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. US POSTAL SERVICE-CANOVANAS POST OFFICE, Respondent.	OSHRC Docket No. 21-0794

Appearances:

Marc G. Sheris, Esq., Department of Labor, Office of Solicitor, New York, New York
For Complainant

David P. Larson, Esq., U.S. Postal Service Law Department, National Employment Litigation Unit, Denver, Colorado
For Respondent

Before: Covette Rooney, Chief Administrative Law Judge

DECISION AND ORDER

Respondent, US Postal Service, Canóvanas Post Office (USPS), is a federal agency engaged in providing postal services and related activities with its principal office and place of business at 18400 Road 3, Suite 136, Belz Outlet, Canóvanas, Puerto Rico 00729. (Joint Pre-Hr'g Statement ¶ 5, 4). On May 14, 2021, the Occupational Safety and Health Administration (OSHA) conducted an investigation, following a complaint about COVID-19 protocols not being followed

at the Canóvanas Post Office. *Id*. After the investigation, the allegations alleging COVID-19 protocols were not being followed were determined to be unsubstantiated by the facts. However, the investigation, through observations made in plain view, resulted in the issuance of a two-item citation (the Citation) to Respondent, alleging a serious violation of 29 C.F.R. § 1910.37(a)(3) and a serious violation of 29 C.F.R. § 1910.37(b)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act). The Citation alleged that Respondent's employees were exposed to hazards presented by an obstructed exit route and hazards presented by the lack of an exit sign on a designated exit door. (*See* Citation). The Citation proposed a total penalty of $15,604.

On July 28, 2021, Respondent timely filed a notice of contest, thereby bringing this matter before the Occupational Safety and Health Review Commission (the Commission). *See* 29 U.S.C. § 659(c). A one-day hearing was held on May 10, 2022, by way of Cisco WebEx videoconferencing technology. The Secretary presented one witness: the Compliance Safety and Health Officer (CO) who conducted the investigation, Teodoro Rovira.[1] Respondent did not call any witnesses. (Tr. 85). Both parties filed timely post-hearing briefs and post-hearing reply briefs.

For the reasons that follow, the Citation, alleging a serious violation of 29 C.F.R. § 1910.37(a)(3) and a serious violation of 29 C.F.R. § 1910.37(b)(2), as amended, is affirmed and a penalty of $15,604 is assessed.

I. Motion to Amend

On May 12, 2022, two days after the hearing, the Secretary moved to amend its citation and complaint. On May 25, 2022, Respondent moved to strike and objected to the Secretary's

[1] The witness testified succinctly, credibly, and without hesitancy, and his testimony is therefore given significant weight.

Motion to Amend. After a thorough review as discussed below, the Secretary's Motion to Amend the Citation and Complaint is Granted.

The Secretary moved for an order amending only the alleged violation description (AVD) of Citation 1, Item 2 as follows (amendments in **BOLD** and ~~strikethrough~~):

> 29 C.F.R. § 1910.37(b)(2): Each exit was not clearly visible and marked by a sign reading "EXIT":
>
> a. On or about 14 May 2021, at USPS Canovanas Post Office; towards **the rear of the facility at** the ~~Main Lobby/Customer~~ **Loading** Area, a designated exit was not marked by an exit sign or any other means.

The Secretary's motion was filed 2 days after the hearing in this matter on May 12, 2022. In his Motion, the Secretary essentially contends the proposed amendment to the factual description of Citation 1, Item 2 more accurately describes the location of the violation in Respondent's facility at the time of the OSHA inspection. The Secretary further contends that he introduced evidence at the hearing indicating the exit door cited in Item 2 was located near the back of the post office facility, leading to the exit discharge in the loading area. (Sec'y Mot. to Amend 4). The Secretary argues the amendment arises out of the same conduct, occurrences or hazards described in the original Citation and Notification of Penalties. (*Id.* 1). He argues that the CO, at the hearing, was extensively questioned and cross examined regarding the location of Citation 1, Item 2, that the Respondent had knowledge of the location since the time of OSHA's closing conference in May 2021, and from the photographs jointly admitted into evidence as J-1, J-2, and J-3. (*Id.*1-6). Accordingly, the Secretary argues the corrected location of the violation alleged in Citation 1, Item 2 was clearly tried by implied consent. (*Id.* 3).

Respondent opposes the Secretary's motion contending it is untimely, seeks to add additional evidence for consideration, and claims the amendment would essentially deny it due process. Respondent also asserts it would be prejudiced by the proposed amendment, as it

defended under the initially cited allegations and would have defended differently under the proposed amendment. (Resp't Opp'n to Mot. to Amend).

Federal Rule of Civil Procedure 15(b)(2) provides:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue…

The key consideration regarding the propriety of a post-hearing amendment is whether the unpleaded issue was tried by express or implied consent of the parties. Fed. R. Civ. P. 15(b).

It is well established that administrative pleadings are liberally construed and easily amended. *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir. 1977); *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973). "[A]mendments to a complaint are routinely permissible where they merely add an alternative legal theory but do not alter the essential factual allegations contained in the citation." *A. L. Baumgartner Constr.*, *Inc.*, 16 BNA OSHC 1995, 1997 (No. 92-1022, 1994) (post-hearing *sua sponte* amendment by judge). The Commission has held that amendment is proper where the parties "squarely recognized that they were trying an unpleaded issue, and consent to try the unpleaded issue may be implied from the parties' conduct." *George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1931 (No. 94-3121, 1999) citing *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995). Consent is not implied by a party's failure to object to evidence that is relevant to both pleaded and unpleaded issues, at least in the absence of some obvious attempt to raise the unpleaded issue. *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2130 (No. 80-5868, 1984).

Despite Respondent's assertions, the record reveals that the nature of the amended allegation and the requirement for an exit sign on a door toward the rear of the facility were tried by consent here. During the hearing, the CO was questioned by Respondent about the specific

door the CO was referring to in Citation 1, Item 2. (Tr. 71-74). The CO confirmed his testimony and exhibits referred to a door toward the back of the building. (Tr. 71-74; Exs. J-2, J-3, J-4, J-4A).

The parties in this case "squarely recognized" that they were trying the issue of whether Respondent was in violation of 29 C.F.R. § 1910.37(b)(2) as it pertained to a designated exit door to the rear of the facility. Both parties knew from the inception of this case that Respondent was defending against the alleged violation of 29 C.F.R. § 1910.37(b)(2) in regard to a door at the rear of Respondent's facility. The Violation Worksheet for Citation 1, Item 2 which was produced to Respondent during discovery as Secretary's Responses and Objections to the Respondent's First Production Requests, states the location of the violation was "at the workfloor toward the exit to the reception platform." (Sec'y Resps. and Objs. to the Resp't First Produc. Req., Resp't. Req. #1). During the course of the hearing, it became apparent Respondent was asserting that the cited standard did not apply to the door at the rear of the facility.

The proposed amendment to the AVD does not raise any new questions of fact. The parties tried the factual issues relevant to the unpleaded AVD; therefore, the proposed amendment is permitted unless Respondent would be prejudiced by the amendment.

Respondent claims that it will be prejudiced by the Secretary's motion in that it would have defended differently under the proposed standard. "[I]t is proper to look at whether the party had a fair opportunity to defend and whether it could have offered any additional evidence if the case were retried." *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822 (No. 88–2572, 1992).

Respondent's ability to prepare and present its case was not impaired by the change in AVD. As set forth above, the nature of the amended allegation and whether the requirement for an exit sign on a door toward the rear of the facility was complied with, on the day of the inspection,

was fully litigated. Not only did Respondent not object to the litigation of the issue of the exit sign on a door to the rear of the facility, but it also specifically questioned the CO on it. Furthermore, Respondent did not seek to present any additional evidence at the hearing. Amending the citation AVD does not alter the essential allegations contained in the original citation AVD. Amendment of the citation conforms the pleadings to the evidence and causes no prejudice to Respondent.

Having considered the pleadings and good cause having been shown, the Secretary's Motion to Amend Citation and Complaint to allege a violation of 29 C.F.R. § 1910.37(b)(2) is GRANTED and the AVD for Citation 1, Item 2 is amended as follows:

> 29 C.F.R. § 1910.37(b)(2): On or about 14 May 2021, at USPS Canovanas Post Office; towards the rear of the facility at the Loading Area, a designated exit was not marked by an exit sign or any other means.

II. Stipulations & Jurisdiction

The parties stipulated to various facts, including several jurisdictional details. (Joint Pre-Hr'g Statement). Based on the Joint Stipulations, the Court finds the Commission has jurisdiction over this action pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c). (Joint Pre-Hr'g Statement ¶ 6, 4). Further, the Court obtained jurisdiction over this matter under section 10(c) of the Act upon Respondent's timely filing of a notice of contest. 29 U.S.C. § 659(c). The Court also finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3), (5).

III. Factual Background[2]

A. <u>USPS Canóvanas Post Office</u>

Respondent operates as a nationwide employer engaged in providing postal services and related activities with its place of business at Canóvanas, Puerto Rico. (Joint Pre-Hr'g Statement).

[2] The factual background is based on the credible record evidence, as discussed below, and consideration of the record as a whole. Contrary evidence is not credited.

Many of the materials and supplies used and/or manufactured by Respondent originated and/or were shipped from outside the Commonwealth of Puerto Rico. (Joint Pre-Hr'g Statement ¶ 6, 4). At the time the Citation was issued, Respondent employed twenty-two employees at its Canóvanas, Puerto Rico, Post Office facility. (Tr. 33-34).

On the day of the inspection, Respondent's facility employees consisted of six carriers, four highway, three clerks, two management, and one maintenance. (Tr. 34). Mr. Tim Knowles was the Acting Postmaster for the facility. (Tr. 34).

B. <u>OSHA Inspection</u>

On May 14, 2021, CO Teodoro Rovira conducted an onsite inspection at the Canóvanas Post Office located at 18400 Road 3, Suite 136, Belz Outlet in Canóvanas, Puerto Rico. (Tr. 16-18; Joint Pre-Hr'g Statement). CO Rovira was assigned to conduct the inspection after the OSHA Puerto Rico Area Office had received a complaint that COVID-19 protocols were not being followed at the Canóvanas Post Office location. (Tr. 16-18). When CO Rovira arrived at the Post Office, he presented his badge to one of the postal clerks and asked to speak with an officer in charge or a postmaster. (Tr. 18-19).

CO Rovira waited in the lobby of the Post Office for approximately 10 to 15 minutes before he was able to speak with an officer in charge concerning the COVID-19 complaint. (Tr. 19-20). While CO Rovira was waiting in the lobby, at the front of the building, he observed some shelving behind a door to the lobby. (Tr. 20-21; Ex. J-1). The door opened outward, from where Respondent's employees worked, into the lobby. (Tr. 21; Ex. J-1). However, the door could not open all the way because it was blocked by shelving and packaging materials. (Tr. 21; Ex. J-1). CO Rovira noticed the shelving had packaging material for customers to buy and was affixed to the wall behind the door. (Tr. 21; Ex. J-1). CO Rovira testified that because he saw the condition

of the door partially blocked by packaging materials on shelves, there was the potential for a fire safety hazard. (Tr. 21). He then determined that the scope of the investigation should be expanded to include an examination of the facility's exits for safety hazards. (Tr. 21, 24-25).

While waiting in the lobby, CO Rovira testified that he observed Respondent's employees socially distancing themselves, wearing the proper protective equipment, and had hand sanitizer for customers to use. (Tr. 21-22). CO Rovira then proceeded to conduct his opening conference with the Acting Postmaster, Tim Knowles, Postal Service Safety Officer, Martin Ramos, by phone, and union representative, Javier Rivera. (Tr. 22-23). CO Rovira informed them that based on his observations of the partially blocked lobby door, he was going to expand the scope of the investigation beyond the original COVID-19 complaint to concentrate specifically on exits. (Tr. 24-25).

Following the opening conference, CO Rovira conducted a walk-around inspection of the facility with Safety Officer Martin Ramos and Acting Postmaster Tim Knowles. (Tr. 24-26). During the walk-around inspection, CO Rovira observed two hazardous conditions which he pinpointed for Mr. Ramos and Mr. Knowles. The two hazardous conditions CO Rovira observed were the partially blocked door to the lobby (at issue in Item 1) and another door at the "back of the building" (at issue in Item 2) which lacked any exit signs. (Tr. 25-26; Exs. J-1, J-2, J-3).

At the end of the inspection, a closing conference was held where CO Rovira summarized the inspection and the violations he observed. (Tr. 26-27). As a result of the CO's investigation, OSHA issued a two-item serious citation for alleged violations of 29 C.F.R. § 1910.37(a)(3) and 29 C.F.R. § 1910.37(b)(2).

IV. Analysis

A. <u>Law Applicable to Alleged Violations</u>

To establish a violation of an OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods. Inc.*, No. 78-6247, 1981 WL 18810, at *4 (OSHRC, July 30, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

The Secretary has the burden of establishing each element by a preponderance of the evidence. *See The Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the evidence, Black's Law Dictionary (10th ed. 2014) (emphasis added).

1. Citation 1, Item 1 (Blocked Door at Front of Building)

Complainant alleged a serious violation of the Act in Citation 1, Item 1, as follows:

> 29 CFR 1910.37(a)(3)[3]: Exit routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, within the exit route. The exit access must not go through a room that can be locked, such as a bathroom, to reach an exit or exit discharge, nor may it lead into a dead-end corridor. Stairs or a ramp must be provided where the exit route is not substantially level.
>
> > On or about 14 May 2021, at USPS Canóvanas Post Office; the egress route and access to an emergency exit door was obstructed by mail shipping materials, boxes and shelving.

See Citation.

[3] 29 C.F.R. § 1910.37(a)(3) states:

> Exit routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, within the exit route. The exit access must not go through a room that can be locked, such as a bathroom, to reach an exit or exit discharge, nor may it lead into a dead-end corridor. Stairs or a ramp must be provided where the exit route is not substantially level.

a. The Standard Applies

"Under Commission precedent, however, the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *S. Pan Servs. Co.*, 25 BNA OSHC 1081, 1084 (No. 08-0866, 2014). In the case before this Court, the conditions of the hazard are the critical element, not the employer. A further example has been noted in *Ryder Transportation Services*, where it was noted that "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"). *Ryder Transp. Servs.,* 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014). The Commission also articulated this in finding "the cited ... provision was applicable to the conditions in [Respondent's] traffic control zone." *KS Energy Servs., Inc.,* 22 BNA OSHC 1261, 1267 (No. 06-1416, 2008) Further the Commission found that "[i]n order to establish a violation, the Secretary must show that the standards applied to the cited conditions." *Arcon, Inc.,* 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004). The Secretary has met his burden here.

It is undisputed that Respondent operates as a nationwide employer engaged in providing postal services and related activities with its workplace at Canóvanas, Puerto Rico. (Joint Pre-Hr'g Statement). The scope of the general industry Exit Routes and Emergency Planning covers every employer and every exit route. *See* 29 C.F.R. § 1910.34. Therefore, Respondent would fall under the purview of Part 1910 as a covered employer. Section 1910.37(a)(3) calls for all exit routes to be "free and unobstructed" and "[n]o materials or equipment may be placed, either permanently or temporarily, within the exit route." Exit route is defined in general industry standard 29 C.F.R. § 1910.34(c) as:

> "[A] continuous and unobstructed path of exit travel from any point within a workplace to a place of safety (including refuge areas). An exit route consists of

three parts: The exit access[4]; the exit[5]; and, the exit discharge[6]. (An exit route includes all vertical and horizontal areas along the route.)"

29 C.F.R. § 1910.34(c).

The Secretary contends that standard 29 C.F.R. § 1910.37(a)(3) is applicable to Respondent's Post Office. He argues that by the standard's plain terms, it applies to the door in question because it is part of an exit route. (Sec'y Br. 6). The exit route is presented on Exhibit J-4A as the exit access path through T-6, through the exit door labeled as A, out of the lobby exit doors (exit discharge) labeled as B, and then leading directly outside of the facility. (Sec'y Reply Br. 3-4). Respondent argues that the map of the facility does not identify the cited door at the front of the facility as an exit door. (Resp't Br. 4).

When interpreting a standard, the first consideration is the plain text of the standard. "If the meaning of the [regulatory] language is 'sufficiently clear,' the inquiry ends there." *The Davey Tree Expert Co.*, 25 BNA OSHC 1933, 1934, 1937 (No. 11-2556, 2016), quoting *Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1685 (No. 04-1091, 2006) (consolidated), *aff'd in relevant part*, 541 F.3d 193 (3d Cir. 2008). The regulatory language is considered ambiguous where the meaning is "not free from doubt." *Martin v. OSHRC* (*CF&I*), 499 U.S. 144, 150-51 (1991).

Here, the plain text of the standard supports the Secretary's interpretation that the cited door was part of an exit route. The cited door is part of a continuous path of travel from within the facility's workplace to the lobby exit. (Tr. 40-43; Exs. J-4, J-4A). It is undisputed that the

[4] Exit access is defined as the "portion of an exit route that leads to an exit…" 29 C.F.R. § 1910.34 (c).

[5] Exit is defined as the "portion of an exit route that is generally separated from other areas to provide a protected way of travel to the exit discharge..." 29 C.F.R. § 1910.34 (c).

[6] Exit discharge is defined as "[T]he part of the exit route that leads directly outside or to a street, walkway, refuge area, public way, or open space with access to the outside…" 29 C.F.R. § 1910.34 (c).

cited door is the only door employees can use to access the lobby from the employee work area. (Resp't Br. 2). The map of the facility, cited to by Respondent, even labels the doors in the lobby as exits. (Ex. J-4). The record reveals the exit access as the route through T-6 (on Exhibit J-4A), through the exit door labeled as A (the cited door), and through the lobby exit discharge labeled as B to outside of the facility. (Tr. 36-43; Ex. J-4A). All of the elements of an exit route described in general industry standard 29 C.F.R. § 1910.34(c) are met. Nowhere does 29 C.F.R. § 1910.34(c) mention an employer specifically designated exit is required as an element of establishing an exit route. The Court finds 29 C.F.R. § 1910.37(a)(3) applies.

b. The Standard was Violated.

The Secretary argues that Respondent failed to comply with the requirements of 29 C.F.R. § 1910.37(a)(3). He contends that the exit route through the lobby to the exit discharge leading out of the facility was obstructed. (Sec'y Br. 7). Respondent does not dispute that the door in question was partially obstructed. (*See* Resp't Br. 4-5). However, Respondent does argue that the door to the lobby was not an exit door and is not identified as such. (Resp't Br. 4). Respondent contends other exits exist and are clearly identified on the map of the facility. (Resp't Br. 4).

The record is clear, the door into the lobby was prevented from fully opening because shelves containing packing and shipping material were affixed to the wall behind the door. (Tr. 20-21; Ex. J-1). The shelves containing packing and shipping material effectively obstructed the path from a point within the facility, where employees were working, to an exit discharge out of the facility. (Tr. 20-25, 28, 36; Ex. J-1). The standard required Respondent to keep all exit routes "free and unobstructed" from any permanent or temporary materials or equipment that could obstruct the route. *See* 29 C.F.R. § 1910.37(a)(3). Here, the shelves and packing material obstructed an exit route from an area where employees were working to the lobby exits out of the

facility. (Tr. 20-25, 28, 36; Ex. J-1, J-4, J-4A). Although there were other routes to exit discharges (two doors to the back of the facility at the loading bay), their presence does not eliminate the hazard posed by the obstructed door in question. *See Gould Publ'ns*, 16 BNA OSHC 1923, 1924 (No. 89-2033, 1994) (multiple routes do not eliminate a hazard *per se*); *see also Hackney/Brighton Corp.*, 15 BNA OSHC 1886, 1991-93 (No. 88-610, 1992) (violation despite presence of several other doors).

Accordingly, in light of the abovementioned, the Court finds Respondent violated the terms of the standard.

c. Employees were Exposed to a Hazardous Condition

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission's test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1374 (No. 08-1386, 2015) (citing *Fabricated Metal Prods*. 18 BNA OSHC at 1074); *aff'd in relevant part,* 845 F.3d 170 (5th Cir. 2016) *See also Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980), *rev'd on other grounds*, *George C. Christopher & Sons, Inc.*, 10 BNA OSHC 1436, 1442 (No. 76-647, 1982); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).[7]

The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013)

[7] In *Gilles & Cotting, Inc*., the Commission rejected the "actual exposure" test, which required evidence that someone observed the violative conduct, in favor of the concept of "access," which focuses on the possibility of exposure under the conditions. *See Gilles & Cotting, Inc*., 3 BNA OSHC at 2003 (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure").

(citing *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). The zone of danger is determined by the hazard presented by the violative condition and is normally the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Constr.*, 17 BNA OSHC at 1234; Gilles *& Cotting, Inc*., 3 BNA OSHC at 2003.

Respondent's employees were exposed to a hazardous condition. Exposure is met by an employee's mere access to a hazardous situation. *Gilles & Cotting, Inc.*, 3 BNA OSHC at 2003. Respondent employs twenty-two employees, which includes the 16 who were on site the date of the inspection. (Tr. 33-34). It is undisputed that Respondent's postal clerks and management worked near the front of the facility near the obstructed doorway. (Tr. 40-42; Exs. J-4, J-4A). These employees were working near shipping and boxing material. (Tr. 40-42; Exs. J-1, J-4, J-4A). The record indicates that in the event of a fire, particularly in the locations annotated "Parcels," "Boxes Area," or "Registry" on the facility map, the obstructed doorway, at A, could prevent the quick escape of any of the employees working in the frontend of the facility. (Tr. 40-43; Exs. J-4, J-4A).

As such, the Court finds Respondent's employees were exposed to a hazardous condition.

d. Knowledge

Respondent's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known of the violative condition. 29 U.S.C. § 666(k); *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991). An employer is required to make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their scheduled work. *Automatic Sprinkler Corp. of Am.*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980). When determining whether an employer has been

reasonably diligent, the Commission considers "several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001).

An employer's awareness of the violation may be shown through actual or constructive knowledge of said violation. It is not necessary to show the employer knew or understood the condition was hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) (citations omitted). "[An] employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard." *Ragnar Benson, Inc.*, No. 97-1676, 1999 WL 770809, at *3 (OSHRC, Sept. 27, 1999) (emphasis in original). An employer is not automatically aware of a hazard in plain view, especially if not observed by a supervisory employee. *Cranesville Block Co., Inc./Clark Division*, Nos. 08-0316 & 08-0317, 2012 WL 2365498, at *10 (OSHRC, June 12, 2012). The actual or constructive knowledge of a foreman or supervisor can generally be imputed to the employer. *Tampa Shipyards,* 15 BNA OSHC 1533, 1537 (No. 86-360, 1992) (consolidated) (citing *A.P. O'Horo Co*., 14 BNA OSHC 2004, 2007 (No. 85-369, 1991)); *N&N Contractors, Inc*., 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) *aff'd,* 255 F.3d 122 (4th Cir. 2001).

The Secretary contends that Respondent had both actual and constructive knowledge due to the readily apparent and plainly visible hazard. (Sec'y Br. 8-9). An employer can be deemed to have constructive knowledge of a violation that is in plain view. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996). The Secretary argues that the doorway to the lobby was

in plain sight and obstructed by shelving filled with packing and shipping material, which could have easily been noticed by supervisory personnel. (Sec'y Br. 9). Further, the Secretary argues Respondent failed to exercise reasonable diligence to discover the longstanding affixed shelves and materials partially blocking the door. (*Id.*). Consideration of "reasonable diligence" includes an examination of the employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co*., 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). Under Commission precedent, "reasonable steps to monitor compliance with safety requirements are part of an effective safety program." *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000). "Reasonable diligence implies effort, attention, and action; not mere reliance upon another to make violations known." *N & N Contractors, Inc.*, 18 BNA OSHC at 2124.

Respondent failed to exercise reasonable diligence to discover the violative condition and take steps within its power to protect its employees from the violative condition. CO Rovira testified that Respondent did not have a health and safety program. (Tr. 47, 62). Additionally, the record reveals the violative condition was in plain view from multiple locations, including the lobby and management personnel's offices, in Respondent's facility. (Tr. 20-21, 40-43; Exs. J-1, J-4, J-4A). The Postmaster's and management's offices were directly connected to the obstructed doorway. (Tr. 35, 40-43; Exs. J-1, J-4, J-4A). Respondent's employees and management worked inside the facility on a daily basis in close proximity to the obstructed doorway. (Tr. 34-35). Further, it is undisputed that Respondent's evacuation plan, which is required to be posted for every employee to see, shows the door labeled A is the only door in the front of the building by which access from the employee work area to the lobby can be obtained. (Tr. 51-52, 67-70; Exs.

J-4, J-4A). Respondent could have known of the presence of the violative condition with the exercise of reasonable diligence.

When the Secretary shows that a supervisor had constructive knowledge of the violation, such knowledge is generally imputed to the employer. *See Ga. Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979); *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). As the Postmaster and supervisory personnel had offices with plainly visible views of the violative condition, their constructive knowledge is imputed to Respondent. *See Tampa Shipyards,* 15 BNA OSHC at 1537.

Constructive knowledge of the violative condition is established. The Secretary has proven all elements of his *prima facie* case.

2. Citation 1, Item 2 (Rear Exit Door)

Complainant alleged a serious violation of the Act in Citation 1, Item 2, as amended, as follows:

> 29 CFR 1910.37(b)(2): Each exit was not clearly visible and marked by a sign reading "EXIT":
>
> > On or about 14 May 2021, at USPS Canóvanas Post Office; towards the rear of the facility at the Loading Area, a designated exit was not marked by an exit sign or any other means.

See Citation as amended.

a. <u>The Standard Applies and was Violated</u>

As previously addressed, the postal services and related activities Respondent performed would fall under the purview of Part 1910. The scope of the general industry Exit Routes and Emergency Planning covers Respondent and exits. *See* 29 C.F.R. § 1910.34. Section 1910.37(b)(2) requires all exits to be "clearly visible and marked by a sign reading 'Exit'." The

exit is the "portion of an exit route that is generally separated from other areas to provide a protected way of travel to the exit discharge." 29 C.F.R. § 1910.34(c).

The Secretary contends that standard 29 C.F.R. § 1910.37(b)(2) is applicable to Respondent's Post Office by the standard's plain terms and was violated. (Sec'y Br. 10-11). The plain language of the standard supports the Secretary's interpretation that the door in question, marked as C on Exhibit J-4A, is an exit door and was required to be marked with a sign reading "Exit." CO Rovira testified that the door is an exit door because "it has a crash bar or a push bar area depicted" and leads to the discharge area. (Tr. 51-52). He further testified "the designated exit was not marked by an exit sign or by any other means." (Tr. 48). The record evidence shows there was no "Exit" sign anywhere near the exit door at the rear of the facility. (Tr. 48-50; Exs. J-2, J-3, J-4A). Photographs taken by CO Rovira of the rear facility door, entered into evidence as Exhibits J-2 and J-3, specifically show there was no "Exit" sign on the exit door. (Exs. J-2, J-3). Respondent has offered no evidence to rebut the exit door distinction or lack of an "Exit" sign.

The record shows that the cited standard applies to Respondent and was violated. (Tr. 48-52; Exs. J-2, J-3, J-4, J-4A). The cited door is part of a continuous path of travel from within the facility's workplace to the exit discharge in the rear of the facility. (Tr. 51-52; Exs. J-2, J-3, J-4, J-4A). There is no evidence that there was an "Exit" sign anywhere near the exit door at the rear of the facility. (Tr. 48-50; Exs. J-2, J-3). The Court finds 29 C.F.R. § 1910.37(b)(2) applies and was violated.

b. Employees were Exposed to a Hazardous Condition

The discussion and rationale addressed in Part IV(A)(1)(c), *supra*, likewise applies to employee exposure to a hazardous condition here and is incorporated herein. Respondent's employees were directly exposed to a hazardous condition when they worked at Respondent's

facility with access to an exit door without proper signage. (Tr. 33-34, 48-52; Exs. J-2, J-3, J-4, J-4A). The record indicates a fire in the front of Respondent's facility would require employees to exit through the rear of the facility, marked as C on the facility map. (Tr. 48-52; Exs. J-2, J-3, J-4, J-4A).

Exiting through the door designated as C on Exhibit J-4A and then through the door designated as letter D would be the only means of exiting from the rear of the facility. (Tr. 55-56; Ex. J-4A). CO Rovira testified the exit to the right of exit door C "was completely blocked by rolling carts, [and] mailing materials." (Tr. 56). Employees exiting through the rear of the facility would have no choice but to use the exit door labeled as C. (Tr. 55-56; Ex. J-4A). Without a clearly designated exit sign on the door labeled C, employees would be prevented from expeditiously exiting the rear of the facility in the event of a fire or emergency. (Tr. 33-34, 48-52, 55-56; Exs. J-2, J-3, J-4, J-4A).

As such, this Court finds Respondent's employees were exposed employees.

c. Knowledge

The discussion and rationale addressed in Part IV(A)(1)(d), *supra*, likewise applies to knowledge here and is incorporated herein. The Secretary contends that Respondent failed to exercise reasonable diligence to discover and to prevent violative conditions and that Respondent therefore had knowledge of those conditions. (Sec'y Br. 12). The Secretary argues the lack of an exit sign on the exit door at the rear of the facility was in plain view and readily observable on a daily basis. (Sec'y Br. 12).

The record reveals Respondent failed to exercise reasonable diligence to discover the violative condition and take steps to protect its employees. (Tr. 33-34, 48-52, 55-56; Exs. J-2, J-3, J-4, J-4A). Respondent had no safety and health program at the site to safeguard its personnel.

(Tr. 47, 62). The cited door is part of an exit route from within the facility to the exit discharge at the rear of the facility. (Tr. 51-52; Exs. J-2, J-3, J-4, J-4A). Respondent's evacuation plan, which is required to be posted throughout the facility, designates the door labeled C as an exit for employees. (Tr. 51-52, 67-70; Exs. J-4, J-4A). Respondent's employees and supervisors worked inside the facility on a daily basis and used this door to access the loading area. (Tr. 34-35, 52-53; Exs. J-4, J-4A). The record shows the lack of an exit sign, on the only available exit from the rear of the facility, was in plain view and readily observable with reasonable diligence by Respondent. (Tr. 48-52, 55-56; Exs. J-2, J-3, J-4, J-4A).

Constructive knowledge of the violative condition is established. The Secretary has proven all elements of his *prima facie* case.

IV. Serious Classifications

The Secretary classified the alleged violations in Citation 1, Items 1-2 as serious. A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). The Secretary need not show there was a substantial probability an accident would occur, only that if an accident did occur, death or serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Wal-Mart Stores, Inc., v. Sec'y of Labor*, 406 F.3d 731, 735 (D.C. Cir. 2005); *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1388 (D.C. Cir. 1985).

In determining whether a hazard is "causing or likely to cause death or serious physical harm," the Commission does not look to the likelihood of an accident or injury occurring, but, instead, looks to whether, if an accident occurs, the results are likely to cause death or serious harm. *See Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1164 (3d Cir. 1980); *Beverly Enters.*, 19 BNA OSHC 1161,1188 (No. 91-3144, 2000) (consolidated); *Waldon Health Care Ctr.*, 16 BNA

OSHC 1052, 1060 (No. 89-3097, 1993).

The record is clear that hazardous conditions existed at Respondent's facility which could potentially result in serious physical harm or death to Respondent's employees. Respondent's failure to comply with 29 C.F.R. § 1910.37(a)(3) and 29 C.F.R. § 1910.37(b)(2) on May 14, 2021, at its facility in Canóvanas, Puerto Rico exposed employees to hazards and serious physical injury. The evidence in this case establishes that there was a probability of death or serious bodily harm if a fire or emergency occurred. (Tr. 46, 59-61). CO Rovira testified the obstructed exit route and lack of an exit sign on a designated exit door, during a fire, could lead to severe injuries such as burns, smoke inhalation, or death. (Tr. 46, 59-61). He testified that the inability to quickly escape the facility through fire routes and their respective exits during a fire or emergency, could cause serious injuries or death to Respondent's employees. (Tr. 33-34, 40-43, 46-52, 55-56, 59-61).

These violations were capable of causing serious injury or death. The Secretary established that the hazards from the obstructed exit route and lack of an exit sign on an exit door were likely to cause death or serious physical harm in a fire or emergency. Thus, the violations were appropriately characterized.

V. Respondent's Defenses Fail

Respondent pleaded numerous defenses in its Answer.[8] Many of these defenses were not raised further at hearing or in its Post-Hearing and Reply Briefs. Respondent elected against presenting any of its own exhibits or witnesses at the hearing. (Tr. 85). Affirmative defenses not raised at the hearing are deemed waived and abandoned by Respondent. *Corbesco, Inc. v. Dole,* 926 F.2d 422, 429 (5th Cir. 1991) (Affirmative defenses not argued waived); *Marmon Grp.*, 11

[8] Respondent asserted multiple defenses, *inter alia*, (1) failure to state a claim, (2) compliance technologically and/or economically infeasible, (3) means of compliance infeasible, (4) Unpreventable or unforeseeable employee misconduct, (5) Respondent's due process rights were violated, (6) failure to describe with particularity the nature of the alleged violations, and (7) compliance functionally impossible. (Answer at 2-4).

BNA OSHC 2090, 2090 n. 1 (No. 79-5363, 1984) ("Commission declines to reach issues on which the aggrieved party indicates no interest."). The Court finds all of these defenses are rejected because they either lack merit or have been abandoned, or both.

VI. Penalty

Under section 17 of the Act, the Secretary has the authority to propose a penalty. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441– 42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). Ultimately, it is the province of the Commission to "assess all civil penalties provided in [Section 17]", which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995). In assessing penalties, the Commission is instructed to give due consideration to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of previous violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd,* 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally afforded greater weight in assessing an appropriate penalty. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). A violation's gravity is determined by weighing the number of employees exposed, the duration of their hazard exposure, preventative measures taken against injury, and the possibility that an injury would occur. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 (No. 76-2644, 1981).

The Secretary, in assessing the penalties for Items 1 and 2, proposed a gravity-based penalty of $7,802 for both violations of the cited standards. The Citation proposed a total penalty of $15,604. The CO explained OSHA believed the violations' gravity was moderate because of

the medium severity and lesser probability of serious injury, permanent disability, or death from exposure to smoke or fire. (Tr. 46, 59-61). The record supports finding that the gravity of the violations warrants a moderate penalty as serious injury and death could occur. (Tr. 33-34, 40-43, 46-52, 55-56, 59-61). The CO noted that sixteen employees were exposed, throughout the day, to the violative conditions on the day of the inspection. (Tr. 33-34).

The Secretary proposed that the penalties should not be reduced for good faith because there was not a safety and health program, or training implemented at the facility. (Tr. 47, 62; Sec'y Br. 14-16). No reduction was made for history because Respondent had previous OSHA violations within the last three years. (Tr. 47; Sec'y Br. 14-16). No adjustment was made for size because Respondent, the U.S. Postal Service, employs over 100,000 people. (Tr. 47; Sec'y Br. 14-16).

Upon due consideration of section 17(j) of the Act, with regard given to the penalty calculation factors, the undersigned finds a penalty for Serious Citation 1, Item 1 and Serious Citation 1, Item 2 of $7,802 is appropriate, resulting in a total combined penalty of $15,604.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1910.37(a)(3), is AFFIRMED and the Court assesses a penalty in the amount of $7,802; and

IT IS FURTHER ORDERED that:

2. Citation 1, Item 2, as amended, alleging a Serious violation of 29 C.F.R. § 1910.37(b)(2), is AFFIRMED and the Court assesses a penalty in the amount of $7,802.

SO ORDERED

/s/Covette Rooney
COVETTE ROONEY
Chief Judge, OSHRC

Dated: October 17, 2022
Washington, DC