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

SECRETARY OF LABOR,	:	
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Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 08-0637
	:	
TUSCAN/LEHIGH DAIRIES, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:	Andrew Karonis, Esquire Matthew Sullivan, Esquire U.S. Department of Labor New York, New York For the Complainant.	Malone M. Lankford, Esquire Steven R. McCown, Esquire Littler Mendelson, P.C. Dallas, Texas For the Respondent.
BEFORE:	Dennis L. Phillips Administrative Law Judge	

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). From September 28, 2007 through March 27, 2008, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's, Tuscan/Lehigh Dairies, Inc. ("Respondent" or "Tuscan") work sites. Specifically on September 28, 2007, OSHA inspected one of Tuscan's milk delivery trucks at a delivery site in Hartsdale, New York, where earlier that day an employee of Tuscan had an accident. As a result of the inspection, OSHA issued to Tuscan a serious citation with a proposed penalty of $2,500 alleging

a violation of the general duty clause, section 5(a)(1) of the Act. The citation alleges that "Milk delivery drivers are exposed to the hazard of being struck by cargo load bars as they attempt to release such bars from their tracks at each stop, on or about September 28, 2007."[1] Respondent contested the citation. The hearing in this matter was held from February 17 through 19, 2009, in New York, New York. Both parties have filed post-hearing and reply briefs. The Secretary also submitted to the Court a letter dated May 1, 2009. Respondent submitted a response to the Secretary's letter dated May 4, 2009.

Background

Tuscan, a dairy products producer, has a distribution facility in Union, New Jersey, and a production facility in Burlington, New Jersey. At the time of the accident, Tuscan employed about 20 route drivers who worked out of the Union facility. The route drivers were responsible for driving tractor-trailers to deliver milk products to Tuscan's customers. The milk products, usually milk in plastic gallon containers, are loaded onto the trailers at the Burlington facility by loaders, also known as "cooler employees." Each gallon container weighs about 8.5 pounds. The loaded trailers are delivered to the Union, New Jersey facility by "transport drivers." Tuscan's route drivers then deliver the milk according to their assigned routes. The milk containers to be delivered are loaded onto the trailers in crates and stainless steel racks known as "bossies." The crates, 16-inch plastic cases holding four gallons of milk each, are generally loaded in stacks five to six crates high. The bossies, metal carts with four to five shelves and about 5.5 feet high and 2.5 feet wide, hold 80 gallons of milk each. An empty bossy weighs about 125 pounds. A full bossy weighs about 800

[1]OSHA also issued a one-item "other" citation to Tuscan. That item has settled. It has been severed from this matter and has been assigned its own docket number, No. 09-0271.

pounds. Each bossy has four wheels under it at each corner. Generally, the rear wheels are fixed and can move only forwards and backwards.[2] The front wheels can move a full 360 degrees. Depending on the run, there are up to 60 loaded bossies with a couple of inches in between the bossies at the beginning of the day. (Tr. 41-44, 76-78, 110-111, 151-52, 327-30, 438-39, 511; CX-21).

The crates and the bossies are typically loaded at the Burlington facility in the order in which they are to be delivered, with the first order on the route placed last in the trailer. The loaders at the Burlington facility load rows of crates and rows of bossies across the width of the trailer and then secure the rows with "load bars" and "load straps." A load bar is a hollow metal device 3 to 4 inches wide, about two - three inches thick, that expands in length to the width of the trailer. Up to three load bars may be used to separate the secured product containing milk from empty cases and bossies; one at the bottom of the product, one in the middle of the product, and one at the top of the product. The load bar has latches on each end that can be fastened to tracks that are on both interior side walls of the trailer. The tracks run the length of the interior side walls and have notches every inch or so into which the load bar latches fit. The driver pulls back a one-quarter inch "ear," also known as a "sleeve," to enable the load bar to be lifted slightly and then slid out of the track. When in place, the load bars create barriers beyond which the rows of bossies (or crates) cannot move.[3] Load straps are polyester or nylon straps 2 to 3 inches wide that are put across each row of bossies. Like the load bar, each end of the load strap can be fastened into the notches in the trailer's track system. The strap can be tightened or loosened as needed by means of a buckle, also known as a rachet device, located in

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[2] One Tuscan employee told the CO that all four wheels turn on large bossies. (Tr. 299).

[3]The load bars are used to secure the strapped-in rows of bossies. They are also used to segregate a load of crates from a load of bossies and are further used to secure the entire load at the back of the truck. (Tr. 46-47, 79-82; CX-4, p. 2).

the middle of the strap. The bossies are sometimes secured every three to five rows, or in the middle and in the back of the trailer by the straps. One of the differences between straps and bars is that a strap does not take up any space. Three bossies fit across the width of the trailers Tuscan uses. The bossy carts alongside each trailer wall typically have their front wheels facing perpendicular to the trailer walls. All four wheels on the center bossy are generally perpendicular to the load bar. All three bossies in a row can place pressure on the load bar because the free-moving wheels can potentially face any direction, including that of the load bar. (Tr. 41-42, 45-47, 76-81, 84, 100-101, 112, 121-22, 151, 156, 329; CX-4, CX-21).

The route drivers deliver Tuscan's product to a number of customers along their assigned routes. There can be from about three to seven different delivery locations per route. The drivers must remove the load bars at each stop to unload the bossies and/or milk crates that are intended for that particular customer. The full bossies and crates are left with the customer on the dock, who returns the empty bossies and crates to the driver on his next delivery. After unloading the product and collecting any empty bossies and crates, the driver must then re-secure the rest of the load in addition to the empty bossies and crates. The driver re-secures the load, including the "empties," with load bars and/or load straps. Drivers may even off uneven stacks of milk crates/cases in the trailer to avoid spillage. (Tr. 41, 47-50, 77, 84-86, 100-01, 328-29, 332-33; CX-4, CX-5).

For most deliveries, the route drivers can remove the load bars manually, without using any tools. The driver releases the lock mechanism, slightly lifts the bar, and then slides the bar out of the track. At times, the load bar will appear "bowed out" or get "stuck" in the tracks and the driver cannot remove it manually. The load bar getting stuck is due to the cargo having shifted toward the back of the trailer, and against the load bar, resulting in pressure being exerted on the load bar. This

situation can arise as often as once per day per driver, depending on the delivery route. It occurs more often at locations where the delivery dock is at an incline, because gravity causes the load to shift against the load bar. When this happens, Tuscan's route drivers have several means they use to relieve pressure on, or remove, the bar. One is the "braking method," which involves the driver getting back in the cab and moving the trailer forward a few feet and then hitting the brakes. The intended effect of this method is to shift the cargo forward 1.5 to 3 inches so that the pressure is removed from the load bar and it can be taken off manually. The braking method is Tuscan's preferred method and best practice to help remove load bars under pressure. Other methods involve using tools to remove the load bar while it is still under pressure. For example, a driver may use a hammer or a 2 to 3-foot long piece of metal with a hook on the bottom and handle on top to knock the load bar out of the tracks on one side.[4] A driver may also use a screw driver to pry the load bar out of the tracks on one side. Another method is to use the forks of a hand truck to pry out the load bar. When the load bar is released while still under pressure, the bar "pops out" or "snaps back" a little bit in the direction of the driver. Unless the driver stands back or the bar is somehow restrained, *i.e.*, by a helper or the driver pressing his shoulder against the bar or holding the bar with his hand, the driver may be struck by the bar when it is released.[5] Tuscan never disciplined any drivers for using a method other than the braking method to help remove load bars under pressure because there was no reason to do so since there had never been an injury associated with load bar removal. (Tr. 46, 49-54, 86-93, 97, 106-07, 122-25, 128-29, 352-55, 359, 365, 376-78; CX-2, CX-4).

[4]The hook is a milkman's tool that every truck driver has that is used to pull milk cases or crates. (Tr. 88, 381).

[5]When using the forks of a hand truck to pry out the load bar, a driver may position the hand truck handle between himself and the bar to avoid being struck. (Tr. 128-29; CX-2, p. 2).

In January 2007, Tuscan hired John Rocco as a route driver. Mr. Rocco had been a driver with Tuscan before, from 1987 to about August, 2005. Pursuant to Tuscan's policy, Mr. Rocco upon rehire received on-the-job training ("OJT"), by going with senior drivers on their routes, before doing any routes on his own. Mr. Rocco was light in weight. All newly hired drivers at Tuscan received two to four weeks of OJT. The training includes instructing new drivers in areas such as loading and unloading of product and stacking and securing filled and empty cases and bossy carts, as well as the safe and correct procedures for using load bars and straps. On September 28, 2007, Mr. Rocco was making a delivery to a supermarket in Hartsdale, New York, shortly before noon. The store's delivery dock was on an incline. Mr. Rocco parked his truck with the back of the trailer on the downward side of the slope. Mr. Rocco's load at that time consisted of loaded milk crates located at the front, or cab end, of the trailer. In front of the milk crates were rows of empty bossies secured by a load bar. Mr. Rocco had also put a row of additional empty bossies along either side at the back of the trailer. These empty bossies were secured with load straps.[6] There was a gap of about 18 inches between the rows of bossies secured with the load bar and the bossies on either side of the trailer secured with the load straps. Although no one else was present at the time, Mr. Rocco was evidently in the process of releasing the load bar that was restraining the rows of empty bossies when an accident occurred. Mr. Rocco was found unconscious in the trailer. He subsequently died. (Tr. 95-96, 107, 117-18, 121-23, 356-57, 366-67, 379-81, 419-20, 428, 433, 437-43, 451-2, 538-39; RX-3, RX 4).

Warren Samuels, the OSHA compliance officer ("CO") who investigated the accident, arrived at the site of the accident at the Pathmark supermarket, in Hartsdale, New York around 1:00 p.m.,

[6] Mr. Rocco's supervisor testified that this was an intelligent, safe practice since it prevented drivers from having to remove empty bossies from the trailer's center aisle or to a customer's loading dock. The straps also held the bossies in place. (Tr. 366).

September 28, 2007 about an hour after the accident occurred. The Greenberg Police Department ("GPD") was there, as were two managers of Tuscan. The CO spoke to the Tuscan managers, Messrs. Santo Sacca and Paul Cunha, and the GPD detectives.[7] The CO also viewed the interior of the trailer and took a number of photographs.[8] Mr. Sacca told the CO on September 28, 2007 that he believed the accident was caused by the load shifting against the load bar and the bar striking Mr. Rocco when it was released. Mr. Sacca also told the CO that where Mr. Rocco may have strapped the empty carts and put a cargo load bar may have contributed to the accident. Mr. Sacca has not been a driver for more than twenty years. Photograph CX-14, p. 1, taken by CO Samuel only hours after the accident, shows one bar on the floor of the trailer and a second bar at an angle still above ground level. CO Samuels testified that he believed the bar above ground level struck Mr. Rocco in the chest. Photograph CX-14, p.15, shows the bar on the trailer floor running perpendicular to the trailer walls in between the front and rear wheels of a bossy. This photograph also shows the front set of two bossy wheels behind which the bar passed to be perpendicular to the trailer walls and two rear wheels to be positioned parallel to the trailer walls. Mr. Sacca indicated load bars under pressure were always a problem when a truck was parked on an incline. Later that day, the GPD took the delivery truck to its impoundment lot. On October 1, 2007, the GPD inspected the trailer with the CO present. In the process, the GPD removed all the bossies from the trailer. After its inspection, the GPD put the bossies back into the trailer and notified Tuscan it could pick up the truck. Tuscan sent a driver, who drove the truck to the company's dock. John Lapare, Tuscan's director of distribution, made his

[7]The GPD contacted OSHA about the accident. (Tr. 117).

[8]Photographs taken by the CO on September 28, 2007 appear at Exhibit CX-14. Photographs taken the week following September 28, 2007 are at Exhibit CX-15. (Tr. 147-48).

own inspection of the trailer after the accident. He believed Mr. Rocco had not properly secured the load on the left side of the trailer and that the 18-inch gap between the empty bossies secured with the load bar and those secured with load straps along the trailer's sides was insufficient room for him to work in.[9] Mr. Lapare also believed that before parking the truck on the incline, Mr. Rocco had backed into the dock too quickly, not only shifting the cargo against the load bar but also causing the milk crates on the left side to tilt. When Mr. Rocco released the load bar, the tilted milk crates pushed the two empty bossies on the left side into him. He was pinned between them and the bossies behind him. Mr. Rocco was asphyxiated by the pressure applied by the crates and empty bossies. Mr. Lapare believed that had there been no strapped-in bossies behind him, Mr. Rocco might have been hit by the load bar, but not injured, because one end of the bar would have come out 2 to 3 feet since the other end of the bar was still locked in on the trailer's other side. The CO believed Mr. Rocco had released the load bar while it was under pressure, by using a hammer, and that he was killed by the load bar striking him.[10] The Court also considered the affidavits of two Tuscan drivers Chuck Jones and Ray Moyla; as well as the admitted portion of the December 17, 2008 deposition testimony of John C. Lapare. (Tr. 117-26, 148-153, 325, 419-20, 431-33, 440-50, 453-54, 458, 509-10, 536-40; CX-3-5, CX-10, CX-12 (in part), CX-13, at pp. 83-84, including deposition exhibits, or portions thereof, that were admitted into evidence at CX-2 (in part), CX-13b through CX-13d, CX-14, CX-15, RX-3 and RX-11 (in part)).

[9]The "left side of the trailer" refers to the left side of RX-3, which reflects Mr. Lapare's recall of the interior of the trailer when he inspected it after the accident.

[10]The CO also spoke to Mr. Lapare and others at Tuscan during his inspection. (Tr. 126).

Jurisdiction

In its answer, Respondent admits that, at all relevant times, it was engaged in a business affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act and that it was an employer within the meaning of section 3(5) of the Act. It also admits that the Commission has jurisdiction of this matter pursuant to section 10(c) of the Act. I find, accordingly, that the Commission has jurisdiction of the parties and the subject matter in this case.

The Secretary's Failure to Produce Evidence

As a preliminary matter, I address the Secretary's failure to produce certain evidence. In particular, at the beginning of the first day of hearing, the Secretary's counsel advised the Court that there were 172 pages of the CO's field notes that had not been produced. Respondent requested the notes months before, during discovery. The Secretary's counsel stated the omission was inadvertent and due to an office error. He himself had not seen the notes until that morning. The Secretary produced the field notes at the hearing. Respondent requested an opportunity to review the notes before responding. (Tr. 10-11). The next day, Respondent pointed out that about 20 percent of the notes were totally redacted, with the legend "IP" (informant's privilege) on them. The Secretary stated that those notes were employee statements the CO had taken. The Court reviewed unredacted copies of the statements and redacted the names of the employees and other information that might identify them. The Court then directed the Secretary's counsel to make copies of the redacted statements and to provide those copies to Respondent. (Tr. 178-186). During its cross-examination of the CO later that day, Respondent utilized the redacted statements. Specifically, the CO was asked to read excerpts from the statements into the record. The excerpts addressed matters such as the OJT

employees received, filling up empty spaces to prevent loads from moving, securing loads with load straps and load bars, and dealing with shifted loads and pressure on load bars. (Tr. 296-302).

In its reply brief, Respondent asserted that the Secretary's counsel "deliberately withheld and then produced redacted documents in an attempt to hide damaging evidence." Respondent's Reply Brief dated April 30, 2009 ("R. R. Brief"), at p. 11. In a May 1, 2009 response, the Secretary objected to that assertion, characterizing it as "baseless and outrageous." The Secretary repeated that the omission was inadvertent. The Secretary also pointed out that Respondent had not claimed it had been prejudiced by the omission. In a May 4, 2009 response, Respondent reiterated its belief that the field notes were "improperly concealed."

My review of the relevant portions of the record persuades me that the Secretary's counsel did not deliberately withhold the CO's field notes. On the other hand, the Secretary's production, on the first day of the hearing, of 172 pages that should have been provided to Respondent during discovery, is clearly not to be condoned. Regardless, I find that Respondent has not been prejudiced. This is especially true in light of the evidence obtained during Respondent's cross-examination of the CO, noted above. Therefore, no further action in regard to this matter is required.

The Secretary's Burden of Proof

To prove a violation of the general duty clause, the Secretary must show that (1) an activity or condition in the employer's workplace presented a hazard to employees; (2) the cited employer or its industry recognized that the condition or activity was hazardous; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) there were feasible means to eliminate or materially reduce the hazard. *See Usery v. Marquette Cement Manufacturing Co.*, 568 F.2d 902, 909

(2nd Cir. 1977), *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996), citing to *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993).

The cited hazard, set out above, is that of Tuscan's milk delivery drivers being struck by load bars when they attempt to release the bars at the stops on their routes. The Secretary's proposed methods to reduce or eliminate the cited hazard are as follows:

1. Follow Cannon Equipment's recommendation to restrain the wheels of each bossy cart using chocks, wheel locks, or other acceptable means, before removing the cargo load bar, when parked on an incline;

2. Develop and implement policies and procedures to require drivers to restrain bossy carts and crates located immediately in front of the cargo load bars by means of a load strap and to inspect their cargo before unloading at each stop to determine if the cargo has shifted.

3. Provide training to all employees on the above policies and procedures.

The testimony as to the four elements listed above that the Secretary must establish to prove the alleged violation is set out below.

The Relevant Testimony

Timothy Bolles, a route delivery driver with Tuscan since February, 2004, appeared and testified. He drives a 45 to 48 foot tractor trailer truck to about three to four locations each day. When picked up each morning, each trailer is one-half full to completely full. Before starting his route, he inspects the trailer to make sure the load of milk is secure and nothing is spilled. The two load bars in the trailers are about 2 and 4 feet off the floor, respectively. When there is a lot of pressure on a bar, it can "slap back" and hit the driver upon release. He himself got a small bruise once when a bar

hit him. It was not serious. He sought no medical treatment and missed no work. After that incident, he learned to stand back from the bar. Mr. Bolles has released load bars thousands of times since he began working at Tuscan. He does not believe that releasing a bar under pressure is likely to cause serious injury or death. Tuscan gave Mr. Bolles no instructions about releasing load bars or securing bossies. It was up to the driver to use his or her best judgment on how to handle such matters. Tuscan provided him OJT for a week or two upon hire. The OJT involved going with an experienced driver on his route to learn the stops and the customers. It also involved watching that driver operate, helping him unload and load, "squaring up" the load, and working with the load bar.[11] In acquiring his commercial drivers license ("CDL"), Mr. Bolles learned about and was tested in driving a truck, "docking in," and securing cargo. He believed it would make no sense to have a standard procedure for stops as the stops and routes are all different. Mr. Bolles knew Mr. Rocco. Mr. Bolles had ridden with Mr. Rocco to learn Mr. Rocco's route. He believed Mr. Rocco knew how to load and unload, secure cargo, and deal with load bars safely and effectively. (Tr. 39-41, 45-49, 52-54, 58-73).

Fladimir Fish, a route driver with Tuscan since 1990, also appeared and testified. Mr. Fish drives 18-wheeler trucks that are from 48 to 51 feet in length. There are two levels of tracks in the trailers he drives, one at knee level and one at shoulder level. Before leaving on his route, he climbs on the lower load bar to look at his load and ensure that everything is secured. Sometimes, when only one load bar is at the back of the load, he will attach another one just to be "on the safe side." A load bar under pressure can "jump" when released. If someone did not hold the bar with his hands, the

[11]Mr. Bolles had also learned these matters in a prior job with another dairy. While at the other dairy, Mr. Bolles learned from other drivers a number of ways a driver could remove a load bar, including the breaking method; and using a hook, hammer, or screwdriver. He said "squaring up" the load means not leaving gaps between the columns of cargo. (Tr. 59, 67).

bar could hit the driver in the shoulder or the head. To prevent this from happening, Mr. Fish always puts either his shoulder or his hand on the bar, or his helper does so.[12] A bar hit Mr. Fish in the shoulder "a couple of times," "way back when," when he was alone and not being careful.[13] He sustained no bruises or injuries from those events. Mr. Fish knew Mr. Rocco because Mr. Rocco was his boss at one time. Mr. Rocco had gone with Mr. Fish to learn Mr. Fish's route after Mr. Rocco was rehired. He understood Mr. Rocco had more experience than he did and that Mr. Rocco had worked about 20 years at Tuscan. Mr. Fish knew about using the braking method to help release the load bar from his many years as a professional driver and from Tuscan's safety employee, Larry Cuomo. No one at Tuscan taught Mr. Fish how to use a hook or hammer to release a load bar. These were things he had learned over the years as a professional driver. Likewise, no one at Tuscan had shown him how to secure empty bossies. It was up to each driver to decide how to secure them. (Tr. 75, 80-83, 89-90, 93-109).

CO Samuels appeared and testified. He has worked as an OSHA CO for 21 years. As part of his investigation, he spoke to Mr. Sacca and learned what Mr. Sacca believed caused the accident. He also spoke to other Tuscan managers, including Mr. Lapare.[14] The CO testified that Mr. Lapare told him that load bars come under pressure when the trucks are parked on an incline causing the cargo to shift against the load bar. Mr. Lapare further told the CO that any milk on the floor would

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[12]Mr. Fish indicated that each driver now has a helper with him on his route. (Tr. 90).

[13]Mr. Fish stated that now with a helper it is a "different story." (Tr. 90).

[14]The CO said that he spoke to Mr. Lapare in October 2007 and in January 2008. He also interviewed Mr. Lapare on February 7, 2008. CX-2 is the CO's notes of his February 7, 2008 interview with Mr. Lapare. Further, CX-3 is the CO's notes of his interview of Mr. Sacca on September 28, 2007. The parts of Exhibits CX-2 and CX-3 that were admitted are noted with "A." (Tr. 126, 219-21, 225-28, 264-67; CX-2, CX-3).

exacerbate the situation. It could cause bossy carts to move and increased the possibility of the load shifting against the load bar. Mr. Lapare told him a driver could "absolutely" be injured when removing a load bar under pressure. Mr. Lapare told CO Samuels that bars come under pressure when trucks are being unloaded on an incline, which occurs one to two times each week. Mr. Lapare also told the CO that the load bar can pop out, snap back and strike the driver. Mr. Lapare believed that load bars would be under pressure once a day for each route driver. The load bar would be under pressure, to the extent the driver was unable to move it up, about once a week. Mr. Lapare also told him the safest method for relieving pressure on the load bar was the braking method, but that did not always work on an incline or where milk was on the trailer floor. Mr. Lapare was aware of drivers using tools, such as hooks or screw drivers to remove load bars under pressure. He himself had sometimes used a wheeled hand truck to strike up on the bottom of the load bar, such that the handles of the hand truck were between him and the load bar when it was released. Mr. Lapare said it was up to each driver as to what method to use. Tuscan provided two weeks of OJT to new drivers, primarily to learn the routes. There was no training on removing load bars under pressure. Besides speaking with management personnel, CO Samuels also spoke with about ten other Tuscan employees, including drivers and truck loaders. The CO also spoke to Messrs. Fish and Bolles. The CO determined that Tuscan's management was aware of the cited hazard, in light of what Messrs. Sacca and Lapare told him. He also determined the cited hazard could cause serious injuries, such as lacerations or broken bones or death, based on the weight a row of either full or empty bossies could exert on a load bar. He determined, based on interviews and observations, that about twenty Tuscan drivers were exposed to the hazard as of September 28, 2007. CO Samuels arrived at three means of abating the hazard, *i.e.*, using chocks to restrain the front free-moving bossy wheels to prevent wheel

movement in the truck especially on an incline, using load straps, in addition to load bars to restrain bossies, and formalized training that would specifically address the hazard of removing load bars under pressure.[15] CO Samuels testified that Tuscan did not provide training on removing load bars under pressure. He stated that Tuscan drivers and driver trainers did not recognize removing load bars under pressure as a hazard. (Tr. 116, 118-36, 142-46, 152-63, 169, 325, 378; CX-2, CX-13 at p. 71).

CO Samuels conceded that he had no prior experience with the milk industry or bossies. He also conceded that Tuscan's injury and illness logs showed no previous injuries caused by being struck by load bars. In addition, he agreed that OJT does not violate the Act and that there was no requirement that the training in this case be in writing. He further agreed that to be a section 5(a)(1) violation, the hazard had to be recognized and foreseeable. The CO said that Tuscan's management recognized the cited hazard, but he admitted that no manager told him that being struck by a load bar released under pressure was likely to cause serious injury or death. CO Samuels also testified that Tuscan drivers Bolles and Fish may have been aware that the bar can pop out, but not aware of the injuries that could occur. He also admitted that while he had removed a load bar during his inspection, it had not been under pressure. He opined that he was better qualified to understand the seriousness of the hazard in this case than the employees were. The CO admitted that he had never tested the use of chocks on the wheels or load straps to secure the last row of bossies up against the load bar. CO Samuels was told by at least two Tuscan employees that the employer had never heard of anyone getting hurt by a bar. He further opined that, as there were no standard procedures and it was up to each employee as to what method to use, training was required in order to have uniform

[15]The CO learned that some employees used load straps or means similar to chocks in addition to the load bars to restrain the bossies. (Tr. 158, 288, 315).

procedures for the safe removal of load bars under pressure.[16] (Tr. 170, 272-87, 290, 299-300, 312, 319-20).

Lawrence Cuomo, Dean Food's director of environmental and safety, appeared and testified.[17] He has been in the dairy business for more than 20 years, although he has never been a driver. He sits on the New Jersey Safety Council. His duties at Dean involve ensuring compliance with OSHA and environmental matters. Mr. Cuomo provides defensive driving and safe lifting training to Tuscan's drivers, all of whom have a CDL. Tuscan also provides OJT to new drivers. New drivers with no experience as dairy route drivers receive at least four weeks of OJT. New drivers with prior experience receive at least two weeks of OJT. The OJT involves the trainee going with an experienced driver and observing and then doing the job, *i.e.*, unloading and loading product, removing and applying load bars, and securing cargo and squaring off the load. It also involves learning the route locations.[18] It is Mr. Cuomo's understanding that route drivers remove load bars about 15 to 20 times a day. He knew Mr. Rocco, due to the nearly twenty years Mr. Rocco had worked for Tuscan. He was aware of the accident. He was shocked by Mr. Rocco's accident because Tuscan never had a load bar injury on any OSHA log at any location. He spoke to the CO about it

[16]The CO testified about an alleged instructional CD he had requested from Cannon Equipment, the manufacturer of the bossies Tuscan used. The CO received CX-16, the CD, from Cannon, and he made a transcript of the statements in CX-16. Tuscan objected to CX-16, which includes the transcript, and the Court heard arguments in that regard. CX-16 was not admitted as a Cannon instructional video for Respondent's bossies, for the reasons stated in the record. The Secretary made an offer of proof as to CX-16. The Secretary declined to offer CX-16 for any other purpose. (Tr. 231-49).

[17]Mr. Cuomo has worked for Dean Foods ("Dean") since 1998, when it acquired Tuscan. Before then, Mr. Cuomo worked for Tuscan. (Tr. 327, 400).

[18]Mr. Cuomo described squaring off the load as not leaving any gaps in the load, so that there is no movement. He noted that this is common knowledge among drivers. (Tr. 423-24).

and to Mr. Sacca. Dean's risk management department did an in-house investigation of the accident. Mr. Cuomo had no involvement in that investigation, and he did not see the report issued. He understood from Mr. Lapare's own investigation, however, that the accident was not due to releasing a load bar under pressure. Rather, it was due to not squaring off the load, such that the load shifted; when the load bar was released, the load moved forward and crushed Mr. Rocco against the bossies on the side. Mr. Cuomo was familiar with how load bars are applied and removed. In his entire history with the company, he had never heard of a load bar's removal causing an injury. Prior to Mr. Rocco's accident, he never viewed removing load bars as a problem or an issue. Tuscan assumed its drivers were removing load bars safely since there had never been any injuries. Mr. Cuomo monitors the company's OSHA logs to learn of accidents and injuries. Any accidents or injuries that are repetitive, such as back strain, become the subject of formal training. He believes that OSHA 300 logs are a very effective means of determining whether a hazard exists.

John Lapare, Tuscan's director of distribution, also appeared and testified. He has been in the dairy business for about 25 years. He is the route drivers' supervisor. He was previously a foreman for Tuscan for eight years, and he spent a significant amount of time training drivers. Tuscan drivers are provided a minimum of 80 hours of OJT if they come from another diary, and almost up to 200 hours of OJT if they are new drivers. All milk drivers know about the braking method, which eventually will always work (*i.e.*, it relieves pressure on load bars). After Mr. Rocco's accident, the police impounded the truck for at least one day. The police then asked Tuscan to retrieve the truck. Mr. Lapare inspected the trailer after it was returned to Tuscan. It was "slowly taken apart,"

numerous photos were taken, and the cause of the accident was determined.[19] Mr. Lapare used RX-3, a diagram of the inside of the trailer as he recalled it, to describe what he observed in his inspection.[20] RX-3 shows the front of the trailer (where the full milk crates were stacked), the middle of the trailer (where the empty bossies secured by at least one load bar were), and the back of the trailer (where a row of empty bossies was secured with load straps on either side of the trailer). RX-3 also shows the 18-inch gap, marked as "B," between the empty bossies secured with the bar and those secured with the straps. "C" on RX-3 shows where the load bar had been released on the left side, and "D" shows where it was still attached on the right. As to the bossies secured by the load bar, "F" shows two rows of three bossies each, and "I" shows the two left-hand bossies in those rows. Behind the middle and right-hand bossies were two more bossies (which were up against the milk crates standing upright shown as "E"). There was no additional bossy behind "I," leaving a space approximately 16 inches between "I" and "H," the milk crate stacks on the left side of the trailer.[21] Two extra stacks of full milk crates, five or six cases high and measuring 5 to 6 feet, shown as "K" on the left side of RX-3, were in the space between "I" and "H," such that there was a 16-inch gap, shown as "A," between the milk crate stacks on the left side of the trailer and "I." Mr. Rocco had only two stops for cases remaining for the day at the time of the accident. He had no more full bossies in the trailer. He had only empty bossies in the trailer. (Tr. 356-359, 430-42, 511-16; CX-2, p. 1, CX-3).

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[19]Mr. Lapare indicated that his trailer inspection took place at the same time and alongside that of Dean's risk management department. Mr. Lapare was not part of Dean's inspection and did not know what its conclusions were. (Tr. 509-10, 513, 523-26).

[20]RX-2 is the diagram Mr. Lapare drew of the truck's interior at his deposition. RX-3 is a computer-generated version of RX-2 that Mr. Lapare used at the hearing to show various aspects of what he observed during his post accident trailer inspection. (Tr. 432-37, 513).

[21]"J" on RX-3 shows the middle and right-hand bossies that were three deep. (Tr. 440).

Mr. Lapare believed Mr. Rocco had backed into the delivery dock too quickly and hit the dock wall, which caused the load to shift and the milk crate stacks at "H" to tilt. When Mr. Rocco, at "B," removed the load bar in front of the empty bossies at "I," the tilted milk crates pushed those bossies at "I" into him. As there were only 18 inches between those bossies and the strapped-in bossies behind him to the left side looking into the trailer, at "G," he was pinned standing between them and asphyxiated.[22] Mr. Lapare noted that because the load on the right-hand side of the trailer (marked as "E") had been properly squared, with no spaces between the secured bossies and the milk crates, and as the load bar was still in place on the right side, the crates on that side were all upright, even after the truck had been driven back 100 miles to Tuscan. Mr. Lapare stated that the four crates at "O" were more or less on the ground when he observed the trailer. On the left side, the 16-inch gap at "A" was improper cargo securement. Mr. Lapare believed that the accident was caused by Mr. Rocco not leaving enough space to work at "B" and leaving a space at "A." Mr. Lapare indicated Mr. Rocco could have moved the two stacks of extra crates at "K" to "L," on the other side of the load bar, and then filled the gap at "A" and "K" with empty crates to even out the load.[23] Mr. Rocco also could have filled the gap at "A" and "K" by moving the first bossy behind him, marked "M," into the gap, which would have squared the load and also given him more room to work in.[24] Mr. Lapare

[22]Mr. Lapare said the four stacks of crates shown as "O," which included the two stacks shown as "K," were "more or less on the ground." The other stacks of crates shown as "H" were still standing but were leaning on the stacks in front of them. (Tr. 449-51).

[23]Mr. Lapare also indicated that Mr. Rocco then could have broken down the crates placed at "L" so they would not have been too high. (Tr. 444).

[24]Mr. Lapare did not know that drivers were strapping empty bossies to the sides of trailers until after the accident. He thought it was a good idea, as a driver would not have to move the empty bossies at each stop. He learned that the idea to do so was Mr. Rocco's. Mr. Lapare said the practice was only safe for empty bossies, because the load straps were inadequate to secure full bossies in that manner. (Tr. 364-66, 381-82, 451-53, 514-15).

stated that if Mr. Rocco had taken these actions, the accident would not have occurred. He agreed it also would not have happened if the load bar had not been removed, but he said the bar was "absolutely not" the cause of the accident. Rather, Mr. Lapare believed that the accident was caused by the load moving the bossies into Mr. Rocco and pinning him. Mr. Lapare said releasing a load bar under pressure can cause it to "pop back" a few inches. He was adamant that, in all his experience, he knew of no injuries from being struck by a load bar. Mr. Lapare testified that releasing that part of the load bar under pressure was not the cause of the accident that killed Mr. Rocco. He did not believe that releasing a load bar under pressure would cause serious injury or death. (Tr. 433, 436, 403-04, 441-54, 458, 463, 511-20, 527).

Mr. Lapare testified that Tuscan could not have one uniform set of procedures for unloading and loading, securing the product, and dealing with load bars, because every stop and every route is different. The idea is to not leave any space in the secured cargo area to prevent milk from being in motion and falling over. The same stop can be different if, for example, a store has more "empties" than usual. In his opinion, using chocks on the bossies' wheels in this case would not have prevented the accident. The tilted milk behind the chocked bossies would have caused the bossies to tilt out and then move forward when the bar and chocks were released.[25] Mr. Lapare testified that he considers it dangerous and unsafe to use wheel chocks on full bossies. Mr. Lapare agreed that using a load strap with the load bar to secure the empty bossies could possibly have prevented the accident. However, his opinion was that even if this had been a rule that was communicated to the drivers, Mr. Rocco

[25]Mr. Lapare said he would not want to use chocks at all on an incline. When removing bars on an incline, he would then have to bend down in front of a full bossy to release the chocks. It would be unsafe for an employee to do so as there would be at least some pressure on the bossy. (Tr. 456-59, 531).

would not have followed it that day. He said Mr. Rocco was a good milkman, but he believed he was taking shortcuts that day. He also said everyone was shocked by the accident as Mr. Rocco was so conscientious. Mr. Lapare noted that if Mr. Rocco had been taking shortcuts and not securing his cargo properly on a regular basis he would have known. Customers who had been "shorted" due to damaged product would have complained, or he would have learned of it from Burlington when trailers with damaged product were returned. Mr. Lapare stated that there had been no indication of any problems with Mr. Rocco's deliveries and that the accident was not foreseeable. In all his years in the industry, he had never heard of an incident like the one involving Mr. Rocco. Mr. Lapare testified that Mr. Rocco's accident was not foreseeable by Tuscan because it had not had a similar accident in its history and none had occurred to his knowledge nationwide. (Tr. 371, 454-65, 531-532).

Mr. Lapare was "100 percent confident" that Mr. Rocco knew how to do his job correctly. He noted that Mr. Rocco was given four to five weeks of OJT when he was rehired in January 2007. The OJT consisted of riding with several senior drivers with good records and learning how to drive a tractor trailer and work with trailer loads.[26] He also noted that Tuscan does not have a set list of topics during OJT. The OJT covers checking the cargo, driving the truck, removing load bars under pressure, squaring the load and leaving enough space to work in. The trainee at first observes and then begins doing the job himself, with the trainer observing. Mr. Lapare said drivers would not be able to do their jobs without learning how to deal with load bars. He also said he does not specifically

[26]Mr. Rocco's prior job with Tuscan was delivering milk with a "straight truck." As he was new to driving a tractor trailer, his OJT was four to five weeks. A new hire with previous experience would have at least two weeks of OJT. According to Mr. Lapare, Mr. Rocco had trained new drivers before 2005 and may have after his rehire. (Tr. 356, 367-70, 380).

ask about topics covered, but does ask the trainer essentially daily how the trainee is doing and thus learns of any problems. Mr. Lapare stated that to obtain a CDL, drivers must pass a driving test and a written test, which covers topics like loading, unloading and securing cargo, and making sure the cargo is balanced. He further stated that as every stop is different and the driver is in charge, it is up to the driver as to how to handle all matters relating to the load. Mr. Lapare admitted that he conceded in his pre-hearing deposition that there is a slight risk that an employee could sustain a minor injury removing a load bar under pressure. He clarified his concession by stating that the odds of any injury were extremely low and asserted that load bars are removed all the time without any injury. Mr. Lapare further clarified that if a load bar was removed under pressure, the bar may pop back a few inches at most, but would not result in an injury. Mr. Lapare also testified at the trial that Tuscan told its drivers that there should be no gaps in the secured product behind the load bar. He testified that the 14 stacks of milk identified with "X's" at RX-3 were all tilted against the empty bossies at "I." During his deposition, he stated that he had no knowledge of any employee being injured by a load bar being removed under pressure. Mr. Lapare stated at the trial that load bars come off "thirty-seven million times" during the course of a year in the milk industry without injury.[27] (Tr. 356-75, 460, 465-68, 481-493, 517-20; CX-13, RX-3, RX-11).

Discussion

The Secretary contends she has met her burden of proving that the cited condition presented a hazard to Tuscan's route drivers, that Respondent recognized the condition was hazardous, and that the condition was causing or likely to cause death or serious physical harm. Respondent, on the other

[27]During his December 17, 2008 deposition, Mr. Lapare calculated that bars are removed nationwide by 8,000 drivers, 15 times each day, six days a week. (CX-13, p. 93).

hand, contends that the Secretary has not met her burden of proof in this matter. *See National Realty and Construction Company, Inc*., 489 F.2d 1257, 1265 (2nd Cir. 1973).

Whether the Secretary Has Met her Burden of Proof as to Whether the Cited Condition is a Hazard Likely to Cause Serious Injury or Death?

Respondent's reply brief focused entirely on one essential element of the Secretary's case; *i.e.*, whether the cited condition is a hazard that is likely to cause serious injury or death. (R. R. Brief). Respondent asserts that in the event the Court finds that the Secretary failed to establish this required element by a preponderance of the evidence, there is no need for the Court to evaluate the other essential elements of the Secretary's case or Respondent's affirmative defenses of preemption and/or employee misconduct. (R. R. Brief, p. 2). With this, the Court agrees, except that the Court will also address Respondent's preemption defense at the end of this decision. *See e.g., Kokosing Construction Co., supra* (item alleging a violation of section 5(a)(1) of the Act vacated where just one element of proof; *i.e.*, feasibility of abatement, not established by the Secretary).

The Act contains no other language that defines the meaning of the phrase "hazards that are causing or are likely to cause death or serious physical harm. . . . " The Commission has clearly established that the criteria for determining whether a hazard is "causing or likely to cause death or serious physical harm" is not the likelihood of an accident or injury; but whether, if an accident occurs, the result is likely to be death or serious physical harm. *R.L. Sanders Roofing Co.,* 7 BNA OSHC 1566, 1569 (No. 76-2690, 1979), *rev'd on other grounds*, 620 F.2d 97 (5th Cir. 1980). The hazard in this case is characterized by the Secretary as a "struck-by" hazard.[28] To resolve this issue,

[28] Although the Court refers to "struck-by" in this decision, it is not convinced that the evidence before it sufficiently proves that drivers relieving load bars that are under pressure are routinely struck-by load bars. The record shows, rather that load bars relieved of pressure may

it is appropriate for the Court to consider: 1) the most serious injury which could reasonably be expected to result from an employee being struck by a load bar under pressure, and 2) whether the results of an injury caused by being struck by a load bar under pressure could include death or "serious physical harm."[29]

I consider first the testimony of the two Tuscan route drivers, as set out *supra*. Mr. Bolles testified he was injured once when he released a load bar under pressure and it struck him. His injury was minor, a small bruise, and he took no time off work and sought no medical treatment. After that, Mr. Bolles learned to stand back when releasing a bar under pressure. Mr. Bolles has released load bars thousands of times. He does not believe releasing a bar under pressure is likely to cause serious injury or death. (Tr. 53-54, 67-69). Mr. Fish testified he had been struck by a load bar under pressure at least twice, but had no injuries at all from those events. Since then, Mr. Fish puts his shoulder or a hand on the load bar when releasing it, or has his helper do so. Although he was unsure, Mr. Fish

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"pop up," "pop out," "pop back," "snap back," "jump," or move a distance.

[29] *See e.g.*, OSHA's Field Inspection Reference Manual (FIRM) which called for compliance officers to consider the most serious injury which could reasonably be expected to result from an accident and whether the results of the injury could include death or "serious physical harm," which it defined as:

> 1. Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor.

FIRM, CPL 2.103, Chapter III, ¶ C.2.c.(2)(b)(c), C.2.b.

Similarly, *see also e.g.,* OSHA's Field Operations Manual (FOM) which contains the same definition of "serious physical harm,"with one addition: the phrase "or other licensed health care professional" follows "by a medical doctor."

FOM, CPL 02-00-148, Chapter 4, §2C3; at p. 4-11.

indicated his belief that releasing a load bar under pressure potentially could kill him if it hit him hard enough in the head. However, his testimony suggests his belief was based on what happened to Mr. Rocco and his assumption that Mr. Rocco was killed by the load bar striking him. (Tr. 88-90, 104-08). In addition, Mr. Fish did not explain how a load bar at shoulder level, or about 4 feet high, could hit him in the head. (Tr. 46-47, 82, 108-09). Upon considering the testimony of these witnesses, I find that this evidence does not establish that being struck by a load bar under pressure when the bar is released, in and of itself, represents a hazard that is likely to cause serious injury or death.

I consider next the statements of Messrs. Sacca and Lapare. In the notes of the CO's interview of Mr. Sacca, the CO asked Mr. Sacca if he had "any ideas what caused the accident." Mr. Sacca answered as follows:

> Truck is not level and all the weight is on bar. It's always a problem.

See CX-3, p. 1.The CO next asked if there was usually only one bar blocking the load. Mr. Sacca's answer was:

> Sometimes (there is) more than one bar depending on the load. (There is a) risk of getting hit by bar, the whole problem is truck not level.

Id. The CO also testified that Mr. Sacca told him that he believed the accident was caused by the load shifting against the load bar and the bar striking Mr. Rocco when it was released. (Tr. 121, 123). However, the record shows that Mr. Sacca, Tuscan's director of major supermarket sales, had not driven a dairy delivery truck for more than 20 years. (Tr. 120, 420). Moreover, the Secretary did not present Mr. Sacca as a witness in this matter, despite the obvious significance of what he told the CO on September 28, 2007.[30] Without the ability to observe the demeanor of this individual and to hear

[30]CO Samuels testified that on September 28, 2007 he and Messrs. Sacca and Cunha were inside the trailer after the accident making observations and discussing what Mr. Sacca thought

his answers to relevant questions on direct and cross-examination, I am unwilling to accord his statements to the CO much weight. This is particularly the case since Mr. Sacca was the only management employee of Tuscan who, according to the CO's testimony, specifically told him that he believed the accident was caused by the load bar striking Mr. Rocco when it was released.

As to the notes of the CO's February 7, 2008 interview with Mr. Lapare, the CO asked if an employee could get injured if he removed a bar under pressure. Mr. Lapare answered: "Absolutely." *See* CX-2, p. 2, 5C. The CO then asked what could happen in that regard. Mr. Lapare answered:

> It pops out toward you. The way to prevent this is to relieve the pressure by driving truck forward, maybe a foot, and then hitting the brakes. This doesn't always work if you [sic] in a pit. They [sic] way I remove [sic] the bar then was to take a hook and bang upward on the bottom of the bar and then put the hook part into the e-track to release it. If it was really stuck and [sic] I would bang up on the bottom of the bar with the hand truck, then use the blade of the hand truck and twist it into the e-track and keep the hand-truck in front of me so that in case the bar would snap back toward me it would hit the hand truck.

See CX-2, p. 2, 5D.

The Secretary points to excerpts from Mr. Lapare's deposition, CX-13, that she asserts supports her position that a load bar striking an employee could cause serious injury or death. These excerpts and others are set out as follows, along with RX-11, corrections Mr. Lapare made to his deposition after he had reviewed it.[31]

In CX-13, page 71, when asked if an employee could be injured when releasing a load bar under pressure, Mr. Lapare answered as follows:

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caused the accident. (Tr. 120).

[31]The portions of CX-13 that were admitted are identified in the record. (Tr. 212-17). The portions of RX-11 that were admitted are identified in the record as well. (Tr. 505-06).

A There's the potential of that. I have not known of any employee really to be injured. If the bar is under pressure it pops back a few inches.

In RX-11, Mr. Lapare corrected his response to read:

A There is the small potential of a minor injury. I have personally have [sic] no knowledge of any employee being injured from a load bar being removed under pressure. If a load bar is removed under pressure, it may pop back a few inches at most, but would not result in an injury.

In CX-13, pages 71-72, the following appears:

Q Okay. But if it's released under pressure, this is a situation where you say potentially the employee could get injured. Correct?

A Correct.

Q To you, if it's removed when it's under pressure, you know, how potentially could the employee be injured?

A If the – not much, not much.

Q I didn't say how much he could get injured. What would be the sequence of events that would result in an injury?

A I really don't know of any injuries from the load bar being under pressure.

In RX-11, Mr. Lapare corrected his response to read (where the answer "Correct" appears):

A Probably not. Most likely if a [sic] injury were to occur it would be a rare occurance [sic] and the injury would be minor in nature, and it depends on the circumstances.

In CX-13, page 73, Mr. Lapare agreed his answer in CX-3, p. 2, to question 5D, was "absolutely true." On page 74, however, he explained:

A No. That's absolutely true. But there's no injury. There isn't any injury at all.

In CX-13, page 74, Mr. Lapare was asked whether he agreed with his "Absolutely" response in CX-2, page 2, to question 5C. On page 75, Mr. Lapare answered "Yes." In RX-11, he corrected his response to read:

A Yes, but the odds are extremely low. Load bars are removed all the time with no injury occurring at all.

In CX-13, page 84, when asked if, with the pressure of the load, Mr. Rocco would have been injured by the load bar hitting him, Mr. Lapare answered:

A He may have been injured from the load bar, but he would not have died.

In RX-11, Mr. Lapare corrected his answer to read:

A I didn't say he would have been injured. I said he might have been hit by the load bar.

In CX-13, pages 87-88, when asked if the purpose of releasing load bars "safely" was to avoid injury to the drivers, Mr. Lapare answered "Correct." In RX-11, he corrected his answer to read:

A Correct, we are trying to avoid any injury, which would be most likely a minor injury.

In CX-13, page 154, when asked whether it was fair to say that removing a load bar under pressure was not a safe practice, Mr. Lapare answered:

A Sure. For the 40th time it is not a safe practice to remove the load bar under pressure.

In RX-11, Mr. Lapare corrected his answer to read:

A It depends on the situation, best practice is to remove the pressure from the load bar before removing the load bar.

The stated reason for the corrections made to the deposition responses, as noted in RX-11, was to clarify the responses. At the hearing, Mr. Lapare expounded on why the corrections were necessary:

> You know that's the second deposition I've ever given....And it was a learning experience....And when I read it I realized there weren't complete answers to the truth, so that's why I had to modify [it; for example,] is there a possibility of injury, yes, but it's going to be a minor chance of an injury, obviously an injury has never

> occurred....But the things dealing [with] that kind of insinuated that this is a dangerous practice, well it's not, nobody has ever been injured before.

I observed the demeanor of Mr. Lapare as he testified, and I found him to be a credible and convincing witness. This was so even when the Secretary's counsel cross-examined him extensively about his original deposition responses and his corrections. (Tr. 475-98). Moreover, upon comparing his original responses to the corrected ones, and considering his testimony at the hearing, I am persuaded the corrections were in fact made to clarify his responses. In this regard, I note that Mr. Lapare never stated, in his original deposition responses, that releasing a load bar under pressure could cause serious injury. Likewise, he never made such a statement to the CO, either in CX-2 or in his other statements as the CO reported them. The CO acknowledged that no manager of Tuscan ever used the word "serious" when describing the risk of injury from being struck by a load bar. (Tr. 285). The CO also acknowledged that Tuscan's injury and illness logs showed no prior injuries from being struck by load bars. (Tr. 170, 276, 283). Mr. Cuomo, who monitors the OSHA logs as part of his job, confirmed this was so. Mr. Cuomo also explicitly testified he had never, in his entire history with the company, heard of anyone being injured from removing a load bar. (Tr. 402-04).

Based upon the record before the Court, Mr. Rocco's demise was caused by a serious of occurrences that all lined up with a domino effect to cause his death. These include, 1) the tilting of the milk crates toward the rear of the trailer, 2) Mr. Rocco leaving an estimated 16-inch space at location "A" between the milk crates and two empty bossies at location "I," and 3) Mr. Rocco leaving inadequate space, an estimated 18 inches, at location "B" to work between the two empty bossies at "I" on one side of the bar and empty bossies that were strapped in on the other side of the bar, along the left side of the trailer looking toward the cab end of the trailer. When Mr. Rocco removed the load bar, the left end of the bar looking toward the trailer's front moved toward Mr.

Rocco. (Tr. 446-448) The right end of the load bar remained attached to the trailer side at location "D." There is no evidence that the movement of the bar caused any physical injury; *e.g.*, head concussion, fractures; or cuts, lacerations or punctures, to Mr. Rocco.[32] The creditable evidence in this case shows that drivers struck by load bars when they are under pressure sustained either no injuries or only small, minor bruises that did not require any medical treatment. Trailer load bars are removed tens of millions of times each year in the nation's milk industry without any injury being reported at the trial. Many of these load bar removals include load bars removed while under pressure. Mr. Rocco's death was a freakish accident. The movement of the load bar, by itself, did not kill Mr. Rocco. Freakish and unforeseeable deaths do not necessarily trigger statutory liability under the general duty clause of the Act.[33] The requirement of "death or serious physical harm" exempts from the general duty clause's coverage hazards that threaten only minor injuries. The most serious injury which could reasonably be expected to result from a milk driver employee being struck by a load bar released under pressure is a small, minor bruise. The results of small, minor bruises caused by being struck by a load bar under pressure do not include death or "serious physical harm." The Secretary has failed to prove that there is a definite causal link between an employee

[32] No autopsy report or testimony regarding the nature and/or extent of any physical damage (other than his death) sustained by Mr. Rocco was offered into evidence. Mr. Rocco was asphyxiated and unable to breath normally because of pressure being exerted upon him by the empty bossies between which he was unfortunately pinned. Absent any physical evidence that the bar had made actual contact with Mr. Rocco, the Court is unwilling to presume that the bar struck and seriously injured Mr. Rocco, or caused his death. With the facts before it, Mr. Rocco may have removed the left side of the bar from its tracks without sustaining any injury, but suffered his demise thereafter when starting to jostle empty bossies to his front causing the empty bossies to move in his direction.

[33] *See* Richard S. Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 Harv. L. Rev. 988 (1973).

being struck by a load bar being released under pressure and the fact or likelihood of death or serious injury.[34] The Secretary's evidence in this regard, that is, the testimony of the CO and Tuscan's employees and prior statements of the employees, came up short. The Secretary presented no persuasive evidence on the amount of force a load bar under pressure actually generates toward a driver when released. Testimony that a load bar under pressure, when removed, may "slap back," "jump," "pop back," "pop out," or "snap back," is insufficient to support a finding that doing so is likely to cause death or serious physical harm. More is needed when, as here, only a small, minor bruise, is reasonably anticipated as the most harmful consequence. The Secretary has simply not proved that an employee who is struck by a load bar is likely to suffer death or serious physical harm. *Beverly Enterprises Inc.*, 19 BNA OSHC 1161, 1188 (Nos. 91-3144, 92-238, 92-819, 92-1257, 93-724, 2000), *compare R.L. Sanders, supra*, at 1570 (injuries resulting from a fall of 13 feet are "likely to cause death or serious physical harm").

The foregoing is sufficient to dispose of the alleged 5(a)(1) violation, in that the Secretary has failed to meet one of the four essential elements of her prima facie case.[35] *See, e.g., Kokosing Constr. Co., supra,* citing to *Waldon Healthcare Center, supra.*

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[34] The Court agrees with the Secretary that Section 5(a)(1) of the Act may be violated even though no accident or injury actually occurs. *REA Exp., Inc. v. Brennan*, 495 F.2d 822, 825 (2nd Cir. 1974).

[35]The Secretary has also failed to show that either Tuscan or its industry recognized the cited condition as a hazard that was likely to cause serious injury or death.

Whether Respondent's Theory Concerning the Cause of the Accident Should be Credited?

For completeness of record, I address the Secretary's assertion that Mr. Lapare's opinion about how the accident occurred was speculation and should not be credited because his inspection of the trailer was made after the trailer was returned to Tuscan from GPD's impoundment lot.[36] In this regard, the Secretary notes that the GPD's inspection of the trailer involved removing the bossies and then replacing them. Thus, according to the Secretary, it is not known whether the bossies were placed back in the trailer in the same position as they had been at the time of the accident. Secretary's Brief dated April 6, 2009, at pp. 25-26.

Mr. Lapare testified that his inspection was on September 29, 2007, the day after the accident. (Tr. 431-32, 449). The CO testified that the GPD took the trailer to its lot on September 28, 2007, a Friday, that its inspection was not until October 1, 2007, the next Monday, and that he was there for that inspection. The CO further testified the GPD removed all the bossies from the trailer during its inspection, but that he was not there when the bossies were replaced. (Tr. 536-40). In view of the CO's testimony about when the GPD took the trailer to its lot and that he was present for the GPD's inspection, I conclude Mr. Lapare was simply mistaken as to the precise date of his trailer inspection and that he did not examine the trailer until after the GPD had done its inspection and the trailer was returned to Tuscan.[37] Mr. Lapare believed the trailer contents when he saw them were in the same

[36] Respondent did not present Mr. Lapare as an expert on accident causation. The Secretary did not object at the trial to Mr. Lapare's testimony regarding his opinion as to the cause of Mr. Rocco's accident.

[37] Mr. Lapare's own testimony as to the precise date of his inspection suggests he could have been mistaken. (Tr. 449, 510). Also, the CO's recall of the dates is more reliable as he had notes and records of his inspection.

position they were in right after the accident. (Tr. 442-43). He conceded, however, that he did not know whether the cargo in the trailer had been moved during the GPD's inspection. (Tr. 510).

The CO observed the trailer just after the accident, and he took many photographs of its interior that day. (Tr. 117-19, 147-48, 539; CX-14). Further, the CO was the Secretary's representative at the hearing and was present for all of the testimony in this case. (Tr. 4-5). He heard Mr. Lapare's opinion as to the cause of the accident and saw RX-3, Mr. Lapare's diagram of the trailer's interior as he recalled it. Moreover, the CO's own photographs of the trailer's interior taken on September 28, 2007 indicate it was in the same or nearly the same condition when Mr. Lapare saw it after the trailer was returned from the GPD. For example, CX-14 shows a row of strapped-in bossies on either side of the trailer and the rows of bossies that had been secured with the load bar. CX-14 also shows the load bar that had been released on the left side of the trailer and, while the photographs are not perfectly clear, they indicate the bar was still attached on the right side. In addition, CX-14 shows the stacks of milk crates near the front, or cab end, of the trailer. Again, the photographs are not perfectly clear, but they appear to show that some of the crates had fallen over and into the bossies on the left side.[38] *See* CX-14, pp. 1-7, 11-17, 30-33, 36-37, 40. Upon comparing CX-14 with RX-3, and upon considering Mr. Lapare's testimony about RX-3, I find the trailer's interior was essentially in the same condition at the time of Mr. Lapare's inspection as it was right after the accident. I also find, on the basis of the record as a whole and my credibility determination *supra*, that Mr. Lapare's testimony provides a reasonable explanation of how the accident occurred.

[38]There is no evidence the GPD moved any milk crates during its inspection, and I find that the milk crates shown in CX-14 were in the same position when Mr. Lapare saw them. The CO indicated that CX-15 showed additional photographs he took at the time of the GPD inspection. These photos more clearly show the milk crates that had fallen over. (CX-15, pp. 5, 9-11).

The Secretary, on the other hand, painted a broad-brushed account of the accident. Missing from her account were the most relevant details of the accident.[39] Since the Secretary has not met her burden of demonstrating the alleged 5(a)(1) violation, Item 1 of Serious Citation 1 is vacated.

Whether the Alleged Violation is Preempted by Section 4(a)(1) of the Act

Respondent contends that the Secretary's citation in this matter is preempted by regulations of the Federal Motor Carrier Safety Administration ("FMCSA"), pursuant to section 4(b)(1) of the Act, which provides as follows:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

In support of its argument that the instant matter is preempted, Respondent cites the case of *Mushroom Transportation Co.*, 1 BNA OSHC 1390 (No. 1588, 1973). There, the Commission held that 29 C.F.R. §1910.178(k)(1) (governing the braking and wheel securement for parked trucks and trains) was preempted by specific FMCSA regulations governing the identical working condition (namely, the securement and braking capabilities of parked trucks, 49 C.F.R. §§392.20, 392.40 and 393.41). The cases following *Mushroom Transportation* have made clear that there is no industry wide exemption for trucking by virtue of the FMCSA regulations.[40]

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[39]The Secretary called no expert witness to present testimony concerning Mr. Rocco's accident.

[40] *See Lombard Brothers, Inc.*, 5 BNA OSHC 1716, 1717 (No. 13164, 1977) ("respondent's claim that an industry-wide exemption has been triggered by a notice of proposed rulemaking by another federal agency [*i.e.* the DOT] has been rejected repeatedly by both the Commission and the appellate courts"); *Lee Way Motor Freight, Inc*., 4 BNA OSHC 1968, 1969 (No. 10699, 1977) (specifically rejecting the principle of an "industry wide exemption under Section 4(b)(1) of the Act [where motor carrier] is subject to the jurisdiction of the U.S. [DOT]"). *See also Chief Freight Lines, Inc.*, 3 BNA OSHC 2083, 2085 (No. 6483, 1976) (the fact that DOT has issued safety regulations applicable to drivers did not preclude applicability of

The Commission evaluates an employer's section 4(b)(1) argument "by considering (1) whether the other federal agency has the statutory authority to regulate the cited working conditions, and (2) if that agency has that authority, whether the agency has exercised it over the cited conditions by issuing regulations having the force and effect of law." *Emery Air Freight Corp.*, 20 BNA OSHC 1928, 1929 (No. 00-1475, 2004) (citation omitted).

The Secretary contends her citation is not preempted. As she notes, the Supreme Court has held that section 4(b)(1) does not confer any "industry-wide" exceptions to the Act's coverage simply because that industry may be subject to limited safety and health regulations by another federal agency. *See, e.g., Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241 (2002). The Commission has recognized this principle in regard to the FMCS regulations at issue in this case. *See, e.g., Lombard Bros., Inc.*, 5 BNA OSHC 1716, 1717-18 (No. 13164, 1979), and cases cited therein. The Supreme Court has also held that another federal agency's minimal exercise of some authority over certain working conditions does not result in complete preemption of OSHA jurisdiction. Rather, to determine whether another agency's regulations have preempted those of OSHA, the contours of that agency's authority as it is actually exercised must be examined with respect to the cited working conditions. *Chao v. Mallard Bay Drilling, Inc.*, *supra* at 241-42. The Secretary asserts that, even assuming the Department of Transportation ("DOT") has the authority to regulate driver safety relating to unloading cargo after it has reached its destination, the DOT has not actually exercised authority in that regard.

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the Act to working conditions of motor carrier's employees at its dock); *Consolidated Freightways Corp.*, 5 BNA OSHC 1481, 1482 (No. 10889, 1977) (Section 4(b)(1) preemption was not appropriate with respect to citation for hazards at motor carrier's maintenance shop where FMCSA regulations did not address maintenance shop safety).

The FMCS regulations are in Title 49 of the Code of Federal Regulations, at Parts 390 through 399. The Secretary maintains that the legislative history pertaining to the FMCSA regulations makes it clear that the primary concern of those regulations is public safety and health, not employee safety and health. More specifically, the purpose of the motor carrier legislation is to prevent accidents on the highway. The Secretary notes that the Committee on Commerce, Science and Transportation described the respective roles of OSHA and the DOT as follows:

> THE SECRETARY OF TRANSPORTATION HAS THE RESPONSIBILITY OF PROTECTING THE PUBLIC FROM UNSAFE COMMERCIAL MOTOR VEHICLES AND ASSURING THAT COMMERCIAL MOTOR VEHICLES ARE SAFELY MAINTAINED, EQUIPPED, LOADED, AND OPERATED, AND, THEREFORE, IS RESPONSIBLE FOR RELATED MATTERS INSOFAR AS FAILURE TO OBSERVE PERTINENT REGULATIONS WOULD ADVERSELY AFFECT THE SAFETY OF THE PUBLIC OR THE HEALTH AND SAFETY OF OPERATORS OF COMMERCIAL MOTOR VEHICLES. HOWEVER, THE SECRETARY OF TRANSPORTATION IS NOT RESPONSIBLE FOR PROTECTING EMPLOYEES FROM ASBESTOS FIBERS, AND TOXIC FUMES INVOLVED IN THE COURSE OF PROPERLY REPAIRING A BRAKE, NOR FOR THE PROTECTION OF EMPLOYEES FROM SLIPPERY WALKING SURFACES OR FROM INADEQUATELY BRAKED FORKLIFT TRUCKS, WHICH ACTIVITIES CONTINUE TO BE THE RESPONSIBILITY OF THE DEPARTMENT OF LABOR.

Senate Report, Tandem Truck Safety Act of 1984, Motor Carrier Safety Act of 1984, S. Rep. 98-424, S. Rep. No. 424, 98th Cong., 2nd Sess. 1984, 1984 U.S.C.C.A.N. 4785 at 4793 (emphasis added). Based on the foregoing, the Secretary concludes that the Legislature contemplated a "division of responsibilities" between the DOT and OSHA, whereby DOT's authority was to regulate matters pertaining to the safe operation of vehicles and OSHA's authority would remain the same, that is, to regulate matters concerning the safety and health of employees.

The Secretary asserts that only a handful of the FMCSA regulations address directly the safety of the driver. She further asserts that while the FMCSA regulations set out in detail how cargo should

be secured to the vehicle, their principal concern is to protect against collisions that could result from cargo shifting during transportation. The regulations say nothing about how the drivers or other employees should load cargo, aside from ensuring it is loaded securely on the vehicle, or how it should be unloaded after reaching its destination. The Secretary points to two particular provisions in support of her position, that is, 49 C.F.R. § 393.100(b) and (c), which state as follows:

> (b) **Prevention against loss of load.** Each commercial motor vehicle must, when transporting cargo on public roads, be loaded and equipped, and the cargo secured, in accordance with this subpart to prevent the cargo from leaking, spilling, blowing or falling from the motor vehicle.
>
> (c) **Prevention against shifting of load.** Cargo must be contained, immobilized or secured in accordance with this subpart to prevent shifting upon or within the vehicle to such an extent that the vehicle's stability or maneuverability is adversely affected.

(Emphasis added).

The Secretary maintains that, unlike the *Mushroom Transportation* case, none of the FMCSA regulations addresses the hazard at issue in this case, *i.e.*, unloading of cargo from a parked trailer that has arrived at its destination. She points out that this fact is made clear by 49 C.F.R. § 390.5(1), which defines an "accident" as "an occurrence involving a commercial motor vehicle operating on a highway in interstate or intrastate commerce...." (Emphasis added). She also points out that 49 C.F.R.§ 390.5(2) explicitly excludes from the definition of "accident" "(i) An occurrence involving only boarding and alighting from a stationary motor vehicle; or (ii) An occurrence involving only the loading or unloading of cargo." The Secretary concludes that it is plain that the DOT has not exercised its jurisdiction in regard to the cited hazard in this case and that the FMCS regulations do not preempt the Act.

Finally, the Secretary maintains she has stated her understanding of section 4(b)(1) as it relates to the DOT's safety regulations many times. She notes that her interpretation in this regard

is set out in materials on her website, which is accessible to the public, and is intended to give guidance to the trucking industry. One such document, captioned "Trucking Industry: OSHA Standards," states that:

> While traveling on public highways, the Department of Transportation (DOT) has jurisdiction. However, while loading and unloading trucks, OSHA regulations govern the safety and health of the workers and the responsibilities of employers to ensure their safety at the warehouse, at the dock, at the rig, at the construction site, at the airport terminals and in all places truckers go to deliver and pick up loads.

(http://www.osha.gov/SLTC/trucking_industry/standards.html) (emphasis added).

Another such document, captioned "Trucking Industry: Other Federal Agencies," provides:

> OSHA has jurisdiction over off-highway loading and unloading, such as warehouses, plants, grain handling facilities, retail locations, marine terminals, wharves, piers, and shipyards. The Department of Transportation (DOT) has jurisdiction over interstate highway driving, Commercial Driving Licensing (CDL), the hours of service and roadworthiness of the vehicles.

(http://www.osha.gov/SLTC/trucking_industry/other.html) (emphasis added).

The Secretary concludes that, as she has consistently held that OSHA has jurisdiction to regulate the working conditions of drivers unloading cargo from vehicles at warehouses, terminals, retail locations and other delivery points, her position should be accorded deference. *See, e.g.*, *Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239, 1246 (9th Cir. 1998).

I agree with the Secretary, for all of reasons above, that the OSHA citation in this case is not preempted by section 4(b)(1). Respondent's asserted defense of preemption is accordingly rejected.

ORDER

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

1. Serious Citation 1, Item 1, alleging a violation of section 5(a)(1) of the Act, is VACATED in its entirety.

//s//
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: July 27, 2009
Washington, D.C.