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.

KIMBLE COMPANY, d/b/a/ Kimble Sanitary Landfill,

Respondent.

OSHRC DOCKET No. 17-0639

APPEARANCES:

For the Complainant:

Adam Lubow, Esq.
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio

For the Respondent:

Tod T. Morrow, Esq.
Morrow & Meyer LLC
Canton, Ohio

BEFORE: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

The Respondent, Kimble Company (Kimble), operates a sanitary landfill in Dover, Ohio. On November 10, 2016, a wheeled front-loader operating on the landfill struck and killed a Kimble employee who was on foot. Kimble's timely report of the fatality to the Occupational Safety and Health Administration (OSHA), and OSHA's subsequent investigation and inspection, resulted in OSHA issuing to Kimble a one-item serious citation alleging that on the day of the fatality Kimble

had violated section 5(a)(1) of the Occupational Safety and Health Act of 1970. 29 U.S.C. §§ 651-678 (OSH Act). Section 5(a)(1), which is commonly known as the "general duty clause," requires that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

The citation alleges that on the day of the fatality Kimble violated section 5(a)(1) in the following manner:

> [E]mployee(s) at the Kimble Company were permitted to walk through areas where earth moving equipment, compactors, tippers, dump trucks, and semi-tractors with end-dump trailers were operating. These conditions exposed employees to the hazardous zones caused by maneuvering/dumping operations of such equipment and vehicles. Employees were thereby exposed to struck-by/crushed-by hazards from nearby equipment operation.

The citation then set forth the means that the Secretary alleged would abate the described hazard, as follows:

> Among other methods, one feasible and acceptable abatement method to correct this is to
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> 1. Appoint a dedicated spotter/observer to monitor, direct, and coordinate all movement at the face of the landfill
> 2. Develop and implement procedures to ensure employees are not in the danger zone where vehicles are maneuvering/dumping
> 3. Ensure equipment operators are adequately trained on new procedures to safely operate in this environment.

Kimble timely contested the citation and thereby invoked the jurisdiction of the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the OSH Act. 29 U.S.C. § 659(c). The Commission docketed the matter on April 13, 2017, and the Secretary thereafter filed his formal complaint pursuant to Commission Rule 34(a), 29 C.F.R. § 2200.34(a), wherein the Secretary re-alleged the allegations set forth in the citation. The

Commission's Chief Judge assigned the matter to the undersigned for hearing and decision. The hearing was conducted in Cleveland, Ohio, on April 19, 2018. Post-hearing briefing was completed on August 2, 2018.

The dispositive issues for decision are as follows:

- Did Kimble establish that the Mine Safety and Health Act (Mine Act), 30 U.S.C. §§ 801–962, preempts application of the OSH Act to the cited landfill operations pursuant to section 4(b) of the OSH Act?

  Decision: No. Kimble did not establish that the OSH Act was preempted.

- Did the operations at Kimble's landfill on the day of the fatality constitute "construction work," so that certain construction industry standards (codified at 29 C.F.R. Part 1926) supplanted the application of section 5(a)(1) to the cited hazard?

  Decision: No. The landfill operations did not constitute "construction work."

- Did the Secretary prove by a preponderance of the evidence that Kimble's means of addressing struck-by hazards at the landfill were inadequate or that there were additional or more effective feasible means by which Kimble could have eliminated or materially reduced the hazard?

  Decision: No. The Secretary did not meet his burden of proving this element of a section 5(a)(1) violation.

Because the Secretary did not meet his burden of proof, the sole citation item must be vacated.

FINDINGS OF FACT

Except where the following findings indicate that the evidence was insufficient to establish a certain fact, the following facts were established by at least a preponderance of the evidence:

OSH Act Coverage and Mine Act Preemption

1. Kimble maintains a workplace at 3596 State Route 39 NW, in Dover, Ohio, where it owns and operates both a sanitary landfill and a mine. The landfill at this business address is the only landfill that Kimble operates, but Kimble operates multiple mines at other locations. (Ex. C-

7, p. 1; T. 131). Kimble is engaged in a business that affects interstate commerce. (Answer, ¶¶ II & III).

2. Kimble operates the landfill pursuant to permitting under federal, state and local environmental and public health laws and regulations. (T. 111-113, 118; Ex. C-7, p. 5).

3. Kimble has about 250 employees. Kimble designates its employees as working in various "divisions" of the company, and Kimble regarded the "mining" and the "landfill" operations to constitute different divisions within the company. (Ex. R-4, p. 8; T. 181). About 22 workers are assigned to Kimble's landfill operation. (T. 109-110). Kimble employs about 100 other workers in non-landfill operations at the same business address as the landfill. Kimble employs about 125 more workers at four other locations. (Ex. C-7, p. 1; T. 109-110).

4. The mine that Kimble owns and operates at the same business address as the landfill has been assigned "metal/non-metal mine number 33-00089" by the federal Mine Safety and Health Administration (MSHA). (T. 10, 105-106, 131; Stipulation ¶ 2; Ex. R-2). The evidentiary record regarding the activities at mine number 33-0089 is very thin. The materials mined at mine number 33-00089 include "construction aggregates, clays and shales." (T. 105-06, 109, 131-32). The parties have stipulated that mine number 33-00089 occupies a "portion" of the tract of land on which the landfill is co-located, but there is no evidence as to precisely what "portion" of the tract that is. (T. 10; Stip. ¶ 2). There is similarly no evidence as to precisely what the footprint of the "mine site" is relative to the footprint of the "landfill site." The whole of the evidence fails to establish by a preponderance that there is any overlap in the footprints of the mine and the landfill. (T. 10, 105-106, 192; Stipulation ¶ 2).

5. The workplace fatality on November 10, 2016 that precipitated OSHA's investigation occurred at the landfill and involved employees, equipment and vehicles that were engaged solely in landfill operations and not engaged in any mining operations. (T. 10-11, 54, 105-106).

6. Kimble timely reported the workplace fatality to OSHA. Kimble did not report the fatality to the MSHA. (T. 10, 54; Stip. at ¶¶ 3, 4, 5; Ex. C-8, p. 6).

7. Kimble maintains records of workplace injuries and illnesses that arise out of its landfill operations on OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and on OSHA Form 300A (Summary of Work-Related Injuries and Illnesses). For injuries or illnesses related to its operation of mine number 33-00089, Kimble maintains separate injury and illness records that are required by MSHA. (Ex. C-10; T. 55-56, 221-22).

8. Kimble had most recently trained the employee who was killed on November 10, 2016 (the decedent) on its "OSHA Personal Protective Equipment Policy" about six months earlier (T. 198-200; Exs. R-5 & R-6) and had provided other training to the decedent and other employees who worked at the landfill on matters covered by OSHA standards. (*See, e.g.*, T. 176, 178; Exs. R-8 & R-9 [containing documentation that Kimble provided training on, *inter alia*, machine guarding, hazard communication, housekeeping, confined spaces, electrical hazards]). Kimble also trained the decedent and other employees who worked at the landfill on MSHA subjects, but in Kimble's view much of this training was pertinent to OSHA subjects as well. (T. 121, 173, 175-179, 191-192; Exs. R-8 & R-9).

Landfill Operations as "Construction Work"

9. Before the landfill opened for operations, the area where solid waste would be deposited was excavated, then a clay and polyethylene liner system was installed, and then a piping system for the drainage of leachate was installed. (T. 110-111). Upon the landfill becoming

operational, solid waste began to be deposited in active "cells," where the waste would be compacted along with soil that is added to it. Over time, multiple cells would be established outward and upward on top of each other "in successive layers." (T. 76, 111).

10. As layers of cells are established over time, it is necessary from time to time to install methane gas extraction wells and associated piping to move the gases that are generated within the closed cells to an on-site processing plant. (T. 111). There is no evidence that any component of a gas extraction system was in the process of being installed or built on the day of the fatality. There is likewise no evidence that any of the vehicles or equipment on the landfill that day were involved in the installation or building of any gas extraction system.

11. On the day of the fatality, the only operation at the landfill in which moving vehicles and equipment were involved was the ongoing landfill operation of waste movement and compaction. (T. 60, 171). These operations were not an integral and necessary part of any construction work. To the extent that these operations were in the nature of construction activities, those activities were ancillary to the operation of the landfill and did not constitute construction work.

Struck-by Hazard at Landfill

12. The fatal accident occurred on the landfill. For the purposes of this decision, different areas of the landfill are defined as follows:

a. *Landfill*. The "landfill" is the entire footprint of the landfill.

b. *Working face.* The "working face" is the part of an active cell in the landfill in which waste and cover soil is in the process of being deposited and compacted by bulldozers and other heavy equipment called compactors. (T. 113, 115-116, 148).

c. *"Front" of the working face.* The front of the working face is the margin of the working face that abuts the "tipping area" (defined next). The linear distance of the "front" of the working face at any given time varies, but it can be up to 200 feet long. (T. 116, 169). (The record does not indicate what the length of the working face was on the day of the fatality).

d. *"Tipping"* or *"tipper" area.* The "tipping" or "tipper" area abuts the "front of the working face" (defined immediately above). (T. 119, 169). In the tipping area, large self-powered hydraulic platforms called "tippers" are oriented so that one end of each tipper abuts the front of the working face. (T. 114). "End-dump" trailers loaded with solid waste are moved onto the tippers, and once in place, the tipper's hydraulic mechanism elevates one end of the tipper to create an incline that slopes toward the working face. The incline causes the solid waste inside the trailer to slide out the end of the trailer and onto the working face by force of gravity. (T. 39-40, 80-81, 114-115). The end-dump trailers appear to be the same size as the trailers hauled by semi-trucks that are common on the nation's highways. (T. 186-187; *see* photos in Exs. C-1 & R-13). Because the footprint of the working face changes over time, the tippers must be repositioned about every seven days. (T. 170). The location of the tipping area thus changes when such repositioning occurs.

e. *Approach area.* The "approach area" is where dump trucks, tractor-trailers, and other vehicles approach the tipping area to deliver waste to the landfill. The approach area ends where the tipping area begins. (T. 113-115, 134-135).

f. *Sides of the working face.* The margins of the working face of the landfill that are *not* abutted by the tipper area constitute the "sides" of the working face. Vehicles and

equipment involved in delivering, moving and compacting waste do not operate in the vicinity of the sides of the working face. (T. 149-150, 163).

g. *Fence line.* Environmental and health regulations require that Kimble maintain a fence whose purpose is to prevent litter from blowing off the grounds of the landfill. (T. 32-33, 118). Kimble uses plastic fencing material for its fence line, because that kind of fencing material is more easily repositioned as weather conditions and the configuration of the working face require. The location of the fence at any given time, and the fence's relative distance from the front of the working face, varies depending on wind conditions and other factors, but the fence can be set up as near as twenty feet from where bulldozers and other heavy equipment are operating on the landfill. (T. 118-120).

13. The locations of the "working face," the "tipping area," the "approach area," the "front" and "sides" of the working face, and the "fence line" are impermanent. They change over time as successive layers of cells are completed in the course of ongoing regular operations of the landfill. (T. 117-119, 149).

14. Kimble recognized that the movement of the vehicles and equipment on the landfill exposes employees who would be on foot in such areas to struck-by hazards that could cause serious injury or death. (T. 147-149).

15. Kimble prohibited workers from being on foot in the working face of the landfill. (T. 155, 120, 123, 113).

16. Kimble permitted landfill employees to be on foot in the tipping area and in the approach area of the landfill at times when vehicles and equipment were operating in those areas, but only when an employee's presence in those areas was necessary for the employee to perform necessary duties. (T. 147-149).

17. Kimble has a safety program to protect workers on foot from struck-by hazards, which includes the following specific measures:

a. Kimble's vehicles and equipment are equipped with backup alarms. (T. 166).

b. Kimble posts signs and notices that warn of the presence of moving vehicles and equipment. (T. 98).

c. Kimble requires all landfill employees to wear high-visibility vests in addition to other personal protective equipment. (T. 77-79, 98, 179-182).

d. Kimble's work rules and practices require that when a worker must be on foot in an area where vehicles and equipment are operating in order to perform essential duties, the worker must maintain awareness and exercise caution with a view toward staying clear of the operating vehicles and equipment by (1) proceeding carefully and alertly when on foot and to mind what the vehicles and equipment are doing, and (2) making and maintaining eye contact with the equipment operators and obtaining the operator's acknowledgment before approaching equipment. (T. 34, 77-79, 96-98, 123, 126, 146-47, 181-182).

18. Kimble succeeded in indoctrinating its employees on its safety rules and practices through initial training for new employees, and through continuing training and emphasis thereafter. (T. 182-83). New employees at the landfill receive a 4-hour training orientation that includes OSHA subjects such as lockout/tagout, confined space, hazard communication, hazardous waste operations, personal protective equipment, and awareness of surroundings. (T. 176). New employees at the landfill also complete two 24-hour MSHA training programs—one of the programs pertains to "metal/non-metal" mines and the other program pertains to coal mines. (T. 177-179). This MSHA training includes much training that is pertinent to OSHA standards.

(T. 121). After this initial new-employee training, landfill employees attend weekly and monthly safety talks on topics relevant to the working conditions in the landfill. (T. 179-181; Exs. R-2, R-6, R-8, R-9). Kimble communicates its rules and safe practices for working around moving equipment in its initial and annual training sessions, and the subject is covered in some of the monthly and weekly safety meetings as well. (T. 146-148, 181-182). Supervisors at the landfill emphasize certain "cardinal" safety rules and practices with frequent reminders. For example, nearly every day the foreman for the landfill operations reminded landfill workers to "stay away from the working face," in order to "make sure that they have awareness of what's going on and talk to the operators." (T. 126, 155-56).

19. Kimble's landfill workers were familiar with these rules and practices, and they knew what they had to do (and what they had to refrain from doing) to comply with these rules and practices. Kimble successfully imbued in its workforce an ethic of safety and compliance with its work rules and practices. (T. 181-83). Both the decedent and the operator of the loader received and understood the training and guidance Kimble provided on keeping safe from struck-by hazards. (T. 197-205; Exs. R-2, R-5, R-6, R-7, R-8, R-9).

20. Kimble exercised reasonable diligence in discovering incidents of noncompliance with its safety rules and practices. (T. 128-29, 144, 150, 183-84).

21. Kimble is reasonably diligent in enforcing its safety rules and practices by utilizing progressive discipline that includes verbal warnings and on-the-spot corrections, notifying next level supervisors in the event of repeated violations, issuance of written reprimands, and imposing probation and suspensions. (T. 150-51, 154, 184-85, 198, Ex. R-4).

22. The decedent had worked at the Kimble landfill for 17 years, and in that time Kimble had not imposed any written discipline on him. (T. 185). Kimble reasonably regarded the decedent to have been an exemplary and safety-minded employee. (T. 185, 189-90).

23. The decedent's principal job at the landfill was to collect litter that had accumulated along the fence line and to put that litter in plastic bags for eventual deposit in the working face. The decedent had other duties in addition to this principal duty (T. 157, 165), but he was not performing any of those other duties on the afternoon that he was killed. (T. 33, 160).

24. There are different ways by which the bags of litter that a worker such as the decedent and others would have gathered along the fence line may be transported and deposited in the working face.

a. The worker who had collected and bagged the litter could pile the bags near the fence line and then summon the front-loader to come to that pile. Upon arriving at the pile, the operator of the front-loader would set the brake and the worker who was on foot would put the bagged trash in the loader's bucket, all the while maintaining communication with the operator of the loader. After all the bags had been put in the bucket, the loader would transport the bagged trash to the working face. This authorized procedure entails the front-loader traveling to the location of the piled bags near the fence line for the purpose of collecting the bagged trash; the procedure does *not* entail a worker traversing the landfill to wherever the loader might happen to be at any given time in order to put bagged trash in the loader's bucket. (T. 153-54).

b. At the end a shift, a worker who had collected and bagged the litter could take the bags to a location on the *side* of the working face and toss the bags into the working face from that location. Depositing the bags onto the working face from a location along

the side of the working face does not expose a worker to struck-by hazards from moving equipment, because the equipment does not operate in the vicinity of the side of the working face. (T. 120-121, 147, 149-150, 163, 167). The worker could transport the bags to the side of the working face at the end of the worker's shift either by loading the bags of waste onto a small truck and then driving the truck to a location on the side of the working face, or simply by carrying the bagged litter by hand and walking it to the side of the working face to deposit the bagged litter in the working face. (T. 158-159).

c. The worker who had collected the bagged litter could place the bags about 20 to 30 feet away from the fence line to where other equipment could access them and sweep them onto the working face. (T. 119-120).

25. On the day of the fatality, the fence line was set up about 150 yards from the front of the working face. (T. 158-160). The decedent's supervisor last observed the decedent collecting litter in the vicinity of the fence line about an hour before he was killed. The supervisor left the landfill to go to a dental appointment soon after that observation, and he was not on the grounds when the decedent was killed. (T. 161).

26. A Kimble employee was operating a front-end loader (also "front loader" and "loader") in the tipping area and the approach area near the tippers shortly before 4:00 p.m. on November 10, 2016, when he backed it up in the approach area and struck and killed the decedent. (T. 186). The loader struck the decedent at a point that was less than 100 feet from the tippers, although the record contains no measurement of the precise distance.[1] (Exs. R-13; Ex. C-6, p. 6; Ex. C-7, pp. 2-3 & 6; T. 211-214).

[1] The whole of the photographic and testimonial evidence permits the reasonable inference that the strike happened less than 100 feet from the tippers. There is reliable evidence that the decedent's body was about the same distance from the tippers as was the cab of a tractor-trailer

27. The loader that struck the decedent is accurately depicted in the photograph in Exhibit C-1 at the page numbered "24 of 28." Typically, only one loader operates at the landfill at any given time, and it operates principally near the tippers. The loader's primary function is to move previously dumped waste to a position where a bulldozer and the compactors can more easily spread it uniformly over the working face and compact it into place. (T. 116).

28. The loader was equipped with a fully functioning audible back-up alarm, and its rear-view mirrors were in place. (T. 166; C-7, pp. 4-5). Just before the loader struck the decedent, its operator checked the loader's rear mirrors as was his practice. (Ex. C-7, p. 3). The operator never saw the decedent. He did not become aware that the loader had struck the decedent until moments after the fact, after another worker discovered the body and frantically alerted him. (Ex. C-3, p. 5).

29. No one witnessed the loader strike the decedent. It is unknown why the decedent had decided to be where he was when he was struck, or what he was doing or was intending to do in that location. (Ex. C-7, p. 2). It was uncharacteristic for the decedent to be in the area where he was struck (T. 162), and it was not necessary for him to be in that location in order to perform essential assigned duties. (T. 160).

30. The last person to see the decedent alive was another worker (Glen Butler), who is employed by a subsidiary company of Kimble. (T. 140). Butler had driven a semitruck and end-dump trailer onto the landfill, and he had backed the trailer up to a tipper in preparation for it to be moved onto the tipper. Butler was not in a position to see the loader strike the decedent because he was on foot tending to the trailer, and the trailer was situated between him and the spot where

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that had been backed up to one of the tippers in preparation for the trailer to be backed onto the tipper. (Ex. C-7, pp. 2-3; Ex. R-13; T. 212-214; Ex. C-7, p. 6).

the decedent was struck. After returning to the other side of the trailer, Butler saw the decedent's lifeless body in the approach area and frantically alerted the loader's operator.

31. Butler told police that a few minutes before he discovered the decedent's body, he had been in the cab of his semi-truck (which was facing away from the tippers) and had noticed the decedent about 20 yards further back from his location in the cab (i.e., further away from the tippers). Butler told police that he observed the decedent "picking up some stuff off the ground" and that "there was a front end loader sitting there" and that the decedent "was putting the stuff in the bucket" of the loader. (Ex. C-3, p. 6; Ex. C-6, pp. 2-3). The evidence is insufficient to establish precisely what Butler observed the decedent doing at this time.[2] However, if the decedent was placing bagged trash in the loader's bucket at this time, that activity would have been contrary to the authorized procedures described in ¶ 24, *supra*.

32. The decedent did not assure that the loader's operator was aware of his presence. The decedent did not make eye contact or otherwise communicate with the operator of the loader regarding his intended actions at any time before or during the time that the decedent positioned himself in the part of the approach area where he was exposed to being struck by the loader. (Ex. C-3). The operator expressed his shock and dismay that the decedent had not done so, telling investigating police that "anyone who is on foot and near heavy machines … is supposed to get the driver's attention and stay clear of the machines." (Ex. C-3, p. 5). In the minutes before the

[2] The Secretary did not present testimony of either Butler or the operator of the loader. The evidentiary record of what both Butler and the loader's operator reported to the police as having seen and remembered is set forth in their written statements that are part of the police report received in evidence at Exhibit C-3. Those statements and that police report are spare and undeveloped, and they beg many questions that apparently were never put to either Butler or the operator of the loader.

The operator's seat for the loader faces toward the loader's bucket (*See* photo at Ex. 1, p. 24 of 28). The record provides no indication why the loader's operator apparently failed to see what Butler saw—the decedent putting "some stuff" in the loader's bucket.

loader struck him, the decedent was in violation of Kimble's rule and practice that required employees on foot to make and maintain eye contact with operators of equipment and vehicles posing a struck-by hazard.

33. When the loader struck the decedent, the decedent was not required to be where he was in order to perform essential job duties. (T. 160). At the time the loader struck him, the decedent was violating Kimble's work rule and practice not to be on foot around such equipment if it was not necessary in order to perform one's essential duties. (Ex. C-7, p. 4; T. 160, 162).

34. At the time the loader struck him, the decedent was not wearing the high-visibility vest that Kimble required that he wear. This was very unusual—the decedent was known for always wearing his vest. (T. 162, 189-91). The record does not disclose where the decedent had put his vest, but because he was struck near the end of his workday, some surmised that he might have removed his vest preliminary to leaving work. (T. 103). At the time the loader struck him, the decedent was violating Kimble's rule and practice that landfill workers wear a high visibility vest while on the landfill.

35. Up to the time of the fatality here, there had not been a struck-by incident at Kimble's landfill for the approximately sixty years that Kimble has operated a landfill. (T. 109, 126-127).

DISCUSSION

The Commission obtained jurisdiction of this matter under section 10(c) of the OSH Act upon Kimble's timely contest of the citation and proposed penalty. 29 U.S.C. § 659(c). Kimble has employees and is engaged in a business affecting interstate commerce, and it thus meets the OSH Act's definition of "employer." 29 U.S.C. § 652(5).

OSH Act Preemption by Mine Act

Section 4(b)(1) of the OSH Act provides in part: "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory

authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). Kimble contends that the Mine Safety and Health Act (Mine Act), 30 U.S.C. §§ 801–962, which is administered by the Mine Safety and Health Administration (MSHA) within the Department of Labor, preempts OSHA's regulation of the cited struck-by hazard at the landfill by operation of section 4(b)(1) of the OSH Act.

The Commission evaluates an employer's argument that OSHA's authority is preempted under section 4(b)(1) by considering: (1) whether the other federal agency has the statutory authority to regulate the cited working conditions; and (2) if the agency has that authority, whether the agency has exercised it over the cited conditions by issuing regulations having the force and effect of law. *JTM Indus., Inc.*, 19 BNA OSHC 1697, 1699 (No. 98-0030, 2001).

A section 4(b)(1) claim of preemption is an affirmative defense, for which the burden of proof rests with the employer. *Idaho Travertine Corp.*, 3 BNA OSHC 1535, 1536 (No. 1134, 1975); *Tidewater Pac. Inc.*, 17 BNA OSHC 1920, 1923 (No. 93-2529, 1997), *rev'd in part on other grounds*, 160 F.3d 1239 (9th Cir. 1998).

The issue of whether the Secretary erred in determining that certain activity at a worksite on which a mine is located is regulated by OSHA and not by MSHA involves a complex question of law and fact. *Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2d Cir. 1978) (observing that "a determination of [section 4(b)(1)] preemption requires an inquiry into complex issues of law and fact"). For Kimble to meet its burden of proof on this complex question, it was incumbent on Kimble to develop an evidentiary record sufficient to support the conclusion that the Secretary's determination that the Mine Act did not apply was unreasonable. *See Sec'y of Labor v. Cranesville Aggregate Cos., Inc.*, 878 F.3d 25 (2d Cir. 2017) (applying *Chevron* framework to Secretary's determination that the OSH Act and not the Mine Act applied to hazards alleged to be

present at a workplace that was co-located on the same grounds on which there was a mine, and upon close scrutiny of a fully developed evidentiary record on that issue, concluding at *Chevron* "step two" that the Secretary's determination was reasonable).

The spare evidentiary record respecting the nature and extent of the operation of Kimble's mine number 33-00089 is addressed in ¶ 4 of the Findings of Fact, *supra*. Kimble's argument in its post-hearing brief in support of preemption by the Mine Act is as thin as the evidentiary record is spare. The entirety of that argument is as follows:

> Kimble submits that it complied with all pertinent requirements under the Act, including the general duty clause and specific construction safety standards. It also complied with all applicable MSHA standards. Indeed, Kimble's safety program was geared toward MSHA compliance, because the landfill was located within the confines of a mine. Indeed, there is no dispute that Kimble's landfill operations are occasionally subject to inspections by MSHA officials. (Tr. 191-192).
>
> Kimble submits that under the facts of this case, OSHA's jurisdiction was preempted. *See* 29 U.S.C. § 635(b)(1) [sic]. As noted above MSHA enforces safety rules pertaining to work around heavy earth moving equipment. Kimble should not be subject to the whims of OSHA's general duty clause when it has complied with applicable MSHA standards that more closely address the hazards in the landfill.

There is no evidentiary support for Kimble's assertion that "MSHA enforces safety rules pertaining to work around heavy earth moving equipment" around the landfill. And the only evidence that Kimble cites in support of its argument that the landfill "was located within the confines of the mine" and that the landfill was "occasionally subject to inspections by MSHA officials" is the following direct examination testimony of Kimble's safety director (T. 192):

> Q: Okay. Does MSHA inspect the landfill area?
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> A: They occasionally drive through but it's not nearly an inspection as you would expect, if they were on a mine site.
>
> Q: Okay. More thorough on the mine site?

A: That's correct.

Q: Why does MSHA have jurisdiction of the landfill?

A: The landfill is on an IM 9 permit, so they have jurisdiction over that, as well.

This testimony is not corroborated or augmented by any other documentary or testimonial evidence. That testimony, standing alone, is insufficient to support a finding or conclusion that the Secretary unreasonably determined that the OSH Act (and not the Mine Act) applied to struck-by hazards at the landfill. Kimble's preemption argument is rejected.

Preemption by Construction Industry Standards

Kimble contends that certain OSHA construction industry standards, codified at 29 C.F.R. Part 1926, apply to struck-by hazards at the landfill, so that those standards preempt application of the general duty clause to the cited hazard. *See Con Agra, Inc.*, 11 BNA OSHC 1126, 1145 (No. 81-2606, 1983) (noting "that specific, promulgated standards will preempt the general duty clause, but only with respect to hazards, conditions or practices expressly covered by the specific standards").

The construction industry standards prescribed in Part 1926 apply to "every employment and place of employment of every employee engaged in construction work." 29 C.F.R. § 1910.12(a). The term "construction work" as used in section 1910.12(a) "means work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b).

"Part 1926 applies … to employers who are actually engaged in construction work or who are engaged in operations that are an integral and necessary part of construction work." *Snyder Well Serv., Inc.*, 10 BNA OSHC 1371, 1373 (No. 77-1334, 1982). "Activities that could be regarded as construction work should not be so regarded when they are performed solely as part of a nonconstruction operation." *BJ-Hughes*, 10 BNA OSHC 1545, 1547 (No. 76-2615, 1982);

see also Royal Logging Co., 7 BNA OSHC 1744, 1750 (No. 15169, 1979) (concluding that even though a logging operation involved some roadbuilding, that roadbuilding was "ancillary to and in aid of [the logging company's] primary nonconstruction function to cut and deliver logs"), *aff'd* 645 F.2d 822 (9th Cir. 1981). Similarly, the mere use of equipment that is often used in construction work does not transform non-construction work to "construction work." *BJ-Hughes*, 10 BNA OSHC at 1547 (rejecting Secretary's argument that Part 1926 applied because the equipment involved was typically used in construction).

Kimble contends that Part 1926 applies to all operations at the landfill, including the movement and compaction of waste and soil as was occurring on the day of the fatality, because those activities are in furtherance of the *construction* of a landfill.

There is no evidence to support the conclusion that anything in the nature of "construction work," such as the installation of methane gas extraction systems (T. 110-112), was occurring at the landfill on the day of the fatality. Similarly, there is no evidence that the vehicles and heavy equipment that were operating on the landfill at the time of fatality were engaged in any activity other than the movement and compaction of waste and soil.

Kimble argues that the solid waste itself (as well as the soil used to cover the waste in the active cell at the end of daily operations) was in the nature of "building material" out of which the cells of the landfill are "constructed," and thus the depositing and compaction of that material in the cells involved the *construction* of those cells. (Resp't Br. 23-24). This argument is rejected. To the extent that the creation of the completed cells of the landfill could be deemed to be "construction" of those cells, any such construction is ancillary to Kimble's primary non-construction function of operating a landfill, so that this activity does not itself constitute "construction work" to which Part 1926 would apply. *Royal Logging Co.* at 1750.

The Commission's decision in *Woolston*, 15 BNA OSHC 1114 (No. 88-1877, 1991), does not dictate a contrary conclusion. In *Woolston*, OSHA cited an employer for violations of Part 1926 for conditions involving a trench excavation that had been dug in the course of constructing a methane gas venting system at a landfill. *See also EMCON/OWT, Inc.*, No. 04-1406, 2006 WL 168534 (O.S.H.R.C.A.L.J. Jan. 17, 2006) (involving citation alleging violations of Part 1926's excavations standard issued to a contractor that was installing a gas collection system at a landfill).[3] In contrast to both *Woolston* and *EMCON/OWT*, the heavy equipment operating on the Kimble landfill on the day of the fatality was not engaged in the construction of a methane gas venting or collection system, or the construction of anything else. Rather, at the time of the fatality, the vehicles and equipment that were operating on the landfill were simply engaged in the process of depositing and compacting solid waste in an active cell. That activity is simply the *operation* of a landfill, as the president of Kimble indicated frequently in the course of his testimony. (*E.g.*, T. 109, 122-23, 113, 135). Kimble was not engaged in any "construction work" as defined in section 1910.12(b).

Kimble's argument that certain standards in Part 1926 preempt application of the general duty clause is rejected.

Citation 1, Item 1: General Duty Clause

The Fatality Occurred in the Landfill's Approach Area

As described in ¶ 26 of the Findings of Fact, the fatality occurred in the "approach area" of the landfill. That finding of fact is at odds with testimony that the Secretary presented in his

[3] Although the Secretary alleged violations of Part 1926 in both *Woolston* and *EMCON/OWT, Inc.*, the employers in those cases appeared not to contest the application of Part 1926 to the cited activities, and thus the issue of whether Part 1926 applied appears not to have been adjudicated in either of those cases. The two cases demonstrate only that in the past the Secretary has determined that certain activities that had taken place at a landfill constituted construction work.

case-in-chief, which was that the decedent was on the "working face" when he was struck and killed. (T. 33-37, 57, 96-97). That testimony was flawed, and it misidentified the actual area of the landfill in which the fatality occurred.

The Secretary's sole witness—the industrial hygienist (IH) who conducted the investigation that preceded the issuance of the citation—seems to have mistakenly understood the landfill's "working face" to include any area where heavy equipment was operating. (*See, e.g.*, T. 33-37, 96-97). Defined in such a way, the "working face" would include the "approach area," as that area is defined in ¶ 12 of the Findings of Fact. This was a profound misunderstanding, and it appears to have resulted in the IH misinterpreting what the Kimble employees were attempting to communicate to her during her investigatory interviews of them. When the IH interviewed Kimble employees and they used the term "working face," they were using that term as it is defined in ¶ 12 of the Findings of Fact, and they were not intending to communicate to the IH that the "approach area" is a part of the landfill's "working face." (T. 113, 115-116, 148).

This conclusion regarding the IH's misunderstanding becomes apparent upon scrutinizing her testimony. Kimble employees told the IH that Kimble had a rule prohibiting employees being on foot in the "working face," (e.g., T. 34, 64) and at the hearing Kimble's witnesses confirmed that Kimble does indeed have such a rule. (E.g., T. 155). As the president of Kimble convincingly testified, "there's no good reason to walk into the working face where the bulldozers and compactors are running back and forth" moving and compacting waste and soil on the surface of an active cell. (T. 120, 123, 113). So, while the IH was accurate in testifying that Kimble had a rule against walking through the "working face" (T. 34, 58), she was *inaccurate* in testifying that the decedent was violating that rule at the time he was struck and killed. (T. 35). Consistent with her misunderstanding, she further erroneously testified that one way the fatality could have been

avoided would have been for Kimble to have enforced (or in other words, to have prevented the decedent from violating) its rule prohibiting employees from being on foot in the working face. (T. 59). But, contrary to the IH's deep misunderstanding, the clear and convincing evidence is that Kimble did *not* have a rule prohibiting employees from being on foot in the approach area, where the decedent was struck and killed. (T. 153, 158, 186; Ex. R-13).

Proof of Section 5(a)(1) Violation

To establish a violation of the general duty clause, the Secretary must prove that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Peacock Eng'g, Inc.*, 26 BNA OSHC 1588, 1589 (No. 11-2780, 2017). In addition, "the Secretary must also show the employer knew or, with the exercise of reasonable diligence could have known of the hazardous condition." *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1305 (No. 06-1201, 2008).

Kimble concedes the presence of the first three enumerated elements (Resp't Br. 15; *see also* Resp't Reply Br. 4), and ¶ 14 of the Findings of Fact establishes those elements of the Secretary's burden of proof.

Kimble challenges the sufficiency of the evidence on the fourth enumerated element, and thus the dispositive issue is whether the Secretary carried his burden to prove that a feasible and effective means existed to eliminate or materially reduce the hazard.[4] In order to establish this

[4] Kimble also (1) disputes that the Secretary proved that it had knowledge of the hazardous condition, and (2) asserts the affirmative defense of unpreventable employee misconduct. (Resp't Br. 24-28). As indicated in the final subsection of the Discussion, resolution of the sufficiency of the evidence on the fourth enumerated element of a violation of section 5(a)(1) in favor of Kimble resolves these two issues in Kimble's favor as well.

fourth enumerated element of a section 5(a)(1) violation, the Secretary "must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enters.*, 19 BNA OSHC 1161, 1190 (No. 91-3144, 2000) (consolidated).

In a case such as this, where an employer has undertaken measures to address a hazard, the Secretary must establish that the employer's measures were inadequate. *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-1774 (No. 04-0316, 2006); *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1215 (D.C. Cir. 2014) (noting that in a matter involving an alleged violation of section 5(a)(1), "[w]hen an employer has existing safety procedures, the burden is on the Secretary to show that those procedures are inadequate"). Commission precedent suggests two similar ways that the Secretary may establish that an employer's existing safety procedures were inadequate—by demonstrating either (1) "that there was a more effective feasible means by which [the employer] could have freed its workplace of the hazard," *Ala. Power Co.*, 13 BNA OSHC 1240, 1243-1244 (No. 84-357, 1987), citing *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986), or (2) that there were "specific *additional* measures" required to abate the hazard. *Pelron Corp.*, 12 BNA OSHC 1833, 1836 (No. 82-388, 1986) (emphasis added). In order to prove the former, the Secretary must show that "conscientious experts, familiar with the industry would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Arcadian Corp.*, 20 BNA OSHC 2001, 2011 (No. 93-0628, 2004), quoting *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2032 (No. 89-0265, 1997). In order to prove the latter, the Secretary must show that "knowledgeable persons familiar with the industry would regard additional measures as necessary and appropriate in the particular circumstances existing at the employer's worksite." *Inland Steel Co.*, 12 BNA OSHC 1968, 1970-

71 (No. 79-3286, 1986), citing *Cerro Metal Products Div., Marmon Grp., Inc.*, 12 BNA OSHC at 1822–23; *see also Pelron Corp.*, 12 BNA OSHC at 1835 (noting that the Secretary must "prove additional measures that would have materially reduced the risk of harm that conscientious safety experts familiar with the industry would take into account in prescribing a safety program").

Even if the Secretary fails to establish that specified alternative or additional measures would be feasible and effective in materially reducing an identified hazard, the Secretary may nevertheless establish that an employer's existing safety program was inadequate to protect its employees from exposure to the hazard under section 5(a)(1) by showing that the employer failed to have done any of the following: (1) established work rules designed to prevent exposure, (2) properly communicated those rules to its employees, (3) taken steps to discover noncompliance with the rules, and (4) effectively enforced its rules in the event of noncompliance. *Ala. Power Co.*, 13 BNA OSHC at 1244, citing *Inland Steel Co.*, 12 BNA OSHC at 1976.

Alternative or Additional Effective Feasible Means to Eliminate or Reduce the Struck-by Hazard

In describing "one feasible and acceptable abatement method to correct" the struck-by hazard at the landfill, the citation set forth three enumerated measures (quoted verbatim at the outset of this decision), which may be summarized as: (1) use a dedicated spotter; (2) prohibit foot traffic in areas where vehicles and equipment are in operation; and (3) train equipment operators on "new procedures to safely operate in this environment."[5]

[5] The text of the citation is somewhat ambiguous as to whether the Secretary was proposing each of the three enumerated measures as a stand-alone means to abate the hazard, or whether the Secretary intended the three enumerated means to be viewed collectively as a single feasible means to abate the hazard. The ambiguity was not addressed at the hearing, but the Secretary expressly adopted the latter interpretation in his post-hearing Reply Brief. (Sec'y Reply Br. 2).

(1) Dedicated Spotter

The Secretary failed to present sufficient evidence to establish that "knowledgeable persons familiar with the industry would regard" having a dedicated spotter to control movement on the landfill to be "necessary and appropriate in the particular circumstances existing at the employer's worksite." *Inland Steel Co.*, 12 BNA OSHC at 1970-71.

The Secretary's sole witness was the industrial hygienist (IH) who conducted the inspection and investigation that preceded the issuance of the citation. The IH's inspection of Kimble's workplace was the first time that she had inspected a landfill, and she had no prior special knowledge or experience with landfills or landfill operations. (T. 22). Her credentials and experience do not accord her with the status of either a "knowledgeable person familiar with the industry" or a "conscientious safety expert familiar with the industry." *Inland Steel Co.*, 12 BNA OSHC at 1970-71; *Arcadian Corp.*, 20 BNA OSHC at 2011.

As part of her investigation, the IH obtained a publication titled "Handbook of Landfill Safety" that had been prepared by a trade association named "Solid Waste Association of North America" (SWANA), of which Kimble is a member. (T. 49, 53; Ex. C-6, pp. 1-3). The record does not indicate whether the IH reviewed the entire handbook, but only a six-page excerpt of the handbook that is titled "Traffic and Spotter Safety" was offered and received in evidence. The focus of the excerpt pertains to the use of a "spotter" to direct the vehicles that are driven by the *customers* of a landfill who might be unfamiliar with the layout and operations of the landfill they are patronizing. (Ex. C-6, pp. 1-3). Nothing in the excerpt suggests that the use of a spotter in that type of landfill environment is universally necessary.

The type of vehicular traffic that the excerpt of the handbook contemplates is significantly different from the vehicular traffic present on Kimble's landfill. All of the equipment and most of the vehicles operating at the Kimble landfill are operated by Kimble employees. The few vehicles

that are not operated by Kimble employees are operated by professional drivers who regularly deliver waste to the landfill and who are familiar with the layout and the operation of Kimble's landfill. (T. 132-35). Nothing in the excerpt indicates that use of a dedicated spotter in the vehicular environment present at the Kimble landfill is universally recommended or even necessarily appropriate. And while there is evidence that Kimble had used a spotter at this landfill decades earlier, that utilization had occurred when the vehicular traffic at the landfill more closely resembled the non-professionally driven traffic that is contemplated by the excerpt. (T. 123-126, 132-135).

The Secretary also introduced into evidence four training modules, apparently endorsed by SWANA, which bear the following titles: "The Basics of Spotter Safety," "The Basics of Landfill Safety," "Equipment Safety—Loader," and "Spotter Safety—Communicating with Drivers." (Ex. C-6, pp. 4-74; T. 49). Nothing in these training materials suggests that spotters, who typically would be on foot in the vicinity of moving vehicles and heavy equipment, ought to be utilized universally at all landfills. Of the training materials that pertain directly to safety considerations in the use of spotters, those materials focus on the protection of the spotters themselves from struck-by hazards. The types of precautions that the training materials recommend for protection from struck-by hazards include measures that Kimble has implemented at its landfill. For example, captions in "The Basics of Spotter Safety" module include the following: "Stay Alert, Stay Alive," "Communication," "Be Visible," "Eye Contact," Hand Signals," "Body Language," and "Personal Protective Equipment." (Ex. C-6, pp. 9-12). If these training materials tend to show anything, it is that Kimble's measures to protect workers on foot against struck-by hazards were consistent with safety practices within the landfill industry. *Cf. Beard-Poulan, A Div. of Emerson Elec. Co.*,

7 BNA OSHC 1225, 1229 (No. 12600, 1979) (noting that compliance with section 5(a)(1) "may require methods of protection of a higher standard than industry practice").

In contrast to the Secretary's evidence, Kimble's president, who has decades of experience in the landfill industry, testified without contradiction that the industry had trended "away from the idea of having a spotter," which was due in part to the industry's reaction to some fatal struck-by incidents involving spotters at other landfills. (T. 126). Kimble's concern for spotter safety, and the diminished non-professionally driven vehicular traffic at its landfill, had caused Kimble to cease using a spotter many years before the fatality here. (T. 109, 126, 134-136). The testimony of Kimble's president was the only evidence presented from a person knowledgeable with the landfill industry that bore on the question of whether employing a dedicated spotter at Kimble's landfill was "necessary and appropriate in the particular circumstances existing at" Kimble's landfill. *Inland Steel Co.*, 12 BNA OSHC at 1970-71.

The evidence was insufficient to establish that use of a dedicated spotter at the landfill was necessary and appropriate in the particular circumstances existing at the landfill to eliminate or materially reduce the struck-by hazards there.

(2) Prohibit Foot Traffic

The Secretary has similarly failed to present sufficient evidence that conscientious experts familiar with the industry would proscribe foot traffic in the vicinity of operating vehicles and equipment as a means or method to eliminate or materially reduce the struck-by hazard at the landfill. *Inland Steel Co.*, 12 BNA OSHC at 1970-71; *Arcadian Corp.*, 20 BNA OSHC at 2011. While the IH testified that Kimble could have "established a zone system to indicate that on certain days, heavy machinery could only move in one area while pedestrians could only walk in a different area" (T. 59), other evidence presented during the Secretary's case-in-chief corroborated Kimble's position that it is impossible to operate Kimble's landfill without allowing employees to

be on foot to perform certain essential job functions in the vicinity of operating equipment in the tipper area and in the approach area. The IH confirmed in her testimony that prohibiting Kimble employees from being on foot in the "tipper area" and the "approach area" would not be possible in the operation of this landfill, and that such areas could not reasonably be regarded as "no-go zones" for employees on foot. (T. 82-83). The Secretary has not proven that a work rule prohibiting foot traffic in the vicinity of operating equipment and vehicles in the tipper area and the approach area of the landfill was feasible or would be prescribed by conscientious experts familiar with the industry to reduce or eliminate the struck-by hazard at Kimble's landfill.

(3) Training on New Procedures

The third enumerated measure for abatement identified in the citation (training equipment operators on "new procedures") does not describe what those "new procedures" would be, and no evidence was presented regarding precisely what that training would entail. Consequently, for purposes of this decision, the content of the additional training contemplated by this proposed abatement measure is presumed to relate to any new procedures that would have resulted from implementation of enumerated items (1) and (2). Proceeding upon that presumption, the disposition of the first two enumerated measures is necessarily dispositive of the third enumerated measure.

(4) Shutdown Sensors

In addition to the three enumerated abatement measures set forth in the citation, the Secretary presented evidence and argued in his post-hearing briefs that another alternative or additional feasible means to abate the hazard would be to install "shut-down sensors on its equipment." (T. 59; Sec'y Br. 14). This measure was not specified in the citation and it was not tried by consent of the parties, so it is not properly considered. *See Ala. Power Co.*, 13 BNA OSHC at 1246 (refusing to consider a means of abatement argued by the Secretary because it "was

not raised in the pleadings nor was it tried by the consent of the parties") citing *McWilliams Forge Co.*, 11 BNA OSHC 2128 (No. 80-5868, 1984).

Even if this measure was considered on its merits, the evidence presented would be found insufficient to establish that it was either feasible or would materially reduce the hazard. The testimony of the IH was the only evidence presented on this measure, the entirety of which was as follows: "[T]he employer could have … install[ed] shut-down sensors on equipment, which would shut down the equipment if someone got too close." (T. 59). This brief and conclusory testimony is far from sufficient to establish that installation of "shut-down sensors" was feasible, or that such installation would have materially reduced the hazard in the context of the particular circumstances existing at Kimble's landfill.

Adequacy of Kimble's Measures

As described earlier, the Secretary may establish that an employer's existing safety program was inadequate to protect its employees from exposure to a hazard under section 5(a)(1) by showing that the employer failed to have done any of the following: (1) established work rules designed to prevent exposure, (2) properly communicated those rules to its employees, (3) taken steps to discover noncompliance with the rules, and (4) effectively enforced its rules in the event of noncompliance. *Ala. Power Co.*, 13 BNA OSHC at 1244, citing *Inland Steel Co.*, 12 BNA OSHC at 1976. The Findings of Fact at ¶¶ 15-21 underlie the determination that Kimble's safety program was not shown to be deficient in any of these respects.

The Secretary argues that Kimble did not exercise reasonable diligence in taking steps to discover violations of its work rules. In support of that argument, the Secretary refers several times in his post-hearing briefs to the IH's cross-examination testimony that an unidentified Kimble employee had told her that "on a light day" at the landfill the employee would observe the decedent

walking bags of litter to the face of the landfill four to five times. (Sec'y Br. 4, 12, 16; Sec'y Reply Br. 5). That cross-examination testimony was as follows:

> Q: …. You would agree that it's not typical for [the decedent] to carry bags of garbage into the working face of the landfill?
>
> A: I would not agree with that statement.
>
> Q: You would agree that there were non-management folks that you spoke to that told you that it was not typical for [the decedent] to be walking bags of garbage into the face of the landfill?
>
> A: I received statements both that it was relatively uncommon and I also received statements that it was very common and happened multiple times per day.
>
> Q: Okay. And very common is your characterization of that; correct?
>
> A: The characterization I received that I recall from the interview was four to five times on a light day.
>
> Q: Okay. And was that with someone who had knowledge or a basis for making that statement?
>
> A: They had visually observed it themselves, according to their statement.

(T. 91-92).

Counsel for Kimble did not move to strike this cross-examination testimony on the ground that Kimble had not been provided copies of unredacted written statements of the unidentified employees that the IH described. Such a contemporaneous objection, if it had been made at trial, would have been meritorious and properly sustained under the rationale of *Massman-Johnson (Luling)*, 8 BNA OSHC 1369, 1376 (No. 76-1483, 1980) (prescribing a procedure that requires the Secretary to provide to the respondent, following the completion of a witness's direct examination, a copy of that witness's prior written statement that the Secretary had previously withheld from the respondent pursuant to the informer's privilege).[6] Notwithstanding the absence of an objection

[6] The Secretary did not offer in evidence any of the written statements of Kimble employees that the IH had secured in the course of her investigation. Prior to the hearing, the Secretary had

at trial, Kimble appropriately makes multiple arguments in its post-hearing briefs that the cross-examination testimony quoted above is not probative. (Resp't Br. 12 n.4, 21; Resp't Reply Br. 7-8). *Cf. Monroe Drywall Constr., Inc.,* 24 BNA OSHC 1111, 1113 (No. 12-0379, 2012) (finding that Commission judge erred in failing to accord unobjected to hearsay testimony its "natural probative weight").

The Secretary argues that the IH's cross-examination testimony quoted above shows that Kimble did not effectively take steps to discover violations of its work rule that employees not be on foot in the working face, because that testimony establishes that the decedent typically violated the rule multiple times every day. The Secretary's argument is rejected for a variety of reasons. First, as discussed above in connection with the IH's apparent misunderstanding of the term "working face," the factual predicate of the argument is flawed—while Kimble had a rule prohibiting workers from being on foot in the working face, Kimble did not have a rule that prohibited workers from being on foot in the approach area or tipping area. The IH's understanding of what any unidentified employee told her is quite possibly affected by her misunderstanding of the term "working face."

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disclosed to Kimble's counsel redacted versions of some employee statements. Those redacted statements were contained in a proposed hearing exhibit that was provided to Kimble prior to the hearing, and which was pre-marked as Secretary's Exhibit C-5. However, none of those redacted statements were specifically referenced in any testimony, and none were offered or received in evidence at the hearing.

In the parties' joint pre-hearing statement dated March 13, 2018, the Secretary indicated that at the hearing he might offer in evidence "[u]nredacted statements of [Kimble's] non-management employees, to be provided on completion of an employee's direct testimony." The initial disclosure of such unredacted statements would be in accordance with the procedure that the Commission prescribed in *Massman-Johnson (Luling)*, 8 BNA OSHC 1369, 1376 (No. 76-1483, 1980). But the Secretary did not present the testimony of any of those employees, so the Secretary did not provide Kimble with unredacted versions of the redacted statements that had been assembled in pre-marked Exhibit C-5.

Second, one unidentified employee told the IH that it was "relatively uncommon" for the decedent to be on the "working face," but some other unidentified employee (the employee whose statement the IH apparently credited) purportedly indicated to her that it was "very common and happened multiple time per day." (T. 92). Such a significant divergence in the content of the two statements is reason alone to question the reliability of one or the other or both statements, absent some indicia of reliability for crediting one statement over the other.

Along these same lines, assuming without deciding that the record establishes all the foundational requirements for the statement of the unidentified employee whose statement the IH appeared to credit to be deemed non-hearsay evidence under Fed. R. Evid. 801(d)(2)(D) as a statement of a party-opponent,[7] the record fails established that the statement is sufficiently reliable to support a finding of fact.[8] The evaluation of the reliability of an employee's statement that is admissible under Rule 801(d)(2)(D) was addressed in *Regina Constr. Co.*, 15 BNA OSHC 1044, 1048 (No. 87-1309, 1991):

> Although [statements of an opposing party] under Rule 801(d)(2)(D) are not inherently reliable, there are several factors that make them likely to be trustworthy, including: (1) the declarant does not have time to realize his own self-interest or feel pressure from

[7] *See Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 817 F.3d 934, 944 (6th Cir. 2016) (noting that an "anonymous statement may be admissible under Rule 801(d)(2) in certain circumstances that demonstrate sufficient indicia of reliability as to the authenticity of the statement") citing *Davis v. Mobil Oil Expl. & Prod. Se., Inc.*, 864 F.2d 1171, 1174 (5th Cir.1989).

[8] Colorable arguments have been made in matters decided by other Commission judges that the content of statements of employees whose identities the Secretary has chosen not to reveal pursuant to the informer's privilege should not be received in evidence under Rule 801(d)(2)(D). *See Armstrong Steel Erectors, Inc.*, No. 97-0250, 1997 WL 765160 at *4 n.6 (O.S.H.R.C.A.L.J. Dec. 22, 1997) (declining to address similar objection because the Secretary was not relying on the objected to testimony); *Meer Corp.*, No. 95-0341, 1997 WL 235621 at *7 (O.S.H.R.C.A.L.J. May 5, 1997) ("Because it is a recurring subject of debate in OSHA hearings, a few words should be said concerning unidentified employee informants as a source of admissions against the employer"). The Commission itself, however, appears not to have had occasion to address the issue.

> the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted.

None of the three enumerated factors described in *Regina Construction* weighs in favor of finding the statement of the unidentified employee whose statement the IH credited to be inherently reliable or trustworthy. There is scant information bearing on the first two enumerated factors, and because the identity of the declarant is unknown to Kimble, Kimble has no apparent means by which to explain or to rebut what the IH testified that the employee had said to her. The statement of that unidentified Kimble employee regarding the frequency with which the employee observed the decedent walking bags of trash to the working face is insufficiently reliable and probative to support a finding of fact by a preponderance of the evidence.

Elsewhere during her direct examination, the IH stated her view that Kimble knew of the hazardous condition, and that Kimble had not effectively communicated its work rules to the decedent:

> Q: Did management know of the hazard?
>
> A: Yes.
>
> Q How?
>
> A: [The decedent's supervisor] stated he had observed [the decedent] walking through the working face of the area, working face of the landfill, and that he had verbally reminded [the decedent] on multiple occasions, each morning, in fact, to avoid walking through that area.
>
> * * * *
>
> Q: Was the rule [not to walk in the working face] effectively communicated?
>
> A: No, not effectively.
>
> Q: Was it communicated?
>
> A: It was communicated.

> Q: In what manner?
>
> A: [The decedent's supervisor] stated that he had verbally reminded [the decedent] each morning to avoid walking through the working face of the area but it was not effective communication, because [the decedent] had repeatedly violated this rule.

(T. 63-64).

Later in her testimony, the IH clarified that she did not understand the decedent's supervisor to have told her that he had orally admonished or reprimanded the decedent each morning for having been violating the rule against being on foot in the working face, or that the supervisor had indicated to her that he believed the decedent routinely violated that rule. (T. 73, 94-95). And in his own testimony, the decedent's supervisor convincingly confirmed that these oral warnings were simply daily safety reminders that it was his practice to communicate to employees. (T. 156). The IH's testimony that the decedent "had repeatedly violated this rule" appears to be based upon the previously described statement of the unidentified Kimble employee that the decedent typically walked bags of trash to the working face "four to five times on a light day." (T. 92). As discussed previously, that purported statement is given no weight, so the IH's testimony bootstrapping that statement is similarly given no weight.

The Secretary argues that Kimble's work rules and practices to prevent struck-by incidents are inadequate to prevent exposure to the hazard, asserting that a work rule that "amorphously tell[s] pedestrians to avoid where heavy machinery operated" is not an effective work rule (Sec'y Br. 15), and that Kimble's "vague description of assigned work area and general allowance of some pedestrian presence on the working face did not fully address the hazards." (Sec'y Reply Br. 1-2). These critiques of Kimble's work rules do not demonstrate that they were inadequate. In *Alabama Power*, the Commission observed:

> [G]eneral admonitions to employees to avoid a hazard or to act in a safe manner do not afford adequate guidance. On the other hand, a

> safety rule is not inadequate merely because it requires employees to exercise a certain degree of judgment and discretion. In determining whether a work rule is sufficiently specific to protect employees, the nature of the hazard and the overall circumstances of the work operation must be considered. In certain situations a specific and detailed safety rule may be necessary, whereas in other situations such detail may be impractical, and it may be necessary to rely on employee judgment.

13 BNA OSHC at 1244 (citations omitted). Here, the loci of the salient areas of Kimble's landfill are in near constant flux. Similar to the hazard that was addressed in *Alabama Power* (involving dump trucks delivering coal to coal pile at a power plant), Kimble's rules and practices were "sufficiently specific considering the fluid and dynamic nature of the work environment." *Id.*

Kimble's rule that workers stay clear of areas where equipment was operating unless an employee's presence in such an area was necessary to perform assigned duties, and the rule that workers make and maintain eye contact with equipment operators if an employee had to be present in an area where equipment was operating, were sufficiently specific and detailed to directly address the struck-by hazards at the landfill. The importance of complying with these rules was regularly emphasized, and Kimble's employees understood them. (Findings of Fact ¶¶ 18-19). As in *Alabama Power*, there is no evidence that the landfill workers, including the decedent, had difficulty in applying these rules in the fluid environment of the landfill. *Id.* at 1244 (noting that there was "no evidence to show that employees could not evaluate the proper clearance distance for any particular dumping operation").

While it is indeed the goal of the OSH Act to prevent the first accident, Kimble's record of having no struck-by incidents in the previous sixty years of operating the landfill bears some relevance to the assessment of the effectiveness and adequacy of Kimble's safety program over time. *Cf. Ala. Power* at 1246 (noting that the employer "had experienced no injuries during at least a 24-year period prior to the fatality," and that the "Secretary presented no evidence from which

we can conclude that [the employer] should have more effectively protected its employees from the hazard").

Commission precedent states that in a matter involving an alleged violation of section 5(a)(1) in which the failure of an employee to follow a work rule has led to the employee's death, the record must indicate that "demonstrably feasible measures would have materially reduced the likelihood that such misconduct would have occurred." *Cerro Metal Prod. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 17-5159, 1986), quoting *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 (D.C. Cir. 1973). On this record, the decedent's violation of multiple work rules and practices that he and other workers had a long record of following is simply inexplicable. There is no evidence that conscientious experts, familiar with the landfill industry, would take that misconduct into account in prescribing a safety program. *See Nat'l Realty & Constr. Co.*, 489 F.2d at 1266 ("Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program"). The decedent's death was tragic and horrible, but the Secretary has not proven that the tragedy occurred at a workplace where the employer had failed to meet requirements of section 5(a)(1) of the OSH Act.

Employer Knowledge &
Unpreventable Employee Misconduct

The factors for determining whether an employer's existing safety program is inadequate to protect its employees from exposure to a hazard under section 5(a)(1) (as described in *Alabama Power* at 1244, quoted above) are essentially identical to the factors for determining both (1) whether an employer had constructive knowledge of a section 5(a)(1) violative condition, *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306 (No. 06-1201, 2008) (describing factors to be considered in determining whether an employer had constructive knowledge of alleged section

5(a)(1) hazardous condition), and (2) whether a section 5(a)(1) violative condition was the result of unpreventable employee misconduct. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010) (ruling that the Secretary's proof that the employer had constructive knowledge of a condition that violated section 5(a)(1) had effectively disproved the defense of unpreventable employee misconduct), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished).

The Secretary does not argue, and the evidence does not establish, that Kimble had actual knowledge of the hazardous condition. (Sec'y Br. 12). As discussed above, the Secretary failed to prove that Kimble's safety program for addressing the hazard cited in the citation was inadequate under the test described in *Alabama Power* at 1244. That failure of proof is similarly dispositive as to whether the Secretary proved that Kimble had constructive knowledge of the hazardous condition.

Moreover, the affirmative findings set forth Findings of Fact ¶¶ 17-21 establish all of the elements of the affirmative defense of unpreventable employee misconduct. *S.J. Louis Constr.*, 25 BNA OSHC 1892, 1900 n.24 (No. 12-1045, 2016) (evaluating employer's safety program for adequacy involves same factors for evaluating constructive knowledge and the defense of unpreventable employee misconduct).

ORDER

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a). If any finding is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the contrary notwithstanding.

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Item 1 of Citation 1, alleging a violation of section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), is VACATED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

Date: April 8, 2019