to the "guidelines given in the facility's … EAP." (*Id.* at 4).

including "what they should do, who they should contact, where they should go, in case of an emergency, and what steps they need to take to get out of the building." (Tr. 177-80, 217; JX-3, at 1-3). Finally, Respondent submitted evidence, in the form of training sign-in sheets, of some USPS employees being trained on the Plant's EAP.[8] (JX-3).

In addition to employees receiving training on the Plant's EAP generally, there are also periodic fire drills at the Teterboro Plant, during which the entire facility is evacuated. (Tr. 158, 162-63; RX-6). Maintenance Manager Ford submits certain information concerning these drills to a "District Safety" office after the drills are completed, and the District Safety office prepares a report based on that information.[9] (Tr. 162-63; RX-6).

Evacuation Procedures

In line with the policies outlined in Respondent's EAP and FPP, employees at the Teterboro Plant are trained to fully evacuate the building in the event of a fire emergency by finding the nearest path of egress and meeting at a rallying point in the Plant's parking lot for "muster and attendance." (Tr. 158-60; *see also* Tr. 184, 197-98, 266-67, 283-84). The Teterboro Plant's employees are not trained to use the fire extinguishers mounted on the walls throughout the Plant during a fire emergency; to the contrary, the Plant's employees are frequently instructed and trained *not* to use these fire extinguishers during a fire emergency. (Tr. 143, 160-62, 64, 184, 187, 198-99, 214-15, 220, 246-47, 266, 280, 284-85, 287-88). In fact, of the Plant's approximately 600

[8] Joint Exhibit 3 contains several sign-in sheets for safety meetings. Although several of these sign-in sheets indicate training on EAPs took place in March and April of 2021 (JX-3, at 6-9, 12, 13), others are either undated or do not have any tie to the subject of EAPs. (*Id.* at 4, 14). None of these sign-in sheets relate specifically to the Teterboro Facility on their face. However, Plant Support Manager Reid briefly discussed these sign-in sheets at the hearing and recognized that they were sign-in sheets intended to document employee training at the Plant. (Tr. 217-18, 231-35).

[9] Mr. Ford was asked about several perceived inconsistencies in the two "Emergency Drill Report and assessment[s]" submitted at the hearing for drills conducted in 2020 and 2021. (Tr. 171-77). Ultimately, what Mr. Ford explained was that, following a fire drill, he would call the District Safety office to report certain information to them. (Tr. 175). Afterward, "they enter the form" because Mr. Ford "no longer ha[s] a portal to this form." (Tr. 175). In other words, Mr. Ford could not himself account for any discrepancies in the two assessments submitted. (Tr. 175, 195-97).

employees, only two employees have any kind of training in the use of fire extinguishers. (Tr. 161-62, 187, 199).

As to these two employees who *are* trained in the use of fire extinguishers, their training is limited to one specific scenario as follows: occasionally, certain "welding" or "grinding" activities need to be performed in the "shops" or on the floor of the Plant. (Tr. 128, 160). During these welding and grinding activities, one of the two employees who are trained to use fire extinguishers performs the actual welding or grinding while the other employee, having brought a fire extinguisher to the site of the welding or grinding, acts as a "fire watch" to "ensure that there [are] no problems." (Tr. 128, 160-62). However, in the event of a fire in the Plant outside of a welding or grinding scenario, these two employees are not trained or directed to use the wall-mounted fire extinguishers to attempt to put out the fire. (Tr. 160-62, 199, 202-03). In fact, they are "encouraged frequently not to do that." (Tr. 203).

OSHA's June Inspection

In June of 2021, then-Acting Plant Manager Laird was overseeing a "redesign" of the floor of the Teterboro Plant which involved "realigning" some of the sorting machines to increase their processing capacity.[10] (Tr. 58, 263-64). On June 3, 2021, in response to a complaint, CSHO Plakalovic inspected the Teterboro Plant in the midst of this redesign. (Tr. 56-58). During this inspection, CSHO Plakalovic observed a fire extinguisher mounted on a wall in the Eastern Section

[10] Acting Plant Manager Laird, the only witness to testify on the specifics of this redesign, offered the following explanation:

> The redesign was for us to take on more packages in the building to realign the machines. When I first got here, the machines were at 130 bins and it require[d] rework. So we redesigned the building and the machines to extend them to 196 bins to fit the entire network in the country, so there's no more moving mail from one machine to the next to quantilize [sic] it … And we were also installing a brand[-]new machine. (Tr. 263-64).

Mr. Laird did not offer further explanation of the redesign of the Plant in June of 2021, including what volume of mail a "bin" represents.

of the Plant. (Tr. 57, 60-64; CX-2, at 2, 6-8, 6a-8a). This extinguisher was blocked by a table, a guardrail, and moving equipment he surmised to be forklifts of some kind.[11] (Tr. 56, 60-64, 265-66; CX-2, at 2, 6-8, 6a-8a). Other than his observation of the blocked fire extinguisher, no further testimony was elicited concerning the details of the CSHO's inspection of the Teterboro Plant on June 3rd.

Tropical Storm Ida & the Newark Facility

Closure of the Newark Facility

"On September 1st and 2nd, 2021, tropical storm Ida hit New Jersey and Newark, New Jersey. The tropical storm Ida caused the highest rainfall ever recorded in the Newark, New Jersey area, over eight inches in two days. New Jersey Governor Murphy declared a state of emergency on September 1st, 2021."[12] (Tr. 354-56).

[11] Acting Plant Manager Laird offered a counter-narrative to the CSHO's observations and testimony on the circumstances of the CSHO's observations in June. According to Mr. Laird, the redesign of the Plant floor required "taking fire extinguishers out and moving stuff around in that area" where the machines were being realigned. (Tr. 263). Mr. Laird elaborated as follows:

> The initial design of the new machines had the fire extinguisher embedded inside the machine. When I looked at the drawing, I had them take them out because it wouldn't fit. It would make no sense to have a fire extinguisher inside of a machine where the machine is running. If the machine was circling the fire extinguisher, there [sic] wouldn't be able to get access to it. So [for] that reason, the fire extinguisher got taken out from those.
>
> And then we had a storage area for the PIV equipments [sic]. One fire extinguisher did not get moved from that area and that's where we had the issue. It was on the ground when he came in. And we saw it right away. We fixed it right away. But all the other fire extinguishers alongside – inside the machine were fixed and taken care of. And we had one that was on the ground by the PIV equipment and we picked it up and relocated it right away. (Tr. 265).

Thus, Mr. Laird's understanding of the violation occurring in June is that it was because the fire extinguisher "was on the floor. It wasn't blocked. It was just on the floor in the PIV equipment area." (Tr. 266). However, in the photographs taken by the CSHO, the fire extinguisher is clearly mounted to the wall underneath a painting of a fire extinguisher. (CX-2, at 6-8, 6a-8a). In front of this wall-mounted fire extinguisher are what the CSHO identified as a table, a guardrail, and moving equipment. (Tr. 60-64; CX-2, at 6-8, 6a-8a). To the extent Mr. Laird's contrary understanding implicates anything material about this violation, the undersigned does not credit his testimony as it is undermined both by the CSHO's testimony and his corroborating photographs.

[12] Rather than the undersigned taking judicial notice of the circumstances of tropical storm Ida, as Respondent originally requested, the parties stipulated to this language, which is therefore accepted in its entirety. *See Armstrong Utils., Inc.*, No. 18-0034, 2021 WL 4592200, at *2 n.2 (O.S.H.R.C., Sept. 24, 2021) (finding it was plain error to not accept parties' stipulations on a factual matter).

The heavy rainfall from tropical storm Ida in the Newark and northern New Jersey area had a deleterious effect on the operations at both the Newark Facility and the Teterboro Plant. At the Teterboro Plant, witnesses described road closures, flooding, and the death of one of the Plant's employees from the storm. (Tr. 209-10, 268-69). Meanwhile, at least in part due to the heavy rainfall, a portion of the roof at the Newark Facility collapsed, halting operations there entirely. (Tr. 29, 165, 210-11, 268-69, 302).

In response to the roof collapse at the Newark Facility, Respondent was forced to reroute the nearly 200,000 packages[13] that would normally be processed there daily. (Tr. 29, 127, 138-39, 148, 165, 210-11, 268, 270, 289-90). Ultimately, the Teterboro Plant was chosen to act as a makeshift hub, to which the approximately 200 trucks of packages normally bound for the Newark Facility were directed, at which point employees at the Plant sorted the packages for distribution to other USPS facilities in the area for final processing and delivery.[14] (Tr. 127, 138-39, 166-68, 192-93, 210-11, 222-23, 268-69, 270-72, 289-91, 305; JX-2). At the same time, a number of the displaced employees from the nonfunctional Newark Facility were also relocated to work at the Teterboro Plant. (Tr. 123-24, 165, 169-70, 211, 213, 273).

The redirection of the 200 trucks from the Newark Facility to the Teterboro Plant effectively doubled the number of packages the Teterboro Plant had to process. (Tr. 268, 270). However, the size of the packages processed at the Newark Facility was generally larger than the packages processed at the Teterboro Plant, and, correspondingly, the Newark Facility had sorting

[13] According to Plant Support Manager Reid, the Newark Facility "only processes priority packages," and the employees working at that Facility were, at the time of the roof collapse, unfamiliar with processing regular mail. (Tr. 211). Maintenance Manager Ford described the rerouting of "mail" generally (Tr. 165), while Acting Plant Manager Laird also emphasized the volume of packages being rerouted from the Newark Facility. (Tr. 270). Because Ms. Reid offered the clearest testimony on the subject, the undersigned finds, based on her testimony, that most, if not all, of the rerouted volume from the Newark Facility was "priority packages." (Tr. 211).

[14] These facilities included the New Jersey National Distribution Center and smaller facilities in Kearney and Trenton, New Jersey, and Queens, New York. (Tr. 289-90, 305).

machines designed to process the larger packages, while the Teterboro Plant did not. (Tr. 165, 167, 187, 192, 210-11, 270). The Teterboro Plant's management recognized that the substantial increase in the number of larger packages coming into the Plant, coupled with the lack of machinery to process these larger packages, would require changes in the Plant's normal processing systems and procedures. (Tr. 127, 148-49, 164-65, 167, 192-93, 268-73, 290-91). In other words, the Teterboro Plant would need to go into "contingency mode" or, more dramatically, "crisis mode." (Tr. 164-65, 268, 271, 291).

Shift in Operations at the Teterboro Plant

Over approximately the week following the roof collapse at the Newark Facility, Maintenance Manager Ford rearranged and resized the bullpens (for sorting incoming mail and packages) and staging areas (for storing outgoing mail and packages) on the floor of the Plant by adjusting the guardrails and lines on the floor which delineated those areas. (Tr. 165-68, 192-93, 223, 271-73). Because the Plant did not have any "historical data" on the types of larger packages being rerouted from the Newark Facility, these adjustments had to be done continually in response to the changing circumstances on the processing floor. (Tr. 170, 192-93). In other words, the new process for handling the influx of larger packages "was created as it was developed. It wasn't something that already existed. It was something that had to be developed." (Tr. 166). As Mr. Ford further expounded, sometimes management "saw where we had other space available [, and so] as we learned the way mail came in the building, we modified, and we adjusted the size of the staging area. And also the location of the staging area for a type of mail to best accommodate it." (Tr. 193).

To address the Teterboro Plant's inability to machine-process the larger packages coming from the Newark Facility, Mr. Ford ultimately instituted a "manual bullpen" system, which called

for employees to physically move the packages to staging areas designated by ZIP code. (Tr. 165-66, 192). Mr. Ford also instituted a system of sorting mail based on a series of gaylords that were labeled with "what should be in that box." (Tr. 166-67). "And then, when the mail is delivered to a central point, it's then sorted manually. Someone reads the address on it, and they sort basically either based on originator or destinator … the first three … numbers of the ZIP code or the final three, and that determines … where they put it." (Tr. 167).

Because the systems implemented in the days after the collapse at the Newark Facility were entirely new, existing Teterboro employees as well as the displaced Newark employees had to be trained on these systems as they were implemented and later adjusted. (Tr. 123-24, 148, 168-69, 271). On top of this training for all employees in the Plant on the new processing systems, the displaced Newark employees required additional training. According to Plant Support Manager Reid, the Newark employees were "unaware of how to process letters and flats, since they had never done that in the Greater Newark facility. They were only used to packages." (Tr. 211). Thus, these employees had to be trained on the "different terminologies of letters and flats; the different machinery that we used to process letters and flats." (Tr. 211). Moreover, the Newark employees were only familiar with "originating mail," i.e., mail coming into the Teterboro Plant to be delivered to the "rest of the world," but were not familiar with "destinating mail," i.e., mail being brought to the Teterboro Plant to be delivered locally in and around New Jersey. (Tr. 211-12). The Newark employees had to be trained on processes related to destinating mail. (Tr. 211-12; *see also* Tr. 167).

Blockages in the Plant

These efforts by Plant management to redesign the sorting systems in the Plant and retrain employees to address the increase in the volume of packages coming into the Plant were apparently

insufficient, at least in the short run,[15] to fully handle the volume of mail and packages in relation to the physical size of the Plant itself. Thus, even on the very first day that the packages started being rerouted from the Newark Facility, Acting Plant Manager Laird, noticed a "bottleneck" of mail and packages blocking aisles in the Plant. (Tr. 273; *see also* Tr. 148-49). These issues apparently persisted in the week or so following the rerouting of the packages from the Newark Facility to the Teterboro Plant. (Tr. 274-76).

OSHA's Inspection & Citation

In response to a complaint from an employee at the Teterboro Plant about blocked aisles,[16] CSHO Plakalovic returned to the Teterboro Plant to inspect the facility. (Tr. 26-27, 151, 170; JX-2). CSHO Plakalovic arrived at the Plant and waited for Respondent's Safety Specialist, Steve Cannon, to arrive before conducting his inspection. (Tr. 27; JX-2). After conducting an opening conference, CSHO Plakalovic proceeded to inspect the Plant, along with Safety Specialist Cannon, Maintenance Manager Ford, and two union representatives. (Tr. 27-28; JX-2). This group was joined at the end of the inspection by Acting Plant Manager Laird and Plant Support Manager Reid. (Tr. 28).

During his inspection, CSHO Plakalovic observed "pallets, other materials, [and] boxes of mail" blocking entrances to and a portion of the Southeast Aisleway. (Tr. 28, 33-56; JX-2, CX-1, at 7-12, 8a-12a). More specifically, based on his perspective in taking the photographs of the Eastern Section of the Plant, the CSHO described the scenario he observed. An emergency "EXIT"

[15] Mr. Laird estimated that operations at the Teterboro Plant reached "level set[,] meaning where there was a process in place and everything was working out fine, no safety issues, no blockages, and the mail was flowing where it was supposed to[,]" after "approximately one week." (Tr. 275). However, they "weren't there quite, not yet" at the time of the CSHO's September 10th inspection. (Tr. 276).

[16] Acting Plant Manager Laird believed that "[t]he complaint originated from the Greater Newark plant" and thus "was curious if the OSHA inspector ended up in the wrong plant." (Tr. 302). The undersigned credits CSHO Plakalovic's testimony on this point and finds it more likely that the complaint originated from and concerned the Teterboro Plant.

sign pointed to a grey emergency exit door located toward the right end of the Southeast Aisleway. (Tr. 33-35, 37-41, 43-56; CX-1, at 7, 8, 8a, 10-12, 10a-12a). At the left end of the Southeast Aisleway were two blue openings to the loading dock, which provided an alternative way to exit the building in an emergency. (Tr. 47-50, 92-97; CX-2, at 11, 11(a)). These blue openings to the loading dock were also marked as an exit. (Tr. 93-97; CX-2, at 11, 11(a)).

As shown in one of the CSHO's photographs, at the time of his inspection there appears to have been a second, interior aisleway in the Eastern Section of the Plant running parallel to the Southeast Aisleway. (Tr. 43-45; CX-1, at 10, 10a). An employee attempting to reach the grey exit door from this interior aisleway would have found it blocked by various materials and "would have to go a roundabout way around all the material" to reach the exit door. (Tr. 33-37; CX-1, at 7, 10, 10(a)). Further along the interior aisleway, a pallet of mail blocked a path leading to the Southeast Aisleway. (Tr. 38-43; CX-1, at 8, 8a, 9, 9a). Finally, toward the left end the Southeast Aisleway was an obstruction of packages, such than an employee who reached the Southeast Aisleway could have reached the grey exit door to the right unobstructed, but the same employee could not reach the blue loading dock openings without taking a circuitous path to avoid this obstruction. (Tr. 50-54, 92-93; CX-1, at 12, 12a).

On the same southeastern wall of the Eastern Section, CSHO Plakalovic also observed a fire extinguisher blocked by a gaylord of mail. (Tr. 57, 64-69; CX-2, at 9-11, 9a-11a). This fire extinguisher was clearly marked by a red-and-white painting of a fire extinguisher on the wall where the extinguisher was mounted. (Tr. 64-65; CX-2, at 9, 9a).

At the time of CSHO Plakalovic's inspection, dozens of employees were working in the Teterboro Plant including "several" in the Eastern Section of the Plant where the Southeast Aisleway and fire extinguisher were blocked by the pallets and boxes of mail. (Tr. 31; CX-1, at 3-

5; CX-2, at 3-5). When CSHO Plakalovic pointed out these issues to Maintenance Manager Ford, he acknowledged the condition had existed for approximately two days. (Tr. 29, 32; CX-1, at 5-6; CX-2, at 5). Moreover, Safety Specialist Cannon, Acting Plant Manager Laird, and Plant Support Manager Reid were all present for at least part of the inspection, directly observed employees working in the Eastern Section of the Plant, and "knew that the Teterboro facility was getting more mail than it could handle." (Tr. 29, 32; JX-2; CX-1, at 5-6; CX-2, at 5)

Based on his September 10th inspection, CSHO Plakalovic concluded that Respondent had violated 29 C.F.R. § 1910.37(a)(3) for obstructing the marked exit route along the southeast wall of the Eastern Section of the Plant (Southeast Aisleway). (Tr. 30). Based on his June and September inspections, CSHO Plakalovic further concluded that Respondent had violated 29 C.F.R. § 1910.157(c)(1) on two instances: first, for obstructing a fire extinguisher in the Eastern Section of the Plant with a table and a guardrail on June 3rd (Tr. 56-57); and again on September 10th for obstructing a fire extinguisher with a gaylord of mail along the southeast wall of the Eastern Section of the Plant. (Tr. 57). Based on Respondent having committed violations of both standards prior to his inspection, CSHO Plakalovic further concluded both violations should be classified as repeat violations. (Tr. 32-33, 59).

As a result of CSHO Plakalovic's inspection, OSHA issued the Citation to Respondent, alleging one instance of a repeat violation of 29 C.F.R. § 1910.37(a)(3), two instances of repeat violations of 29 C.F.R. § 1910.157(c)(1), and proposing a total penalty of $96,542.

IV. ANALYSIS

All of the Citation items charge violations of standards promulgated by OSHA. To establish a violation of a safety standard promulgated under the Act, "the Secretary must prove that the cited standard applies, there was a failure to comply with the standard, employees were

exposed to the violative condition, and the employer knew or could have known of the violative condition with the exercise of reasonable diligence." *Maxim Crane Works*, No. 17-1894, 2021 WL 2311880, at *1 n.4 (O.S.H.R.C., May 20, 2021), *aff'd*, No. 21-3647, 2022 WL 2160669 (6th Cir. June 15, 2022).

Before addressing the merits of the Citation items, the undersigned notes that in its Post-Hearing Brief Respondent has not challenged any of the four prima facie elements (applicability, noncompliance, exposure, and knowledge) with regard to the violation of 29 C.F.R. § 1910.37(a)(3) but instead only challenges its classification as a repeat violation. With regard to the violations of 29 C.F.R. § 1910.157(c)(1), Respondent has challenged only the applicability element as well as its classification as a repeat violation.

Nonetheless, the Secretary has the burden of proof in proceedings before the Commission and must, therefore, set forth some evidence on each element of the violations charged. *See Trinity Indus., Inc*., 15 BNA OSHC 1788, 1790 (No. 89-1791, 1992) (the Secretary has the burden of proof by a preponderance of the evidence); *see also New River Corp. v. OSHRC*, 25 F. 4th 213 (4th Cir. 2022) ("If (and only if) the Secretary makes out a *prima facie* case with respect to all four elements, the employer may then come forward and assert [an] affirmative defense …"). With that principle in mind, the key issues raised in this case will be analyzed. First, the prima facie elements of the violation of 29 C.F.R. § 1910.37(a)(3) will be briefly addressed before turning to its repeat classification. Because the Secretary has failed to establish the violations of 29 C.F.R. § 1910.157(c)(1) at the first element, applicability, only this element of the violations will be addressed.[17]

[17] It is again noted, however, that Respondent has not devoted any of its briefing to challenging any of the other elements of these violations other than its repeat classification.

Obstructed Aisles and Exits

Citation 1, Item 1

Citation 1, Item 1 alleges one instance of a repeat violation of 29 C.F.R. § 1910.37(a)(3), which states, in relevant part: "Exit routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, within the exit route." 29 C.F.R. 1910.34(c) defines an "exit route" as

> a continuous and unobstructed path of exit travel from any point within a workplace to a place of safety (including refuge areas). An exit route consists of three parts: The exit access;[18] the exit;[19] and, the exit discharge.[20] (An exit route includes all vertical and horizontal areas along the route.)

The Citation alleged that Respondent violated 29 C.F.R. § 1910.37(a)(3) as follows:

> 29 CFR 1910.37(a)(3): Exit route(s) were not kept free and unobstructed.
>
> (a) Eastern Section of Facility – Exit routes were not kept free and unobstructed. Aisleways along the south-eastern wall leading to exits from the loading dock of the building were obstructed by pallets and boxes of material/mail. The aisle ways [sic] were part of an exit route and were obstructed and impassable, on or about 9/10/2021.

The Citation further alleged four prior instances of citations issued to Respondent for violations of 29 C.F.R. § 1910.37(a)(3), which were affirmed as Commission final orders, as the predicate orders for Item 1's repeat classification.

The Citation proposed a penalty of $64,361 for Respondent's alleged repeat violation of 29

[18] 29 C.F.R. § 1910.34(c) defines "exit access" as "that portion of an exit route that leads to an exit. An example of an exit access is a corridor on the fifth floor of an office building that leads to a two-hour fire resistance-rated enclosed stairway (the Exit)."

[19] 29 C.F.R. § 1910.34(c) defines "exit" as "that portion of an exit route that is generally separated from other areas to provide a protected way of travel to the exit discharge. An example of an exit is a two-hour fire resistance-rated enclosed stairway that leads from the fifth floor of an office building to the outside of the building."

[20] 29 C.F.R. § 1910.34(c) defines "exit discharge" as "the part of the exit route that leads directly outside or to a street, walkway, refuge area, public way, or open space with access to the outside. An example of an exit discharge is a door at the bottom of a two-hour fire resistance-rated enclosed stairway that discharges to a place of safety outside the building."

C.F.R. § 1910.37(a)(3).

Applicability

29 C.F.R. §§ 1910.34(a) and (b) state that Subsection B, containing standards governing "Exit Routes and Emergency Planning," applies, in relevant part, as follows:

> (a) *Every employer is covered*. Sections 1910.34 through 1910.39 apply to workplaces in general industry except mobile workplaces such as vehicles or vessels.
>
> (b) *Exits routes are covered*. The rules in §§ 1910.34 through 1910.39 cover the minimum requirements for exit routes that employers must provide in their workplace so that employees may evacuate the workplace safely during an emergency. Sections 1910.34 through 1910.39 also cover the minimum requirements for emergency action plans and fire prevention plans.

The standard therefore applied to Respondent and the exit routes in the Teterboro Plant, including the Southeast Aisleway, which served as an exit route to both the grey exit door and the blue loading dock openings on either end of the Aisleway. (Tr. 33-35, 37-41, 43-56, 92-97; CX-1, at 7, 8, 8a, 9, 9(a), 10, 10(a), 11, 11(a), 12, 12a; CX-2(a), at 11, 11(a)). The standard also applied to the pathway leading to the grey exit door (Tr. 33-35; CX-1, at 7, 10, 10(a)), and the pathway leading to the Southeast Aisleway from the interior aisleway in the Eastern Section of the Plant. (Tr. 38-43; CX-1, at 8, 8a, 9, 9a).

Respondent has not challenged this element of the Secretary's case. The Secretary has proven the applicability of 29 C.F.R. § 1910.37(a)(3) to the Teterboro Plant.

Noncompliance

During his inspection on September 10, 2021, CSHO Plakalovic observed at least three exit routes in the Eastern Section of the Teterboro Plant blocked by "pallets, other materials, [and] boxes of mail." (Tr. 28). First, from the interior aisleway, the exit route to the grey exit door was blocked by various materials, such that an employee "would have to go a roundabout way around all the material" to reach this exit door. (Tr. 33-35; CX-1, at 7). Second, further along the interior

aisleway, a pallet of mail blocked a path leading to the Southeast Aisleway. (Tr. 38-43; CX-1, at 8, 8a, 9, 9a). Finally, the left end of the Southeast Aisleway, near the blue loading dock openings, was obstructed by a number of packages, such that an employee who reached the Southeast Aisleway could not have reached the blue loading dock openings without taking a circuitous path to avoid the obstruction. (Tr. 50-54, 92-93; CX-1, at 12, 12a). Although some of Respondent's witnesses testified that these obstructions were only temporary (Tr. 224, 292-94, 297-98), the standard prohibits storing materials in an exit route even "temporarily."

Respondent has not challenged this element of the Secretary's case. The Secretary has proven Respondent's noncompliance with 29 C.F.R. § 1910.37(a)(3).

Exposure

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Here, CSHO Plakalovic observed several employees working in the Eastern Section of the Plant where the exit routes leading to the Southeast Aisleway, and the Southeast Aisleway itself, were blocked. (Tr. 31; CX-1, at 3-5). These employees were thereby exposed to burns or smoke inhalation "due to a prolonged exit time" in the event of a fire, as well as "bruises, sprains, broken bones from colliding with the pallets and the other materials that were blocking the exit routes." (Tr. 31-32).

Respondent has not refuted this element of the violation. The Secretary has proven employee exposure to the hazard.

Knowledge

The Secretary can satisfy the knowledge element of the violation "by establishing that the employer knew or, with the exercise of reasonable diligence, could have known of the presence of

the violative condition." *Jersey Steel Erectors,* 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994) (Table). The actual or constructive knowledge of an employer's supervisors can be imputed to the employer. *Id.*; *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Here, during CSHO Plakalovic's inspection on September 10, 2021, Maintenance Manager Ford acknowledged that the increase in volume of mail at the Teterboro Plant had resulted in obstructions in exit routes in the Eastern Section of the Plant and that such obstructions had been ongoing for at least two days.[21] (Tr. 28-29, 32; JX-2; CX-1, at 5-6). The CSHO was later joined by other managers, including Acting Plant Manager Laird and Plant Support Manager Reid, who also observed employees working in the Eastern Section of the Plant while there were obstructions in the exit routes and "knew that the Teterboro facility was getting more mail than it could handle." (Tr. 32 CX-1, at 6). At the hearing, Maintenance Manager Ford, Plant Support Manager Reid, and Acting Plant Manager Laird all admitted to having actual knowledge of blocked aisleways in the Eastern Section of the Plant in the days following the roof collapse at the Newark Facility. (Tr. 123, 148, 193, 224-25).

Respondent has not challenged this element of the Secretary's case. Respondent's managers' actual knowledge of the violation is imputed to Respondent. *See Jersey Steel Erectors,* 16 BNA OSHC at 1164; *Dover Elevator Co.*, 16 BNA OSHC at 1286.

Classification

[21] The record also establishes that an individual named Stephen Cannon, a "Safety Specialist," was present with CSHO Plakalovic during his inspection. (Tr. 27-28, 32, 141-42; JX-2, CX-1, at 5-6). Mr. Cannon did not testify at the hearing, and other than his title, no witness gave a description of Mr. Cannon's role at the Teterboro Plant, including whether he was delegated any authority over other employees at the Plant. The record is therefore insufficient to conclude that Mr. Cannon was a supervisor for purposes of imputing his knowledge to Respondent. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("It is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority" that determines whether an employee is a supervisor for purposes of imputing knowledge).

The Secretary has classified Respondent's violation of 29 C.F.R. § 1910.37(a)(3) as a repeat violation. In this regard, Section 17(a) of the Act, 29 U.S.C. § 666(a), imposes heightened penalties for "[a]ny employer who … repeatedly violates the requirements of … regulations prescribed pursuant to this chapter …." "A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Jersey Steel Erectors*, 16 BNA OSHC at 1167, citing *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979) (*Potlatch*).[22] "Unless the violation involves a general standard, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard." *Id.* This prima facie showing of substantial similarity may be rebutted "by evidence of the disparate conditions and hazards associated with these violations of the same standard." *Potlatch Corp.,* 7 BNA OSHC at 1063.

As a basis for a repeat violation of 29 C.F.R. § 1910.37(a)(3), the Citation set forth as follows:

> U.S. Postal Service was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.37(a)(3), which was contained in OSHA inspection number 1451114, citation number 1, item number 1, and was affirmed as a final order on June 11, 2020, with respect to a workplace located at 56 Hughes Road, Madison, AL 35758.

---

[22] The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) & (b). Here, the violation occurred in New Jersey, in the Third Circuit, where the Teterboro Plant is located. The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

In a passing citation in its reply brief, Respondent points to a prior holding from the Third Circuit which required a showing of an employer "flaunting" the requirements of a standard before a repeat violation could be found. Resp't Reply Br. 3; *Bethlehem Steel Corp. v. OSHRC,* 540 F.2d 157, 162 (3d Cir. 1976). However, in *Reich v. D.M. Sabia Co.*, the Third Circuit overruled its prior interpretation of what constituted "repeatedly" under the Act. *D.M. Sabia Co.*, 90 F.3d 854, 860 (3d Cir. 1996) (finding that the prior Court's "formula prescribed in *Bethlehem* for determining when a repeated violation occurs is no longer operative."). Noting several developments in the law, the Court adopted the Commission's standard as set forth in *Potlatch*. *See D.M. Sabia Co.*, 90 F.3d at 856 ("We now deem an OSHA violation to be 'repeated' if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." (quoting *Potlatch*, 7 BNA OSHC at 1063)). Thus, the classification of Respondent's violation here would not differ under Third Circuit law.

> U.S. Postal Service was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.37(a)(3), which was contained in OSHA inspection number 1297911, citation number 1, item number 1b, and was affirmed as a final order on May 16, 2018, with respect to a workplace located at 751 Palisades Avenue, Teaneck, NJ 07666.
>
> U.S. Postal Service was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.37(a)(3), which was contained in OSHA inspection number 1295472, citation number 1, item number 1a, and was affirmed as a final order on May 11, 2018, with respect to a workplace located at 4600 Aldine Bender Rd., North Houston, TX 77315.
>
> U.S. Postal Service was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.37(a)(3), which was contained in OSHA inspection number 1214338, citation number 2, item number 2, and was affirmed as a final order on May 17, 2018, with respect to a workplace located at 293 Hackensack St., East Rutherford, NJ 07073.

To establish the violation as a repeat violation, the Secretary first introduced a printout for Respondent from OSHA's internal "OIS" recordkeeping system. (CX-3). Each OIS record contained, among other information, the standard that was violated and "final order date" for the violation. (*Id.*). CSHO Plakalovic explained he had obtained these records for each of the previous violations against Respondent alleged in the Citation. (Tr. 70-75, 82-83). After some back-and-forth between the parties on the admissibility and adequacy of these records in sustaining a repeat classification, OSHA's attorney eventually produced more records from OSHA's OIS system, including each of the previous citations issued to Respondent for violations of 29 C.F.R. § 1910.37(a)(3). (Tr. 322-24; RX-12). These citations correspond to the alleged violations occurring in Madison, Alabama, Teaneck, New Jersey, North Houston, Texas, and East Rutherford, New Jersey referenced in the instant Citation. (RX-12, at 3, 6, 9, 12). For each of these citations, the OIS records indicate a settlement was reached on the violations, although the settlement

agreements themselves were not entered into evidence.[23] (RX-12, at 1-2, 4-5, 7-8, 10-11). Taken together,[24] this evidence establishes at least one prior violation of 29 C.F.R. § 1910.37(a)(3) against Respondent establishing a prima facie case of substantial similarity for the repeat classification. *Jersey Steel Erectors*, 16 BNA OSHC at 1167 & n.8; *see also Triumph Constr. Corp.*, 26 BNA OSHC 1331, 1346-47 (No. 15-0634, 2016) (ALJ) (finding that an informal settlement agreement constitutes a "Commission final order" for purposes of repeat classification), *aff'd*, 885 F.3d 95 (2d Cir. 2018).

Relying on *Wynnewood Refining Co., LLC*, No. 13-0644, 2019 WL 1466257 (O.S.H.R.C.,

[23] In his opening statement, Respondent's attorney mentioned Federal Rule of Evidence 408, which prohibits the admission of evidence of "compromise offers and negotiations" for certain purposes, and suggested he may object to the admission of the Secretary's evidence supporting repeat classifications on the basis of that rule. (Tr. 21-22). However, when the Secretary actually offered the OIS records at the hearing, Respondent's attorney only objected to the admission of these records as "hearsay within hearsay" and on the basis that the records were based on underlying documents not produced to Respondent and therefore were incomplete. (Tr. 70-71, 75-76). However, Respondent's attorney made no mention of Rule 408, and his other objections were eventually overruled. (Tr. 82-83). Nonetheless, in its Reply Brief, Respondent has again invoked Rule 408 and argues that it bars reliance on the Secretary's OIS evidence. Resp't Reply Br. 6 ("since these alleged prior final orders might have been the result of a settlement, they are inadmissible to establish a repeat violation."). Because Respondent failed to timely object to the admission of the OIS records on the basis of Rule 408 at the hearing, Respondent's claim of error is not preserved. *See United States v. Webster*, No. 22-3064, 2024 WL 2712697, at *9 (D.C. Cir. May 28, 2024 ("To preserve an objection, a party must "first make his objection known to the trial-court judge.") (quoting *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 764 (2020)); Fed. R. Evid. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (1) if the ruling admits evidence, a party, on the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context ….").

Moreover, in its primary Post-Hearing Brief, Respondent raises only the adequacy of the records in establishing that the violations were substantially similar but does not renew any objection to their admission. Resp't Br. 9-15. Only in its Reply Brief does Respondent again raise an objection to the admission of these exhibits as evidence of settlement agreements under Rule 408. Because Respondent did not re-raise its objection until its Reply Brief, any claim of error that may have otherwise been preserved for post-hearing review has been waived. *See, e.g.*, *Javitz v. Luzerne Cnty.*, 616 F. Supp.3d 394, 407 (M.D. Pa. 2022) (finding plaintiff waived arguments raised for the first time in a Reply Brief), *aff'd* No 22-2519, 2023 WL 5842299 (3d Cir. Sept. 11, 2023).

[24] Throughout its Post-Hearing Brief, Respondent criticizes the OIS printout information as being inadequate because "[t]he specific facts that underlie the previous violations are not contained in this Violation Summary." Resp't Br. 11; *see also id.* at 15 ("As is clearly demonstrated by the lack of evidence produced by the Secretary in Exhibit C-3 …"). While this exhibit is admittedly scant on detail, it is also not the only evidence in the record that touches on the facts underlying the previous violations. The undersigned finds the OIS printouts along with the underlying citations are sufficient to establish the Secretary's burden of demonstrating that there was a final order against Respondent for a violation of the same standard, which, contrary to Respondent's position throughout its briefing on the issue, is sufficient to make out a prima facie showing of substantial similarity that Respondent is then required to rebut. *See Jersey Steel Erectors*, 16 BNA OSHC at 1167. As detailed below, Respondent's reliance on *Wynnewood* as providing contrary authority is misplaced.

Mar. 28, 2019) (*Wynnewood*), *aff'd*, 978 F.3d 1175 (10th Cir. 2020), Respondent argues that "other factors including the **'type of condition involved in the prior violations'** in addition to the substantial similarity of the hazards" bear on whether a violation is a repeat violation. Resp't Br. 9 (emphasis in original), quoting *Wynnewood*, 2019 WL 1466257, at *17. Respondent goes on to argue that "[i]t is therefore incumbent on the court to not only consider whether the hazards were substantially similar, but also determine the conditions of the prior violation and assess whether they are substantially similar." Resp't Br. 9, citing *Wynnewood*, 2019 WL 1466257, at *17. "Recognizing this in *Wynnewood Refining*, it is imperative for the court to consider the conditions and circumstances as they existed in the previous citation compared to the present citation." Resp't Br. 9; Resp't Reply Br. 3-4.

Respondent's reliance on *Wynnewood* as controlling law on the issue of repeat classification is misplaced for a number of reasons. First, the majority of the Commission in that case found the repeat classification was unwarranted not because the employer rebutted the Secretary's prima facie showing of substantial similarity but because a corporate restructuring and change in safety personnel led the majority to conclude that "the record does not support the Secretary's contention that there was sufficient continuity in the safety personnel at the cited entity such that there was a Commission final order against the *same employer* for a substantially similar violation." *Wynnewood*, 2019 WL 1466257, at *9 (emphasis in original). Second, the citations and quotations in Respondent's brief for the arguments set forth above come from the partial dissent of Commissioner Attwood, who in fact *disagreed* with the Commission's then-recent holding she was discussing, namely *Angelica Textile Servs., Inc.*, 27 BNA OSHC 1246 (No. 08-1774, 2018). *Wynnewood*, 2019 WL 1466257, at *13-14 (Attwood, Comm'r, concurring in part & dissenting in part) ("I reiterate my view here that *Angelica* was wrongly decided" with regard to

the issue of repeat classification). Third, the decision in *Angelica* itself has since been vacated by the Second Circuit, with directions to the Commission to dismiss the case as moot. *See Scalia v. Angelica Textile Servs., Inc.*, 803 F.App'x 542 (2d Cir. 2020), *dismissed on remand*, No. 08-1774, 2020 WL 4475583 (O.S.H.R.C., July 27, 2020). Thus, any proxy reliance on the holding in *Angelica* by citing Commissioner Attwood's discussion of the case in *Wynnewood* is further misplaced. *See UHS of Westwood Pembroke, Inc.*, No. 17-0737, 2022 WL 774272, at *13 n.18 (O.S.H.R.C., March 3, 2022) ("The Second Circuit, however, has since vacated the Commission's *Angelica* decision, rendering any arguments that rely on the rationale of that case unsupported.").

Respondent is not arguing that it should be treated as a different employer for purposes of the repeat classification, and thus the majority's holding in *Wynnewood* does not govern this case. The correct standard to rebut a prima facie finding of substantial similarity remains focused on the difference in *hazards* associated with the violations. *See UHS of Westwood Pembroke,* 2022 WL 774272, at *12 ("The Commission has long held that similarity of abatement is not the criterion for finding a repeat violation; it is whether the two violations resulted in substantially similar hazards."); *Active Oil Serv.*, 21 BNA OSHC 1184, 1189-90 (No. 00-0553, 2005); *Amerisig Southeast, Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996), *aff'd*, 117 F.3d 1433 (11th Cir. 1997) (unpublished); *Kent Nowlin Constr. Co*, 9 BNA OSHC 1306, 1308 (No. 76-191, 1981) ("At the Bluewater trench cited in 1975 and at the manholes described in the 1973 citation, the same hazard was posed to employees working within them—the collapse of the walls of a cavity dug in unstable or soft ground."). Respondent has identified no such differences here.

Respondent points out that the rain from tropical storm Ida led to the closure of Respondent's Newark Facility and altered normal operations at the Teterboro Plant. Resp't Br. 12;

Resp't Reply Br. 2. Respondent points to testimony from Respondent's managers that the Teterboro Plant was in "contingency mode" or "crisis mode" because of packages being rerouted from the Newark Facility to the Teterboro Plant and lays out in detail how this shift affected normal operations at the Teterboro Plant. Resp't Br. 12-13; Resp't Reply Br. 4-5. Respondent also points to the "challenges and difficulties with trying to absorb another facility's mail and package volume, [and] also the practical difficulties with trying to accommodate, educate and train all the displaced workers" who were moved from the Newark Facility to the Teterboro Plant. Resp't Br. 14. Respondent goes on to argue that "[t]hese type of contingency mode operations cannot … be considered 'substantially similar' to the circumstances involved in the alleged repeat violations that occurred during normal postal operations." *Id.* at 15.

Respondent's arguments relate only to the circumstances that led to the violation of 29 C.F.R. § 1910.37(a)(3) here. None of the alleged differences highlighted by Respondent points to any material difference in the conditions or hazards associated with blocked aisles and exits. Particularly the Madison, North Houston, and East Rutherford citations all relate to obstructed aisles and exits routes from mail or associated processing equipment, just as was present here.[25] (RX-12, at 3, 9, 12). These obstructions therefore implicated the same hazards identified by the CSHO here in the event of a fire, particularly burn, smoke, and collision hazards. (Tr. 32-32).

Respondent has therefore failed to rebut the Secretary's prima facie showing of substantial similarity because it has failed to identify any difference in the hazards associated with the instant violations and its previous violations of 29 C.F.R. § 1910.37(a)(3). *See Par Elec. Contractors, Inc.*, 20 BNA OSHC 1624, 1628 (No. 99-1250, 2004) ("That is the same hazard cited here. We

[25] The Citation issued to the USPS location in Teaneck, New Jersey citation alleges a "trip hazard" from an "[u]nused rubber hose," which is arguably different than what the CSHO alleged were the hazards presented in this case. (RX-12, at 6). However, the record is sufficient to demonstrate at least three other previous violations of the standard implicating the same hazards identified here.

therefore find, based on the evidence, that the violation was repeated.").

Respondent's violation is properly classified as a repeat violation.

Citation 1, Item 2

Citation 1, Item 2 alleged a repeat violation of 29 C.F.R. § 1910.157(c)(1), which states: "The employer shall provide portable fire extinguishers and shall mount, locate and identify them so that they are readily accessible to employees without subjecting the employees to possible injury."

The Citation alleged two instances of a violation of 29 C.F.R. § 1910.157(c)(1), in relevant part, as follows:

> 29 CFR 1910.157(c)(1): Portable fire extinguishers were not mounted, located and identified so that they were readily accessible without subjecting the employees to injuries:
>
> (a) Eastern Section of Facility – A portable fire extinguisher was not readily accessible. Materials were placed in front of the fire extinguisher, obscuring its access, which could contribute to exacerbation of a fire, on or about June 3, 2021.
>
> …
>
> (b) Eastern Section near Loading Dock – A portable fire extinguisher was not readily accessible. Access to the fire extinguisher was completely blocked by boxes of mail/packages. Materials were placed in front of the fire extinguisher, obscuring its access, which could contribute to exacerbation of a fire, on or about September 10, 2021.

As a basis for the repeat classification of the violations, the Citation further alleged as follows:

> U.S. Postal Service was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1910.157(c)(1), which was contained in OSHA inspection number 1195213, citation number 1, item 1a, and was affirmed as a final order on May 15, 2017, with respect to a workplace located at 2950 Unity Drive, Houston, TX 77057.

The Citation proposed a total penalty of $32,181 for Respondent's alleged violations of 29

C.F.R. § 1910.157(c)(1).

Applicability

29 C.F.R. § 1910.155(b) states that Subpart L of Part 1910, which governs fire protection, "applies to all employments except for maritime, construction, and agriculture." More specifically, 29 C.F.R. § 1910.157(a), the subsection governing portable fire extinguishers, "Scope and application," states "[t]he requirements of this section [157] apply to the placement, use, maintenance, and testing of portable fire extinguishers provided for the use of employees." This subsection goes on to state, in relevant part:

> Where extinguishers are provided but are not intended for employee use and the employer has an emergency action plan and a fire prevention plan that meet the requirements of 29 CFR 1910.38 and 29 CFR 1910.39 respectively, then only the requirements of paragraphs (e) and (f) of this section apply.

The parties agree that this subsection is determinative as to whether Respondent was required to comply with §1910.157(c).[26] The parties further do not dispute that Respondent "ha[d] an emergency action plan and a fire prevention plan that me[t] the requirements of 29 CFR

[26] The Secretary specifically argues that Respondent bears the burden of demonstrating that section 1910.157 does not apply under this subsection, a proposition Respondent seems to accept. *See* Sec'y Br. 27; Resp't Br. 16 (arguing that "Respondent has established that the [USPS] is exempt from the requirement of 29 C.F.R. § 1910.157(c)(1) …"). However, the undersigned finds, based on the text and structure of 29 C.F.R. § 1910.157 as a whole (*cf. United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021) ("[W]hen interpreting statutes, we work to fit, if possible, all parts into a harmonious whole." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)), the better reading is that subsection (a) places the burden of proof on the Secretary as a matter of applicability. By its own terms, this subsection governs the "application" of the standard, an element of a violation for which the Secretary ordinarily bears the burden of proof. *See Maxim Crane Works*, 2021 WL 2311880, at *3 n.7 ("As the judge pointed out, the burden is on the Secretary to establish the applicability of the cited standard[.]"). Moreover, subsection (b) contains specific "exemptions" from the regulation's requirements, for which an employer would ordinarily bear the burden of proof. *See Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 367 (3d Cir. 2015). The Secretary's reliance on *Jake's Fireworks, Inc.*, 26 BNA OSHC 1738 (No. 15-0260, 2017) (ALJ), an unreviewed ALJ decision of no precedential value, does not alter this conclusion. *See Hartwell Excavating Co.*, 4 BNA OSHC 1263, 1264 (No. 3841, 1976); *see also* Sec'y Br. 27 n.5.

In any event, as detailed more fully below, a preponderance of the evidence establishes that the two employees trained in using fire extinguishers were not trained to use them during a fire emergency. Accordingly, the wall-mounted fire extinguishers were not "intended for employee use" as contemplated by § 1910.157. Thus, shifting the burden of proof would not alter the outcome of the applicability of the standard in this particular case.

1910.38[27] and 29 CFR 1910.39[28]" at the time of the CSHO's inspection. (JX-6). Thus, the remaining question is whether the fire extinguishers mounted throughout the Teterboro Plant were "intended for employee use." Based on the record as a whole, the Secretary has not proven the fire extinguishers were so intended.

The Teterboro Plant's EAP specifically states that "[i]n an emergency, or when an emergency evacuation drill occurs, **all USPS employees, contractors, and other building tenants must evacuate** the building in a rapid but orderly manner." (JX-6, at 5). The EAP then goes on to outline general procedures employees should follow in the event of an emergency, including a fire. (*Id.* at 6). Like the EAP, the Teterboro Plant's FPP directs that "[d]uring an emergency, or when an emergency evacuation drill occurs, all USPS employees, contractors, and

[27] 29 C.F.R. § 1910.38(c) provides:

> *Minimum elements of an emergency action plan*. An emergency action plan must include at a minimum:
>
> (1) Procedures for reporting a fire or other emergency;
>
> (2) Procedures for emergency evacuation, including type of evacuation and exit route assignments;
>
> (3) Procedures to be followed by employees who remain to operate critical plant operations before they evacuate;
>
> (4) Procedures to account for all employees after evacuation;
>
> (5) Procedures to be followed by employees performing rescue or medical duties; and
>
> (6) The name or job title of every employee who may be contacted by employees who need more information about the plan or an explanation of their duties under the plan.

[28] 29 C.F.R. § 1910.39(c) provides:

> *Minimum elements of a fire prevention plan*. A fire prevention plan must include:
>
> (1) A list of all major fire hazards, proper handling and storage procedures for hazardous materials, potential ignition sources and their control, and the type of fire protection equipment necessary to control each major hazard;
>
> (2) Procedures to control accumulations of flammable and combustible waste materials;
>
> (3) Procedures for regular maintenance of safeguards installed on heat-producing equipment to prevent the accidental ignition of combustible materials;
>
> (4) The name or job title of employees responsible for maintaining equipment to prevent or control sources of ignition or fires; and
>
> (5) The name or job title of employees responsible for the control of fuel source hazards.

other building tenants must evacuate the building in a rapid but orderly manner." (*Id.* at 21). In line with this policy, the FPP further directs that "[i]n the event that a fire emergency requires building evacuation, occupants should … us[e] the nearest available exit" and "get out of the building …" (*Id.*). In a table addressing various types of emergencies, the FPP calls for a "FULL" evacuation for fire emergencies. (*Id.* at 22).

Witness testimony at the hearing was nearly uniform that employees at the Teterboro Plant are trained to fully evacuate the building in the event of a fire emergency and directly instructed to *not* use the wall-mounted fire extinguishers to attempt to fight the fire. (Tr. 143, 158-62, 184, 187, 197-98, 214-15, 220, 246-47, 266-67, 280, 283-85, 287-88). According to Maintenance Manager Ford, the Plant's employees' "only duty [in the event of a fire] is to leave the building[,]" and the employees are "instructed not to use the fire extinguishers very specifically." (Tr. 158-60). Echoing the latter point, Plant Support Manager Reid noted that she has never been directed to train her employees in using fire extinguishers and was never trained to use one herself, as a mail handler, a supervisor, or a manager. (Tr. 214-15). In short, "We're not allowed to use fire extinguishers." (Tr. 143). As Acting Plant Manager Laird summarized:

> We train [our employees] just to exit. We have an EAP, emergency action plan, for emergencies. The employee is supposed to leave the building and there's a rally point where they meet outside and let the experts [i.e., the fire department] do their jobs. But we don't train employees to put out fires. That's not part of their job description.

(Tr. 267).

Against the weight of this evidence, the Secretary points out that two of the Teterboro Plant's 600 employees *were* in fact trained in the use of fire extinguishers during grinding and

welding activities.[29] Sec'y Br. 28; Sec'y Reply Br. 2. Based on this uncontested fact, the Secretary makes two further arguments.[30] First, she points to a statement contained in a general section of the Teterboro Plant's EAP which directs the "First at Scene Person," i.e., "the first person within the installation to encounter the emergency," as follows: "If the emergency is a first stage fire and is well controlled, **if trained and safe to do so**, try to put out the fire with an appropriate fire extinguisher." (*Id.* at 8) (emphasis added). From this, the Secretary argues that the two employees trained to use fire extinguishers during grinding and welding activities are in fact instructed by the EAP to use a wall-mounted fire extinguisher in the event they encountered a first stage fire in the Plant. Sec'y Br. 28; Sec'y Reply Br. 2.

However, Maintenance Manager Ford's testimony refuted this meaning of the EAP's statement. As Mr. Ford explained, the two employees trained in the use of fire extinguishers are only trained to use them when acting as a "fire watch" during welding and grinding activities.[31] (Tr. 128, 160-62). Mr. Ford repeatedly emphasized that outside of this context, these two employees are not trained or directed to use fire extinguishers to put out any other fires; rather,

[29] The Secretary also points out that it was Respondent who maintained these fire extinguishers, including inspection and certification. Sec'y Br. 27-28. The undersigned accords this fact no weight in determining whether the fire-extinguishers were "intended for employee use" because regular inspection, maintenance, and testing of portable fire extinguishers is required by 29 C.F.R. § 1910.157(e), a subsection an employer is still required to comply with even if subsection (a) relieves the employer of its obligations under other subsections of the standard.

[30] In addition to pointing out that two of the Plant's approximately 600 employees are trained to use fire extinguishers in certain circumstances, an undisputed fact, the Secretary also points out that the Plant's EAP calls for "evacuation route maps for each floor [of the Plant]" which "must include graphic illustrations of emergency escape route assignments, shelters, and locations of fire alarms and extinguishers." Sec'y Br. 28, citing JX-6, at 15 (emphasis added). In the EAP, this requirement cites to "ELM 852.2," the meaning of which is not apparent from the EAP itself and which no witness elucidated. Other than briefly pointing out the existence of this phrase to Maintenance Manager Ford at the hearing (Tr. 183-84), no other witness discussed the meaning of the evacuation route maps or the requirement for them to have the locations of fire extinguishers displayed. The undersigned does not place any material weight on the EAP's requirement of including the locations of fire extinguishers in light of the evidence concerning the employees' training to fully and immediately evacuate the building during a fire emergency.

[31] The undersigned notes that the use of a "fire watch" is required in certain situations under OSHA's Welding, Cutting, and Brazing standards. *See* 29 C.F.R. § 1910.252(a)(2)(ii) ("Suitable fire extinguishing equipment shall be maintained in a state of readiness for instant use [during welding and cutting work]."); *id.* § (a)(2)(iii)(A) ("Fire watchers shall be required whenever welding or cutting is performed in locations where other than a minor fire might develop …").

they are "encouraged frequently not to do that." (Tr. 161, 199, 202-03). Thus, even though the EAP on its face calls for the "First at Scene Person" to use a fire extinguisher during certain fire emergencies "if trained … to do so," the evidence here demonstrates that the only two employees in the Teterboro Plant who had any training in fire extinguishers were not "trained … to do so." (JX-6, at 8).

Moreover, as Mr. Ford further explained, the employee acting as a fire watch during grinding and welding is not instructed to use one of the wall-mounted fire extinguishers in the event of a fire. Rather, they are trained to bring a fire extinguisher with them while acting as the fire watch. (Tr. 128, 161). Thus, the training of these two employees in the use of fire extinguishers does not demonstrate that the wall-mounted fire extinguishers, which are the subject of section 1910.157, were "intended for employee use," such that the subsection (c) would apply.[32]

In attempt to undermine Mr. Ford's testimony on this point, the Secretary points to his answer to a hypothetical posed to him during his cross-examination as a defense witness. Sec'y Br. 28; Sec'y Reply Br. 2-3. That exchange occurred as follows:[33]

> Q I'm asking you now if your testimony is that that first person at the scene does not use fire extinguishers that are on the wall at Teterboro to put that fire out?

[32] The Secretary criticizes Respondent for "point[ing] misleadingly to testimony by Maintenance Manager Ford that access to wall-mounted fire extinguishers is not an issue during welding operations, when the maintenance employees have the closest extinguisher with them." Sec'y Reply Br. 2-3. She goes on to argue that "Respondent ignores the obvious issue of what happens if a fire occurs outside of those limited welding occasions when its maintenance employees do not have immediate access to the closet where the extinguishers used during fire watch are located." *Id.* at 3. Relying on a portion of Mr. Ford's testimony (Tr. 184-87), she further argues that "the trained maintenance employees would use the nearest *wall-mounted* extinguisher – not the *closest* extinguisher – if they came upon an early-stage fire." *Id.* (emphases in original). However, as detailed below, the undersigned does not believe the cited portion of Mr. Ford's testimony supports the Secretary's case for applicability, and thus rejects the suggestion that the two employees' training on the use of fire extinguishers during welding and grinding implicated their use of the wall-mounted fire extinguishers.

[33] The Secretary points to the broader exchange between the Secretary's counsel and Mr. Ford, during which he consistently testified that none of the Plant's employees were trained to fight fires and, despite the wording of the EAP, were not instructed to use a fire extinguisher as the first person at the scene. (Tr. 184-86). The undersigned does not find that any part of this exchange lends support for the Secretary's argument that "Mr. Ford testified that the first person at the scene, if trained, *should* put out a fire with an extinguisher." Sec'y Br. 28 (emphasis added). In fact, twice he testified that "[t]hey're instructed not to." (Tr. 185-86).

> A I -- it's -- you're talking about two employees out of 600 that are actually trained. Yes. If the unlikely odds that one of those two people was the first responder in a location, yes they could do that -- they could make that assessment; they do that. But it's 2 of 600 employees are trained.
>
> Q So of those two employees that you just referred to, if they were the first person on the scene to encounter that fire, they do use one of those fire extinguishers off the wall to put it out?
>
> A They could make that choice. Yes.

(Tr. 187).

The undersigned does not find that this exchange undermines the remainder of Mr. Ford's testimony that, in actuality, these two employees were not trained to use the wall-mounted extinguishers during a fire emergency. (Tr. 161, 199, 202-03). Nor does this exchange establish that the wall-mounted fire extinguishers in the Teterboro Plant are "intended for employee use" such that subsection 1910.157(c) would apply. Mr. Ford's testimony was not based on any personal knowledge but rather his perception of what "choice" or "assessment" one of the two employees with fire extinguisher training "could make" in a hypothetical scenario where they were the first person on the scene of a first stage fire. (Tr. 186-87). Mr. Ford's personal knowledge, as the individual responsible for overseeing these two employees, is that they were "encouraged frequently not to" use the wall-mounted fire extinguishers in the event of a fire emergency. (Tr. 128, 203).

Although Respondent provided fire extinguishers in the Teterboro Plant, the Secretary has not proven they were "intended for employee use." Because it is otherwise uncontested that Respondent had "an emergency action plan and a fire prevention plan that meet the requirements of 29 CFR 1910.38 and 29 CFR 1910.39," the Secretary has failed to establish that the cited standard applied to Respondent's Teterboro Plant. Therefore, Item 2 of the Citation is vacated.

V. PENALTY

When OSHA issues a Citation, it may include a proposed penalty amount. *See* 29 U.S.C. § 659(a). OSHA has published a Field Operations Manual (FOM) to, among other things, act as a guide for its CSHOs in proposing penalties. FOM at 1-1, 6-1. FOM, Directive No. CPL-02-00-164 (eff. Jan. 23, 2023). However, the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *See Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0293, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995); *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to four criteria: (1) the size of the employer's business; (2) the gravity of the violations; (3) the good faith of the employer; and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

With Item 2 of the Citation vacated, only the proposed penalty of $64,361 for Item 1 of the Citation is at issue. In calculating this penalty, CSHO Plakalovic and AAD Mesuk determined the severity of the violation was "low since the closest exit routes were the ones that were blocked, and there were other exit routes that were a much further distance away." (Tr. 108; CX-1, at 3). As to probability, CSHO Plakalovic and AAD Mesuk determined it was "lesser" because "the probability of injury was low since the building has a fire alarm system and a sprinkler system." (Tr. 108; CX-1, at 3). The gravity of the violation was also determined to be "low because of the fire sprinkler and the alarm system." (Tr. 108; CX-1, at 3). This resulted in a baseline, gravity-

based penalty of $5,851. (Tr. 108-09; CX-1, at 3). Based on the number of repeat violations, at least three times in the five years before the instant Citation was issued, a repeat multiplier of 10 was applied to the based penalty. (Tr. 109; CX-1, at 3). A ten percent increase was applied because of Respondent's history in the five years prior to this Citation. (Tr. 109-10; CX-1, at 3). As a large employer, Respondent received no reduction based on its size. (CX-1, at 3). Because the violation was classified as a repeat violation, no reduction for good faith was applied. (Tr. 110; CX-1, at 3). This resulted in the proposed penalty of $64,361.

The Secretary argues that the proposed penalty is appropriate and requests the full amount to be assessed against Respondent. Sec'y Br. 24. Other than challenging the violation's repeat classification, Respondent has advanced no arguments specifically addressing the penalty amount.

Having weighed the relevant factors, the undersigned finds the proposed penalty for Item 1 of the Citation is appropriate and therefore assesses the full amount. CSHO Plakalovic and AAD Mesuk adequately accounted for the low gravity of the violation, as a function of severity and probability. As this is one of multiple repeat violations of the standard, the undersigned finds the repeat multiplier is appropriate under the circumstances, as is the increase in the penalty based on Respondent's violation history. The proposed penalty also adequately accounted for Respondent's status as a large employer and appropriately contains no reduction for Respondent's good faith based on the violation being a repeat violation. The proposed penalty of $64,361 is assessed for Item 1 of the Citation.

VI. ORDER

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

Based on the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED as a REPEAT violation and a PENALTY of $64,361 is ASSESSED.

2. Citation 1, Item 2 is VACATED.

SO ORDERED.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

Date: July 8, 2024
Washington, DC