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

SECRETARY OF LABOR,
Complainant,

v.

U.S. POSTAL SERVICE,
Respondent.

OSHRC Docket No. 18-0188

APPEARANCES:

Jennifer L. Gold, Attorney; Louise McGauley Betts, Senior Attorney; Oscar L. Hampton, III, Regional Solicitor; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Philadelphia, PA and Washington, D.C.
For the Complainant

Miriam Dole, Attorney; U.S Postal Service, Eastern Area Law Office, Philadelphia, PA
For the Respondent

## REMAND ORDER

Before: SULLIVAN, Chairman; and ATTWOOD, Commissioner.*

BY THE COMMISSION:

The Occupational Safety and Health Administration issued U.S. Postal Service a one-item citation alleging an other-than-serious violation of 29 C.F.R. § 1904.135(b)(1)(iv), a recordkeeping regulation that prohibits employers from "discharg[ing] or in any manner discriminat[ing] against any employee for reporting a work-related injury or illness." The citation alleges that USPS retaliated against two mail carriers in its Mount Oliver Branch in Pittsburgh, Pennsylvania, by issuing "a seven-day working suspension" to each of them after each one reported a work-related injury. Following a hearing, Administrative Law Judge Keith E. Bell vacated the citation, concluding that the Secretary failed to establish that USPS's proffered reasons

* Commissioner Laihow has recused herself from participation in this case.

for disciplining the mail carriers were pretextual.[1] For the following reasons, we set aside the judge's decision and remand this case for further proceedings consistent with this opinion.

The citation sets forth two instances of violation based on each reported injury. The first involves a mail carrier who injured his shoulder while lifting a sack of mail to load it onto a mail truck. He reported his injury to his immediate supervisor, who then sent the mail carrier to the Mount Oliver Branch's acting manager. After meeting with the mail carrier, the acting manager recommended that he be disciplined, and the discipline was later imposed.[2] The Secretary argues that USPS disciplined the mail carrier for merely reporting an injury, whereas USPS maintains that its disciplinary action was justified given the acting manager's claim that the mail carrier demonstrated an improper lifting technique when reenacting how he injured his shoulder.

There is conflicting testimony, however, on whether the mail carrier actually reenacted how he lifted the mail sack. Both the acting manager and the mail carrier testified that they discussed the injury soon after it occurred. But the acting manager also testified that the mail carrier "came into my office and demonstrated to me how he injured his shoulder." In response to further questioning on this issue, the acting manager explained that he asked the mail carrier to demonstrate how he had lifted the mail sack, and that the acting manager could "tell right from [the mail carrier's demonstration] that he did not use his knees to lift." In contrast, the mail carrier testified that he was in the acting manager's office for "[p]robably five minutes," and he confirmed that he did not reenact his lifting method for the acting manager and that the acting manager said nothing to him about "unsafe acts."

Resolving this conflict is central to the alleged instance of violation—if no reenactment took place and, therefore, an improper lifting technique was never demonstrated by the mail carrier, then USPS's purported justification for imposing discipline is unsupported. The judge,

---

[1] In assessing whether the Secretary established USPS's failure to comply with § 1904.35(b)(1)(iv), the judge applied the burden-shifting framework articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which involved a discrimination claim under Title VII of the Civil Rights Act of 1964. *See, e.g., Acosta v. Lloyd Indus., Inc.*, 291 F. Supp. 3d 647, 653 (E.D. Pa. 2017) (noting that three-step burden-shifting test requires plaintiff to "make a prima facie case of retaliation," defendant to identify "an appropriate non-discriminatory reason for its action," and plaintiff to prove that "proffered reason is pretextual").

[2] We note that the acting manager also recommended disciplinary action for the other mail carrier at issue in the citation and that action was imposed as well. Although it is not relevant to this remand order, both disciplinary actions were later rescinded.

however, made no credibility determinations—demeanor-based or otherwise—to explain why he appears to have discounted the mail carrier's testimony in favor of the acting manager's testimony.[3] *See American Wrecking Corp.*, 19 BNA OSHC 1703, 1714-15 (No. 96-1330, 2001) (consolidated) (remanding for "credibility determinations based on the demeanor of the witnesses on the stand"; noting that "the judge is the one who has 'lived with the case, heard the witnesses, and observed their demeanor' " (citation omitted)); *Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No. 98-0866, 2000) (remanding case to judge to make credibility determinations regarding conflicting testimony because judge who heard case is best qualified to make such findings). Given the conflicting testimony on this key issue, the judge on remand "must give reasons for crediting the testimony of one witness over that of another that are 'accompanied by summaries of pertinent testimony and reasons for crediting the testimony.' " *Agra Erectors, Inc.*, 19 BNA OSHC at 1066 (citation omitted).

Such credibility determinations are also pertinent to the second alleged instance, which concerns a mail carrier who suffered a dog bite injury while delivering mail. The same acting manager investigated that incident and, as noted, recommended that disciplinary action be taken against the mail carrier. As such, the judge should also evaluate to what extent, if any, his assessment of the witnesses' credibility affects his findings with regard to that instance. Finally, although we have identified only a single example of conflicting testimony, the judge should also reevaluate the entire record to ascertain whether there is any other conflicting testimony that should be resolved through credibility determinations, or whether there are other circumstances that may bear on the witnesses' credibility. *See Lake County Sewer Co.*, 22 BNA OSHC 1522, 1524 (No.

[3] Addressing the Secretary's argument that "[t]here is no evidence to support that [the mail carrier] lifted improperly, and no witnesses to either his lifting or his alleged reenactment," the judge noted that the USPS labor relations specialist who drafted the mail carrier's disciplinary letter "corroborated [the acting manager's] testimony" that the mail carrier reenacted an improper lifting technique. The labor relations specialist testified that he communicated with only the acting manager—and not the mail carrier—before drafting the letter, and that the acting manager told him about the purported reenactment and asserted that the mail carrier had demonstrated this improper technique. Although the labor relations specialist testified that he had received other documentation concerning the incident, including the results of a pre-disciplinary investigation, he admitted that absent his conversation with the acting manager, he may have opted not to pursue discipline. In short, the labor relations specialist did not observe the purported reenactment; his testimony was based solely on what the acting manager told him about it. Thus, while the labor relations specialist's testimony shows that the acting manager consistently claimed there was a reenactment, it does not by itself explain why the judge apparently found the acting manager's version of events more credible than the contrary version testified to by the mail carrier.

07-1786, 2009) (remanding case to judge to "address all conflicting testimony, as well as any other record evidence relevant to [disputed] issue, making credibility findings where necessary").

Accordingly, we set aside the judge's decision and remand for the judge to make credibility determinations concerning evidence that is relevant to whether USPS retaliated against its two mail carriers for reporting work-related injuries, including the conflicting testimony specified above, and to reconsider in light of these determinations whether the Secretary established a violation of § 1904.135(b)(1)(iv).[4]

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: July 28, 2020

[4] In his decision, the judge questions the citation's failure to specify a means of abatement. Specifically, the judge cites OSHA's interim enforcement procedures for the new recordkeeping regulation, which were in place at the time the citation was issued and required as follows: "The citation must include remedies for the aggrieved employee, such as back wages, removal of disciplinary action, reinstatement of lost time and wages, etc., where appropriate" as well as "the means for abatement of the underlying policy or procedure that is related to the merit determination." Memorandum from Directorate of Enforcement Programs to Regional Administrators, *Interim Enforcement Procedures for New Recordkeeping Requirements under 29 CFR 1904.35* (Nov. 10, 2016). To the extent the judge relied on this rationale as a basis for vacating the citation, he erred. There is no requirement under the Occupational Safety and Health Act, OSHA's recordkeeping regulations, or Commission precedent that compels the Secretary to specify a means of abatement in a citation alleged under 29 C.F.R. § 1904.35(b)(1)(iv). *See* 29 U.S.C. § 658(a) (citation "shall be in writing and shall describe with particularity the nature of the violation, including a reference to the . . . regulation . . . alleged to have been violated" and "shall fix a reasonable time for the abatement of the violation"). Moreover, the Commission has long held that while OSHA's internal manuals may "provide[] guidance to OSHA professionals," they "[do] not have the force and effect of law, nor [do they] confer important procedural or substantive rights or duties on individuals." *Caterpillar Inc.*, 15 BNA OSHC 2153, 2173 n.24 (No. 87-0922, 1993). The judge shall take this ruling into account in reaching his decision on remand.

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

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>U.S. POSTAL SERVICE,<br><br>Respondent. | OSHRC DOCKET NO. 18-0188 |

Appearances: Kate S. O'Scannlain, Solicitor of Labor
Oscar L. Hampton, III, Regional Solicitor
Jennifer L. Gold, Attorney
U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania
For the Complainant

Miriam Dole, Attorney
U.S. Postal Service, Eastern Area Law Office, Philadelphia, Pennsylvania
For the Respondent

Before: Keith E. Bell
Administrative Law Judge

## DECISION AND ORDER

This case concerns a claim of alleged discrimination for reporting work-related injuries. It is brought under a new anti-discrimination regulation recently promulgated and published on May 12, 2016, under authority from the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). Around May and June 2017, two postal workers for the Mt. Oliver branch of the

United States Postal Service (USPS or Respondent) in Pittsburgh, Pennsylvania reported their work-related injuries to their management. After an internal pre-disciplinary investigation, the USPS suspended them with pay for alleged violations of USPS safety rules. Shortly thereafter, a union steward filed whistleblower complaints on their behalf with the Occupational Safety and Health Administration (OSHA), which commenced two separate, parallel investigations: (1) pursuant to § 11(c) of the OSH Act[5], and (2) pursuant to the recently promulgated anti-discrimination regulation under part 1904 ("Recording and Reporting Occupational Injuries and Illnesses") subpart D ("Other OSHA Injury and Illness Recordkeeping Requirements") at 29 C.F.R. § 1904.35(b)(1)(iv).[6]

A few weeks after the whistleblower complaint was filed, the USPS rescinded both disciplinary suspensions and expunged the discipline from the records of both injured postal workers. (Exs. JX-7 at 1, JX-14 at 1.) Less than two weeks later, OSHA closed out the § 11(c)

---

[5] Section 11(c) of the OSH Act states in pertinent part:

> (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.
>
> (2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person[.]

29 U.S.C. § 660(c).

[6] Published on May 12, 2016, § 1904.35(b)(1)(iv) states: "You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness." 29 C.F.R. § 1904.35(b)(1)(iv).

investigation. However, the other investigation, under § 1904.35(b)(1)(iv), continued. On November 28, 2017, OSHA issued a Citation to USPS alleging an other-than-serious violation of § 1904.35(b)(1)(iv) and proposing a $5,432 penalty. The Citation required the USPS to abate the alleged violation by December 8, 2017. Nothing in the Citation specified how the USPS was to achieve abatement.

Respondent received the Citation on November 30, 2017 and filed a late notice of contest (LNOC) on February 2, 2018, bringing this matter before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Pittsburgh, Pennsylvania on December 11 and 12, 2018. Both parties filed post-hearing briefs on March 21, 2019. On February 25, 2020, the undersigned issued an Order Directing the Parties to File Supplemental Briefs by March 13, 2020 to address the sole issue of Respondent's LNOC. The Secretary filed his supplemental brief on March 5, 2020, Respondent filed its supplemental brief on March 13, 2020. As discussed below, the Citation and proposed penalty are VACATED.

## PART I: LATE NOTICE OF CONTEST

### JURISDICTION AND COVERAGE

The Commission gains jurisdiction to adjudicate an alleged violation of the OSH Act by an employer if the employer is engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act, and, if the employer timely contests the citation. 29 U.S.C. §§ 652(5), 659(c). The record establishes that Respondent, as of the date of the alleged violation, was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. 29 U.S.C. § 652(5). *See* Amended Complaint & Answer at ¶¶ 4.

The record also reveals that Respondent filed an untimely notice of contest (NOC). The OSH Act allows 15 working days "from the receipt" of the citation by the employer for the

employer to notify the Secretary of its intent to contest the citation. 29 U.S.C. § 659(a). At that point, if an employer fails to file a timely NOC, "the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. § 659(a).

The Citation for this matter was issued on November 28, 2017, sent by certified mail, and signed as received by "Daniel Sowchah" at the USPS at 140 Brownsville Road, Pittsburgh, PA 15210. *See* Citation Certified Receipt. Next chronologically in the record is a "Notice of Contest" addressed to OSHA Area Director Christopher Robinson that is dated February 2, 2018. In this NOC, Respondent states that "[t]he documents were not received by the Safety and Law Departments until February 2, 2018." The next filing in the record is the Secretary's Complaint, in which the Secretary states the following in pertinent part:

> 1. On November 28, 2017, OSHA issued to Respondent a Citation and Notification of Penalty. The Citation and Notification of Penalty is attached hereto as Exhibit A and is incorporated by reference.
>
> 2. On February 2, 2018, Respondent notified the Secretary that he wishes to contest the Citation and Notification of Penalty. Respondent's notice of contest is attached hereto as Exhibit B.
>
> 3. The Occupational Safety and Health Review Commission has jurisdiction over this contest pursuant to Section 10(c) of the OSH Act, 29 U.S.C. § 659(c).

(Complaint and Amended Complaint at ¶¶ 1-3.)

In response, Respondent filed in its Answer the following:

> 1. It is admitted only that Complainant issued a citation, the remaining averments are denied. Respondent specifically denies the validity of the citation, the proposed penalty, and the date it was issued to Respondent.
>
> 2. Admitted.
>
> 3. Respondent admits jurisdiction pursuant to Section 10(c) of the Act.

(Answer at ¶¶ 1-3.) Respondent also raised as an affirmative defense, "[t]he Citation and Notification of Penalty was not properly served on Respondent." (Answer at 4.)

The record is silent regarding this NOC until February 25, 2020, when the undersigned issued an Order Directing the Parties to File Supplemental Briefs to address the sole issue of Respondent's Late NOC. *See Taj Mahal Contracting*, 20 BNA OSHC 2020, 2023 (No. 03-1088, 2004) ("[A] court may *sua sponte* raise the issue of lack of jurisdiction (and indeed is under an independent obligation to do so) when the matter comes to the attention of the court during the course of proceedings"); *Stone Container Corp.*, 9 BNA OSHC, 1832, 1833 (No. 15116, 1981) ("As a jurisdictional question, the issue of the timeliness of a notice of contest can be raised by a party or by the Commission, *sua sponte*, at any time during the proceedings") *citing* Fed. R. Civ. P. 12(h)(3)("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Based on the date the Citation package was received by the Respondent, Respondent's NOC should have been filed by December 21, 2017. Respondent's NOC was not filed under February 2, 2018, approximately 6 weeks late.

The Secretary filed a brief on this issue on March 5, 2020, and Respondent filed a brief on March 13, 2020. Both parties agree that Respondent's NOC was untimely. (Sec'y Supp. Br. at 2; Resp't Supp. Br. at 6.) Accordingly, the Citation, as issued, is deemed a final order of the Commission by operation of law. 29 U.S.C. § 659(a).

Relief from a final order of the Commission may be granted under Federal Rule of Civil Procedure 60(b).[7] *Nw Conduit Corp.*, 18 BNA OSHC 1948, 1949 (No. 97-851, 1999); *see also*

[7] Fed. R. Civ. P. 60(b) provides in relevant part: "On motion and just terms, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[…, or] (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (6).

*George Harms Constr. Co., Inc., v. Chao*, 371 F.3d 156 (3d Cir. 2004); *J.I. Hass Co., Inc. v. OSHRC*, 648 F.2d 190 (3d Cir. 1981) (holding that the Commission has residual authority over uncontested citations such that it may, in the exercise of its authority, grant relief under Rule 60(b)). The Secretary argues that Respondent's LNOC "was the functional equivalent of a petition for relief under Rule 60(b)." (Sec'y Br. at 2.) In its LNOC, Respondent claimed that "[t]he documents were not received by the Safety and Law Departments until February 2, 2018." The Commission has construed informal statements such as these in LNOCs as motions for Rule 60(b) relief (though typically in *pro se* cases). *See, e.g., Secretary of Labor v. Kaposy*, 607 F. Appx. 230 (3d Cir. 2015) (unpublished) (Commission treating Respondent's letter as petition for relief from judgment under Fed. R. Civ. P. 60(b)).

In its supplemental brief, Respondent requests relief due to "extraordinary circumstances" and "excusable neglect." (Resp't Br. at 6-7 citing Commission Rule 33 note 1 "Under extraordinary circumstances, the cited employer, an affected employee, or an authorized employee representative may seek relief from the final order pursuant to Federal Rule of Civil Procedure 60[.]"). Excusable neglect falls under Fed. R. Civ. P. 60b)(1) and "extraordinary circumstances" have typically fallen under Fed. R. Civ. P. 60(b)(6). *Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993) (*Pioneer*); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2116-2117 (No. 80-1920, 1981).

A late filing may be excused under Fed. R. Civ. P. 60(b)(1) if the final order was entered because of "mistake, inadvertence, surprise or excusable neglect."

> The moving party bears the burden of showing that it is entitled to such relief. Rule 60(b) provides that the judge may grant relief for reasons including "mistake, inadvertence, surprise, or excusable neglect." In determining excusable neglect, the Commission takes into account "all relevant circumstances surrounding the party's omission," including: "the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for

> the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."

*Elan Lawn & Landscape Serv., Inc.*, 22 BNA OSHC 1337, 1339 (No. 08-0700, 2008) (citations omitted).

A late filing may also be excused under Fed. R. Civ. P. 60(b)(6), for any other reason that justifies relief, such as when "absence, illness, or a similar disability prevent[s] a party from acting to protect its interests." *Branciforte Builders, Inc.*, 9 BNA OSHC at 2116-2117. A party seeking relief under Rule 60(b)(6) "must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer*, 507 U.S. at 393. Where a party is partly to blame for the delayed filing, relief from the final order must be sought under Fed. R. Civ. P. 60(b)(1) and the party's neglect must be excusable. *Id.* The Third Circuit has emphasized that the *Pioneer* equitable analysis requires consideration of "all relevant circumstances" surrounding a party's request for relief due to excusable neglect. *Avon Contractors, Inc. v. Sec'y of Labor*, 372 F.3d 171, 174 (3d Cir. 2004. Therefore, the "control" factor must not be weighted too heavily at the expense of the other relevant *Pioneer* factors. *Id*; *see also Coleman Hammons Constr. Co. v. OSHRC*, 942 F.3d 279, 283 (5th Cir. 2019) (same); *George Harms Constr.,* 371 F.3d at 164 (same).

In the Third Circuit, where this case may be appealed, a decision to exercise discretion under Fed. R, Civ. P. 60(b)(6) is " ' available only in cases evidencing extraordinary circumstances.' " *Lasky v. Cont'l Prods. Corp.,* 804 F.2d 250, 256 (3d Cir.1986) (quoting *Stradley v. Cortez,* 518 F.2d 488, 493 (3d Cir.1975)); Fed. R. Civ. P. 60(b)(6). Equitable factors guiding the decision to grant relief include:

> [1] the general desirability that a final judgment should not be lightly disturbed;
>
> [2] the procedure provided by Rule 60(b) is not a substitute for an appeal;
>
> [3] the Rule should be liberally construed for the purpose of doing substantial justice;

> [4] whether, although the motion is made within the maximum time, if any, provided by the Rule, the motion is made within a reasonable time; ...
>
> [5] whether there are any intervening equities which make it inequitable to grant relief;
>
> [6] any other factor that is relevant to the justice of the [order] under attack.

*Kaposy*, 607 F. App'x at 231 citing *Lasky,* 804 F.2d at 256 (citations omitted); *see also Coltec Indus., Inc. v. Hobgood,* 280 F.3d 262, 274–75 (3d Cir.2002) (holding that the movant's particular situation in the context of a Rule 60(b)(6) motion is vitally important). "The fundamental point of 60(b) is that it provides 'a grand reservoir of equitable power to do justice in a particular case.' " *Cox v. Horn,* 757 F.3d 113, 122 (3d Cir. 2014).

Here, Respondent explains "that Daniel Sawchak was a craft employee, who was on his 4th day of a temporary detail as a 204b supervisor. He was asked but did not recall signing for the letter or what he might have done with it." (Resp't Supp. Br. at 6.) Respondent then claims that

> [o]nce Postal management became aware of the Citation, it acted promptly in response, filing its NOC the very same day it received a copy of the Citation from the Area Director. The Commission did not, at any time, object to the Late Notice of Contest, and has not been prejudiced by the late Notice of Contest.

(Resp't Supp. Br. at 9.) Even though Respondent's employee mishandled the certified mailing of the Citation, the Commission typically holds parties responsible for their mail-handling procedures and Respondent has provided little to no support explaining why it should be excused for Mr. Sawchak's mishandling of the Citation. *La.-Pac. Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (Commission expects employers to maintain orderly procedures for handling important documents). The record also reveals that Respondent management knew about previous instances of late filings in OSHA matters from "the WPA safety office" and about its OSHA history that "is not acted on timely and an extension date or two are requested." (Ex. JX-15 at 7-8.) As Respondent has not explained why it should not be held responsible for Mr. Sawchak's mishandling of the Citation, and Respondent's management was aware of previous instances of

untimeliness from that branch, the undersigned is unable to find that Respondent's neglect in this instance was excusable under Fed. R. Civ. P. 60(b)(1).

On the other hand, the Secretary claims that, at the time of Respondent's late filing, the Secretary did not oppose it and instead filed his Complaint. The Secretary further claims that, "given that the parties' pleadings were processed in the normal course, and this case has been tried on the merits and briefed, we see no reason to oppose that petition now." (Sec'y Supp. Br. at 2.) The Commission has previously held, however, that "where an untimely NOC is docketed, under Commission practice it is incumbent upon the Secretary to file a motion to dismiss the NOC as untimely[.]" *Taj Mahal Contracting*, 20 BNA OSHC at 2022. Here, instead of filing the motion to dismiss, the Secretary filed the Complaint, averring that the Commission had jurisdiction for this matter under section 10(c) of the OSH Act, because the Secretary "did not oppose" Respondent's LNOC. (Sec'y Supp. Br. at 2.) The undersigned finds that, based on the Secretary's supplemental brief, the Secretary knew that Respondent's filing was late, that the matter had been deemed a final order, and yet, the Secretary did not specifically raise this issue to the undersigned's attention in the Complaint.

As each party notes, however, this case has proceeded despite the LNOC for over two years, wherein the hearing was held and then the merits were fully briefed. The undersigned is also mindful that Fed. R. Civ. P. 60(b) caselaw cautions that no one equitable factor should be weighed too heavily, and that the aim is "to do justice in a particular case." *Cox,* 757 F.3d at 122. The undersigned finds that all share blame in cultivating this issue. No entity would be prejudiced if this matter were to proceed after relief from the final judgment. Indeed, substantial justice would be furthered if the merits were reached as all spent significant time preparing for, participating in, and briefing the merits after, the hearing that was held in this matter.

Accordingly, the undersigned finds that this case barely passes muster for Fed. R. Civ. P. 60(b)(6) relief. It is particularly noted that the Secretary abdicated his responsibility to file a motion to dismiss as is the practice before this Commission. *Taj Mahal Contracting*, 20 BNA OSHC at 2022. However, the weight of the equitable factors for this case is in favor of reaching the merits of this case. Relief is granted from the final order under Fed. R. Civ. P. 60(b)(6) as the events in this matter constitute "extraordinary circumstances."

## PART II: MERITS

For the following reasons, the Citation is this matter is VACATED.

### STIPULATIONS

The parties stipulated to the following facts:

1. At the time of the issuance of the discipline, [Postal Worker 1 ("PW1")][8] was an employee of USPS, and had been for approximately 20 years (start date on or about June 21, 1997).

2. At the time of the issuance of the discipline, [Postal Worker 2 ("PW2")] was an employee of USPS, and had been for just over one year (start date on or about April 16, 2016).

3. At all times relevant to this case, Clifford Mayfield was an employee of the Respondent and a member of management.

4. At all times relevant to this case, Mayfield was eligible for Respondent's pay-for-performance compensation and incentive program.

5. At all times relevant to this case, Robin Derry, Supervisor, Customer Services, Mount Oliver Branch of the Pittsburgh Post Office of USPS, was an employee of the Respondent and a member of management.[9]

6. At all times relevant to this case, Derry was eligible for Respondent's pay-for-performance compensation and incentive program.

[8] For personal privacy reasons, the names of the injured employees have been redacted in this Decision and Order.

[9] At all times relevant to this case, this was Derry's position. Derry is currently on extended military leave, was thus unavailable for depositions, and is thus also unavailable for trial.

7. At all times relevant to this case, Harry Wolfe was an employee of the Respondent and a member of management.

8. At all times relevant to this case, Wolfe was eligible for Respondent's pay-for-performance compensation and incentive program.

9. At all times relevant to this case, Gerst-Stewart was an employee of the Respondent and a member of management.

10. At all times relevant to this case, Gerst-Stewart was eligible for Respondent's pay-for-performance compensation and incentive program.

11. At all times relevant to this case, Kammermeier was an employee of the Respondent and a member of management.

12. At all times relevant to this case, Kammermeier was eligible for Respondent's pay-for-performance compensation and incentive program.

13. On May 15, 2017, [PW1] was injured during the performance of his duties on the job.

14. [PW1] was injured while moving a mail sack onto a truck.

15. On May 15, 2017, [PW1] reported his injury to USPS management.

16. [PW1] received medical treatment for his injuries.

17. On May 15, 2017, Wolfe conducted an investigation into the facts of [PW1's] injury.

18. On/about May 15, 2017, Wolfe ordered [PW1] to be drug tested.

19. On/about May 17, 2017, Wolfe was informed that [PW1's] drug test results were negative.

20. On May 22, 2017, Mayfield conducted a Pre-Disciplinary Interview with [PW1], with union steward David Bugay in attendance.

21. On May 31, 2017, Respondent disciplined [PW1], issuing him a seven day, no-time-off suspension.

22. The grievance brought by [PW1] concerning his May 31, 2017 discipline was settled by Acting Manager Louis Kammermeier on August 18, 2017, fully rescinding and expunging the discipline from the affected employee's file, stating "[e]vidence does not support issued discipline."

23. On June 1, 2017, [PW2] was injured during the performance of her duties on the job.

24. [PW2] was injured when she was bitten by a dog.

25. The dog that bit [PW2] was in the yard at 510 Augusta Street.

26. [PW2] was bitten by the dog while attempting to deliver mail to 514 Augusta Street.

27. On June 1, 2017, [PW2] reported her injury to USPS management.

28. [PW2] received medical treatment for her injuries.

29. On June 1, 2017, Wolfe conducted an investigation into the facts of [PW2's] injury.

30. On June 2, 2017, Mayfield conducted a Pre-Disciplinary Interview with [PW2], with union steward David Bugay in attendance.

31. On June 2, 2017, Respondent disciplined [PW2], issuing her a seven-day, no-time-off suspension.

32. The grievance brought by [PW2] concerning her June 2, 2017 discipline was settled by Acting Manager Louis Kammermeier on August 18, 2017, fully rescinding and expunging the discipline from the affected employee's file, stating "[e]vidence does not support issued discipline."

33. Memorandum from USPS' Nancy L. Rettinhouse, Vice-President Employee Resource Management to all USPS Area Vice Presidents re: OSHA Rule Change – November 1, 2016, dated October 6, 2016 is an authentic copy of a memorandum and business record of the Respondent.

34. Regarding its intended trial exhibits, Respondent did not produce in discovery, in response to the Secretary's discovery requests, the following exhibits as listed by Respondent in the Joint Prehearing Statement: RX-3, RX-9, RX-10, RX-11, RX-13, RX-14, RX-15, RX-16, and RX-19.

35. Specifically, for its intended exhibits RX-17 and RX-18, as listed by Respondent in the Joint Prehearing Statement, in its discovery responses, Respondent produced a link to a web site, as in pertinent part below:

    a. In response to Secretary's Interrogatory No. 1: "Employee and Labor Relations Manual ("ELM"), Section 814.2, http://about.usps.com/manuals/elm/elmarch.htm"
    b. In response to Secretary's Interrogatory No. 12: "Employee and Labor Relations Manual, in general at: http://about.usps.com/manuals/elm/elmarch.htm and specifically, ELM Section 814.2"

36. The following OSHA memorandums and guidance are publicly available on OSHA's web site, and neither party objects to the admission of these exhibits as additional Joint Exhibits:

a. **JX-16** 2016 11-10 Interim Enforcement Procedures for New Recordkeeping Requirements Under 29 CFR 1904.35
b. **JX-17** Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015
c. **JX-18** 2016 10-19 Interpretation of 1904.35(b)(1)(i) and (iv)
d. **JX-19** 2018 10-11 Clarification of OSHA's Position on 1904

37. The Secretary confirms, and Respondent does not object, that the 11(c) portion of OSHA's investigation into the employee complaints of discrimination and retaliation at issue in OSHRC Docket No. 18-0188 ended on or about September 1, 201[7][10], and that OSHA has closed both 11(c) claims. Both parties acknowledge that the § 1904 portion of OSHA's investigation continued on after that date and resulted in OSHA's issuing the citation at issue in the trial for OSHRC Docket No. 18-0188.

("Stipulations"; Ex. JX-0; Tr. at 11-12.)

[10] The context of this stipulation, as well as the record, support a finding that the "2018" as written in Exhibit JX-0 is a typographical error and that the date intended to be stipulated to is "September 1, 2017."

## BACKGROUND

This case concerns two postal workers (PW1 and PW2) employed by Respondent at the Mt. Oliver Branch of the Pittsburgh Post Office located in Pittsburgh, PA. PW1 and PW2 are both letter carriers and, at the time of their injuries, PW1 had been employed about 20 years and PW2 had been employed about 1 year by Respondent. (Stip. ¶¶ 1, 2.) PW1 injured his back when he lifted a bag full of mail. The Secretary claims that Respondent retaliated against PW1 when Respondent disciplined PW1 after he reported his injury to his manager. Respondent claims that PW1 failed to follow proper and established safety protocol when lifting the mailbag and was disciplined in accordance with Respondent's worker safety program. PW2 was bitten on her arm by a dog while attempting to deliver mail to a residence. The Secretary claims that Respondent retaliated against PW2 when Respondent disciplined her after she reported a dog bite injury to her manager. Respondent claims that PW2 failed to follow proper and established safety protocol related to mail delivery around aggressive dogs and was disciplined consistent with its worker safety program.

The disciplinary process in this case was conducted according to a contract in place between Respondent and the National Association of Letter Carriers (NALC). (Tr. at 364-366, 393-394, 406-407). The process includes the participation of the employee at issue, the direct supervisor, the manager, a higher-level official than the manager, and a union steward. (Tr. at 394.) In this case, the process was the same for both PW1 and PW2. After PW1 notified Acting Manager Harry Wolfe of his injury, Wolfe talked with PW1 for 5-10 minutes and then sent PW1 to Concentra Medical (a medical provider for Respondent) for medical treatment.[11] The same process happened for PW2. (Stip. ¶¶ 16, 28; Tr. at 32, 35, 62, 213, 239, 271; Sec'y Br. at 9, 16).

[11] No further information regarding Concentra Medical, and its relationship to Respondent and its employees, is in the record.

With regard to PW1, PW1 testified that he did not demonstrate his lifting technique to Wolfe during this conversation. (Tr. at 35.) In contrast, Wolfe testified that PW1 did demonstrate to Wolfe his lifting technique upon his request during this conversation. (Tr. at 207.) Wolfe also ordered PW1 to be drug tested that day, and the results were negative. (Stip. at ¶¶ 18, 19.)

Wolfe reported each injury to his boss, Maureen Gerst-Stewart, the Manager of Customer Service Operations, Pittsburgh, via e-mail on or around the day of the incidents and before pre-disciplinary interviews were conducted in each matter. (Tr. at 338-339; Ex. JX-15 at 2 (e-mail on or around May 17, 2017 re: PW1), 4 (e-mail on June 1, 2017 re: PW2).) Subsequently, delivery supervisor Clifford Mayfield conducted a pre-disciplinary interview (PDI) with each injured employee, with both PDIs accompanied by union steward Dave Bugay. (Stip. ¶¶ 20, 30; Exs. JX-3, 4, 10, 11).

Wolfe thereafter submitted formal discipline requests for both PW1 and PW2. (Tr. at 216, 240.) Mayfield delivered the discipline packages to Respondent's Labor Relations office for their consideration. (Tr. at 106 (PW1), 123-124 (PW2).) At Respondent's Labor Department, Labor Relations Specialist David Chludzinski reviewed the disciplinary packages, concurred with the requested discipline, and drafted the discipline letters. (Tr. at 389-390, 394.) Shortly after, two discipline letters were issued to the injured employees. Delivery Supervisor Robin Derry issued the discipline to PW1, and Delivery Supervisor Clifford Mayfield issued the discipline to PW2 (signed by Robin Derry for Clifford Mayfield). (Exs. JX-6, 13.)

Due to the many people involved in the disciplinary process in this case, the undersigned created a pictorial chart as shown in "Chart A," to assist the reader in understanding who participated in the disciplinary process, how much influence that person had, and at what point in time that person took those actions relative to the other events that occurred in this case. The

record reveals that, as relevant to this case, Respondent's organizational structure is complex with overlapping relationships among Respondent's management, workers, and union representatives.

**Respondent's Management Chain**[12]

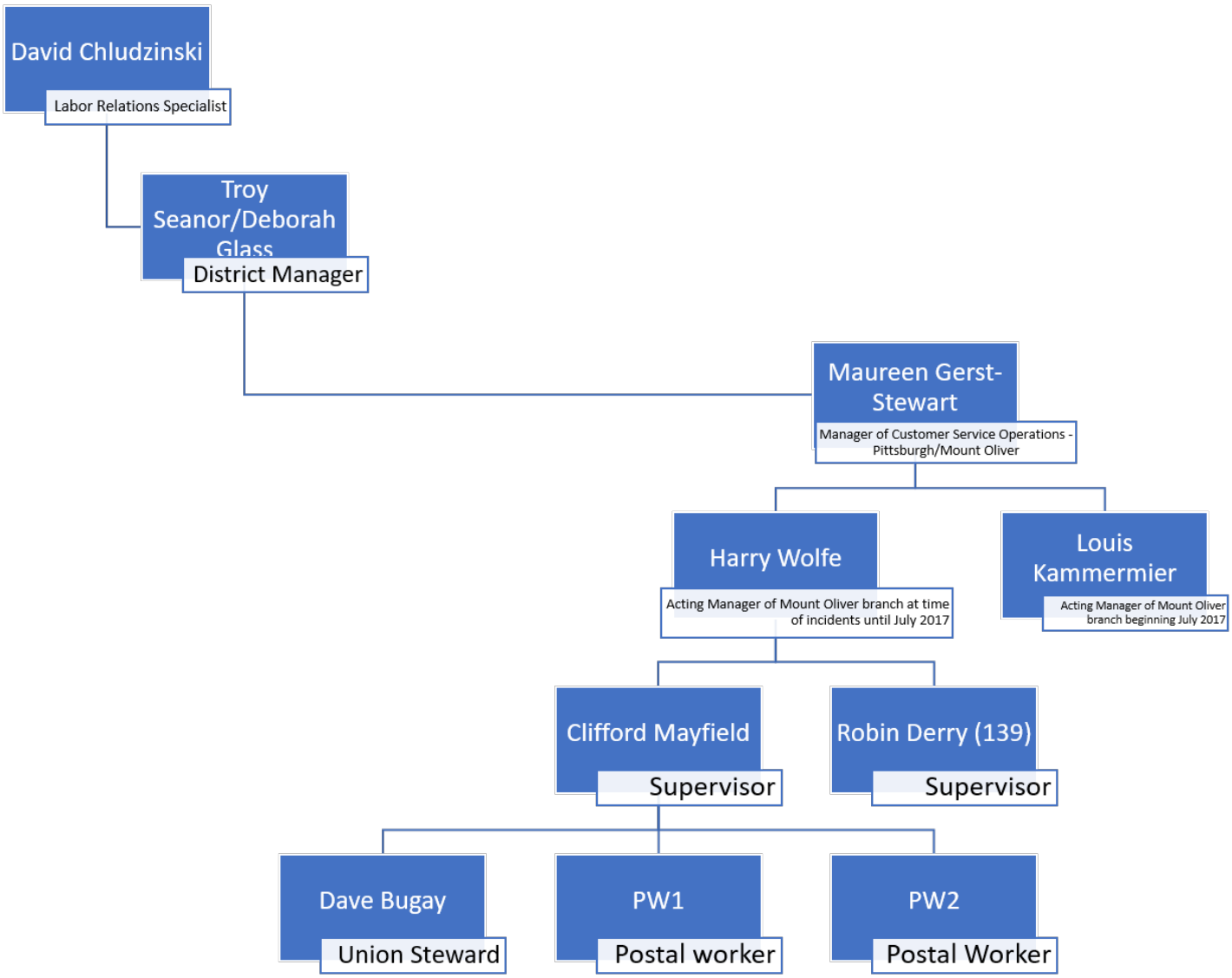


**CHART A: Respondent's Management Chain.**

[12] The information in Chart A comes from the record and is used for visualization purposes. Chart A is not intended to capture Respondent's complete organizational structure of the people at issue in this case, rather, it is intended to reflect the information that was provided in the record as is relevant to the issues herein.

As Chart A indicates, PW1 and PW2 are the two postal workers who were injured in this case. They both had been trained in the relevant safety protocols related to their job tasks. (Tr. at 50, 70-71.) They both reported their respective injuries to their manager at the time, Wolfe. (Tr. at 31, 60, 204-206.) Wolfe was more senior in management than the delivery supervisors, Clifford Mayfield and Robin Derry. (Tr. at 89, 137, 139; Ex. GX-13 at 1.) Mayfield and Derry were equivalent in rank and directly supervised PW1 and PW2 depending on who was on duty at the Mt. Oliver post office that day. (Tr. at 31, 89, 139, 332.) Both Mayfield and Derry directly reported to Wolfe. (Exs. GX-13 at 1, GX-14 at 1.) Mayfield did "what [he] was told" by Wolfe and conducted the PDIs of PW1 (May 22, 2017) and PW2 (June 2, 2017), with union steward Dave Bugay also in attendance, as part of this disciplinary process. (Tr. at 106; Stip. ¶¶ 20, 30.) Bugay is a letter carrier in the Mt. Oliver branch, as well as a union steward. (Tr. at 467-468.)

Chludzinski, the Labor Relations Specialist manager, reviewed the requested discipline in this case. (Tr at 389.) Chludzinski's concurrence with the disciplinary request was required by the NALC contract as he was Wolfe's "higher level official." (Tr. at 394.) The purpose of the concurrence is to have a "higher-level manager who presumptively has more experience, maybe a little more levelheaded, can tell the new supervisor you're not – this is excessive in this case. Or vice versa." (Tr. at 405.) Gerst-Stewart testified that the requesting official has the power to override "Labor," but never does, because "Labor" is the one familiar with the law. (Tr. at 364-366.) Chludzinski did not talk with Wolfe's delivery supervisors, Mayfield or Derry, regarding the discipline during his review of the matters. (Tr. at 390, 394.) Chludzinski testified that he reviews non-safety discipline requests with the goal of whether it would "be supported through the grievance procedure" because he "didn't want it to be some discipline that was issued that was just going to get tossed in a grievance procedure." (Tr. at 413.) Safety related disciplinary requests,

however, are different and, for example, he got "more in depth" with the disciplinary request at issue in this case. (Tr. at 412-415.)

When Wolfe formally requested discipline for PW1 and PW2, Wolfe requested a 7-day no time off suspension to be issued to them. (Exs. JX-5, 12.) According to Chludzinkski, Respondent's progressive disciplinary policy follows Respondent's contract with NALC, which gives discretion to the requesting official to "skip steps" based on "mitigating or aggravating circumstances," especially in his opinion for safety infractions. (Tr. at 402-405.) The steps in the progressive disciplinary policy include: 1) discussion with the employee, 2) written warning, 3) 7-day no time off suspension[13], 4) 14-day no time off suspension, and 5) possible termination. (Tr. at 405-408.) With regard to PW1, Respondent's contract with NALC required concurrence, verbal or written, by a higher-level official than the one who requested the discipline. (Tr. at 394.) Here, Chludzinski was Wolfe's higher-level official. PW2, however, was a "non-career" employee and was therefore not subject to the concurrence requirement of the NALC contract. (Tr. at 447.) Chludzinski testified that he still spoke with Wolfe regarding the discipline for PW2, but any anomalies in the paperwork for PW2 were not a potential procedural defect in the grievance procedure and were therefore of no concern to him. (Tr. at 446-448.)

Chludzinski concurred with Wolfe's requested discipline of a 7-day no time off suspension for PW1 and PW2 and drafted their respective disciplinary letters. (Tr. at 412, 418-421.) The letters were issued by the delivery supervisors and presented to PW1 on May 31, 2017 and to PW2 on June 2, 2017.

[13] According to Chludzinski, the "no time off" suspensions were a relic from the negotiations between Respondent and the NALC that "goes back [] to the 60's…They're just paper. But they carry the same effect for purposes of progressive discipline." (Tr. at 406-407). The employee still goes to work, "they get paid…It's just paper that goes in their file…for purposes of progressive discipline it can be relied upon for the next level." (Tr at. 407.)

Bugay filed a grievance on behalf of PW1 on June 8, 2017, and PW2 on June 16, 2017. (Tr. at 68, 477; Exs. JX-7, 14; Resp't Br. at 23 ¶ 84.) Bugay also filed retaliation complaints under § 11(c) of the OSH Act with OSHA on behalf of PW1on July 6, 2017, and PW2 on June 19, 2017. (Tr. at 51, 82, 511, 524-525; Resp't Br. at 17 ¶ 42, 23 ¶ 85.) In mid-July 2017, Louis Kammermier replaced Wolfe and became the Acting Manager of the Mt. Oliver branch. (Tr. at 309, 320.) After reviewing the disciplinary matters, Kammermier rescinded and expunged both disciplinary suspensions in this case on August 18, 2017. (Exs. JX-7, 14.) For both rescinded disciplinary measures, Kammermier determined that the "evidence does not support issued discipline." (Tr. at 312-315; Exs. JX-7, 14.) He testified that he does not know who decided to issue the discipline. (Tr. at 310.) Kammermier testified that the local manager, not the supervisor, is responsible for the decision to send or not send the package requesting discipline. (Tr. at 334).

To recap the timeline of events of this case, and to tie them to OSHA's investigation actions, Table A summarizes the relevant events.

**Timeline of Events**

| Event | Date |
|---|---|
| PW1 injured and reported injury | May 15, 2017 (Ex. JX-0 ¶¶ 13,15) |
| PW1 suspension | May 31, 2017 (Ex. JX-0 ¶ 21) |
| PW2 injured and reported injury | June 1, 2017 (Ex. JX-0 ¶¶ 23, 27) |
| PW2 suspension | June 2, 2017 (Ex. JX-0 ¶ 31) |
| Whistleblower complaint filed | June 2017 (Tr. at 524-525) |
| OSHA begins 11(c) investigation | June 2017 (Tr. at 525) |
| OSHA begins 1904 investigation | July 6, 2017 (Citation) |
| Discipline rescinded | August 18, 2017 (Ex. JX-0 ¶¶ 22, 32) |
| Whistleblower complaint closed | September 1, 2017[14] (Tr. at 526, 538-539; Ex. JX-0 ¶ 37) |
| Management statements taken | October 6, 2017 (Exs. GX-13, 14) |
| Citation issued | November 28, 2017 (Citation) |

**TABLE A: Timeline of Events.**

As Table A shows, PW1 was injured on May 15, 2017 lifting a mailbag and he reported his injury to Wolfe that day. On May 31, 2017, PW1 was disciplined with a 7-day no time off suspension. On June 1, 2017, PW2 was injured by a dog and she reported her injury to Wolfe that day. The next day, PW2 was disciplined with a 7-day no time off suspension. In June 2017, union steward Bugay filed a grievance and whistleblower complaint regarding the discipline of PW1 and PW2. Shortly thereafter, also in June, OSHA began a § 11(c) investigation of the whistleblower complaint.

On July 6, 2017, OSHA began a separate § 1904 investigation, under 29 C.F.R. § 1904.35(b)(1)(iv), which ultimately led to the Citation at issue here. Before either OSHA investigation concluded, Respondent rescinded and expunged both disciplinary matters from the records of both PW1 and PW2 on August 18, 2017. About two weeks later, on September 1, 2017, OSHA closed out the § 11(c) investigation and complaint. On October 7, 2017, OSHA took

[14] As noted above, he context of this stipulation, as well as the record, supports a finding that the "2018" as written in Exhibit JX-0 is a typographical error and that the date intended to be stipulated to is "September 1, 2017."

Respondent management's statements as previously planned during the § 11(c) investigation, but subsequently used those statements for the § 1904 proceedings here. On November 28, 2017, OSHA issued the Citation for this case.

An aspect of this case that will be addressed is Respondent's National Performance Assessment, Performance Evaluation System, Pay-for-Performance plan ("NPA-PES-PFP"), of which the Secretary devoted almost 7 pages of his post-hearing brief. (Sec'y Br. at 21-27.) The Secretary sets out in detail part of Respondent's own business evaluation system and compensation plan as relevant to the issues in this case. While the Secretary insists that he does not allege that this compensation plan violates § 1904, he nevertheless claims that this compensation plan shows Respondent's "incentive for taking the adverse actions at issue." (Sec'y Br. at 22 n.7.)

Respondent disagrees and claims that this "litigation is nothing more than an excessive fishing expedition, in which the Secretary hopes to stumble upon some evidence which might support their attempt to expand the allegation to include an indictment of Respondent's incentive programs." (Resp't Br. at 46.) Elsewhere in its brief, Respondent claims that OSHA is attempting to use the cited standard under 1904 to "examine and evaluate an employer's performance and compensation programs, its training and evaluation of employees, including 'all criteria' used to evaluate management." (Resp't Br. 42.) It is also noteworthy that no abatement was specified in the Citation for this matter and no discipline remained on the subject employees' records at the time the Citation was issued.

## DISCUSSION

### I. The Standard Applies and the Citation is Valid

#### A. The Standard is Applicable

To establish a violation of a standard, the Secretary must establish its applicability, the employer's noncompliance with it, employee access to the noncomplying condition, and the

employer's knowledge of the violation. *Astra Pharma. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d. 69 (1st Cir. 1982). "It is well settled that the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned." *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502-1503 (No. 89-1555, 1993).

The standard at issue here states that the employer must not "discharge or in any manner discriminate against any employee for reporting a work-related injury or illness." 29 C.F.R. § 1904.35(b)(1)(iv). The Secretary alleges that Respondent, the employer, discriminated against PW1 and PW2 after they reported their work-related injuries to Wolfe, their manager, by issuing to each of them a 7-day no time off suspension. The undersigned finds that by its plain terms, the standard applies to Respondent.

**B. The Citation is Valid**

Both parties filed motions for summary judgment in this matter in which the parties addressed *inter alia* Respondent's "ultra vires" affirmative defense that Respondent asserted in its Answer. *See* Answer at 3; Complainant's Motion for Partial Summary Judgment (Sept. 12, 2018); Respondent's Motion for Summary Judgment (Oct. 26, 2018); Secretary's Response in Opposition to Respondent's Motion for Summary Judgment (Nov. 9, 2018); Respondent's Reply to Secretary's Response to Respondent's Motion for Summary Judgment (Nov. 16, 2018). While both motions were denied, the parties address this issue again in their post-hearing briefs. *See* Order Denying Complainant's Motion for Partial Summary Judgment and Motion to Stay Pending Ruling (Sept. 24, 2018); Order Denying Respondent's Motion for Summary Judgment (Nov. 20, 2018).

Respondent argues that the Citation under the cited standard is invalid as *ultra vires*. (Resp't Br. at 29-42.) Respondent claims that OSHA exceeded its authority in promulgating the

cited standard because (a) "Congress created the exclusive tool for discrimination and retaliation regulation in section 11(c) of the OSH Act," (b) OSHA now has "new unlimited discrimination causes of action," (c) these "unlimited discrimination claims under section 1904 are arbitrary and capricious," and (d) "OSHA's description of the unlimited authority granted by Congress violate the non-delegation doctrine."

The Secretary, on the other hand, argues that he had the authority to promulgate the cited standard "under the recordkeeping authorities in the OSH Act, *see* 29 U.S.C. §§ 657(c)(1), 657(c)(2), 657(g)(2), 673(a), 673(e), and thus the Secretary's reasonable interpretation of the Act is entitled to controlling deference under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842 (1984)." (Sec'y Br. at 29.) The Secretary also refers to a recent well-researched and well-reasoned order issued by Commission ALJ William S. Coleman on this same issue in a similar matter before the Commission. *See U.S. Postal Serv.*, OSHRC No. 18-0462, Order Granting Secretary's Motion for Partial Summary Judgment on Affirmative Defenses Numbered 8 & 9 in Respondent's Answer (Dec. 27, 2018) (Coleman Order).[15]

The undersigned has reviewed the parties' arguments in their post-hearing briefs and in their motions for summary judgment (and oppositions and responses thereto). The undersigned also reviewed the Coleman Order and hereby incorporates by reference into this Decision its detailed analysis of this issue into this Decision. *See* Attachment A. For the following reasons, the undersigned rejects Respondent's arguments and agrees with the Secretary that the Citation in this matter is valid.

[15] As the Secretary notes, that case settled shortly after Judge Coleman issued that order. *U.S. Postal Serv.*, No. 18-0462, Consent Order Approving Settlement (Feb. 26, 2019); Sec'y Br. at 30 n.10.

The Coleman Order addresses the same arguments Respondent raises in this case. It begins by reviewing the statutory and regulatory background to analyze the Secretary's authority to promulgate recordkeeping regulations. (Coleman Order at 3-5.) The standard at issue here was promulgated pursuant to sections 2(b), 8(c)(2), 8(g)(2), and 8(c)(1) of the OSH Act. (Coleman Order at 5-13.) Section 9(a) then gives the Secretary the duty and the power to enforce this regulation by conducting inspections and issuing citations. (Coleman Order at 4.) During the promulgation of the subject regulation, the Secretary addressed comments regarding the standard's similarity to section 11(c). (Coleman Order at 8-13.) The Secretary stated that "the principal motivation for the proposed anti-retaliation regulation is not to redress an employee's 11(c) rights, but rather to advance OSHA's responsibility to collect accurate injury and illness statistics[.]" (Coleman Order at 10.)

With this in mind, the Coleman Order analyzes arguments relating to whether the alleged standard was invalid as *ultra vires,* and whether it lacked a rational basis and/or whether it was arbitrary and capricious, under the framework established by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). (Coleman Order at 2, 14, 24.) According to the Coleman Order, "nothing in section 11(c) [of the OSH Act] speaks to whether OSHA may exercise its authority to promulgate regulations that promote accurate recordkeeping where anti-retaliation and recordkeeping goals overlap." (Coleman Order at 19.) It further explains that "[i]nterpreting the Act to permit the Secretary to promulgate a regulation that advances the accuracy of injury and illness data is consistent 'with the design and structure of the statute as a whole.' " (Coleman Order at 19 citing *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014).)

The Coleman Order also concludes that the rulemaking record "far surpasses" the minimum requirements articulated in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) for assessing whether certain rulemaking is arbitrary and capricious under the

Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (APA). (Coleman Order at 17, 21.) Similarly, it found that the "preamble to the final rule more than amply establishes that the anti-retaliation regulation is 'reasonably related' to the requirements of the Act that employers provide and that OSHA collect accurate injury and illness data," and therefore the regulation did not violate the "non-delegation" doctrine as addressed in *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 214 (1989). (Coleman Order at 21-22.) The Coleman Order goes on to clarify that "[e]nforcement of the anti-retaliation regulation is not rendered arbitrary and capricious simply because there could be a parallel section 11(c) and section 9(a) proceedings involving the same alleged retaliatory act." (Coleman Order at 22.) Conflicts arising under the parallel proceedings, such as double recovery, could be prevented by equitable principles, and issue or claim preclusion could be permitted to solve such conflicts. (Coleman Order at 22.)

Finally, in sum, the Coleman Order concludes that:

> Enforcement of section 1904.35(b)(1)(iv) pursuant to section 9(a) of the Act is well within the bounds of permissible construction of the Act and is neither arbitrary nor capricious. This permissible interpretation of the Act is due 'controlling weight' under *Chevron*, inasmuch as the anti-retaliation regulation was promulgated pursuant to Congress's express delegations of authority to the Secretary (a) to promulgate regulations 'as necessary or appropriate for the enforcement of this [Act] or for developing information regarding the causes and prevention of occupational accidents' in section 8(c)(1), (b) to 'prescribe regulations requiring employers to maintain accurate records of … work-related deaths, injuries and illnesses,' in section 8(c)(2), and (c) to prescribe regulations deemed necessary to carry out [his] responsibilities under this [Act]' in section 8(g)(2).

(Coleman Order at 23 citing *Chevron*, 467 U.S. at 843-844.)

Judge Coleman's analysis persuasively addresses Respondent's arguments raised in this matter. The undersigned agrees with the Secretary regarding the Coleman Order and embraces the legal conclusions as applied to the issues in this case. For these reasons, the undersigned finds that the cited standard is a valid exercise of the Secretary's rule-making authority and rejects Respondent's arguments that it is invalid as *ultra vires* or arbitrary and capricious under the APA.

Accordingly, the undersigned concludes that the Citation issued in this case pursuant to 29 C.F.R. § 1904.35(b)(1)(iv) is valid.

## II. The Secretary Failed to Establish a Violation of the Cited Standard

The undersigned finds that the Secretary failed to establish a violation of the cited standard in this case. The Secretary has not proven that Respondent discriminated against PW1 or PW2 because they reported their work injuries.

### A. Applicable Law

According to the Secretary, "to establish a violation of § 1904.35(b)(1)(iv), the Secretary must show by a preponderance of the evidence that: 1) the employee reported a work-related injury or illness; 2) the employer took adverse action against the employee; and 3) the employer took the adverse action because the employee reported a work-related injury or illness." (Sec'y Br. at 34 citing JX-16 OSHA Interim Enforcement Procedures for New Recordkeeping, Section III – Special Interim Enforcement, Inspection, Referral, and Citation Procedures for Violations of 1904.35(b)(1)(iv), Sub-section A – Elements of the violation, p. 3.) The Secretary further states that "[t]hese elements of proof are entirely consistent with well-established law of retaliation and discrimination." (Sec'y Br. at 35 citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Tex.as Dept. of Comty. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981); *Postal Serv. Bd. of Gov. v. Aikens*, 460 U.S. 711, 715 (1983); *Acosta v. Lloyd Indus., Inc.*, 291 F.Supp. 3d 647 (E.D. Pa. 2017).)

The Third Circuit, in which this case arose, applies the burden-shifting scheme of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) if a statute does not provide for a burden-shifting framework to determine discrimination. *Doyle v. U. S. Sec'y of Labor,* 285 F.3d 243, 250 (3d Cir. 2002); *see also* 29 U.S.C. § 660(a) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for

the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . . ."); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of the circuit where it is probable a case will be appealed).

District courts analyzing section 11(c) claims under the OSH Act also apply the *McDonnell Douglas* framework. *See, e.g., Perez v. E. Awning Sys., Inc.*, No. 3:15-CV-01692 (MPS), 2018 WL 4926447 (D. Conn. Oct. 10, 2018); *Acosta v. Dura-Fibre LLC*, No. 17-C-589, 2018 WL 2433589 (E.D. Wis. May 30, 2018); *Acosta v. Lloyd Indus., Inc.*, 291 F. Supp. 3d 647 ; *Perez v. Champagne Demolition, LLC*, No. 112CV1278FJSTWD, 2016 WL 3629095 (N.D.N.Y. June 29, 2016); *Perez v. Pac. Ship Repair & Fabrication, Inc.*, No. C14-1773-JCC, 2015 WL 7292594 (W.D. Wash. Nov. 16, 2015); *Chao v. Blue Bird Corp.*, No. 5:06-CV-341 (CAR), 2019 WL 485471, (M.D. Ga. Feb. 26, 2009), *aff'd sub nom. Solis v. Blue Bird Corp.*, 404 F. App'x 412 (11th Cir. 2010) (unpublished).

When the Commission is asked to apply a legal test developed outside of the OSH Act, the Commission looks to whether the OSH Act's goals of ensuring workplace health and safety are preserved by applying that test. *See, e.g., Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1294-95 (No. 00-1402, 2010) (considering "substantial continuity test" developed under the National Labor Relations Act for purposes of repeat characterization under the OSH Act). As discussed in the previous section, the standard at issue in this case was properly promulgated pursuant to section 8(c)(1) of the OSH Act which provides that "[e]ach employer shall make, keep and preserve … such records regarding his activities relating to this Act as the Secretary … may prescribe by regulation as necessary or appropriate for the enforcement of this Act [.]" 29 U..S.C. § 657(c)(1). The OSH Act further directs the Secretary to "prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under this Act." 29 U.S.C. § 657(g)(2).

The OSH Act is silent as to the burden-shifting framework to be applied to a discrimination analysis of a regulation properly promulgated under the OSH Act. Moreover, the *McDonnell Douglas* burden-shifting scheme is the well-established framework for discrimination case law, both parties agree to apply this test, and the undersigned finds that it is the appropriate framework to apply in this case.

In his brief, the Secretary advances a retaliation theory of discrimination in this case.[16] (Sec'y Br. at 34-46.) The *McDonnell Douglas* framework for a retaliation discrimination analysis is a three-step burden-shifting test that is summarized as follows:

> [i]n the absence of direct evidence, the plaintiff must first make a *prima facie* case of retaliation by showing (1) participation in a protected activity, (2) a subsequent adverse action by the employer, and (3) evidence of a causal connection between the protected activity and the adverse action. The burden then shifts to the defendant, who must articulate an appropriate non-discriminatory reason for its action. Finally, if the defendant satisfies its burden, the plaintiff must then demonstrate that the proffered reason is pretextual.

*Acosta v. Lloyd Indus., Inc.*, 291 F. Supp. 3d at 653(citations omitted); *see also Reich v. Hoy Shoe Co.*, 32 F.3d 361, 365 (8th Cir. 1994) (adopting three-pronged framework for analyzing retaliation case under § 11(c) of the OSH Act).

**B. Analysis**

The Secretary's approach to presenting his *prima facie* case with this three-step burden shifting test to the matter at hand is consistent with this test. (Sec'y Br. at 34 citing Ex. JX-16.) As such, the undersigned examines the facts here to see if the Secretary established whether: "1) the employee reported a work-related injury or illness; 2) the employer took adverse action against

[16] Respondent also discusses the facts of this case through a disparate treatment theory of discrimination. (Resp't Br. at 47-49.) As the Secretary does not advance a disparate treatment theory, the undersigned deems the Secretary abandoned that theory in this case. *L&L Painting Co.,* 23 BNA OSHC 1986, 1989 n. 5 (No. 05-0055, 2012) (holding that items not addressed in briefs before the Commission are deemed abandoned).

the employee; and 3) the employer took the adverse action because the employee reported a work-related injury or illness." (Sec'y Br. at 34).

**1. Protected Activity**

The facts here readily establish the Secretary's *prima facie* case. Even Respondent agrees that the Secretary has presented a *prima facie* case of retaliation. (Resp't Br. at 50.) Both PW1 and PW2 engaged in protected activity when they each reported their work-related injury to Wolfe. *Perez v. U.S. Postal Serv.,* 76 F. Supp. 3d 1168, 1184 (W.D. Wash. 2015) ("The scope of rights protected implicitly and explicitly under the Act is broad."); (Sec'y Br. at 36 citing 29 C.F.R. §§ 1904.35(b)(1)(iv)("You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness."); 29 C.F.R. § 1904.36 ("In addition to § 1904.35, section 11(c) of the OSH Act also prohibits you from discriminating against an employee for reporting a work-related fatality, injury, or illness[.]"); Resp't Br. at 50 ("Both employees engaged in protected activity and both were subject to an adverse action.").

### 2. Adverse Action

Both PW1 and PW2 suffered an adverse action when they were issued a 7-day no time off suspension. In a retaliation claim, an "adverse action" can include an action that could "dissuade a reasonable employee from exercising their protected conduct." *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The Secretary has incorporated *Burlington* into his analysis by defining an adverse action as whether the "action would deter a reasonable employee from accurately reporting a work-related injury or illness." (Ex. JX-16 at 3.) The 7-day no time off suspension was recordable, and could serve as a pre-requisite for subsequent discipline, as part of Respondent's progressive disciplinary policy. A recordable disciplinary action that could serve as a basis for the next level of discipline could chill a reasonable employee from reporting a workplace injury. Even if, as in this case, the discipline was subsequently expunged, "[a]n employer cannot nullify a retaliation claim simply by offering to undo its adverse action once the possibility of a government enforcement action looms on the horizon. Further, a subsequent offer of reinstatement does not eliminate the chill of the retaliatory act." *Perez v. E. Awning Sys., Inc.*, 2018 WL 4926447, at *7.

### 3. Causality

With regard to the third prong, causality, Respondent disciplined both PW1 and PW2 shortly after they reported their injuries – within two weeks for PW1 and one day for PW2. Courts have looked to open hostility or temporal proximity, to find a causal link between the protected activity and the adverse action. *See, e.g.*, *Acosta v. Lloyd Indus., Inc.*, 291 F. Supp. 3d at 654 (focusing on timing and "ongoing antagonism" as two main factors in finding the causal link necessary for retaliation); *Perez v. E. Awning Sys., Inc.*, 2018 WL 4926447, at *8 ("A plaintiff may establish causation either directly through a showing of retaliatory animus, or indirectly through a showing that the protected activity was followed closely by the adverse action") (citation omitted).

> Direct evidence is that which 'if believed, proves the fact of discriminatory animus without inference or presumption.' Direct evidence includes statements demonstrating hostility toward a protected status. Circumstantial evidence may also be used to show causation, provided that the evidence 'give[s] rise to an inference of unlawful discrimination.' Temporal proximity between protected activity and subsequent adverse actions can constitute sufficient circumstantial evidence.

*Perez v. U.S. Postal Serv.*, 76 F. Supp. 3d at 1188 (citations omitted).

There is no direct evidence, such as a statement from Wolfe, establishing hostility toward PW1 or PW2 solely due to their reporting an injury and not due to a safety infraction. Circumstantially, however, due to the close temporal proximity of the suspensions to when PW1 and PW2 reported their injuries to Wolfe, the undersigned finds, and the parties do not dispute, that the Secretary established the causality connection between protected activity and retaliatory action. (Sec'y Br. at 41-42; Resp't Br. at 50.) The Secretary has therefore established a *prima facie* case of retaliation.

**4. Burden Shift: Legitimate, Nondiscriminatory Reason**

At this point, the burden shifts to Respondent to proffer a legitimate, nondiscriminatory reason for issuing the 7-day no time off suspensions to PW1 and PW2 in this case. *Acosta v. Dura-Fibre LLC*, 2018 WL 2433589, at *6. This burden is "one of production, not persuasion." *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 142 (2000). Respondent states that the suspension letters themselves, as well as the testimony supporting Respondent's actions in this case, articulate its legitimate, non-discriminatory business reasons for issuing the suspensions to PW1 and PW2. (Resp't Br. at 50.)

The suspension letter to PW1 states that Respondent issued the 7-day no time off suspension because "it was determined that [he] did not practice safety or proper lifting techniques while handling the load." (Ex. JX-6 at 1.) The letter cites to multiple provisions of the

Respondent's "Employee & Labor Relations Manual," and the "City Delivery Carriers Duties & Responsibility Methods Handbook." (*Id*.)

The suspension letter to PW2 states the Respondent issued the 7-day no time off suspension because she "should have avoided getting close enough to the fence that the dog could bite [her]." (Ex. JX-13 at 1.) This letter cites to Respondent's Postal Rules & Regulations, "including but not limited to[,] Section 133.1 of Handbook M-41[:] Always exercise care to avoid personal injury and report all hazardous conditions to the unit manager." (*Id*.)

The undersigned finds that Respondent has produced sufficient evidence for this trier of fact to conclude that Respondent disciplined PW1 and PW2 because they violated Respondent's worker safety rules. *Reeves*, 530 U.S. at 142. The suspension letters articulate legitimate, non-discriminatory business reasons for the issued disciplinary measures for PW1 and PW2.

**5. Burden Shift: Pretext**

The burden now shifts back to the Secretary to demonstrate that this proffered reason is pretextual. *Acosta v. Lloyd Indus., Inc.*, 291 F. Supp. 3d at 653; *Acosta v. Dura-Fibre LLC*, 2018 WL 2433589, at *6 (holding if employer articulates "legitimate, nondiscriminatory reason," the burden shifts back to the plaintiff to submit evidence that the employer's explanation is pretextual") citing *David v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 846 F.3d 216, 224 (7th Cir. 2017).

> A plaintiff may demonstrate pretext by showing that the defendant's proffered reasons for taking adverse employment actions "(1) had no basis in fact; (2) did not actually motivate [the adverse employment actions]; or (3) [were] insufficient to motivate [the adverse employment actions]" and were therefore pretextual.

*Acosta v. Dura-Fibre LLC*, 2018 WL 2433589, at *7 (citation omitted); *Chao v. Blue Bird Corp.*, 2009 WL 485471, at *5 (citations omitted) (to support a finding of pretext, courts have looked to evidence such as changes in the employer's proffered reason for its employment decision or whether the employer's investigation of the incident was thorough or complete).

Here, the Secretary's case falters. The discipline in this matter was subject to management discretion and approved by a reviewing official. The suspension itself was in accordance with Respondent's progressive disciplinary policy, as testified to by Chludzinski, whose testimony the Secretary does not attack. The discipline was necessarily issued close in time to the reporting of the injury as it related to the action of the employee that caused the injury.

The Secretary claims that "the issued disciplines are completely unsupported by the facts, and Respondent's proffered explanations are pretextual and unworthy of credence." (Sec'y Br. at 43.) Yet the evidence that the Secretary relies on does not support his claim. For example, the Secretary argues that "there is no evidence to support that [PW1] lifted improperly, and no witnesses to either his lifting or his alleged reenactment for Wolfe." (*Id*..) At the same time, the Secretary questions Wolfe's testimony that PW1 demonstrated improper lifting to him, arguing "that there is no evidence to support Wolfe's claim." (*Id*. at 32.) Chludzinski, however, corroborated Wolfe's testimony. (Tr. at 420.) The Secretary also questions PW2's discipline letter that states that "having her dog spray 'would not have helped in this instance.' " (Sec'y Br. at 44.) The Secretary, however, does not address how that section of the letter began, "you should have avoided getting close enough to the fence that the dog could bite you." (Ex. JX-13 at 1.)

The Secretary then questions the details and procedural irregularities within Respondent's disciplinary process. For instance, the Secretary criticizes that Mayfield's and Bugay's PDI notes did not mention specific facts that would support unsafe acts or rule violations. (Sec'y Br. at 43-44.) Yet, the Secretary does not question the validity of Chludzinski's testimony. Chludzinski testified that he concurred with the requested discipline based on a conversation with Wolfe. Chludzinski also was not surprised about irregularities in the documentation. (Tr. at 446-447.) Chludzinski testified that he "writes hundreds of these a year," and therefore does not recall all

specifics relating to PW1's discipline, and for similar reasons does not recall all the documentation he reviewed for PW2's discipline. (Tr. at 408, 432-434.)

The only aspect that raised Chludzinski's eyebrows was the drug test order on PW1. (Tr. at 421.) Wolfe testified that he did not remember ordering the drug test, even though the e-mails in the record establish that he did (the parties stipulated to it). (Tr. at 223-224, 245-246; Stip. at ¶ 18.) Respondent argues that the Secretary failed to prove that this particular drug test order is connected to PW1's reporting of his injury. (Resp't Br. at 52.) The Secretary claims that the drug test order is proof of animus because it was a deviation from Respondent's own personnel policies.

It is not disputed that the drug test order deviated from Respondent's personnel policies, but this fact alone is not enough to establish pretext. The case the Secretary cites for support for his proposition, *Perez v. U.S. Postal Serv.*, 76 F. Supp. 3d 1168, is distinguishable from this case. In that case, the evidence regarding deviation from personnel policies was overt and rampant, including the fact that the employer did not consult with "Labor Relations" in that matter. *Perez v. U.S. Postal Serv.*, 76 F. Supp. 3d at 1190. Here, as Chludzinski testified, all Labor procedures were followed, and the Secretary has not established that any irregularities in paperwork are a result of inherent retaliatory intent; rather, the record establishes that irregularities in paperwork are a result of general mishandling of paperwork.

The Secretary also relies on the fact that Kammermeir eventually threw out the discipline, writing "evidence does not support issued discipline." (Sec'y Br. at 45.) Yet, while Kammermeir's testimony reveals that he had a barren record from which to adjudicate the grievance, he also testified that "[i]t's typical for information not to be passed along through the process. Either it's lost or just not placed in there." (Tr. at 332.)

The Secretary also alleges that Respondent's pay-for-performance compensation and incentive plan "created an incentive for managers to reduce the number of carrier hours and

reported injuries." (Sec'y Br. at 45.) The Secretary further claims that Respondent's "upper level management understood the potential for this kind of performance plan to incentivize managers to discourage injury-reporting," and that Wolfe "was aware that his performance was evaluated solely on his NPA scorecard." (*Id*. at 45-46.) The Secretary then boldly declares, "[w]hile some supervisors and managers may balance these conflicts appropriately, others, such as Wolfe in this case, may be unduly influenced by their desire for performance achievement, from a career advancement point of view, as well as a financial point of view." (*Id*.. at 46.)

Respondent asserts that the Secretary has provided "nothing more than unfounded suspicion to support its Citation. There is simply no evidence of discriminatory or retaliatory animus in the record." (Resp't Br. at 51.) The undersigned agrees. The Secretary has failed to carry his burden at this stage in the retaliation analysis. As the preamble to the final rule noted:

> It is important to note that the final rule prohibits employers only from taking adverse action against an employee because the employee reported an injury or illness. Nothing in the final rule prohibits employers from disciplining employees for violating legitimate safety rules, even if the same employee who violated a safety rule also was injured as a result of that violation and reported that injury or illness (provided that employees who violate the same work rule are treated similarly without regard to whether they also reported a work-related illness or injury). What the final rule prohibits is retaliatory adverse action taken against an employee simply because he or she reported a work-related injury or illness.

Improve Tracking of Workplace Injuries and Illnesses, Final Rule, 81 Fed. Reg. 29623, 29672 (May 12, 2016) (to be codified at 29 C.F.R. Part 1904); *see also* 29 C.F.R. § 1977.6. ("An employee's engagement in activities protected by the Act does not automatically render [him/her] immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non-prohibited considerations.").

The Secretary must put forth more than conjecture regarding Respondent's compensation incentive program – especially if the Secretary assures the undersigned that the program does not itself violate the cited standard. (Sec'y Br. at 22 n.7.) Nothing in the record supports the

Secretary's claim that Wolfe treated these employees differently, or discriminated against these employees, who reported their injuries because they reported their injuries. Indeed, Respondent's organizational structure is set up so that employees can report their injuries, receive medical treatment, and file grievances to support them. This structure is frequently used as Chludzinski testified that he works on "hundreds" of these issues yearly. (Tr. at 408.) PW2 testified that she did not feel discouraged to report another injury even after being disciplined. (Tr. at 81.)

Finally, given that the suspensions in this matter were rescinded and expunged from the employees' records in this case, before the Citation was issued, the undersigned questions how the Secretary would propose that Respondent abate this Citation Item. The Secretary is aware of the need to specify abatement for citations issued pursuant to this new standard as evidenced in the Secretary's interim enforcement procedures, which were in effect at the time of issuance:

> *Abatement*: The citation must include remedies for the aggrieved employee, such as back wages, removal of disciplinary action, reinstatement of lost time and wages, etc., where appropriate… Also, the citation must include the means for abatement of the underlying policy or procedure that is related to the merit determination.

Ex. JX-16 at 5.

No abatement, however, is specified in the Citation. There is no remedy for the employees at issue here, as they had already been made whole well before the Citation was issued in this case. The Secretary claims Respondent's pay-for-performance compensation and incentive plan is not violative of the cited standard, but the Secretary spent a considerable amount of time researching it and presenting the research in his brief. To the extent that the Secretary is attempting to touch Respondent's incentive programs, as Respondent suggests, the undersigned finds that the Secretary has failed to present enough evidence tying Wolfe's actions to the pay-for-performance compensation program in this case.

The Secretary failed to establish that Respondent violated the cited standard.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

## ORDER

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

1) Citation 1, Item 1, alleging an other-than-Serious violation of 29 C.F.R. § 1904.35(b)(1)(iv), is VACATED.

**SO ORDERED.**

*/s/ Keith E. Bell*
Keith E. Bell
Judge, OSHRC

DATE: May 18, 2020
Washington, D.C.

## ATTACHMENT A

*U.S. Postal Serv.*, "Order Granting Secretary's Motion For Partial Summary Judgment On Affirmative Defenses Numbered 8 & 9 In The Respondent's Answer" (No. 18-0462) (Dec. 27, 2018) (ALJ Coleman).

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

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>U. S. POSTAL SERVICE,<br>Respondent. | OSHRC DOCKET No. 18-0462 |

**ORDER GRANTING SECRETARY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSES NUMBERED 8 & 9 IN THE RESPONDENT'S ANSWER**

On February 26, 2018, the Secretary issued a one-item other-than-serious citation (Citation) to the Respondent, the United States Postal Service (USPS). The Citation's sole item alleged that on or about August 29, 2017, at USPS's Pleasant Hills facility in Pittsburgh, Pennsylvania, USPS "issued a seven-day working suspension to a carrier because he reported a work-related injury on August 16, 2017." The citation item alleged that this action violated 29 C.F.R. § 1904.35(b)(1)(iv), which provides that an employer "must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness." The Citation proposed a penalty of $5543 and required abatement by March 9, 2018.

USPS timely contested the Citation and thereby invoked the jurisdiction of the Occupational Safety and Health Review Commission (Commission) pursuant to section 10 of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 659. The Secretary thereafter duly filed a complaint pursuant to Commission Rule 34(a), 29 C.F.R. § 2200.34(a), wherein the Secretary re-asserted the Citation's alleged violation, proposed penalty, and abatement.

USPS duly filed an answer pursuant to Commission Rule 34(b), in which it denied the allegations of the Citation and interposed a number of affirmative defenses, including the following two defenses:

- "The alleged standard and/or penalties are invalid as ultra vires."
- "The alleged standard and/or penalties lack(s) a rational basis and/or are arbitrary and capricious."

The Secretary filed a motion for partial summary judgment dated September 14, 2018, seeking judgment as a matter of law on those two affirmative defenses. (If the motion were granted, the remedy on the motion would be to strike the affirmative defenses.) The Respondent filed a memorandum in opposition to the motion, and the Secretary filed a reply memorandum on October 24, 2018.

The first issue for decision, which will be dispositive of the "ultra vires" defense, may be stated as follows:

> Did Congress intend the procedure prescribed by section 11(c) of the Act to be the exclusive means to redress retaliatory acts that both (a) violate an employee's 11(c) rights, and (b) undermine OSHA's duty to collect accurate injury and illness data?

If the section 11(c) procedure is exclusive, that would be the end of the matter—OSHA's attempted enforcement of section 1910.35(b)(1)(iv) by issuing a citation and abatement order under section 9(a) of the Act (along with a proposed penalty under section 10(a) of the Act) would contravene the Act and be ultra vires. In that event, the Citation would be ordered vacated.

But, if the enforcement mechanism prescribed in section 11(c) is *not* exclusive, then the following issue, which would be dispositive of the "arbitrary and capricious" defense, must be resolved:

> Did the Secretary act arbitrarily and capriciously in promulgating a regulation that proscribes certain conduct (i.e., employer

> retaliation against an employee for having reported a work-related injury or illness) that is already proscribed by section 11(c) of the Act?

As described below, the answers to both questions are negative, so the Secretary's motion is GRANTED, and the two affirmative defenses described above shall be ordered stricken from the answer.

## Statutory and Regulatory Background

### *Secretary's Authority to Promulgate Recordkeeping Regulations*

Section 2(b) of the Act states that the Act's overarching purpose—which is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources"—is served in part "by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this [Act] and accurately describe the nature of the occupational safety and health problem." 29 U.S.C. § 651(b)(12).

Section 24(a) of the Act thus directs the Secretary to

> *[C]ompile accurate statistics on work injuries and illnesses* which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

29 U.S.C. § 673(a) (emphasis added).

Toward that end, section 8(c)(2) of the Act directs the Secretary to "*prescribe regulations requiring employers to maintain accurate records of ... injuries and illnesses* other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." 29 U.S.C. § 657(c)(2). (emphasis added). And in section 8(g)(2), Congress delegated even broader lawmaking power to

the Secretary, directing the Secretary to "prescribe such rules and *regulations as he may deem necessary* to carry out [his] responsibilities under this Act." 29 U.S.C. § 657(g)(2) (emphasis added). Section 8(c)(1) of the Act requires employers to comply with the Secretary's recordkeeping regulations—it provides that "[e]ach employer shall make, keep and preserve … such records regarding his activities relating to this Act *as the Secretary ... may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses.*" 29 U.S.C. §657(c)(1) (emphasis added).

Section 9(a) of the Act directs the Secretary to enforce "any regulations prescribed pursuant to this Act" by conducting inspections or investigations and issuing citations for perceived violations. 29 U.S.C. § 658(a).

*Section 11(c) of the Act and the*
*Interpretive Regulation at 29 C.F.R. Part 1977*

Section 11(c) of the Act prohibits certain retaliatory acts against employees and includes an enforcement mechanism for remedying such unlawful acts. 29 U.S.C. § 660(c). The 11(c) enforcement mechanism is triggered by an employee filing a complaint with the Secretary alleging retaliation for having exercised "any right afforded by this Act." Section 660(c)(1). Section 11(c) provides in its entirety as follows:

> (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this [Act].
>
> (2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation

> to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.
>
> (3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

A few years after the enactment of the Act, the Secretary promulgated a regulation (now codified at 29 C.F.R. pt. 1977), the stated purpose of which is to "make available in one place interpretations of the various provisions of section 11(c) of the Act which will guide the Secretary of Labor in the performance of his duties thereunder." 29 C.F.R. § 1977.2. None of the provisions of part 1977 address the matter of whether the Secretary regards section 11(c) to provide an exclusive mechanism for redressing unlawful retaliation against an employee for a permissible reason other than to redress an employee's 11(c) rights.

*Promulgation of the Cited Regulation, § 1904.35(b)(1)(iv)*

Subparagraph (b)(1) of section 1904.35 (of which the cited subparagraph (iv) is a part) was recently promulgated with a declared effective date of August 10, 2016.[1] Final Rule, *Improve Tracking of Workplace Injuries and Illnesses*, 81 Fed. Reg. 29624 (May 12, 2016) (to be codified at 29 C.F.R. pts. 1904 and 1902). The preamble to the final rule explains that section 1904.35(b)(1) was promulgated as a "regulation" under sections 8 and 24 of the Act, and not as an "occupational safety and health standard" under section 6 of the Act. *Id.* at 29656 & 29687; s*ee also Thermal*

[1] Although the regulation was effective on August 10, 2016, the Secretary delayed its enforcement until December 1, 2016. *See* Memorandum dated Nov. 10, 2016, "Interim Enforcement Procedures for New Recordkeeping Requirements Under 29 CFR 1904.35," available at www.osha.gov/dep/memos/recordkeeping_memo_11102016.html

*Reduction Corp.*, 12 BNA OSHC 1264, 1266 (No. 81–2135, 1985) (noting that OSHA's recordkeeping regulation was promulgated pursuant to "the authority conferred by section 8").

The promulgation of subparagraph (b)(1) was part of a wider ranging amendment to OSHA's regulation for Recording and Reporting Occupational Injuries and Illnesses, which is codified at 29 C.F.R. Part 1904. Although the validity of only subparagraph (b)(1)(iv) is at issue here, the entirety of subparagraph (b)(1) provides important context. It provides as follows:[2]

> **§ 1904.35 Employee involvement.**
> (a) ….
> (b) *Implementation*—(1) *What must I do to make sure that employees report work-related injuries and illnesses to me?* (i) You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;
> (ii) You must inform each employee of your procedure for reporting work-related injuries and illnesses;
> (iii) You must inform each employee that:
> (A) Employees have the right to report work-related injuries and illnesses; and
> (B) Employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses; and
> (iv) You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.

The rulemaking process that resulted in the eventual promulgation of subparagraph (b)(1)(iv) formally commenced on November 8, 2013, when OSHA caused to be published a

---

[2] Before the 2016 amendment, section 1904.35(b)(1) had provided as follows:

> (b) *Implementation. (1) What must I do to make sure that employees report work-related injuries and illnesses to me?*
> (i) You must set up a way for employees to report work-related injuries and illnesses promptly; and
> (ii) You must tell each employee how to report work-related injuries and illnesses to you.

Notice of Proposed Rulemaking (NPRM) "to amend its recordkeeping regulations to add requirements for the electronic submission of injury and illness information employers are already required to keep under OSHA's regulations for recording and reporting occupational injuries and illnesses." Proposed Rule, *Improve Tracking of Workplace Injuries and Illnesses*, 78 Fed. Reg. 67254 (proposed Nov. 8, 2013) (to be codified at 29 C.F.R. pts. 1904 & 1952). The NPRM cited the provisions of sections 8 and 24 of the Act, described above, as providing the legal authority for the proposal. *Id.* at 67255; 29 U.S.C. §§ 657 & 673.

OSHA conducted a public meeting on the NPRM on January 9-10, 2014.[3] The preamble to the final rule describes certain comments made during that public meeting:

> A concern raised by many meeting participants was that the proposed electronic submission requirement might create a motivation for employers to under-report injuries and illnesses. Some participants also commented that some employers already discourage employees from reporting injuries or illnesses by disciplining or taking other adverse action against employees who file injury and illness reports.

81 Fed. Reg. at 29625; *accord* Supplemental NPRM, *Improve Tracking of Workplace Injuries and Illnesses*, 79 Fed. Reg. 47605 (Aug. 14, 2014).

These comments caused OSHA to consider "adding provisions that will make it a violation for an employer to discourage employee reporting in these ways," with a view toward "protect[ing] the integrity of the injury and illness data" that employers report to OSHA. 79 Fed. Reg. 47605. Consequently, OSHA issued a Supplemental NPRM on August 14, 2014 that solicited public comment on adding three requirements intended to promote the accurate reporting of work-related

[3] The administrative record on the rulemaking, which includes the transcripts of the public meeting, is available at the following URL: https://www.regulations.gov/docket?D=OSHA-2013-0023

injuries and illnesses, including a provision that would "prohibit employers from taking adverse action against employees for reporting injuries and illnesses."[4] *Id.*

The Supplemental NPRM's stated legal authority for these proposed additions to the recordkeeping regulation remained sections 8 and 24 of the Act, as had been cited in connection with the original NPRM. 79 Fed. Reg. at 47606. The Supplemental NPRM expresses the view that including the proposed anti-retaliation provision in the recordkeeping regulation would "fit comfortably within these various grants of authority," because "[i]f employers may not discipline or take adverse action against workers for reporting injuries and illnesses, workers will feel less hesitant to report their injuries and illnesses, and their employers' records and reports will be more 'accurate', as required by sections 8 and 24 of the Act." *Id.* The Supplemental NPRM noted that even before the original NPRM's electronic reporting proposal, there had been evidence that unlawful retaliation had the effect of suppressing employee reporting of work-related injuries and illnesses:

> Further, *given testimony that some employers already engage in such practices,* and the possibility that the proposed rule could provide additional motivation for employers to do so, prohibiting employers from taking adverse actions against their employees for reporting injuries and illnesses in this rulemaking is "necessary to carry out" the recordkeeping requirements of the Act. (See 29 U.S.C. 657(g)(2).).

79 Fed. Reg. at 47606-607 (emphasis added).[5]

---

[4] The other two proposed requirements on which the Supplemental NPRM solicited public comment were to "(1) require that employers inform their employees of their right to report injuries and illnesses; [and] (2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome." *Id.* at 47606.

[5] OSHA had identified the suppressive impact of retaliation on the reporting of work-related injuries and illnesses well before the 2016 promulgation of the cited regulation. Another provision of the recordkeeping regulation that was originally promulgated in 2002, section 1904.36, contained the Secretary's interpretation that section 11(c) prohibits retaliation against an

The Supplemental NPRM recognized that section 11(c) provides a remedy for employees who have been subjected to retaliation for having reported a work-related injury or illness, but the Secretary did not regard the pre-existing statutory procedure to preclude promulgation of a

---

employee for having reported a work-related injury or illness. As originally promulgated in 2002, section 1904.36 provided as follows:

> **§ 1904.36 Prohibition against discrimination.**
>
> Section 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the Part 1904 records, or otherwise exercises any rights afforded by the OSH Act.

(The 2016 final rule amended section 1904.36 by changing its first sentence to read as follows: "In addition to § 1904.35, section 11(c) of the Act also prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness." The final rule left the second sentence of section 1904.36 unchanged. 81 Fed. Reg. at 29671.)

The preamble that was published in connection with the promulgation of original section 1904.36 described that regulation's purpose as follows:

> Section 1904.36 of the final rule makes clear that § 11(c) of the Act prohibits employers from discriminating against employees for reporting work-related injuries and illnesses. Section 1904.36 does not create a new obligation on employers. Instead, it clarifies that the OSH Act's anti-discrimination protection applies to employees who seek to participate in the recordkeeping process.
>
> * * * *
>
> OSHA has also included in the final rule, in section 1904.36, a statement that section 11(c) of the OSH Act protects workers from employer retaliation for filing a complaint, reporting an injury or illness, seeking access to records to which they are entitled, or otherwise exercising their rights under the rule. This section of the rule does not impose any new obligations on employers or create new rights for employees that did not previously exist. In view of the evidence that retaliation against employees for reporting injuries is not uncommon and may be "growing" [citation to rulemaking record omitted], this section is intended to serve the informational needs of employees who might not otherwise be aware of their rights and to remind employers of their obligation not to discriminate.

*Occupational Injury and Illness Recording and Reporting Requirements*, 66 Fed. Reg. 5916, 6050 & 6053 (Jan. 19, 2001) (to be codified at parts 1904 and 1952).

regulation (which is perforce enforceable by the issuance of a citation under section 9(a)) that proscribes that same retaliatory conduct. The Supplemental NPRM indicates the principal motivation for the proposed anti-retaliation regulation is not to redress an employee's 11(c) rights, but rather to advance OSHA's responsibility to collect accurate injury and illness statistics:

> Section 11(c) of the Act prohibits any person from discharging or discriminating against any employee because that employee has exercised any right under the Act. (29 U.S.C. 660(c)(1).) Under this provision, an employee who believes he or she has been discriminated against may file a complaint with OSHA, and if, after investigation, the Secretary determines that Section 11(c) has been violated, then the Secretary can file suit against the employer in U.S. District Court seeking "all appropriate relief" including reinstatement and back pay. (29 U.S.C. 660(c)(2).) Taking adverse action against an employee who reports a fatality, injury, or illness is a violation of 11(c), (see 29 CFR 1904.36); therefore, much of the primary conduct that would be prohibited by the new provision is likely already proscribed by 11(c).
>
> The advantage of this provision is that it would provide OSHA with additional enforcement tools to promote the accuracy and integrity of the injury and illness records employers are required to keep under Part 1904. For example, under 11(c), OSHA may not act against an employer unless an employee files a complaint. Under the additions to the proposed rule under consideration, OSHA would be able to cite an employer for taking adverse action against an employee for reporting an injury or illness, even if the employee did not file a complaint. Moreover, an abatement order can be a more efficient tool to correct employer policies and practices than the injunctions authorized under 11(c).
>
> * * * *
>
> As noted above, these retaliatory actions would likely be actionable under 11(c), as well as under the provisions that OSHA is considering as amendments to 1904.35. The remedy, however, would be different. Under this provision, OSHA could issue citations to employers under Section 9 of the OSH Act for violating the provision, and the employer could challenge the citations before the Occupational Safety and Health Review Commission. The citations would carry civil penalties in accordance with Section 17 of the OSH Act, as well as a requirement to abate the violation; the abatement could include reinstatement and back pay ….

79 Fed. Reg. at 47607 & 47608.

OSHA received 142 comments on the Supplemental NPRM. 81 Fed. Reg. at 29625. On May 12, 2016, OSHA promulgated the final rule that contained the annual electronic reporting provisions that had been proposed in the original NPRM (to be included in section 1904.41)[6] as well as the three additional requirements that had been proposed in the Supplemental NPRM, including the anti-retaliation provision cited here, section 1904.35(b)(1)(iv). 81 Fed. Reg. 29624.

The preamble to the final rule reiterated the rationale and statutory authority for the anti-retaliation provision that was originally expressed in the Supplemental NPRM:

> The Act's various statutory grants of authority that address recordkeeping provide authority for OSHA to prohibit employers from discouraging employee reports of injuries or illnesses. If employers may not discriminate against workers for reporting injuries or illnesses, then discrimination will not occur to deter workers from reporting their injuries and illnesses, and their employers' records and reports may be more "accurate", as required by sections 8 and 24 of the Act. Evidence in the administrative record establishes that some employers engage in practices that discourage injury and illness reporting, and many commenters provided support for OSHA's concern that the electronic submission requirements of this final rule and associated posting of data could provide additional motivation for employers to discourage accurate reporting of injuries and illnesses. Therefore,

[6] The Secretary has recently proposed to rescind the recently promulgated requirement set forth in section 1904.41 for the annual electronic submission by establishments with more than 249 employees of the information that is recorded on OSHA Forms 300 (Log of Work-Related Injuries and Illnesses) and 301 (Injury and Illness Incident Report). Proposed Rule, *Tracking of Workplace Injuries and Illnesses*, 83 Fed. Reg. 36494 (proposed July 30, 2018) (to be codified at 29 C.F.R. pts. 1904 & 1952). However, this proposed rescission would not affect other electronic reporting requirements promulgated in the 2016 final rule that those same large employers, as well as certain other smaller employers, electronically submit information that is recorded on OSHA Form 301A (Summary of Work-Related Injuries and Illnesses). Nothing in the public notice that announced the proposed partial rescission of the electronic reporting requirements in section 1904.41 suggests any backpedaling from the justifications for promulgating section 1904.35(b)(1) as stated in the 2016 preamble to the final rule.

> prohibiting employers from engaging in practices that discourage their employees from reporting injuries or illnesses, including discharging or in any manner discriminating against such employees, is "necessary to carry out" the recordkeeping requirements of the Act (see 29 U.S.C. 657(g)(2)).
>
> * * * *
>
> If employers reduce the accuracy of their injury and illness records by retaliating against employees who report an injury or illness, then OSHA's authority to collect accurate injury and illness records allows OSHA to proscribe such conduct even if the conduct would also be proscribed by section 11(c).

81 Fed. Reg. at 29627.

The preamble acknowledges that the "conduct prohibited by § 1904.35(b)(1)(iv) of the final rule is already proscribed by section 11(c)," and that the rule "does not change the substantive obligations of employers." 81 Fed. Reg. at 29627 & 29671. Notwithstanding the absence of any new substantive obligations, the preamble states the anti-retaliation regulation "will have an important enforcement effect" by providing "an enhanced enforcement tool for ensuring the accuracy of employer injury and illness logs" that is not dependent upon an employee first filing a complaint under section 11(c) of the Act. 81 Fed. Reg. at 29671. The preamble notes that "[s]ome employees may not have the time or knowledge necessary to file a section 11(c) complaint or may fear additional retaliation from their employer if they file a complaint."

Further, in response to public comments that section 1904.35(b)(1)(iv) would interfere with section 11(c) "by infringing on an employee's right to bring a section 11(c) claim and by eliminating section 11(c)'s 30-day window for employees to bring complaints," the preamble stated:

> The final rule does not abrogate or interfere with the rights or restrictions contained in section 11(c). An employee who wishes to file a complaint under section 11(c) may do so within the statutory 30-day period regardless of whether OSHA has issued, or will issue, a citation to the employer for violating the final rule. OSHA

> believes that many employees will continue to file 11(c) complaints because of the broader range of equitable relief and punitive damages available under that provision.

Because section 1904.35(b)(1)(iv) is a "regulation" issued under the Act, the Secretary is empowered pursuant to section 9(a) of the Act to issue a citation for its alleged violation, as was done here. 29 U. S. C. § 658(a) (authorizing the Secretary to issue a citation to an employer for violating a requirement "of any regulations prescribed pursuant to this Act").

Standard of Review

The Commission has the authority to consider an enforcement challenge to the statutory validity of standards and regulations that the Secretary has promulgated pursuant to the Act. *See Rockwell Int'l Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980) (rejecting Secretary's argument that the Commission lacks authority to consider procedural challenge to occupational safety and health standards promulgated under § 6(b) of the Act), *overruled on other grounds, George C. Christopher & Sons, Inc.*, 10 BNA OSHC 1436 (No. 76-647, 1982); *see also CBI Servs., Inc.*, 19 BNA OSHC 1591, 1594, n. 7 (No. 95-0489, 2001) (noting that "Commission precedent does not distinguish between 'substantive' and 'procedural' issues in determining whether a validity challenge [to a standard promulgated pursuant to sec. 6(b) of the Act] is properly before the Commission").

The Commission considers a challenge to a regulation in the same manner as would a federal court. *Martin v. OSHRC* (*CF & I Steel Corp.*), 499 U.S. 144, 154 (1991) (concluding "that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context").

The two defenses at issue here amount to the functional equivalent of a challenge to the cited regulation under the Administrative Procedure Act (APA). *See La. Forestry Ass'n Inc. v.*

*Sec'y of Labor*, 745 F.3d 653, 668-69 (3d Cir. 2014) (considering a claim that the Department of Labor exceeded its authority in promulgating a certain regulation in a case brought under the judicial review provisions of the APA). The judicial review provisions of the APA require a court to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A) & (C).

Such a challenge to a regulation may be resolved through a motion for summary judgment. *See Marshall Cnty. Health Care Auth. v. Shalala,* 988 F.2d 1221, 1226 (D.C. Cir. 1993) (noting that where the only arguments made were "about the legal conclusion to be drawn about the agency action" and not about issues of fact, "there is no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for summary judgment"); *Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 440 n. 3 (D.C. Cir. 1999) (noting that when reviewing agency action, the "district court sits as an appellate tribunal, … and the question whether [the agency] acted in an arbitrary and capricious manner is a legal one which the district court can resolve on the agency record"); *La. Forestry Ass'n Inc.*, 745 F.3d at 667.

The two-step framework established by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), applies to resolution of the issue of whether the Secretary exceeded his statutory authority in promulgating the challenged regulation. *See City of Arlington v. FCC*, 569 U.S. 290 (2013) (holding that *Chevron* framework applies to resolve the contention that an agency's regulation was ultra vires as being outside the bounds of the agency's statutory authority); *La. Forestry Ass'n*, 745 F.3d at 669-70 (applying *Chevron* framework in case brought

under the judicial review provisions of the APA in considering a claim that the Department of Labor exceeded its authority in promulgating a certain regulation).

The *Chevron* framework similarly applies to a challenge to a regulation promulgated pursuant to a broad delegation of authority to prescribe regulations that the responsible agency deems "necessary" to advance a specified statutory purpose. *Chevron* 467 U.S. at 843–44 (stating that where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and that "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that "implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002) (applying *Chevron* framework to review of a rule promulgated by Secretary of Labor pursuant to delegated authority to "prescribe such regulations as are necessary to carry out" the Family Medical and Leave Act); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (applying *Chevron* framework to the review of a rule that was promulgated pursuant to delegated authority to "prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code).

At the first step of the *Chevron* framework, a court must apply "traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue," and"[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron* at 842–

843; *see also City of Arlington*, 569 U.S. at 301 (stating that "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not").

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

A court may consider a statute's purpose and its legislative history in ascertaining whether the statute speaks to the precise question at issue. *See Chevron* at 862-63 (considering the Clean Air Act's legislative history at step one and finding it "as a whole [] silent on the precise issue before us"); *see also Arcadian Corp.,* 17 BNA OSHC 1345, 1348-49 (No. 93-3270, 1995) (considering legislative history to discern congressional intent, seemingly at *Chevron* step one); *but cf. United States v. Geiser*, 527 F.3d 288, 292 (3d Cir. 2008) (stating "that legislative history should not be considered at *Chevron* step one," although noting "ambiguous guidance from the Supreme Court" on the issue), *Geisinger Cmty. Med. Ctr. v. Sec'y H.H.S.*, 794 F.3d 383, 391 n. 5 (3d Cir. 2015) (noting that "the Supreme Court has often oscillated between considering and then refusing to consider legislative history at Step One"), and *Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1098 (D.C. Cir. 2017) (holding that employees do not have a private cause of action under section 11(c) of the Act, and noting that "when statutory text resolves the issue, as it does here, the Supreme Court has said that we need not dig into the legislative history") (Kavanaugh, J.).

Only "if the statute is silent or ambiguous with respect to the specific issue," does the analysis continue to step two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron* at 843. At *Chevron* step two, courts must "accept an agency's reasonable resolution of an ambiguity in a statute that the agency

administers," *Michigan v. EPA*, 576 U.S. —, —, 135 S. Ct. 2699, 2707 (2015), and "may not disturb an agency rule unless it is arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011). Recently, in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016), the Court provided a fuller summary of the standard for assessing whether certain rulemaking is arbitrary and capricious under the APA:[7]

> One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983) (internal quotation marks omitted). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.,* 419 U.S. 281, 286 (1974). But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. See 5 U.S.C. § 706(2)(A); *State Farm, supra,* at 42–43.

[7] "Regulations" issued under the Act are subject to review under the APA's "arbitrary and capricious" standard, in contrast to the standard of review for a challenge to a health or safety standard, where the "substantial evidence" standard prescribed by section 6(f) of the Act is applicable. 29 U.S.C. § 655(f). *See Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1178 (D.C. Cir. 2014) (noting that the "substantial evidence" standard of judicial review under section 6(f) of the Act "demands more stringent review of OSHA rules than would the APA's arbitrary and capricious standard"); *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1466 (D.C. Cir. 1995) (dismissing for lack of jurisdiction an attempted pre-enforcement challenge to a recordkeeping regulation promulgated pursuant to section 8 of the Act that was initiated in the court of appeals pursuant to section 6(f) of the Act, and transferring the matter to the district court for APA review under 5 U.S.C. § 703).

"Ultra Vires" Defense

The issue to be decided at *Chevron* step one on the "ultra vires" defense may be framed as follows: Does the Act speak directly to the question whether, in order to enhance the accuracy of injury and illness information reported to OSHA, the Secretary is restricted to employing the section 11(c) procedure to deter and thwart retaliatory action against employees for having reported a work-related injury or illness?

Analysis of the text of the Act, employing traditional tools of statutory interpretation, shows that the Act is silent on this precise question at issue.

OSHA's statutory authority for promulgating the anti-retaliation provision of § 1904.35(b)(1)(iv) derives from the Act's recordkeeping provisions described in detail above. 29 U.S.C. §§ 657(c)(l), 657(c)(2), 657(g)(2), 673(a), 673(e). Nothing in the text of section 11(c) addresses recordkeeping. Rather, section 11(c) creates employee rights and establishes the exclusive remedy available to employees who believe they have been retaliated against for having engaged in certain protected activities (of which the reporting of work-related injuries and illnesses is but one). *Taylor v. Brighton Corp.*, 616 F.2d 256, 258 (6th Cir. 1980) (indicating that the class of persons that section 11(c) was intended to benefit are employees engaging in activity protected by 11(c), and holding that 11(c) does not provide employees with a private cause of action); *Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1096 (D.C. Cir. 2017) (noting that 11(c) "supplies a remedy for employees who believe they have been subject to retaliation").

The text of section 11(c) contains no limiting language of any kind. The text does not "directly sp[eak] to the precise question at issue" of whether OSHA must rely on the section 11(c) procedure to vindicate and advance statutory interests other than the interest of employees to be protected from retaliation for engaging in protected activities. *Chevron*, 467 U.S. at 842. Rather,

the text of the Act reflects that "Congress did not have a specific intention" on the issue. *Id.* at 845; *see also Montford & Co. v. SEC*, 793 F.3d 76, 82 (D.C. Cir. 2015) (where text of statute does not "forclose[] other interpretations," it is regarded to be "silent … with respect to the specific issue" at *Chevron* step one). Put another way, nothing in section 11(c) speaks to whether OSHA may exercise its authority to promulgate regulations that promote accurate recordkeeping where anti-retaliation and recordkeeping goals overlap.

Interpreting the Act to permit the Secretary to promulgate a regulation that advances the accuracy of injury and illness data is consistent "with the design and structure of the statute as a whole." *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014), quoting *Univ. of Tex. Sw. Med. Ctr.. v. Nassar*, 570 U.S. 338, 353 (2013); *see also Gen. Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2041 (No. 76–5033, 1980) (noting that the Commission considers the reporting requirements of the Act to be "a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier," so that classifying recordkeeping violations as *de minimus* "would weaken significantly the reporting requirements of the Act and the Secretary's regulations").

This conclusion is supported by the Fifth Circuit's decision in *United Steelworkers, AFL-CIO v. St. Joe Resources*, 916 F.2d 294, 299 (5th Cir. 1990) (*St. Joe Resources*), which the Secretary cited in both the Supplemental NPRM and the preamble to the final rule as supporting promulgation of an anti-retaliation provision in the recordkeeping rule. 79 Fed. Reg. at 47607; 81 Fed. Reg. at 29627 & 29672. The court in *St. Joe Resources* ruled that the Commission had the authority to order an employer to abate a violation of the medical removal protection (MRP) provision of OSHA's lead standard at 29 C.F.R. § 1910.1025(k) by ordering back pay. In the course of reaching that conclusion, the court ruled that section 11(c) did not establish the exclusive

mechanism for requiring an employer to provide back pay—the court noting that employment discrimination statutes such as section 11(c) "redress different misconduct than general health and safety provisions," and concluding that "'the remedial purposes of [the OSH Act] would be undermined by a presumption of exclusivity.'" *Id.*, 916 F.2d at 298, quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n. 23 (1983) (brackets in original) (holding that even though section 11 of the Securities Act of 1933 and section 10(b) of the Securities Exchange Act of 1934 proscribe some of the same activity, the two provisions "address different types of wrongdoing" so the section 11 remedy is not exclusive).

USPS points to the legislative history of section 11(c) as establishing that "Congress contemplated and rejected making retaliation and/or discriminatory actions subject to a civil penalty through the issuance of an OSHA citation." (Mem. in Opposition, 6-8). The portions of the Act's legislative history identified by USPS do not include any material that suggests Congress intended the rights and remedy of section 11(c) to promote accurate recordkeeping. (*Id.*). The Sixth Circuit's thorough account of the legislative history of section 11(c) in *Taylor v. Brighton*, 616 F.2d at 259-263, confirms that no such congressional intent is reflected in the legislative history. The Sixth Circuit noted that section 11(c) grew out of a concern "that the possibility of retaliatory discharge might inhibit employees from reporting OSHA violations." *Id.* at 260, citing H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 27 (1970). That concern is different from a concern that employer retaliation against employees for having reported a work-related injury or illness might suppress employee reporting of the same.

Assuming for the sake of analysis that section 11(c)'s legislative history does give rise to some ambiguity as to whether Congress intended to the address the precise question at issue, the regulation also withstands an "ultra vires" challenge at step two of the *Chevron* framework. The

issue to be decided at *Chevron* step two is whether the enforcement of section 1904.35(b)(1)(iv) pursuant to sections 9(a) and 10(c) of the Act "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002), citing *Chevron* at 843. The regulation will be deemed to exceed the bounds of the permissible if found to be "arbitrary or capricious in substance," as failing to meet the minimum requirements summarized in *Encino Motorcars, LLC v. Navarro* quoted above. The rulemaking record here far surpasses the minimum requirements articulated in *Encino Motorcars*. The preamble to the final rule reflects the Secretary having examined the relevant information and having provided cogent reasoning for including an anti-retaliation provision in the recordkeeping record as a means to promote increased accuracy of illness and injury data that the Act requires OSHA to collect.

USPS complains of the "sea change" wrought by section 1904.35(b)(1)(iv) in the enforcement against unlawful retaliation for reporting of work-related injuries and illnesses, noting that for "nearly fifty years … OSHA has never attempted to issue a civil citation or penalty" for a violation of section 11(c). (Mem. in Opposition, 8 & 15). This does not render the promulgation of the cited regulation arbitrary or capricious. " '[N]either antiquity nor contemporaneity with [a] statute is a condition of [a regulation's] validity.' " *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55, (2011), quoting *Smiley v. Citibank (S.D.), N. A.*, 517 U.S. 735, 740 (1996).

USPS also argues that the provisions of the Act that the Secretary cited as legal authority for the promulgation of the cited regulation violate the "non-delegation doctrine," and thus promulgation of the cited regulation is contrary to law. (Mem. in Opposition, 16). *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 214 (1989) (addressing non-delegation doctrine and noting "our longstanding principle that so long as Congress provides an administrative agency with

standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority trenching on the principle of separation of powers has occurred" [internal citations omitted]). Further apropos of the non-delegation doctrine, the Supreme Court has declared that "[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publ'ns. Serv., Inc.*, 411 U.S. 356, 369 (1973); *see also Thermal Reduction Corp.*, 12 BNA OSHC 1264, 1266 (No. 81-2135, 1985) (citing *Mourning* for this proposition, and observing that the recordkeeping regulations requiring employers to maintain injury and illness records and to produce those records to the Secretary during an inspection "reasonably effectuates Congress's requirement that employers maintain and make available to the Secretary records pertaining to the incidence of injuries and illnesses in the workplace" and is consistent with the Act). The preamble to the final rule more than amply establishes that the anti-retaliation regulation is "reasonably related" to the requirements of the Act that employers provide and that OSHA collect accurate injury and illness data.

Enforcement of the anti-retaliation regulation is not rendered arbitrary and capricious simply because there could be parallel section 11(c) and section 9(a) proceedings involving the same alleged retaliatory act. To the extent that the Secretary may seek back-pay and similar relief in an order of abatement in a section 9(a) proceeding enforcing the anti-retaliation regulation, equitable principles would foreclose an employee's double recovery in a parallel section 11(c) proceeding. Similarly, one of the parallel proceedings could be stayed to conserve resources and potentially to permit application of issue or claim preclusion principles to the stayed proceeding.

In its memorandum in opposition to the motion, USPS points to discovery requests that were filed in a *different* proceeding before the Commission that also involves an alleged violation of section 1904.35(b)(1)(iv), which USPS argues would be irrelevant in a section 11(c) proceeding. The USPS seems to suggest that such discovery requests show that the cited regulation is both ultra vires and arbitrary and capricious. (Mem. in Opposition, 10-13). To the extent a litigant regards a discovery request in a particular matter to be outside the scope of permissible discovery, unduly onerous, disproportionate, or otherwise objectionable, such arguments are best addressed and resolved in the context of an appropriate discovery motion filed in a particular case, where such a discovery dispute would be concrete and ripe. This argument is not material to whether the cited regulation is ultra vires or arbitrary and capricious.

Enforcement of section 1904.35(b)(1)(iv) pursuant to section 9(a) of the Act is well within the bounds of permissible construction of the Act and is neither arbitrary nor capricious. This permissible interpretation of the Act is due "controlling weight" under *Chevron*, inasmuch as the anti-retaliation regulation was promulgated pursuant to Congress's express delegations of authority to the Secretary (a) to promulgate regulations "as necessary or appropriate for the enforcement of this [Act] or for developing information regarding the causes and prevention of occupational accidents" in section 8(c)(1), (b) to "prescribe regulations requiring employers to maintain accurate records of … work-related deaths, injuries and illnesses," in section 8(c)(2), and (c) to prescribe regulations deemed "necessary to carry out [his] responsibilities under this [Act]" in section 8(g)(2). *Chevron* at 843-44.

For these reasons, the Secretary's motion for summary judgment on the "ultra vires" affirmative defense set forth in paragraph 9 of the answer's "affirmative defenses" section, is GRANTED, and that defense is ordered STRICKEN from the answer.

"Arbitrary and Capricious" Defense

For the same reasons described in connection with the *Chevron* step two analysis immediately above, the Secretary's motion for summary judgment on the "arbitrary and capricious" affirmative defense set forth in paragraph 8 of the answer's "affirmative defenses" section, is GRANTED, and that defense is ordered STRICKEN from the answer. *See Judulang v. Holder*, 565 U.S. 42, 53 n. 7 (2011) (indicating that the analysis under *Chevron* step two is substantially the same as the analysis under the APA's "arbitrary and capricious" standard at 5 U.S.C. § 706(2)(A)).

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: December 27, 2018