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

SECRETARY OF LABOR,

Complainant,

v.

RICHARD CARRIER TRUCKING, INC.,

Respondent.

OSHRC DOCKET No. 16-1655

Appearances: Attorney James L. Polianites
U.S. Department of Labor, Office of the Solicitor
Boston, Massachusetts
For the Complainant

Mr. Kris M. McKenna
Safety Manager, Richard Carrier Trucking, Inc.
Skowhegan, Maine
For the Respondent

Before: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

The Respondent, Richard Carrier Trucking, Inc. (RCT), is a commercial trucking company based in Skowhegan, Maine, whose business includes hauling timber. On April 18, 2016, a compliance safety and health officer (CO) from the area office of the Occupational Safety and Health Administration (OSHA) located in Bangor, Maine, conducted a complaint investigation at RCT's workplace in Skowhegan. The CO concluded that some of RCT's truck drivers had engaged in the practice of putting diesel fuel in portable fire extinguishers, and then spraying the fuel onto the interior walls and

floors of their trailers. The reason for coating the interior surfaces of the trailers with diesel fuel was to prevent wood chips from sticking to those surfaces in sub-freezing temperatures.

The Secretary alleges that RCT countenanced this alleged practice and thereby violated section 5(a)(1) of the Occupational Safety and Health Act of 1970 (Act), which is commonly known as the "general duty" clause. 29 U.S.C. § 654(a)(1). On September 9, 2016, OSHA issued to RCT a one-item serious citation arising out of the inspection, which alleged the following violation of the general duty clause:

> OSH Act of 1970 Section (5)(a)(1): The employer did not furnish employment in a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to burns and other injuries due to fire extinguishers containing pressurized diesel fuel:
>
> > Worksite – A 2.5 gallon Badger fire extinguisher served as an unapproved container for pressurized diesel fuel used by truck drivers to coat the trailer walls.
> >
> > Among other methods, one feasible and acceptable abatement method to correct this hazard is to apply an approved non-stick or low friction surface to the trailer walls and floor in accordance with the manufacturer's specification.

OSHA designated this alleged violation as "Citation 2 Item 1."[1]

[1] The reason the citation item was not designated "Citation 1 Item 1" is because earlier, on July 18, 2016, OSHA had issued a single item serious citation to RCT arising out of the same inspection. That citation was designated "Citation 1 Item 1," and alleged a violation of subparagraph (d)(2)(i) of 29 C.F.R. § 1910.106, "Flammable liquids," which is located in subpart H, "Hazardous Materials."

RCT timely contested "Citation 1 Item 1," and the Executive Secretary of the Occupational Safety and Health Review Commission (Commission) docketed the matter,

RCT timely contested the citation and thereupon the Secretary duly filed a complaint that incorporated by reference the allegations of the citation quoted above. Prior to the hearing, the Secretary filed a motion to amend the complaint to reflect the following changes to the originally filed citation [deletions are stricken through; additions are underscored]:

> Worksite – A ~~2.5 gallon Badger~~ fire extinguisher served as an unapproved container for pressurized diesel fuel used by truck drivers to coat the trailer walls.
>
> Among other methods, one feasible and acceptable abatement method to correct this hazard is to ~~apply an approved non-stick or low friction surface to the trailer walls and floor in accordance with the manufacturer's specification~~ remove from service and not allow fire extinguisher to be used to spray diesel fuel on the trailer walls and floors.

RCT did not object to the pre-hearing amendment, and the motion to amend was granted. (T. 6-8).

An evidentiary hearing was conducted on June 15, 2017, in Bangor, Maine. The Secretary presented two witnesses in his case-in-chief: the assistant area director of

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assigning it docket number 16-1363. Thereafter, the parties entered into an agreement dated August 26, 2016, in which the Secretary agreed to withdraw that citation and further agreed to the entry of an order dismissing it. The Commission approved the parties' agreement and incorporated its terms by reference by an order that became a final order of the Commission on December 14, 2016. (T. 12, 54, 75; Exhibit C-3). *See Copomon Enters., LLC*, 24 BNA OSHC 2177, 2179 n. 1 (No. 13-0709) (ALJ) (taking judicial notice under Fed. R. Evid. 201 of documents contained in the case file of a different matter before the Commission), *aff'd* 601 F. App'x 823 (11th Cir. 2015) (unpublished).

OSHA issued "Citation 2 Item 1" at issue here on September 9, 2016, after having agreed to the dismissal of "Citation 1 Item 1."

OSHA's Bangor area office (Samuel Kondrup), and RCT's safety manager (Kris McKenna), who had been present during the CO's inspection. The Secretary did not present the testimony of the CO who had investigated the complaint. She had retired about six months before the hearing. The record is silent as to whether her attendance at the hearing could have been secured by compulsory process or other reasonable means.

RCT, in its case in chief, presented the testimony Derek DeFelice, who was present during the CO's inspection and whose position at that time was "dispatcher." At the time of the hearing, DeFelice's position was terminal manager. (Ex. C-2, p. 2; T. 77).

The parties filed simultaneous post-hearing briefs, and both opted not to file a brief in reply. The briefing period concluded on August 25, 2017. (T. 107).

As set forth below, the Secretary has not met his burden to prove by a preponderance of the evidence that the equipment used to spray the diesel fuel had been manufactured as a fire extinguisher. There being insufficient evidence to establish a fact that is essential to proving the alleged violation, the citation must be vacated.

Findings of Fact

1. The Respondent, Richard Carrier Trucking, Inc. (RCT), is a commercial trucking company headquartered in Skowhegan, Maine, whose business includes hauling timber materials in commerce. RCT has about 600 employees altogether, about 70 of whom are truck drivers involved in hauling timber materials. (Ex. C-2).

2. On April 4, 2016, the OSHA area office in Bangor, Maine, received a complaint reporting that RCT drivers were using fire extinguishers to spray diesel fuel on the interior surfaces of their trailers. (T. 21, 30).

3. On Friday, April 15, 2016, CO Hilda Chow from OSHA's area office in Bangor, Maine, was assigned to investigate the complaint. She conducted the investigation at RCT's workplace in Skowhegan on Monday, April 18, 2016, over a period of about two hours and forty minutes. Among the persons she communicated with while at RCT were: RCT's safety manager (Kris McKenna); RCT's terminal manager at the time (Rick Tucker); RCT's dispatcher at the time (Derek DeFelice); and RCT's owner (Richard Carrier) and his son (Jim Carrier). (Ex. C-2).

4. CO Chow retired from OSHA in December 2016, and she did not testify at the hearing. (T. 30). Consistent with the regular practice of her office, CO Chow had prepared documents and taken photographs incident to her investigation. Those materials were received in evidence without objection. (Exs. C-2, C-3, C-4, & C-9).

5. The only OSHA official who testified at the hearing was the assistant area director for the Bangor area office (Samuel Kondrup), who had not been present at the inspection on April 18, 2016. His knowledge of CO Chow's investigation of RCT was derived from what CO Chow told him and the documents that she had prepared. (*E.g.*, T. 30, 34, 56-57).

6. For many years prior to the investigation on April 16, 2016, some RCT truck drivers had engaged in the practice of coating the interior surfaces of trailers with diesel fuel. The diesel fuel acted as a lubricant that prevented wood chips, sawdust and wood shavings from freezing onto those surfaces. (T. 79-80, 94). When materials such as wood chips freeze onto the interior surfaces of trailers, the drivers must use hand tools to remove them, which is an arduous and time-consuming task. (T. 92-93). Originally, the drivers

applied the diesel fuel to the floors and walls of a trailer by pouring the fuel from watering cans, such as the kind used in home gardening. (Ex. C-4, p. 5; T. 81).

7. Sometime after 2009, some RCT drivers began to use pressurized canisters to apply the diesel fuel. Using pressurized canisters enabled the drivers to spray the diesel fuel onto the surfaces. This avoided the use of a watering can to pour fuel while treading inside the trailer, whose floors could become treacherously slick from the diesel fuel. (T. 80-83, 95-96). When the pressurized sprayers were empty and not in use, drivers stowed them in an exterior stow area. (T. 83-84, 99-100; Ex. C-4, p. 5).

8. It takes about one gallon of diesel fuel to coat the interior surfaces of a trailer when using a pressurized sprayer, and up to two gallons when using a non-pressurized watering can. (T. 94-96).

9. The RCT drivers who used pressurized canisters to spray the diesel fuel obtained the canisters on their own initiative and at their own expense. (T. 102). The management of RCT was aware of the practice of using pressurized sprayers to apply diesel fuel, and management neither encouraged nor discouraged the practice. (Ex. C-2, p. 2; T. 102).

10. In the course of her investigation on April 18, 2016, the CO inquired about the type of equipment that drivers were using to apply the diesel fuel to the trailer walls. There were no trailers at RCT's Skowhegan workplace at the time of the CO's inspection, so there was no spraying equipment available to show to the CO. (T. 101-102). RCT's terminal manager at the time, Mr. Rick Tucker, was aware that some drivers had obtained the equipment that they used to spray the diesel fuel from a nearby store named Kennebec

Fire Equipment (KFE). In an effort to be responsive to the CO's inquiry, Tucker traveled to the KFE store to try to obtain the type of equipment that the drivers were purchasing there to show to the CO. (T. 65, 98).

11. When Tucker arrived at KFE, the store did not have in stock the type of equipment that had been sold to some RCT drivers. Instead, the storekeeper supplied Tucker with a used 2.5 gallon water-type fire extinguisher manufactured by a company named Badger Fire Protection. The storekeeper did this because the fire extinguisher had similarities to the kind of equipment the KFE store was selling to RCT truck drivers for spraying diesel fuel. (T. 65, 67). But in actuality, the sprayers that KFE had been selling to RCT drivers were not fire extinguishers, even though they shared several features found in a typical water-type fire extinguisher. (T. 65-69, 72-73).

12. The fire extinguisher that Tucker obtained from KFE on April 18, 2016 is depicted in the photographs on pages 1 and 3 of Exhibit C-4. These photographs depict an unpainted stainless steel fire extinguisher that was obviously not new and far from being in pristine condition. Rather, its finish is worn and dull, and the informational and warning decals that had been affixed to it were partially scraped off or rubbed away. (T. 69). The writings on what remained of those decals are indecipherable in the photographic exhibits, and might have been unreadable in actuality. The only decipherable decal in the photographs is the one bearing the logo of the manufacturer, Badger Fire Protection. (*See* Ex. C-7).

13. Diesel fuel was never put in the fire extinguisher that Mr. Tucker obtained from KFE on April 16, 2016, and it was never used by any RCT employee for any purpose other than to show it to the CO. RCT returned the fire extinguisher to KFE on April 18, 2016, two days after the CO's inspection. (Ex. C-8; T. 73).

14. After the fire extinguisher that Mr. Tucker obtained at KFE was shown to the CO, the CO expressed the view that RCT drivers were using re-purposed fire extinguishers to spray the diesel fuel. At least one RCT employee disputed the CO's view and stated that the spraying equipment that RCT drivers had obtained were not manufactured to be fire extinguishers. (T. 101, 104-05).

15. RCT's safety manager, Mr. Kris McKenna, did not challenge the CO's impression that RCT drivers were using re-purposed fire extinguishers to spray the diesel fuel. At the time of the inspection, he was unaware that the drivers had been using any type of pressurized sprayers to apply the diesel fuel and he had no knowledge regarding whether any pressurized sprayer being used had been manufactured as a fire extinguisher. Once freezing temperatures subsided in the springtime, RCT drivers stopped spraying diesel fuel. McKenna did not begin to closely examine whether any drivers had been using re-purposed fire extinguishers until after July 18, 2016, when OSHA issued the first citation arising out of the inspection (*see* footnote 1, *supra*). (T. 52, 64, 105-106; Ex. C-3, p.1). Once McKenna began to look closely into the matter, he determined that the equipment that RCT drivers had purchased from KFE were spray canisters that had not been manufactured as fire extinguishers. (T. 64, 72-73).

16. The type of equipment that some RCT drivers used to spray the diesel fuel was a cylindrical tank with a hose and nozzle that was capable of being pressurized, similar to the type of sprayer that is depicted in Exhibit R-1. (T. 80-81, 84-85). The cylinder depicted in Exhibit R-1 is pressurized by using its integrated hand pump, and it bears no labels or markings to indicate that it is a fire extinguisher. (T. 86-87). Other varieties of sprayers that are not manufactured as fire extinguishers are pressurized by connecting a pressurized air hose to a valve on the sprayer, in the same manner that the fire extinguisher that Tucker obtained from KFE is pressurized. (T. 89-91).

17. No RCT drivers had ever used a re-purposed fire extinguisher for spraying diesel fuel on the interior surfaces of RCT trailers. (T. 88-89, 99).

18. Diesel fuel has a flash point below 199.4 degrees Fahrenheit and is thus a "flammable liquid" as that term is defined in 29 C.F.R. § 1910.106(a)(19). (T. 40-41).

19. The National Fire Protection Association (NFPA) has promulgated a consensus standard designated as "NFPA 10 – Standard for Portable Fire Extinguishers," the current version of which was issued in 2013. (Court Ex. 1). NFPA 10 includes a provision that "[f]ire extinguishers shall not be used for any purpose other than that of a fire extinguisher." (Court's Ex. 1, § 7.9.1). Another provision states that a "fire extinguisher that has been used for any purpose other than that of a fire extinguisher" "shall be condemned or destroyed." (Ex. C-5, p. 4, § 8.4.2).

Discussion

The Commission obtained jurisdiction of this matter under section 10(c) of the Occupational Safety and Health Act (Act) upon RCT's timely contest of the citation and proposed penalty. 29 U.S.C. § 659(c). At all relevant times, RCT was an employer covered by the Act because it met the Act's definition of "employer." 29 U.S.C. § 652(5).

The Act's general duty clause mandates 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). To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Peacock Eng'g, Inc.*, 26 BNA OSHC 1588, 1589 (No. 11-2780, 2017).

The Secretary failed to prove the existence of the hazard alleged in the citation. Specifically, the evidence is insufficient to establish that any pressurized canister used or maintained by any RCT driver to spray diesel fuel had been originally manufactured as a fire extinguisher.

Derek DeFelice, the current terminal manager for RCT and its dispatcher at the time of the inspection, testified with poise and confidence that the sprayers some drivers were using were not manufactured to be fire extinguishers. Rather, they were simply liquid sprayers that had not been manufactured as fire extinguishers. DeFelice had personal

knowledge of the practices of RCT's drivers. No witness with personal knowledge of the drivers' practices controverted DeFelice's testimony.

Some of the evidence presented to support the contrary conclusion involves the saga of RCT's former terminal manager, Rick Tucker, going to the KFE store and returning with the battered Badger fire extinguisher provided by the storekeeper as a facsimile of the type of equipment KFE was selling to RCT drivers to spray diesel fuel. At the time of the hearing, Tucker was no longer serving as the terminal manager for RCT (T. 65, line 1), and the record is silent as to whether he remained in RCT's employ. Either party was presumably capable of securing his presence at the hearing by compulsory process or other reasonable means, but neither party did. Thus, the account of the circumstances surrounding Tucker's obtaining the fire extinguisher at KFE is based upon Kris McKenna's testimony recounting his post-inspection conversation with the operator of KFE, which took place sometime after July 18, 2016. (T. 67, 72-73). That hearsay testimony was not objected to and no evidence was presented to controvert it. McKenna's hearsay testimony is reasonably probative and sufficiently reliable to support the findings of fact set forth in ¶ 11, *supra*, that KFE had not been selling fire extinguishers to RCT drivers. *See 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 contends that CO Chow's one-page written narrative of her inspection establishes that RCT management admitted to the CO that RCT drivers were using fire extinguishers to spray diesel fuel. The Secretary relies on the following

paragraph of CO Chow's narrative report (Ex. C-2):

> Mr. Carrier stated that all of his drivers were out of the shop. Many do not leave from the shop but rather from their home or other points. The drivers (Carrier employees) were not required to purchase the water fire extinguisher and fill it with pressurized diesel fuel. Mr. Carrier further stated that one of the drivers came up with the idea and shared it with others. This practice was not condoned by the employer but they did not stop it.

(The narrative does not indicate whether the person identified as "Mr. Carrier" in this paragraph is RCT's owner, Richard Carrier, or his son, Jim Carrier. [*See* T. 97-98].)

This paragraph of the narrative is of questionable reliability to prove that Mr. Carrier admitted or acknowledged that RCT drivers were using fire extinguishers to spray diesel fuel. There is no evidence indicating the date that CO Chow wrote the quoted paragraph, but she completed the narrative portion of her inspection report on July 14, 2016, about three months after her inspection. Similarly, there is no evidence as to what extent CO Chow had an independent memory of what Mr. Carrier said on April 18, 2016, or whether that part of her narrative was derived in whole or in part from notes she may have taken during her inspection (none of which were presented in evidence). There is no evidence to indicate the timing of the CO's communication with Mr. Carrier—whether it was before or after Tucker returned from KFE with the used fire extinguisher. If the conversation with Mr. Carrier occurred before Tucker returned from KFE with the fire extinguisher, the CO could have conflated Mr. Carrier's comments about drivers spraying diesel fuel with an erroneous presumption that such spraying was being done with fire extinguishers, rather than a pressurized sprayer that was not a fire extinguisher. It is clear

from the CO's narrative that part of her concern was the use of diesel fuel as a lubricant, as well as the equipment used to apply it. This is demonstrated by the following paragraph included in her narrative (Ex. C-2):

> Mr. McKenna stated that the drivers should only use the diesel fuel for fueling their tractors. The drivers' contact with diesel fuel is at the fuel pump when they are refueling their tanks. The only training involved is through their written haz comm, using SDSs to identify hazards. The drivers do not perform maintenance on their tractors involving the diesel lines.

This intermingling of dual concerns in the narrative makes it uncertain what the focus of the CO's investigation was at any given time. The circumstances were ripe for the CO and Mr. Carrier to have been speaking past each other and for the possibility of miscommunication between them.

This potential for confusion is further exemplified by the abatement method identified in the original citation (before it was amended). The original citation provided that "one feasible and acceptable abatement method to correct this hazard is to apply an approved non-stick or low friction surface to the trailer walls and floor in accordance with the manufacturer's specification." This described method of abatement appears directed to the practice of using a hazardous material to coat the trailer surfaces, not to the appropriateness of the equipment being used to apply the hazardous material. The original proposed method of abatement makes sense if the hazard that had been identified was the coating of the walls and floor of the trailers with a hazardous material. But that proposed abatement is a non sequitur with respect to the hazard alleged here of the potential use of a fire extinguisher, containing diesel fuel, to extinguish an actual fire. (T. 31).

If CO Chow had testified, she might well have dispelled such uncertainties about her narrative, but she might also have come to recognize that she had misunderstood or mischaracterized what Mr. Carrier said. Of course, how CO Chow might have testified is unknown on this record. RCT presented credible testimony from Mr. DeFelice that no drivers were using re-purposed fire extinguishers to spray the diesel fuel. RCT also presented a plausible description of the circumstances surrounding the production of the fire extinguisher that Tucker obtained from KFE. In the face of that evidence, the CO's spare written record of her inspection and other supporting evidence are not sufficiently reliable to meet the Secretary's burden to prove that the pressurized canisters being used were manufactured as fire extinguishers.

The Secretary argues that the "missing witness" inference should be applied and that the trier of fact should conclude that if Mr. Carrier had testified, his testimony would have been unfavorable to RCT (and favorable to the Secretary). *See Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1968, 2003) ("when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party"). The federal district court in *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 700–01 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016), recently described the contours of the missing witness inference in detail as follows (internal quotation marks and footnotes omitted):

> A missing witness charge permitting the jury to infer that the testimony of an unproduced witness would have favored one party is appropriate if production of the witness is

> peculiarly within [the] power of the other party. Such an inference is equally permissible in bench trials. Hence, where one party alone could produce a material witness but fails to do so, an inference that the testimony would favor the opposing party may be appropriate. . . . By parity of reasoning, an adverse inference may be appropriate based on the failure to testify of someone closely allied with or related to a party, such as an employee. In the event that a witness is available equally to both sides, the failure to produce is open to an inference against both parties or neither party. Where the missing witness's testimony would be cumulative, however, the inference is not available.
>
> In determining whether a witness is uniquely available to an adverse party, courts in [the Second Circuit] consider whether that witness is available to the party seeking the adverse inference, as the availability of the witness to an opposing party makes an adverse inference against the party with the closer relationship to the witness less appropriate. An adverse inference is not warranted, for example, where the controlling or related party makes the missing witness available to its opponent, the party seeking the adverse inference equally could obtain the missing witness's testimony, or the party seeking the adverse inference made no attempt to obtain the witness's testimony. Such a rule prevents a party from manipulating the system by choosing not to call a witness while claiming that the witness's testimony would be favorable. The availability determination rests on all the facts and circumstances bearing upon the witness's relation to the parties.

The inference that the Secretary seeks to have drawn is that if Mr. Carrier had testified, he would have corroborated CO Chow's narrative that he acknowledged that drivers were using repurposed fire extinguishers to spray diesel fuel. The undersigned declines to indulge in the "missing witness" inference here for two reasons. *See U.S. v. St. Michael's Credit Union*, 880 F.2d 579, 597 (1st Cir.1989) (noting that the decision of whether or not to allow a missing-witness inference is within the sound discretion of the

trial judge).

First, the Secretary had the burden to prove that the equipment used to spray the diesel fuel had been manufactured as a fire extinguisher. It was not RCT's burden to disprove it. *See U.S. v. Rohm & Haas Co.*, 47 F. App'x 125, 129 (3d Cir. 2002) (declining to apply adverse inference where the party urging the inference had the burden to prove the matter in issue and could have deposed the "missing witness" but chose not to); *Boardman v. Nat'l Med. Enters.*, 106 F.3d 840, 844 (8th Cir. 1997) (noting that "[d]rawing an adverse inference from the failure of a party to put on key witnesses relevant to some issue is most reasonable when it is the party with the burden of proof on that issue who fails to do so"). The missing witness inference inevitably injects a substantial measure of speculation and supposition about what a witness would have said if called to testify. For such speculation to tilt the scale in favor of the party with the burden of proof effectively relaxes that party's burden. The Secretary could have sought to present the testimony of Mr. Carrier in his case-in-chief to confirm the accuracy of the CO's narrative, particularly since the Secretary expected not to present CO Chow to testify respecting her communication with him. The Secretary, after all, called RCT's safety manager to testify in his case-in-chief. The Secretary could have similarly sought Mr. Carrier's testimony.

Second, RCT was self-represented in this matter by its safety manager, who is neither trained in the law nor experienced in the litigation of OSHA citations. While a reasonably diligent attorney representing RCT may have endeavored to present Mr. Carrier's favorable testimony, most *pro se* litigants cannot reasonably be expected to possess comparable litigation savvy. *Cf. Wentzell*, 16 BNA OSHC 1475, 1476 (No. 92–

2696, 1993) (noting that a "*pro se* employer can often be genuinely confused by legal terminology and the technicalities of judicial procedure; that is, even while trying to exercise reasonable diligence, a *pro se* employer can fail to grasp exactly what he is being asked to do"); *Imageries*, 15 BNA OSHC 1545, 1547 (No. 90-378, 1992) (noting that parties appearing *pro se* may "require additional consideration of their circumstances").

The Secretary having failed to meet his burden to prove that any fire extinguishers had been used or maintained by RCT employees to spray diesel fuel, the citation must be vacated.[2]

ORDER

The foregoing decision constitutes findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 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

[2] For the citation here to have been issued before the six-month limitations period of 29 U.S.C. § 658(c) expired, the alleged hazardous condition would have had to have existed sometime after March 15, 2016. However, RCT did not raise the limitations defense, so that defense is deemed waived and it is not adjudicated here. *See Charles W. Mason, DDS, & Assocs., PLLC*, 25 BNA OSHC 1792, 1794 n. 4 (No. 10-2313, 2015). Nevertheless, it is notable that the Secretary did not allege the date or timeframe when the alleged hazardous condition existed in his amended complaint, which is a requirement of Commission Rule 34(a)(2)(ii) (requiring that the complaint state "with particularity" the "time … of each alleged violation"). 29 C.F.R. § 2200.34(a)(2)(ii). Similarly, no evidence was presented of any particular date or timeframe that any alleged re-purposed fire extinguisher had been present at RCT's workplace or present on any of its vehicles or trailers.

that Citation 2, item 1, alleging a violation of the 29 U.S.C. § 654(a), having not been proven, is VACATED.

SO ORDERED.

/s/William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: September 29, 2017