THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. CSA Equipment Company, LLC., Respondent.	OSHRC Docket No. **12-1287**

Appearances:

Amy Walker, Esquire, U.S. Department of Labor, Atlanta, Georgia
For the Complainant

McCord Wilson, Esquire, Rader & Campbell, P.C., Dallas, Texas, and
Ronald L. Signorino, Consultant, The Blueocean Company, Inc., Basking Ridge, New Jersey
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER ON REMAND

On June 4, 2012, the Secretary issued a one-item Citation and Notification of Penalty to CSA Equipment Company, LLC, following an inspection conducted by Compliance Safety and Health Officer (CSHO) Eliseo Hernandez at the Port of Mobile, Alabama. CSA is a stevedoring company. Its work includes unloading cargo from vessels, as well as checking and transferring large steel coils. The CSHO's inspection resulted from an accident that occurred on December 29, 2011, when a forklift struck a CSA employee who was checking a coil. The employee later died from his injuries.

The Secretary alleged CSA committed a serious violation of § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §654(a)(1), for failing "to provide a clear view of the designated path of travel for the powered industrial trucks, exposing employees to crushing hazards while materials are checked into the warehouse." Item 1 listed three alternative abatement methods. On November 19, 2013, the undersigned issued a Decision and Order in this proceeding affirming Item 1 of the Citation and assessing a penalty of $6,300.00. The undersigned found the third listed abatement method—setting up a separate 'safe area' where

employees could check coils free from forklift struck-by hazards—was feasible because CSA had already implemented that method when it moved its coil-checking operation from the warehouse to the dock after the accident. CSA petitioned for review, contending this proposed abatement method is not feasible.

On March 26, 2014, the Commission remanded this case to the undersigned with instructions to determine "whether the method of separating the checkers and the forklifts proposed by the Secretary will materially reduce or eliminate the cited hazard, taking into account whether implementing that method of abatement would create safety consequences so adverse as to render its use infeasible. If the judge concludes that the Secretary did not establish this as a feasible method of abatement, she shall determine whether the other two methods of abatement proposed by the Secretary are feasible." (Remand Order, p. 4.)

In its Brief on Remand, the Secretary "concedes that the evidence at trial did not support his argument that the other two means of abatement identified in the Citation are feasible under the circumstances presented at this worksite." (Secretary's Brief, p. 5, n. 2.) Thus, only the feasibility of one method, separating the checkers from the forklifts, is at issue. For the reasons that follow, the undersigned finds the Secretary's proposed method of separating the checkers and the forklifts materially reduces the struck-by hazards created by the operation of the forklifts. This method does not create adverse safety consequences. Item 1 of Citation No. 1 is, once again, AFFIRMED.

The Commission's Instructions

The Commission states the undersigned "refused to consider testimony from CSA's expert, John Faulk, who testified that implementing the abatement method exposed CSA employees to other hazards." (Remand Order, p. 3). The Commission states the undersigned should have considered Faulk's contention that implementation of the proposed method of abatement creates two adverse consequences: "(1) checkers are still exposed to the 'immediate area' where the forklifts operate, and (2) checking coils on the dock presents additional hazards, specifically increased traffic from other moving vehicles such as small forklifts, 18-wheeler trucks, and road trucks, as well as hazards posed by overhead crane loads." (*Id.*).

Although the original decision did not address it in detail, the undersigned did consider Faulk's testimony. Nevertheless, consistent with the Remand Order, the undersigned has again carefully considered the testimony, along with the rest of the record, and finds it not reliable.

For the reasons that follow, the undersigned finds the testimony of CSA's expert is speculative, hyperbolical, and not grounded in the facts established by the undisputed testimony of the eyewitnesses who actually observed and experienced the pre-accident and post-accident operations at issue.

Eyewitness Testimony

Thomas Repoll Jr. is CSA's regional director of loss control (Tr. 22). Repoll was not at the worksite the day of the accident, but he had observed CSA's operations at the Port of Mobile both before and after the accident (Tr. 321, 324). Repoll described the pre-accident operation:

> [The clerks] were usually stationed right by the doorway. Once the coil was loaded from the vessel to the dock, a lift machine would bring it to the doorway and go back to the ship to get another coil. And you had machines inside the warehouse that would get the coil after it had been checked and bring it to the piles. The clerk was usually in the vicinity of the doorway of the warehouse.

(Tr. 41).

Repoll acknowledged that in the pre-accident operation there was "no set area where only the clerks [were] and the forklift doesn't enter into." (Tr. 42). With regard to the forklift traffic, Repoll stated, "[T]here's really no designated path. They start with a particular traffic pattern. And as the work progresses, as the warehouse fills up with cargo, they have to change their . . . traffic pattern." (Tr. 47).

The post-accident operation eliminates the step of forklifts bringing the coils from the dock to the warehouse. Now the checkers check the coils on the dock after they have been set down by crane. Repoll testified, "[F]rom the point of rest on the dock, the clerk checks [the coil] off. He motions to the driver once it's been checked off on his clipboard to come get the coil. The driver comes to get the coil, he brings it in the house to where it's stored in the bay inside the warehouse." (Tr. 323). Unlike the pre-accident operation, during which clerks were in the "general area" when the forklifts were dropping off or picking up the coils, in the post-accident operation, the clerk is "done with all of his coils and he's out of the way and he's standing next to the two guys that actually unhook the coil before the clerk checks it off." (Tr. 331-332).

At the time of the hearing, the post-accident operation had been implemented for approximately one year. Repoll testified there is more vehicular traffic on the dock where the checkers now check the coils than in the warehouse where they had previously checked them (Tr. 329). He was equivocal when asked his opinion of the safety of the post-accident operation compared to the pre-accident operation:

> Q. How is the current operation working?
>
> Repoll: I mean, we haven't had any injury with -- with clerks since then, but you know, we're -- we're still putting more people out -- out on -- out on the dock where there's more -- more congestion. So it's tough to say. Is it any safer? We don't -- we don't know. We've got more exposure to have, you know -- once we get people next to ship side, so I don't – I don't know if it's safer or not.
>
> Q. So you're not alleging that it creates a greater hazard for these employees now that they're out on the dock; is that right?
>
> Repoll: I mean, you always have a hazard when you have employees around lift machines.
>
> Q. Do you think the current operation is less safe than the way it was being done on the date of the accident?
>
> Repoll: At this particular time, I really don't know if it's any safer or any less safer.
>
> Q. If you felt it was less safe, I'm assuming you would certainly make a change and would not let your employees be exposed . . .to a greater hazard being out on the dock; would you?
>
> Repoll: Right. Our superintendents would have that authority to shut a job down and to change anything they see deemed -- that was unsafe.
>
> Q. And they would certainly do so if they felt this operation was unsafe, correct?
>
> Repoll: Right.

(Tr. 325-326).

Mark Bass is president of the International Longshoreman's Association (ILA), Local 1410 (Tr. 122). He observed the checkers' operations as performed before the December 29, 2011, accident and after it. Bass was called to the worksite the day of the accident (Tr. 127).

Bass testified he had responded previously to complaints about forklift operators driving recklessly in the warehouse. Approximately a year before the December 2011 accident, Bass had gone to the warehouse in response to a complaint and noticed the clerks "had coils all over the place and they were trying to keep up." (Tr. 138). Bass called Miles Covington, CSA's general superintendent, and relayed his concerns, stating, "I noticed that [the forklift operators] were driving all the coils on the inside of the door, and the clerk and checker is in harm's way." (Tr. 140). Bass testified the checkers were exposed to a hazard because the forklift operators were

> constantly bringing coils in and they—they weren't giving them an opportunity to move the coils. And the way they have to stack the coils or put the coils in the right place, it—it wasn't—it wasn't providing enough time. It wasn't providing

> enough time for them to keep up. And then you have all the lift driving. The lift has a big counterweight on the back, so they have to back up with those—they move forward and then have to back up with the operation. So it was just dangerous.

(Tr. 140-141).

Bass stated the post-accident operation, requiring forklift operators to wait for a signal from the checker checking the coils on the dock before approaching to transport the coils into the warehouse, is an improvement over the pre-accident operation (Tr. 149). He stated the post-accident operation "is better than what the situation with [the decedent] was. . . because at the end of the day, the clerks are standing over against the warehouse waiting for the discharge. Nobody can move any coils until he does his job—he or she does their job and then comes back out of the way. And then the coil is moved. " (Tr. 162-163). Bass stated that the checkers on the dock were exposed to other vehicular traffic while on the dock (Tr. 167-168).

Michael Crismon works as a checker for CSA (Tr. 78). Of the witnesses, he was the only one who observed and worked during both the pre-accident and post-accident operations and who was onsite at the time of the December 29, 2011, accident (Tr. 81-82). Crismon stated that at times while working during the pre-accident operation in the warehouse, coils would back up and forklift operators would move into the area in which he was working to drop off or pick up coils (Tr. 84). At times he had "10 or more" coils backed up in his area and more than one forklift accessing his area (Tr. 85-86). Backups of coils were frequent under the pre-accident operation (Tr. 98). On the day of the accident, three forklifts were bringing coils in from the dock and three forklifts were moving the checked coils from the checkers' areas to their designated bays. The number of forklifts in the warehouse at any given time fluctuated. Crismon thought there might have been some over-the-road trucks in the warehouse that day (Tr. 88). He stated it was usual for there to be over-the-road trucks and 18-wheelers operating in the warehouse at the same time the forklifts were operating (Tr. 91). Forklift operators routinely backed into the areas occupied by the checkers to drop off or pick up coils (Tr. 94).

Although Crismon testified that "there is more traffic [with] the new procedure" on the dock (Tr. 117), he stated the checkers are notified if vehicular traffic comes through (Tr. 96). He stated that under the new operation, "I find that you can stay away from [industrial trucks] better with—you have more eyes on you to let you know what's going on." (Tr. 99). Crismon testified he feels he is safer under the new procedure and that the industrial trucks "can consistently stay

away from the checkers that may be out on the dock checking cargo." (Tr. 99-100). When asked if the vehicular traffic is near the checkers, Crismon stated, "Not while we're checking. We're—they're moving—if they are moving, they're moving a little further behind going up. They won't be near the coil." (Tr. 118). Crismon responded, "Correct," to the statement, "So, [the industrial trucks are] not coming anywhere near your area while you're checking coils." (Tr. 118).

Crismon also stated he believes the new procedure is faster and more efficient because "as soon as the coils get dropped onto the dock, instead of having one truck grab it, put it inside, and then another truck grab it, you have them grabbing straight from the dock. So it's not—it's not as much movement. . . They don't have to handle the coil as much." (Tr. 100). After the coils are checked, the checkers signal the forklift operators to pick up the coils. Then, Crismon stated, "We move off with the rest of the longshoremen to the side of the doorway in the area where we're working." (Tr. 101).

Testimony of CSA Expert John Faulk

John Faulk testified it is not feasible to set up a separate 'safe area' where employees could check coils free from forklift struck-by hazards because "[y]ou couldn't conduct cargo handling operations unless you had people on the ground and you had machines in the immediate area." (Tr. 462). It is clear from the record, however, that, while the area where employees now check the coils is not geographically separate from the area where the forklifts pick up the coils (the coils are in the same location for both activities), the checkers and forklifts are temporally separated under the new procedure. All three witnesses who actually observed and worked with the new procedure testified without contradiction that the checkers check the coils, signal to the forklift operators, and then retreat from the area where the coils are located until after the forklifts pick up the coils and transport them to the warehouse. The checkers and the forklifts do not occupy the same area at the same time; in this way the checkers and forklifts are separated.

Faulk continually mischaracterized the pre-accident operation as it occurred in the warehouse. Despite the testimony of Bass and Crismon, who stated that coils frequently backed up in the checkers' areas, Faulk described the warehouse procedure in idealized terms. "This clerk with nothing around him checks the coil for damage and marks it, then signals for the lift truck operator inside the warehouse to drive up and pick up the coil and store it in the warehouse

. . . You have one machine feeding him, one machine taking it, storing it, using an open clear area." (Tr. 466-467). "He's in an open area, in an open aisle with just one machine working this way and one that way." (Tr. 494). "It was in a much open area inside the door of the warehouse in at least a 20-foot aisle-way. And the warehouse lift machine wouldn't come get the coil till he was finished checking it and then store it. The -- the lift machine from the ship would bring it, set it down, back away. The clerk wasn't even on that side. He -- he would check it, then signal. So he was in an open safe location – much safer than where he is now, believe me." (Tr. 498).

The Secretary's counsel questioned Faulk about his seeming certainty regarding an operation he never personally witnessed and which runs counter to the testimony of the witnesses who had witnessed it:

> Q. Mr. Faulk, where are you getting this information regarding how the operation was done? What are you basing that on?
>
> Faulk: I'm basing it on the documents that I read in the OSHA citation.
>
> Q. And you're also inc –
>
> Faulk: In my experience seeing this operation being conducted both ways for 43 years during my career.
>
> Q. Mr. Faulk, were you onsite on the day that this accident occurred?
>
> Faulk: No. I wasn't onsite. No.
>
> Q. Had you observed yourself what the operation was like?
>
> Faulk: I've seen that type of operation hundreds of times.
>
> Q. Were you onsite at the Respondent's location? Did you observe the way the operation was done on the date of the accident?
>
> Faulk: No. I wasn't there the day of the accident.

(Tr. 498-499).

> Faulk: If he's inside the shed, there's no lift machines by him while he's bending down checking. One's already put the coil down, went back to get another one. And the other one's not going to come get the coil till he signals him.
>
> Q. So you're talking about hypothetically that's the way it was done in the warehouse?
>
> Faulk: No. That's the way it was done. I've seen it done hundreds of times like that.
>
> Q. Do you know that that's the way it was done on the day of the accident?
>
> Faulk: It's the way it's typically done in ports throughout the United States and done throughout the world in ports that way. It's been done like that for decades safely. It's a simple operation.

(Tr. 502-503).

When confronted with the testimony of the eyewitnesses that established the coils backed up (as many as ten deep) and forklifts accessed the checkers' areas while the checkers were working, Faulk doubled down on his interpretation of the procedure he never personally observed:

> Well, it depends on how fast one machine could stack them and one can deliver. But if – even if there's three coils, and in his area there might have been. But the way I understand, it was one coil in this area. Maybe in his it was backed up. Maybe he was -- maybe he had damage on a coil. It took him longer to -- to check it. In the meantime, the machine from the ship brought another coil, so they may stack up. But he's checking one coil at a time. But still the warehouse forklift operator doesn't come and get the coil until he signals him to come get it. So he's aware of the two machines.

(Tr. 495-496).

When asked about the current checking procedure performed on the dock (which Faulk "reluctantly" agreed CSA has implemented), Faulk again rejected the eyewitness testimony of Repoll, Bass, and Crismon and substituted his own version of reality:

> Q. So they currently -- the way it's being done is that the coils are dropped on dockside, the checkers check it, they move out of the way, and then the forklift comes to get the coil. Do you agree with that? Do you understand that?
>
> Faulk: Well, you say "move out of the way." There might be four or five coils there where he's checking one of the other, so "moving out of the way" is just something that doesn't happen. He -- he might have four coils discharged at one time. He's checking one at a time now. So he's not going to be -- there's no safe place under the hook or under the crane or the whip we call it. If a sling should break and there's four coils coming out, they're not going to fall straight down. They're going to scatter. So you have -- you have now three people. The hook-on men are always in danger of being struck by falling cargo. Now you have three people that's in danger of being struck by falling cargo should something fail. Not only that, you have an additional person exposed to numerous vehicles passing up and down a narrow warehouse apron where before you didn't have that.

(Tr. 497-498).

Having reconsidered Faulk's testimony, the undersigned finds, again, that it is unreliable and deserving of little weight. Faulk manifested a stubborn refusal to acknowledge the actual pre-accident and post-accident operations as established by eyewitnesses and instead engaged in speculation about hypothetical operations that were unlike either of the ones attested to by the witnesses who worked on the site in question. The testimony of Repoll, Bass, and Crismon

regarding the pre-accident and post-accident operations of the checkers is credited over that of Faulk.

Purported Adverse Consequences:

Checkers Still Exposed to "Immediate Area" Where Forklifts Operate

Based on the testimony of Repoll, Bass, and Crismon, the undersigned finds CSA's checkers are not exposed to the "immediate area" where forklifts operate. All three eyewitnesses stated the checkers approach the coils after they have been set down by crane on the dock, check the coils, signal to the forklift operators to commence pickup, and then retreat from the area while the forklifts are retrieving the coils. Except for Faulk, who did not observe the operation, no one disputed that the new procedure successfully separates the checkers from the forklifts, thereby materially reducing struck-by hazards.

In addition to separating the checkers from the forklifts during the time the forklifts are retrieving the coils, CSA's new procedure reduces by half the number of forklifts operating during the checking operation. It is undisputed that under the old system, drivers were operating six forklifts every time the checkers were checking the coils. If the coils were backed up, a checker could experience more than one forklift entering his or her area, both delivering coils and retrieving checked coils. Under the new procedure, forklifts no longer deliver the coils. Three forklifts are used to retrieve the coils once they are checked (and once the checkers retreat from the area). The reduction in struck-by hazards can be quantifiably measured: the number of forklifts involved during the checking operation is reduced from six to three. A reasonable person would concede that a reduction by one-half is, objectively speaking, a material reduction.

Checkers Exposed to Additional Hazard of Increased Traffic

CSA's main argument for disputing the feasibility of separating the checkers from the forklifts is that it introduces the employees to new hazards. The record does not support this argument. CSA contends the checkers are exposed to more vehicular traffic under the new procedure. While the record establishes there is more vehicular traffic on the dock than in the warehouse, it does not establish the employees are exposed to more struck-hazards while on the dock.

Repoll, Bass, and Crismon stated there was more traffic on the dock than in the warehouse (Tr. 117, 167-168, 329). None of them, however, testified that the increased vehicular traffic created more struck-by hazards. Crismon, the only witness who worked as a

checker, stated that he felt safer under the new procedure and that the traffic on the port is not near the landed coils (Tr. 99-100). Repoll is CSA's regional director of loss control. As such, he is a representative of CSA's upper management and the employee witness most likely to further the defense of his employer by asserting the increased traffic creates a greater hazard. Yet when the question was put to him, he stated only that it is hazardous for employees to work around forklifts, which is the same hazard that existed in the warehouse under the previous procedure. He declined to state that the new procedure is more dangerous than the previous procedure:

> Q. So you're not alleging that it creates a greater hazard for these employees now that they're out on the dock; is that right?
>
> Repoll: I mean, you always have a hazard when you have employees around lift machines.
>
> Q. Do you think the current operation is less safe than the way it was being done on the date of the accident?
>
> Repoll: At this particular time, I really don't know if it's any safer or any less safer.

(Tr. 325).

CSA's regional director of loss control, who has personal knowledge of the pre-accident and the post-accident procedures, refused to state that the new procedure is more hazardous when directly asked about it. CSA provided no empirical evidence showing how close to the coil checking area the vehicular traffic normally ran. CSA adduced no evidence quantifying either the amount of vehicular traffic or the distance between the traffic and the coil landing area. In its Remand Order, the Commission directs the judge to consider Faulk's testimony with regard to alleged adverse consequences caused by implementing the abatement method

> along with other evidences indicating that the proposed abatement method fails to materially reduce the cited hazard and in fact, introduces other hazards to which the checkers are exposed. *See also Kokosing*, 17 BNA OSHC at 1875 n.19, 1995-1997 CCH OSHD at p. 43,727 n.19 3 (Secretary has the burden of rebutting evidence that abatement method presented a greater hazard); *Western Mass. Electric Co*., 9 BNA OSHC 1940, 1945 n.11, 1981 CCH OSHD ¶ 25,470, p. 31,766 n.11 (No. 76-1174, 1981) (referring to principle articulated in *Royal Logging Co*. that there is no greater hazard defense per se in case arising under section 5(a)(1), i.e., "evidence which would be relevant to the affirmative defense of 'greater hazard' under § 5(a)(2) is properly treated as rebuttal evidence to the Secretary's case [for a § 5(a)(1) violation].").

(*Id.,* pp. 3-4).

The undersigned discussed the consideration of Faulk's testimony and the reasons for finding it unreliable above. The undersigned now finds, with regard to CSA's assertion that the abatement method it is currently using presents a greater hazard to its checkers due to increased vehicular traffic, that CSA's assertion is unsupported by the record. To the extent CSA has put forth a case that the increased vehicular traffic creates a greater hazard, the Secretary successfully rebutted that case. None of the three witnesses who had personal knowledge of both procedures, including CSA's regional director for loss control, testified that the increased vehicular traffic increased struck-by hazards to the clerks. No evidence was adduced to show the distance between the vehicular traffic and the area where the checkers check the coils. The only checker who testified stated vehicles "stay away from the checkers that may be out on the dock checking cargo" (Tr. 100) and "won't be near the coils." (Tr. 118).

Checkers Exposed to Additional Hazard of Overhead Crane Loads

Faulk, who did not observe either the pre-accident or post-accident operations of CSA's checkers, stated the checkers were exposed to struck-by hazards from overhead crane loads.

> [Y]ou've got loads being swung out over the hull over these, this area being lowered. You're exposing him now to being struck by cargo that could possible fall from a suspended load. There's no place to give—you have two other men out there already-longshoremen that's hooking up and unhooking cargo. There's no safe place for these people to stand. He was safer in this open area where he had one machine feeding him and one taking it away.

(Tr. 468).

As discussed above, Faulk is again ignoring the new checking procedure as it is actually performed and is substituting his own version of reality. The undisputed testimony of the eyewitnesses establishes the checkers were not exposed to struck-by hazards from overhead crane loads when the cranes were in operation. Bass testified that he complained to CSA when he first observed a coil operation occurring near a steel plate operation (Tr. 163). CSA changed its operation so that it does not occur at the same time as the steel plate operation (Tr. 165). Now when loads are "discharging, [the checkers] can't go out there to check the coils. They have to wait till whatever commodity is landing and then they go out." (Tr. 167).

Crismon likewise testified the checkers are not exposed to struck-by hazards from overhead crane loads. He stated that the checkers do not approach the coils until they have been landed on the dock and "I don't go up until after the crane already started moving away." (Tr. 116).

As with the increased vehicular traffic allegation, CSA bases its case on the unsupported assertion of its expert witness, who never observed the operation at issue and who ignored the undisputed testimony of the eyewitnesses. The Secretary successfully rebutted CSA's assertion by adducing testimony from witnesses who have observed the operation at issue and who stated that checkers are not in the coil checking area while cranes are in operation, and thus they are not exposed to struck-by hazards from overhead crane loads.

Conclusion

In accordance with the Commission's Remand Order, the undersigned has determined, based on all of the evidence in the record, that the method of separating the checkers and the forklifts proposed by the Secretary materially reduces the cited hazard and does not create safety consequences so adverse as to render its use infeasible. Accordingly, as before, Item 1 is affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.

ORDER

Based on the foregoing Decision, it is hereby ORDERED that Item 1 of Citation No. 1, alleging a serious violation of § 5(a)(1) of the Act, is affirmed and a penalty of $6,300 is assessed.

SO ORDERED.

Date: December 16, 2014

/s/
Sharon D. Calhoun
Judge