

**No. 09-1013**

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UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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**SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT OF LABOR,**

Complainant,

v.

**WAL-MART STORES, INC.**

Respondent.

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**BRIEF FOR THE SECRETARY OF LABOR**

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## BRIEF FOR THE SECRETARY OF LABOR

### STATEMENT OF ISSUES<sup>1</sup>

1. Whether the record evidence and Review Commission precedent establish that Wal-Mart's employees were exposed to serious crowd-related hazards at Wal-Mart's Valley Stream store on Blitz Day 2008, where a crowd of customers pinned employees against walls and vending machines as it surged into the store, crowd members knocked the store's vestibule glass doors off their hinges, causing one door to strike an employee, and the onrushing customers struck and trampled employees underfoot as they stampeded into the store in search of Blitz Day bargains.

2. Whether the ALJ correctly found that Wal-Mart recognized the Blitz Day 2008 crowd-related hazards where Wal-Mart had actual knowledge of such hazards based on prior Blitz Day crowd-related incidents at both the Valley Stream store and at other stores nationwide, and Wal-Mart directed all of its stores to take steps to control expected crowds on Blitz Day 2008 to reduce the likelihood of injuries.

3. Whether the Secretary was required to also establish that the broader retail industry recognized crowd-related hazards to prove the cited violation of the General Duty Clause where Wal-Mart had actual knowledge of the crowd-related hazards.

4. Whether the ALJ properly determined that a feasible means of abatement existed where Wal-Mart abated crowd-related hazards at the Valley Stream store's 2009 day-after-Thanksgiving sale by implementing feasible and effective measures available to it prior to

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<sup>1</sup> On April 19, 2011, the Commission issued a briefing notice specifying the "[i]ssues of particular interest." The numbering used in the Secretary's Statement of Issues corresponds to the numbered issues in the Commission's briefing notice. In addition, Wal-Mart has briefed issues not identified in the Commission's briefing order, Wal-Mart Br. 48-59; those issues are addressed *supra* pp. 58-60.

Blitz Day 2008, and where Wal-Mart also could have materially reduced the hazards faced by its employees on Blitz Day 2008 by not directing employees to wedge themselves between the crowd and the vestibule doors, and by not stationing employees directly in the path of an oncoming crowd.

5. (a) Whether the ALJ properly dismissed Wal-Mart's contention that abatement of the cited conditions would result in a greater hazard where Wal-Mart provided no evidence to show that eliminating a waiting crowd outside its Valley Stream store and using other crowd management measures would result in a greater hazard.

(b) Whether the ALJ correctly found that Wal-Mart did not establish the technological infeasibility of abatement where Wal-Mart implemented effective means of eliminating or materially reducing crowd-related hazards during the Valley Stream store's day-after-Thanksgiving sale in 2009.

(c) Whether the ALJ correctly found that Wal-Mart failed to take reasonable precautions to protect its employees where Wal-Mart's trip, slip, and fall training to prevent hazards to customers, and instruction to employees to stay out of the way of an on-rushing crowd, were plainly inadequate to protect employees from crowd-related hazards.

(d) Whether the ALJ properly dismissed Wal-Mart's claim that it undertook good faith efforts to comply with the OSH Act where there is no record evidence that Wal-Mart engaged in a good faith effort to materially reduce or eliminate the hazardous conditions that had previously manifested at its Valley Stream store on Blitz Day events in 2005, 2006, and 2007, and again on Blitz Day 2008.

(e) Whether the Secretary's amendments to the citation were barred by 29 U.S.C. § 658(c) where the amendments arise from the same conduct described in the citation and therefore relate back to the issuance date of the citation.

(f) Whether the ALJ properly dismissed Wal-Mart's claim that the Secretary had engaged in inconsistent enforcement where no such affirmative defense exists under Review Commission precedent, Wal-Mart in any event failed to introduce evidence demonstrating inconsistent enforcement, and no other authority exists that excuses Wal-Mart's failure to abate a recognized hazard.

6. Whether the ALJ correctly found that Wal-Mart's claim that the citation was improperly directed to an issue of public safety lacked merit where the citation squarely addresses Wal-Mart's obligation under the OSH Act to protect its employees from recognized hazards in the workplace.

### **PROCEDURAL BACKGROUND**

On November 28, 2008, a Wal-Mart employee died after being trampled by a crowd that stampeded into a Wal-Mart store in Valley Stream, New York, during the store's "Blitz Day" day-after-Thanksgiving sale. Decision ("Dec.") 3. The Department of Labor's Occupational Safety and Health Administration ("OSHA") conducted an inspection from November 28, 2008, to May 26, 2009. Dec. 1. On May 26, 2009, OSHA issued Wal-Mart a citation alleging a serious violation of section 5(a)(1), 29 U.S.C. § 654(a)(1), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act"). Citation and Notification of Penalty ("Citation"). Wal-Mart timely contested the citation, and on August 14, 2009, the Secretary filed a complaint amending the citation. Complaint 2-3. Chief Administrative Law Judge ("ALJ") Irving Sommer denied Wal-Mart's subsequent

motions to dismiss the amendments to the citation as barred by the OSH Act's statute of limitations, 29 U.S.C. § 658(c). Order (Sept. 1, 2009), Order (Oct. 15, 2009). A six-day hearing on the merits was held from July 7 – July 14, 2010, before ALJ Covette Rooney. Dec. 3. On March 25, 2011, ALJ Rooney issued her decision affirming the citation and assessing a penalty of \$7000. Wal-Mart filed a petition for discretionary review with the Commission, and on April 6, 2011, the Commission directed the case for review.

### STATEMENT OF FACTS

A. *The Wal-Mart Valley Stream Store's History of Crowd Management Problems During Blitz Day Sales.*

Wal-Mart operates approximately 4200 retail stores in the United States, including its store in Valley Stream, New York. Dec. 1, 3. Wal-Mart does more business on the day-after-Thanksgiving than on any other day of the year, and the Valley Stream store is one of Wal-Mart's best performing stores in terms of sales volume for that day. Dec. 3, 4. Known generally as "Black Friday" in the retail industry, Wal-Mart also refers to its day-after-Thanksgiving sale as "Blitz Day." Dec. 3. On Blitz Day, Wal-Mart offers deep discounts on certain items, such as televisions and digital cameras, but the discounts are available only for the first six hours of the sales day and while supplies last. Dec. 3, 36-37; Secretary's Exhibit<sup>2</sup> ("Ex.") 51, Ex. 52, Ex. 152 at 96.

The Valley Stream store opened in late 2003, and held its first Blitz Day sale in 2004. Ex. 50 at 3. For Blitz Days held in 2006 and 2007 (and possibly 2005) Wal-Mart took the following steps to manage anticipated crowds at the Valley Stream store: it requested a police presence to maintain order outside the store (but not to ensure orderly crowd entry into the

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<sup>2</sup> All exhibit references in the Secretary's brief are to the Secretary's exhibits entered into evidence at the hearing, with the exception of those exhibits specifically identified as Wal-Mart exhibits.

store); it had employees communicate with customers to inform them of the quantities and location of merchandise and to ask them not to run; and it told employees to stay out of customers' way as they entered, but to assist any customers who fell. Dec. 37-38; Tr. 1036-37; Ex. 145 at 95, Ex. 151 at 41-42, Ex. 152 at 69-72, 99; *see also* Ex. 48 at 9-11 (for 2005 Blitz Day, event coordinated with police and employees walked line to provide information to customers and to ask customers to remain calm and in line). During certain years, Walmart used shopping carts or traffic cones as a means to demarcate the customer waiting area outside the store. *See, e.g.*, Ex. 152 at 63, 69-70, 99-100.

Blitz Day preparations at the Valley Stream store for 2005, 2006, and 2007 proved ineffective given the size of the Blitz Day crowds. Dec. 4-6, 47-48. For example, on Blitz Day 2005, employees set up shopping carts to demarcate the line for the waiting crowd, and provided customers with hot chocolate. Ex. 152 at 69-72. Even so, when the store opened at 5:00 a.m., the crowd entered in a "bum's rush," knocked off the outer entrance doors (which opened into the glass-enclosed vestibule through which customers passed before going through another set of internal doors onto the store floor), and injured two customers. Dec. 45 n.26, 47. Ten minutes after the store opened, it was forced to close because it had reached capacity. Ex. 127 at 1079 (statement of Assistant Manager Kenneth Worthington that "they were trying to get the small children and handicapped out of the crowd but they had over 3000 people there").

Prakash Steve Sooknanan became the Manager of the Valley Stream store after Blitz Day 2005. Dec. 36. In preparation for Blitz Day 2006, Mr. Sooknanan requested a police presence, but only to maintain order outside the store, not to ensure orderly crowd entry through the vestibule and into the store. Ex. 152 at 99; Dec. 38. Mr. Sooknanan also created

maps of the store for employees to hand out to customers. Dec. 37; Tr. 993-94. In addition to noting the location of the merchandise, the maps contained a request to customers not to run “to avoid injuring fellow shoppers and our associates” and to “please wait for the doors to be completely open before entering.” Tr. 1030-31; Ex. 69. Mr. Sooknanan included the latter request because he knew “the doors were broken the year before and [he] wanted to make sure that, you know, we d[id]n’t have any similar issues.” Ex. 152 at 106-07. He also knew that two customers had been injured in the opening rush on Blitz Day 2005. Dec. 47; Ex. 48 at 9. Notwithstanding these preparations, on Blitz Day 2006, Valley Stream store customers again knocked the outer entrance doors off their hinges as they rushed into the store. Dec. 4, 22-23; Tr. 905-06, 910.

For Blitz Day 2007, Mr. Sooknanan decided against using shopping carts to mark the line outside the store, because in prior years they had created a “tumultuous environment” at the entrance, as customers who had entered the store left to retrieve a cart and then re-entered the store. Dec. 37; Tr. 992-93. Mr. Sooknanan also decided against handing out maps, because on Blitz Day 2006, some of the customers had dropped the maps on the floor, creating a slip, trip, and fall hazard. Dec. 37. He requested a police presence, and, as he had done in 2006, told his employees to stay out of customers’ way as they entered, but to assist any customers who fell in getting back up. Dec. 37-38; Tr. 1036-37; Ex. 152 at 120-26, 136-38.

On Blitz Day 2007, there were an estimated 600 to 800 people waiting to enter the store at 5:00 a.m., a crowd comparable in size to the prior year’s. Tr. 995; Ex. 152 at 121. The crowd was pressed up against the store’s outer entrance doors, and then-sales associate Justin Rice and approximately five other Wal-Mart employees created space between

customers and the entrance doors by working their way through the front line of people and placing themselves between the crowd and the doors. Tr. 128-31. Mr. Rice heard a crackling noise as the crowd pushed against the glass walls of the vestibule, and he thought the vestibule was about to fall apart. Tr. 117-121.

Within seconds of opening the store's outer doors on Blitz Day 2007, 300 customers entered the vestibule and multiple glass panes at the top of the doors broke and fell—one pane fell completely out, and another shattered in pieces. Tr. 124, 131, 175. One of the shattered pieces struck and cut Mr. Rice in the hand as he put his hand up to cover his face. Tr. 124. He also was pushed and pinned against the entrance door for several minutes as the crowd rushed in. Tr. 122-23, 130-31, 177-78. Other Wal-Mart employees who had been stationed in the vestibule for the store's opening were similarly pushed and shoved by customers. Tr. 123-24. Many customers fell in the vestibule, and employees helped them up. Tr. 125; Ex. 151 at 46-48. Mr. Rice described the Blitz Day 2007 opening as a "dangerous scene." Tr. 124-25; *see also* Ex. 151 at 44-49, 53 (similar deposition testimony of Mr. Smokes adding that door broke off), Ex. 145 at 89-92 (deposition testimony of employee Julius Blair describing people pushing their way through the doors, running through vestibule, and knocking door off).

B. *Wal-Mart Received Voluminous Claims of Crowd-Related Injuries From Blitz Day Sales at Wal-Mart Stores Across the Nation, Including the Valley Stream Store.*

The Blitz Day crowd management problems experienced at Wal-Mart's Valley Stream store in 2005, 2006, and 2007, were not isolated incidents. Wal-Mart received voluminous reports of employees and customers who were struck or injured by crowds entering or rushing through its stores during Blitz Days in 2003-2007 across the country.

See, e.g. Exs. 112-127 (prior injury records of employee and customer injuries).<sup>3</sup> Indeed, Wal-Mart admitted notice of over 100 such incidents. Ex. 48 at 15-16 (Wal-Mart interrogatory responses including 114 incidents meeting the following criteria: (1) “employees and/or customers who were struck or injured by crowds entering or rushing through the store,” (2) from “centrally-located” information, (3) from “a period of five years before the subject incident,” and (4) on Blitz Days (and a few other limited holidays)). According to Wal-Mart claim records for 2003 through 2007, thirteen or fourteen employees filed claims with Wal-Mart stating they were injured at various Wal-Mart stores across the nation during Blitz Day events.<sup>4</sup> See Ex. 112-126, 127 at 1-90, 860-69. Wal-Mart recorded nine of these injuries on OSHA’s Form 300, four others resulted in work restrictions, and the records documenting the remaining injury indicate that the employee received emergency treatment at a hospital.<sup>5</sup> The majority of the claimed injuries occurred when employees were

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<sup>3</sup> Except to the extent they contained admissions, these documents were admitted as evidence that Wal-Mart had notice of crowd-related hazards, rather than for the truth of claims contained in the documents. Independent of these claims forms, however, Wal-Mart admitted that the two Valley Stream customers who had filed claims were in fact injured on Blitz Day 2005. Ex. 48 at 9 (“Respondent is aware of injuries to two customers caused by an entering or rushing crowd during Blitz 2005”).

<sup>4</sup> The precise number of employee injuries is difficult to specify because the documentary evidence of employee injuries overlaps, and in some cases the documents do not include the name of the employee. Organized employee-by-employee, the supporting exhibits include: (1) Ex. 112, Ex. 113, Ex. 127 at 56-65 (5 USC 552(b)(6)); (2) Ex. 114, Ex. 115, Ex. 127 at 9-17 (5 USC 552(b)(6)); (3) Ex. 116, Ex. 117, Ex. 127 at 18-30 (5 USC 552(b)(6)); (4) Ex. 120, Ex. 121, Ex. 127 at 29 (5 USC 552(b)(6)); (5) Ex. 122, Ex. 123, Ex. 127 at 29 (5 USC 552(b)(6)); (6) Ex. 124, Ex. 125, Ex. 127 at 66-81 (5 USC 552(b)(6)); (7) Ex. 126, Ex. 127 at 52-55 (5 USC 552(b)(6)); (8) Ex. 118, Ex. 119 (5 USC 552(b)(6)), (9) Ex. 127 at 82-90 (unnamed); (10) Ex. 127 at 860-69 (unnamed); (11) Ex. 127 at 42-46 (unnamed); (12) Ex. 127 at 31-41 (unnamed); (13) Ex. 127 at 47-51 (unnamed); (14) Ex. 127 at 1-8 (unnamed).

<sup>5</sup> Under 29 C.F.R. §§ 1904.7, .29, employers are required to record all serious work-related injuries or illnesses on an OSHA Form 300 illness/injury log. The documentary evidence describes the injuries that were recorded on this form as follows: (1) Ex. 127 at 60,

struck or trampled as customers crowded into a store or rushed to items at the beginning of a Blitz Day sale. Exs. 112-26, Ex. 127 at 12-13, 23, 44-45, 50, 53, 75 (all describing accidents that occurred at 5 a.m. as doors opened or as Blitz Day merchandise was unwrapped).

During this same five-year period, Wal-Mart records also document 109 customers' claims for medical expenses or other damages allegedly caused by being struck or trampled by other customers on Blitz Days at various Wal-Mart stores across the nation. *Infra* pp. 10-12 (citing portions of claim documents). Two of the customers' injuries occurred at the Valley Stream store in 2005. Ex. 127 at 539-667, 1077-80. One Valley Stream store customer's claim alleged post-concussion syndrome, which totally disabled her for a period of time, and Wal-Mart settled the claim for \$25,000. Ex. 127 at 559, 586, 590. The other Valley Stream store customer described a big bruise running from her elbow to her wrist; Wal-Mart settled that claim for \$700. Ex. 127 at 1078, 1079.

In deciding whether to pay 48 of the 109 claims, Wal-Mart expressly referred to crowd control measures it had or had not implemented. *See e.g.*, Ex. 127 at 250 ("central questions-- \* \* \* what measures did management have for crowd control"), at 319 (a/m "sd

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62, 65 (5 USC 552(b)(6))— pain/discomfort in multiple body parts, acute back pain); (2) Ex. 127 at 11-13, 16 (5 USC 552(b)(6))— back/middle and thoracic muscle strain, and lower back strain); (3) Ex. 127 at 21, 24, 29 (5 USC 552(b)(6))— pain/discomfort in multiple body parts, including cervical spine, shoulder, left wrist and right foot); (4) Ex. 127 at 29 (5 USC 552(b)(6))— pain/discomfort in shoulder); (5) Ex. 127 at 29 (5 USC 552(b)(6))— pain/discomfort, in arm-upper); (6) Ex. 127 at 67-70, 75, 80 (5 USC 552(b)(6))— difficulty breathing/respiratory system, chest pain, acute rib contusion, back pain); (7) Ex. 127 at 55 (5 USC 552(b)(6))— pain/discomfort in feet); (8) Ex. 127 at 83, 90 (unnamed— wrist sprain, contusion); (9) Ex. 127 at 868 (unnamed— knee sprain). The documentary evidence describes the four injuries that resulted in work restrictions that were not recorded on the OSHA Form 300 as follows: (1) Ex. 127 at 44-45 (unnamed— left trapezius strain); (2) Ex. 127 at 35-38 (unnamed— contusion of backs/buttocks, shoulder, lumbar, and wrist pain); (3) Ex. 127 at 49-50 (unnamed— wrist sprain, forearm contusion); (4) Ex. 127 at 4-6 (unnamed— spine contusion). The remaining injury is not described. Exs. 118-119 (5 USC 552(b)(6)).

they had 2 police officers outside for crowd control & 1 inside . . . they also had an assoc handing out tkts for the TV . . . assoc inside the door helping cust get s/c, trying to control crowds”), at 429 (“store was using crowd control w/ associates located in front of store to the best they could”), at 455 (“Terry stated that himself, a police officer, the people greeters, etc were positioned at the front by the doors to try to offer crowd control”), at 502 (“A/m Rachel Hoover stated that there were 2 police officers and all of LP/Risk helping with crowd control and at the front of the store”), at 880 (“Explained that I had . . . s/w mgmt at the str and determined they were doing all they could for crowd control and no payment would be made”), at 946 (“Determine what the store had set up as security for crowd control for the day. Did they allow the crowd to rush in the store all together”), at 1067 (“what procedures were in place for crowd control”), at 1150 (“Store had several mgrs and assoc at the frt of the store along w/ additional assoc inside the store for crowd control”), at 1294 (“We need to establish what the store was doing for crowd control and if it appears reasonable”), at 1330 (“Prior to denying we need a stmt from a/m Greg Cox and find out what precautions they were taking for crowd control”), at 1417 (“at this time I am requesting information on what precautions were taken in crowd control to make a decision on the claim”).<sup>6</sup>

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<sup>6</sup> Wal-Mart claim records contain numerous additional statements by employees related to crowd management: Ex. 127 at 95 (“what kind of crowd control did store have?”), at 160 (“s/w/ John. said that . . . also positioned assoc. every so many feet to try to have some sort of crowd control”), at 184 (“there were police outside to assist w/ crowd control”), at 219 (“Did store have any crowd control measures in place?”), at 227 (“Store version: \* \* \* Mgr \* \* \* stated \* \* \* that \* \* \* they did only had 1 police officer for crowd control at the store”), at 259 (“Was this a crowd control issue?”), at 278 (“What was store doing for crowd control?”), at 351 (“The store had police officer there even to do crowd control per the clmt’s stmt”), at 362 (“I explained that the store had security that day – they were doing what they could for crowd control”), at 413 (store was using crowd control by hand signaling customers to back away from the doors prior to opening the doors”), at 466 (“they had police on hand to help control the crowd but it didn’t matter”), at 520 (“Donna states that police dept was outside for crowd control—3-4 officers standing at doors in swat type uniform and

In another eleven customer claims, the customers alleged or implied that Wal-Mart's failure to manage the crowd caused their injury. *See, e.g.*, Ex. 127 at 890 ("They did nothing to stop the people from rushing in. And that's how I got injured."), at 1089 ("he said wm should have controlled the crowd better"), at 1365 ("No crowd control. No one trying to contain the \* \* \* shoppers or keep order & people safe"), at 1382 ("said WM needs better crowd control, because they don't have any").<sup>7</sup> Other claims describe customers who were "knocked over during rush," "squeezed against the glass," "trampled," and other similar, crowd-related incidents. Ex. 127 at 177, 208, 844, 958, 1068, 1147.<sup>8</sup>

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several squad cars in pking lot"), at 535 ("what crowd control measures was the store taking?"), at 671 ("What was the store doing to provide crowd control outside?"), at 677 ("explained that denial due to \* \* \* the store was attempting to control the crowd"), at 848 ("What was the store doing to provide crowd control outside?"), at 878 ("Were any associates warning, asking everyone one not to run, proceed in normal fashion?"), at 911 ("They were trying to do crowd control"), at 926 (Was their focus crowd control?), at 935 ("STORE VERSION - \* \* \* no effective crowd controls at blitz item area"), at 962 ("was store taking crowd control measures?"), at 968 ("We did have 1 poorly trained security guard there he was trying to control this mass people"), at 984 ("Explained that I had . . . s/w mgmt at the str and determined that they were doing all they could for crowd control and no payment would be made"); *see also* Ex. 127 at 523, 995, 1000, 1011, 1018, 1079, 1085, 1178, 1281, 1323, 1343, 1391, 1403 (similar statements acknowledging need to manage crowd on Blitz Day).

<sup>7</sup> Additional customer statements include Ex. 127 at 101 ("Clmt is upset because she feels WalMart Should of control and mob"), at 116 ("clmt stated that she thinks some type of Security should have been there for crowd control"), at 282 ("She felt that because they had a sale like this and people were rushing to get in, that it is WM's fault she was knocked down"), at 294 ("was not single file but crowded line . . . sd no one came out to warn the crowd to be careful or anything"), at 342 ("What did w/m do that caused the accident - \* \* \* the other thing she noticed was there was no security or crowd control on the premises"), at 496 ("Notes WM is negligent in the clmts case in its handling of the crowd to purchase a limited # of laptop computers"), at 550 (There were not any procedures in place for the laptops they were just first come first serve he said that there was not any security in that area at the time, they were all at the front door the customers that were still waiting to come in had broken down the door").

<sup>8</sup> Other claimed customer injuries include Ex. 127 at 198 ("Push by Other Customers), at 200 ("Pushed, Fell & Twisted Right Knee"), at 202 ("Cust Tripped by Another Cust then

C. *Wal-Mart's Ineffective and Inadequate Crowd Management Preparations for Blitz Day 2008.*

Wal-Mart's main corporate headquarters in Arkansas establishes the company's safety policies, posts them on Wal-Mart's intranet, and oversees implementation of safety policies primarily through its Asset Protection and Safety Divisions. Dec. 4, 29-30. In preparation for Blitz Day 2008, Wal-Mart analyzed accident data from the prior three years' Blitz Days and distributed the resulting analysis to its stores, including the Valley Stream store, via a presentation on its closed circuit television network and through e-mails. Ex. 148 at 133-53, Ex. 55. In the analysis, Wal-Mart acknowledged that most Blitz Day accidents occurred between 5 a.m. and 6 a.m., and 36% of "total claims [were] directly related to crowd control." Ex. 12 at 2, Ex. 55 at 5, Ex. 148 at 152.

On October 31, 2008, Brian Broadus, a Wal-Mart Regional Director for Asset Protection, advised Salvatore D'Amico, the Market Asset Protection Manager for the Valley

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Steppe"), at 212 ("Customer Knocked Down When Door Opened"), at 221 ("Alleges Pushed by Othe Cust. Entering"), at 238 ("clmt was pushed down by another customer upon entering store"), at 253 ("Caught Between Rush of People"), at 263 ("Customer States She Was Pushed Against"), at 267 ("Customer Pushed in Back"), at 285 ("Crowd Shoving Against \$3.88 DVD BIN"), at 287 ("Blitz - Cust Pushed, Fell, Hit Knee"), at 289 ("Pushed to Floor and Stepped On"), at 308 ("Right hand was smashed by customers against door frame"), at 311 ("Knocked to Ground While Entering Store"), at 407 ("Slip While Coming With Large Blits Crowd"), at 409 ("Pushed or fell during blitz sell"), at 449 ("Blitz - Running and Fell During 5:00 Rush"), at 479 ("Pushed by Customers Trying to Enter the"), at 487 ("Customer Pushed into Pallet"), at 537 ("Crowd Moved, Customer Slipped and Fell"), at 668 ("Was Pushed And Tripped Over Own Leg"), at 842 ("Pushed & Fell, Fell Again"), at 854 ("Got Pushed into TV by Other Customers"), at 856 ("Pushed into Metal Rack by Customers"), at 858 ("Customers Hit Her with Their Carts"), at 870 ("Customers Smashed Her Into Counter"), at 904 ("Customer Pushed Down by Other Customers"), at 938 ("Customers Pushed Her Into Display"), at 940 ("Customers Pushed Me Into Photo Counter"), at 1007 ("Customer Was Shoved Pushed Onto the Floor), at 1041 ("Customer Ran Into Her Breaking Glasses); *see also* Ex. 127 at 309, 313, 852, 931, 964, 1070, 1072, 1076, 1267, 1269, 1273, 1284, 1346 (similar claims of injury by customers).

Stream store, to include crowd management in planning for the upcoming Blitz Day 2008.<sup>9</sup> Ex. 54; Tr. 217. Thereafter, Mr. D'Amico (who had no training in crowd management) prepared the "Black Friday Market 45 Action Plan" ("2008 Action Plan"), which was a general operational plan for the sale. Tr. 220-22; Ex. 2. The measures contained in 2008 Action Plan that arguably addressed crowd management were minimal. They included using caution tape/cones to control the line, maintaining ten feet of clearance between the outer glass entry doors and the start of the cones/barricade, having employees walk the line to ask customers to walk and remain calm, and procedures for handling "[a]ny fights/disputes/arguments." Ex. 2 (items 9-11, 22, 28). On November 7, 2008, Mr. D'Amico transmitted the 2008 Action Plan to Mr. Blair, the Asset Protection Coordinator for the Valley Stream store, and to Mr. Sooknanan. Tr. 221; Ex. 11.

On November 25, 2008, Wal-Mart's home office sent an e-mail to Mr. D'Amico advising him that based on a "very positive customer response," Wal-Mart was "expecting heavier customer traffic than normal for Blitz day. Please ensure action plans for crowd control, inclement weather . . . and customer safety are in place." Ex. 15 at 2; *see also* Ex. 14 (Nov. 20, 2008 e-mail reminding Mr. D'Amico to review crowd management plans); Ex. 71 at 4 (material posted on Wal-Mart's intranet on Nov. 23, 2008, reminding stores to be prepared for crowd control on Blitz Day morning). Mr. D'Amico forwarded this e-mail to

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<sup>9</sup> Wal-Mart organizes its stores geographically into "markets," which are organized into "regions," which are organized into "divisions," and Wal-Mart oversees this organizational structure from its principal place of business in Arkansas. Dec. 4. In 2008, regional director Mr. Broadus supervised Mr. D'Amico, the Market Asset Protection Manager for "Market 45" -- the market that included the Valley Stream store. Tr. 186; Dec. 17-18. In turn, Mr. D'Amico supervised the Asset Protection Coordinators and Asset Protection Associates at all the individual stores in Market 45. Dec. 17.

Mr. Blair and to the two Asset Protection Associates that he supervised at the Valley Stream store, Greg Lewis and Andrew Gilroy. Tr. 233.

In a television interview that took place a few days before Blitz Day 2008, Mr. Sooknanan explained that year after year on prior Blitz Days, customers had rushed into the store when the doors were first opened, and he expected the same thing to happen on Blitz Day 2008. Ex. 53 at 2:22 to 2:31 (“[I]t’s always the same. It’s always in the morning, you know, the big rush and getting everybody through the door and everybody running towards that great item”). Mr. Sooknanan acknowledged that the Blitz Day 2007 crowd, pressed up against the store’s doors, had been “too close for comfort.” Tr. 1039, 1047; Ex. 152 at 203-04. In addition, Mr. Blair and Mr. Rice expressed their concerns to Mr. Sooknanan about the Blitz Day 2007 crowd, and recommended measures to make Blitz Day 2008 safer, such as the use of movie ropes or barricades, and having more employees help at the door. Dec. 26; Tr. 134-36; Ex. 145 at 102.

In an apparent attempt to address these concerns, Mr. Sooknanan (who like Mr. D’Amico had no training in crowd management), modified the 2008 Action Plan. Dec. 39; Ex. 152 at 159-60, 207-08; Tr. 998-99, 1022-23, 1027-28. In lieu of “caution tapes/cones,” Mr. Sooknanan instructed Mr. Blair to construct an L-shaped barricade forty feet from the front doors. Dec. 39. Mr. Sooknanan also directed Valley Stream Assistant Manager Michael Sicuranza to open the outer entrance doors at 3:00 a.m. Dec. 39. Mr. Sooknanan believed that having the doors opened in advance would avoid having “too many people trying to get into the door during the process of opening the door” at 5:00 a.m. Ex. 152 at 203-05.

In addition, Mr. Sooknanan relied on measures that had proven ineffective on prior Blitz Days: he had employees inform customers about the quantities and locations of merchandise and ask customers not to run; he asked Mr. Blair to contact the police to determine the police presence at the opening of the store; and he issued his customary instructions to his employees to stay out of customers' way as they entered, but to assist any customer who fell. Dec. 37-39; Tr. 998-99. And, as he had done in prior years, he directed his employees to bisect the vestibule area between the outer store doors and the inner store doors by lining up vending machines through the middle of the vestibule, thereby separating the entrance doors from the exit doors. Dec. 37, 38, 48.

D. *Wal-Mart Employees Are Exposed to Crowd-Related Hazards and a Wal-Mart Employee Dies When a Crowd Stampedes into the Valley Stream Store on Blitz Day 2008.*

Valley Stream store customers started to line up for the Blitz Day 2008 sale at around 5:30 p.m. on Thanksgiving Day, nearly twelve hours before the store was scheduled to open. Dec. 3. By around 3:00 a.m., the crowd had grown to approximately 2000 people. Dec. 6. Sometime between 3:00 and 3:30 a.m., Mr. Sooknanan, who was at a nearby hotel, spoke via telephone with Mr. Blair and Assistant Manager Sicuranza, who were at the store. Dec. 39; Tr. 1011-15. Both employees told Mr. Sooknanan that the crowd had crossed over the barricade and had entered the buffer zone between the barricade and the Valley Stream store's entry doors. Dec. 39. As a result, Mr. Sicuranza decided not to open the doors at 3:00 a.m., as Mr. Sooknanan had previously instructed. Dec. 39; Tr. 1011-15.

According to Mr. Sooknanan, both Mr. Blair and Mr. Sicuranza sounded concerned about the crowd, and in Mr. Sicuranza's case, afraid. Tr. 1012-15, 1084, 1109. Mr. Sooknanan directed Mr. Sicuranza to send the largest employees to deal with the crowd

outside the store. Ex. 142 at 10. Accordingly, Mr. Sicuranza instructed several employees to form a human-chain inside the barricades to keep customers out of the entrance area. Ex. 142 at 10. Like the managers, none of these employees had any training in crowd management. Dec. 5. Because they were unable to keep customers outside of the buffer zone created by the barricades, all employees were eventually told to come back inside the store. Ex. 142 at 11. Mr. Sooknanan also told Mr. Sicuranza and Mr. Blair to ask the police to restore order; the police (who had already been called and were present) were able to get the customers temporarily back behind the barricade. Tr. 1012-15.

Mr. Sooknanan and Mr. D'Amico arrived separately to the Valley Stream store at approximately 4:00 a.m. Dec. 19, 40. By 4:30 a.m. a large number of customers had again gathered in the buffer zone next to the store's entry doors, and were pressed up against the doors. Dec. 19, 40; Tr. 1088-89. Employees again called the police to the scene, but the crowd ignored the police officer's instructions, and he left. Dec. 27-28. Thereafter, at around 4:45 a.m., Mr. D'Amico and Mr. Sooknanan decided to send several Wal-Mart employees outside to try to create space between the crowd and the store's outer doors by wedging themselves between the crowd and the doors. Dec. 19, 40; Tr. 241-42; Ex. 152 at 264. The employees' effort failed, and Mr. D'Amico, concerned for the employees' safety, directed them to return inside the store. Tr. 242-43, 1088-89; Ex. 152 at 261-62.

Mr. Sooknanan then determined that "there were too many people outside for us to open the building." Ex. 152 at 289. He again told Mr. D'Amico and Mr. Blair to get the police. Ex. 152 at 289. Nevertheless, and in the absence of any police presence, and despite Mr. D'Amico's advice to wait until the police arrived, Mr. Sooknanan decided to open the

store's doors on schedule at 5:00 a.m. because he was afraid that the crowd pressure on the doors would break the glass and seriously injure someone. Dec. 20, 40; Tr. 246, 1099-1101.

Mr. Sooknanan directed eight to ten Wal-Mart employees to stand in the store vestibule and "assist in keeping the doors open." Ex. 152 at 272-73. These employees, including some temporary employees who had only worked at the store for a few days, were instructed to push from the inside against the two outer entrance doors to counter the pressure from the crowd outside. Tr. 141-48. Wal-Mart employees and managers counted down from ten to one as the doors were unlocked to mark the beginning of the sale. Tr. 890-91. After Assistant Manager Roydell Shaw unlocked the doors, he ran back into the store. Tr. 890-91; Ex. 25, Ex. 145 at 251-52. The doors began to open, but before they were fully opened, the crowd pressure knocked the doors off their hinges and into the vestibule, and customers and employees were slammed to the ground and trampled as the crowd rushed through the outer entrance into the vestibule. *See, e.g.*, Dec. 45; Ex. 25, Ex. 145 at 253-55.

Several employees and Wal-Mart's security cameras filmed the customers rushing into the store; numerous employees and customers were struck by the crowd, caught in repeated crowd crushes and surges, knocked to the ground and trampled, and pinned against vending machines and the walls of the vestibule. *E.g.*, Ex. 25, Ex. 28c, Ex. 31b, Ex. 31c, Ex. 31g, Ex. 34a, Ex. 35a, Ex. 35d, Ex. 143a & b. The videos graphically depict employees exposed to crowd-related hazards as "a stampede of frenzied customers pushed, ran and jostled their way into the vestibule." Dec. 49.

At least ten employees corroborated the events depicted in the video footage, describing, among other things, the unsafe conditions they faced inside and outside the store, the inability to hold themselves upright as the crowd "busted through," the pain they felt

while being dragged, and the danger of asphyxiation from crowd pressure and trampling. Tr. 89-92, 96 (Dennis Fitch testifying about the pressure on his chest he felt from the crowd as it “stomped” on him, his inability to hold himself up, his concern for his safety, and customers “trying to get in to get whatever it is that’s for sale”); Ex. 142 at 13-16 (interrogatory responses containing over twenty employee accounts of opening), Ex. 144 at 81-105, 117 (deposition testimony of Bibi Azeem describing people pushing, falling and running), Ex. 145 at 253-58 (deposition testimony of Mr. Blair about glass popping out of door), Ex. 150 at 11-17, 57-58 (deposition testimony of Earl Sanders describing people (including an employee) falling, glass falling, and concern that customers would push vending machines over), Ex. 151 at 85-94, 106-111 (deposition testimony of Dennis Smokes relating his fear of falling, people forcing their way in and knocking door off, and his difficulty breathing).

Wal-Mart employee Dennis Fitch was near the vestibule doors when they were opened. Tr. 86. The crowd knocked him down, and he was pushed and dragged through the vestibule by customers running over him. Tr. 89-92 (“All I can remember is feeling pressure” immediately after the doors being opened). The force of customers “stomp[ing]” on him exerted “too much pressure” to allow him to breathe easily. Tr. 91-92. After Assistant Manager Shaw assisted him to his feet, he removed an outer layer of clothes so he could breathe. Tr. 91-92. After recovering, Mr. Fitch helped up an estimated ten to twenty customers who had been knocked down. Tr. 93. He also saw Wal-Mart employees being knocked to the ground. Tr. 93.

Mr. Rice was one of the employees who had been stationed at the vestibule doors, trying to keep them open and on their hinges. Tr. 141-48. When the doors were opened, he heard the same creaking noise he had heard on Blitz Day 2007 (when the glass above the

doors fell and struck him), and he thought the vestibule was about to collapse. Tr. 163. The in-rushing crowd subsequently pinned Mr. Rice against the vending machines. Tr. 156. Alton Calhoun was another Wal-Mart employee who had been stationed at the vestibule doors. Tr. 913-21. Crowd pressure pushed the glass out of the door he was holding. Tr. 919; *see also* Ex. 145 at 253-55 (Mr. Blair's deposition testimony that force of the crowd caused the glass to pop out of the door and break). Customers rushed in and he saw people fall. Tr. 919-20.

Employee Jamie Thompson was on top of one of the vending machines in the vestibule when the outer doors were opened, and he saw customers and employees fall to the floor as the crowd rushed in. Tr. 888-94. He saw employee Jdimytai Damour, who was also trying to keep the doors open, fall to the ground after being hit by one of the doors that had come off its hinges. Tr. 891-93. The door fell on top of Mr. Damour, and customers trampled over the door (and Mr. Damour) as he was on the ground. Dec. 45; Tr. 891. Mr. Thompson tried to pick the door up off Mr. Damour, but dropped it on his first attempt. Tr. 893. He and other Wal-Mart employees removed the door on the second try, and attempted to form a protective circle as customers continued to walk on Mr. Damour. Tr. 159-60, 893.

Approximately fifteen minutes after the store's entryway doors had been opened, and while Wal-Mart employees were still doing their best to shield Mr. Damour from the crowd, the police and emergency medical service personnel arrived. Tr. 160; Ex. 150 at 17-18, 65. An ambulance took Mr. Damour to a hospital, where he was pronounced dead.<sup>10</sup> Dec. 3, 49 n.29.

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<sup>10</sup> The Nassau County medical examiner determined that Mr. Damour had died from mechanical asphyxia, but when Wal-Mart proposed to present evidence that Mr. Damour had instead died from a heart attack, the Secretary filed a motion (granted by the ALJ) to exclude

E. *Wal-Mart Implements Feasible and Effective Crowd Management Measures at the Valley Stream Store for its Day-After-Thanksgiving Sale in 2009.*

Following Mr. Damour's death, Nassau County initiated a criminal investigation of Blitz Day 2008 at the Valley Stream store. *See* Ex. 148 at 226-27; Wal-Mart Br. Ex. B at 1. In exchange for Nassau County's agreement not to criminally prosecute Wal-Mart, Wal-Mart agreed to adopt crowd management measures for future day-after-Thanksgiving sales at its New York stores and developed a general crowd management plan.<sup>11</sup> Ex. 148 at 226-27; Wal-Mart Br. Ex. B at 1. Wal-Mart subsequently applied this general crowd management plan to all of its stores nationwide. Dec. 32.

Under Wal-Mart's general crowd management plan, stores were classified into three tiers based on their crowd density ranking and prior Blitz Day experience, including prior injuries, architectural features, and other factors. Ex. 74 at 6, Ex. 148 at 252-59. Each store had to develop an "Operations Plan" containing required and optional crowd management techniques based on their tier classification, with tier one stores implementing the most comprehensive crowd management techniques in terms of equipment and staffing. Dec. 32; Ex. 74 at 6-7. Crowd management training was required for all stores. Ex. 74 at 8.

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Wal-Mart's evidence to avoid the delay inherent in litigating the cause of death. Order (June 24, 2010).

<sup>11</sup> Wal-Mart had previously employed crowd management techniques on other occasions. For example, Wal-Mart provided its stores with guidance for the July 2007 release of a Harry Potter book in the form of a "best practices" guide for managing crowds. Dec. 31; Ex. 70. The guidance plan required customers to sign up at a table to obtain a bracelet before getting in line, organized the customer line single file or no more than two abreast, and allowed only two customers at a time to enter the store. Dec. 31; Ex. 70 at 1, 5, 7, 11. Mr. Sooknanan could not recall if the Valley Stream Store implemented any of these measures because there was little interest at that store for the Harry Potter book. Ex. 152 at 304-05.

The Valley Stream store was classified as a tier one store. Dec. 32. For the day-after-Thanksgiving sale held at the Valley Stream store in 2009 (renamed from Blitz Day to the Event), Wal-Mart implemented the following measures:

1. All associates and managers received crowd management training. Ex. 74 at 5, 8, Ex. 148 at 225-27; Tr. 97.
2. The store remained open for twenty-four hours prior to the sale's 5:00 a.m. start. Tr. 162; Ex. 48 at 22.
3. The store rented steel security barricades that were placed in front of and along the outer wall of the store, and which formed a serpentine queuing line to the entrance of the store. Tr. 98; Ex. 48 at 22, Ex. 95d, Ex. 95f, Ex. 151 at 119-21.
4. The store used a metering technique such that an equal number of customers were permitted to enter the store as the number of customers who left the store. Ex. 48 at 23, Ex. 95m.
5. Customers could wait in lines in different areas of the store where they received tickets indicating they would receive a desired item. When all tickets for an item were handed out, a balloon came down to indicate that the item was sold out. Tr. 162; Ex. 151 at 123-25.
6. The store hired third-party crowd management personnel to interact with customers outside the store. Ex. 48 at 22, Ex. 49 at 4. Additionally, the store provided bullhorns to several associates to make announcements, such as informing customers waiting in line when all of the popular sales items were sold. Ex. 48 at 22. Other associates and security personnel were positioned upon elevated viewing stands outside the store so that they could maintain an unobstructed view of the crowd to quickly identify any issues that might arise. Ex. 48 at 22, Ex. 95L, Ex. 151 at 120-21; Tr. 99.

No crowd-related hazards developed at the Valley Stream store at the 2009 day-after-Thanksgiving sale. Customers did not push each other or Wal-Mart employees as they entered the store. People did not fall. Doors did not break or come unhinged. No one died or was injured. Tr. 162-63

F. *OSHA's Investigation of the Valley Stream Store and Issuance of the Citation.*

Following Mr. D'Amour's death on Blitz Day 2008, OSHA conducted an inspection of Wal-Mart's Valley Stream store from November 28, 2008, to May 26, 2009. Dec. 1.

Following the inspection, on May 26, 2009, OSHA issued a citation alleging that Wal-Mart violated the OSH Act's General Duty Clause, 29 U.S.C. § 654(a)(1), on Blitz Day 2008 by failing to provide Valley Stream store employees a workplace free of the recognized "hazard of asphyxiation due to crowd crush" at the "East entrance of 77 Green Acres Mall, Valley Stream, NY." Citation. Proposed abatement measures included "preplan[ning]" of "[l]arge sales events" and "[e]ffective crowd control procedures . . . includ[ing] such techniques as offset barricade lines, stanchions and ropes to stage crowd inflow." Citation.

Wal-Mart contested the citation, and the Secretary subsequently filed a complaint amending the citation "to provide a more complete description of the violative condition." Complaint 2. The "amendments [arose] out of the same conduct, occurrences or hazards described in the citation . . . ." Complaint 3. As amended the citation alleged that:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazards of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling: (a) At the work site -- East 77 Green Acres Mall, Valley Stream, NY -- reasonable and effective crowd management was not implemented to prevent the hazards of asphyxiation, or being struck, due to crowd crush, crowd surge or crowd trampling. Respondent's managers and employees were not provided effective prior crowd management training and did not use appropriate crowd management techniques to safely manage a large crowd of approximately 2000 customers; on or about 11/28/2008. ABATEMENT NOTES: Among other methods, feasible and acceptable methods to correct this hazard include, but are not limited to: Special events anticipated to attract the public shall be preplanned by a person(s) qualified in crowd management. Effective crowd control procedures and techniques shall be implemented which may include, but are not limited to, maintaining queuing lines, metering, comprehensive barricade systems, etc. There shall be an adequate number of trained crowd managers and supervisors. There shall be effective signage and information awaiting customers and radios for employee communication in order to receive frequent updates and to timely provide information to customers.

Complaint 3 (emphasis omitted).

G. *The ALJ Issues Her Decision Affirming the Citation.*

Following a six-day hearing on the merits, ALJ Rooney found that Wal-Mart's employees were exposed to the cited hazards at the Valley Stream store on Blitz Day 2008, affirmed the citation, and assessed a penalty of \$7000. Dec. 43-55. According to the ALJ, the "overwhelming evidence of record shows that Wal-Mart's employees assigned to the vestibule were exposed to the hazard of being struck by an out-of-control stampede of people upon the opening of the vestibule doors." Dec. 45. In addition, the ALJ determined that the employees who were sent outside shortly before 5:00 a.m. to create space between the crowd and the vestibule doors were exposed to the hazards of being crushed, trampled, or struck by customers who were pressing against the doors. Dec. 45-46.

The ALJ further found that Wal-Mart had actual knowledge of the hazard. She premised Wal-Mart's actual knowledge on, among other things: (1) Mr. Sooknanan's knowledge of crowd-related problems that occurred during Blitz Day sales in 2005, 2006, and 2007, including the entryway doors falling off in all three years, customers being injured in 2005, and Mr. Rice's 2007 injury; (2) Mr. Sooknanan's contradictory instructions to his employees to stand to the side and be safe as customers entered but to enter the fray to help fallen customers; and (3) Mr. Sooknanan's inadequate efforts to address crowd-related hazards both prior to and on the morning of Blitz Day 2008. Dec. 46-49. Although the ALJ generally found the witnesses to be credible, she specifically noted that "Mr. Sooknanan's deposition testimony indicated a remarkable lack of memory for the relevant events that occurred during the 2007 event" and that although he was in a location that allowed him to testify about events, "he did not recall certain events that other employees related that were adverse to Wal-Mart's defense." Dec. 38 n.21. The ALJ therefore credited the other

witnesses' testimony over Mr. Sooknanan's, to the extent there were any conflicts. Dec. 38 n.21.

The ALJ also determined that the cited hazard was likely to cause death or serious physical harm. Dec. 49. According to the ALJ, the "evidence clearly established that employees assigned to assist fallen customers in the small area of the vestibule were exposed to being pushed to the floor and trampled on by the crowd of customers forcing their way into the Store." Dec. 49. Further, "[i]t is reasonable to infer that falling and being trampled on by a large and frenzied crowd, especially in the small space of the vestibule, would likely result in serious injury or death." Dec. 49. And, employees "were also exposed to being struck by falling doors and broken glass, which could also result in serious injury or death." Dec. 49. Moreover, the ALJ found, the Secretary had established that there were feasible methods of abatement, as shown by Wal-Mart's implementation of procedures that "virtually eliminated" the crowd-related hazards at the 2009 day-after-Thanksgiving sale event. Dec. 51.

After determining that the Secretary had met her burden of establishing the elements of the cited violation, the ALJ then rejected the defenses asserted by Wal-Mart. Among other things: the citation was not time-barred by the OSH Act's six-month statute of limitations and the complaint properly amended the citation; there was no evidence that abatement would create a greater hazard; Wal-Mart had not implemented reasonable measures to address the hazard and had not engaged in a good faith effort to eliminate the hazard; the citation properly addressed a matter of employee, not public, safety; the citation was sufficiently particular and did not violate Wal-Mart's due process rights to fair notice; the Secretary was not required to use notice-and-comment rulemaking to address the hazard;

and the Secretary's alleged inconsistency in enforcement did not excuse the violation. Dec. 2 n.1, 51-54.

### **SUMMARY OF ARGUMENT**

The ALJ properly affirmed the citation because Wal-Mart violated the OSH Act's General Duty Clause when it exposed its Valley Stream store employees to the known serious hazards of being struck, trampled, or asphyxiated by a large crowd of customers gathered for the Blitz Day 2008 sale, and Wal-Mart failed to implement feasible crowd management measures that would have prevented or materially reduced these hazards. As the ALJ correctly found, a large crowd stampeding into a store is likely to cause death or serious harm to an employee struck by, or trapped inside or underneath the surging crowd. Wal-Mart plainly recognized these crowd-related hazards, as it had received numerous reports of crowd-related injuries to both customers and employees stemming from prior years' Blitz Day sales, it had made repeated (though inadequate) efforts to address crowd-related hazards, and the Valley Stream store had received warnings from store employees and express notice of the hazards from the corporate office. In addition, Wal-Mart had a feasible means of eliminating or materially reducing the Blitz Day crowd-related hazards, as evidenced by its abatement of the hazards at the Valley Stream store's day-after-Thanksgiving sale in 2009.

Wal-Mart's arguments to the contrary are without merit. The lack of prior serious injuries to Valley Stream store employees is irrelevant, as the OSH Act's purpose is to prevent the first injury from occurring. Wal-Mart's claim that the conduct of the Blitz Day 2008 crowd was unforeseeable is belied by the evidence that Wal-Mart's prior Blitz Day sales had created large, unmanaged crowds that caused scores of customer and employee claims

for injuries. And, Wal-Mart could have eliminated or materially reduced the crowd-related hazards on Blitz Day 2008 by implementing the same crowd management measures it later implemented in 2009. Wal-Mart also could have protected its employees by not sending them directly into the zone of danger to wedge themselves between the crowd and the store's entrance doors, and into the vestibule to hold the doors up against the pressure of the crowd.

Likewise, the defenses Wal-Mart raises are baseless. There is no violation of the OSH Act's six-month statute of limitations, because the citation amendments arise from the same conduct described in the original citation and therefore relate back to the date of the citation. Nor is there any evidence that the use of crowd management measures would create a greater hazard. Wal-Mart did not implement reasonable measures to address the hazard and did not engage in a good faith effort to eliminate the hazard. The citation does not involve a matter of public safety, it instead addresses Wal-Mart's obligation to protect its employees from hazards at their places of employment. Wal-Mart's claim of "inconsistent enforcement" has no basis in fact or law. And, the ALJ also properly denied Wal-Mart's remaining, miscellaneous claims.

## **ARGUMENT**

A. *On Blitz Day 2008, Wal-Mart Violated the General Duty Clause by Exposing its Valley Stream Store Employees to Recognized Crowd-Related Hazards.*

On November 28, 2008, a Wal-Mart employee tragically died after a crowd of customers stampeded into Wal-Mart's Valley Stream store during the store's annual Blitz Day sales event. As graphically captured on video and corroborated by employee testimony, numerous employees and customers were struck by the crowd, caught in repeated crowd crushes and surges, struck by a glass door knocked off its hinges by the crowd, knocked to the ground and trampled, and pinned against vending machines and the walls of the store's

vestibule. The unmanaged crowd created a significant likelihood of death or serious injury for Wal-Mart's Valley Stream store employees.

At every level of the company Wal-Mart had actual knowledge of the crowd-related hazards posed to its employees during its busiest and most profitable sales event of the year. Even so, Wal-Mart's meager safety measures on Blitz Day 2008 utterly failed to address these known crowd-related hazards, and Wal-Mart failed to use effective crowd management techniques that were available and would have eliminated or materially reduced crowd-related dangers. Consequently, and as explained in further detail below, Wal-Mart violated the OSH Act's General Duty Clause, 29 U.S.C. § 654(a)(1), at its Valley Stream store on Blitz Day 2008.

1. *Legal Framework*

Under the OSH Act's General Duty Clause, each employer must "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). To establish a violation of the General Duty Clause, the Secretary must prove by a preponderance of the evidence that: (1) a condition or activity at an employer's workplace is a hazard; (2) the hazard is recognized either by the employer or the employer's industry; (3) the hazard has caused or is likely to cause death or serious physical injury to an employee; and (4) there is a feasible means of eliminating or materially reducing the hazard.<sup>12</sup> *Beverly Enters. Inc.*, 19 BNA OSHC 1161, 1168 (No. 91-3144, 2000).

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<sup>12</sup> Wal-Mart erroneously argues that this well-established four-part test is preceded by a preliminary inquiry into whether the Secretary proved that Wal-Mart's safety precautions were inadequate. Wal-Mart Br. 14-19. As explained in the cases relied upon by Wal-Mart, however, such an inquiry is not a separate, preliminary test, but is instead subsumed in the fourth element. See, e.g., *United States Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-

Reasonable presumptions and inferences may be drawn based upon the record evidence.

*American Iron & Steel Inst. v. OSHA*, 577 F.2d 825, 831 (3d Cir. 1978).

The Commission reviews an ALJ's legal rulings de novo. *Stevens Equip. Co.*, 1 BNA OSHC 1227, 1229 (No. 1060, 1973). The Commission also has the ultimate fact-finding authority under the OSH Act, although it defers to an ALJ's demeanor-based credibility determinations. *Waste Mgmt. of Palm Beach*, 17 BNA OSHC 1308, 1309-10 (No. 93-128, 1995); *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2131 n.18 (No. 78-6247, 1981), *aff'd in part, rev'd in part*, 681 F.2d 69 (1<sup>st</sup> Cir. 1982). The decision to allow an amendment to a citation is reviewed for an abuse of discretion. *Reed Eng'g Group Inc.*, 21 BNA OSHC 1290, 1291 (No. 02-0620, 2005).

2. *Wal-Mart Exposed its Employees to Crowd-Related Hazards at the Valley Stream Store on Blitz Day 2008.*

“A hazard may exist in a workplace even though no accident or injury has actually occurred.” Dec. 43 (citing *Titanium Metals Corp. v. Utery*, 579 F.2d 536, 542 (9<sup>th</sup> Cir. 1978)). Moreover, the “existence of a hazard is established if the hazardous incident can occur under other than freakish or utterly implausible concurrence of circumstances.”

*Waldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (Nos. 89-2084 & 89-3097, 1993).

As the ALJ correctly found, on Blitz Day 2008 the evidence “overwhelming[ly]” established that Wal-Mart's Valley Stream store employees were exposed to the cited hazards of

asphyxiation or being struck due to crowd crush, crowd surge, or crowd trampling. Dec. 45.

Uncontradicted testimonial and video evidence demonstrated that Wal-Mart employees were

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0316, 2006) (“To show that a proposed safety measure will materially reduce a hazard, the Secretary must submit evidence proving, as a threshold matter, that the methods undertaken by the employer to address the alleged hazard were inadequate.”).

exposed to: (1) being struck by glass; (2) being struck by falling doors; (3) being struck by customers; and (4) asphyxiated by an oncoming unmanaged crowd.

Record evidence for 2005-2008 established that each year at its day-after-Thanksgiving Blitz Day sale, Wal-Mart's advertising generated a large congregation of shoppers at the Valley Stream store. Dec. 43. Customers would begin lining up at midnight or earlier waiting for the doors to open at 5 a.m., and they knew they had to compete for a limited amount of highly coveted, discount items.<sup>13</sup> Dec. 43-44. Because Wal-Mart offered the limited quantities of sale merchandise on a first-come first-serve basis, time and speed were of the essence for shoppers. Dec. 44.

For Blitz Day 2008, people began waiting in line at 5:00 p.m. the day before. Dec. 44. By 3:00 a.m., the unmanaged crowd was so large and chaotic that the Valley Stream store assistant manager became frightened and refused to open the doors. Dec. 44. As the 5:00 a.m. opening time approached, customers waiting in cars left their cars and attempted to cut in line, while many others in the crowd of approximately 1000 pushed and shoved in an attempt to get to the head of the line. Dec. 44. "The customers at that point were out of control." Dec. 44.

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<sup>13</sup> Recognition that certain competitive crowds must be effectively managed to protect employees from crowd-related hazards does not mean, as Wal-Mart and the Chamber of Commerce suggest, that Wal-Mart is required to address conditions outside of Wal-Mart's control. Wal-Mart Br. 33-36; Amicus Curiae ("AC") Br. 7-11. Moreover, that crowd management techniques might not control a large crowd as reliably as engineering controls ameliorate a toxic substance does not mean that crowd management techniques are ineffective. Similarly, Wal-Mart's claim, Wal-Mart Br. 36-37, that recognizing crowd-related hazards will require the Secretary and the Commission to oversee Wal-Mart's advertising efforts is unfounded. Instead, Wal-Mart would be free to continue to generate enthusiasm for its sales, while keeping in mind its obligation under the OSH Act to protect its employees from the hazardous conditions created by Wal-Mart's failure to appropriately manage the crowds such advertising creates.

Against this backdrop, supervisors ordered six to eight Wal-Mart employees to attempt to move the crowd away from the outer vestibule doors. Dec. 45. The employees were directed to wedge themselves between the vestibule entrance and a crowd of customers pushing against the doors. Tr. 241-42; Ex. 152 at 264. These employees were therefore exposed to being crushed and/or trampled by the uncontrolled crowd. Dec. 45-46.

Likewise, the ten employees assigned to the vestibule to assist in opening the doors at 5:00 a.m., who were also told to assist any customers who fell upon entering the vestibule, and to help pick up customers' personal items, were exposed to the "hazard of being struck by an out-of-control stampede of people upon the opening of the vestibule doors." Dec. 45; *see also* Ex. 24 at 4 (noting that a common cause of a crowd hazard is "competitive rushing toward some objective"). As the Valley Stream store doors were opened, "[t]he frenzied crowd stampeded into the vestibule . . . and bedlam ensued." Dec. 45. The initial wave of the crowd was forced into the small vestibule (which was made even smaller by the use of vending machines to bisect the vestibule), and customers and some employees were pushed against the vending machines. Dec. 45. The crush of the crowd knocked both doors off their hinges, and employees were unsuccessful in their attempts to keep the doors from falling. Dec. 45. One of the doors actually fell on an employee, and as customers continued to pour in, they stepped on top of the door that had fallen on the employee. Dec. 45. Other customers were pushed to the floor by the unmanaged crowd, and employees who attempted to provide assistance were also knocked to the ground. Dec. 45.

Given this evidence, Wal-Mart cannot seriously argue that the unmanaged crowd of customers congregated outside its Valley Stream store on Blitz Day 2008 did not pose a hazard to its employees, or that its employees were not sent into "an ascertainable zone of

danger.” Wal-Mart Br. 24. Wal-Mart nevertheless attempts to deflect attention from these facts by making a series of unsupported and irrelevant assertions about the hazardousness of crowds in general.

First, Wal-Mart claims that the “*only* relevant testimony regarding the supposed dangers presented by crowds . . . was provided by the Secretary’s expert, Paul Wertheimer,” whose testimony the ALJ “*excluded* . . . after concluding that it was insufficiently reliable to satisfy Federal Rule of Evidence 702.” Wal-Mart Br. 20 (emphasis in original). As an initial matter, the Secretary notes that Mr. Wertheimer’s expert opinion was not offered to prove that crowd-related hazards existed at the Valley Stream store on Blitz Day 2008, but instead as evidence of the feasibility of abatement measures and the reasonableness of the abatement measures taken by Wal-Mart. Tr. 319-24; Dec. 7. Moreover, Wal-Mart’s statement is plainly contradicted by the voluminous and uncontradicted documentary, testimonial, and video evidence of crowd-related hazards present on Blitz Days (both in 2008 and in prior years) that is highlighted above. *See also supra* pp. 5-11, 15-19.

Second, Wal-Mart asserts that a large crowd cannot be a hazard because Wal-Mart handles crowds on a daily basis. Wal-Mart Br. 20. But this claim ignores the fact that “Blitz Day is Wal-Mart’s largest sales event of the year.” Dec. 44. And, the record is devoid of evidence that a Blitz Day crowd is in any way comparable to the crowds that come to shop at Wal-Mart on a day-to-day basis; indeed, Mr. Sooknanan acknowledged that even on other busy weekends and holiday sales, the only crowds the Valley Stream store had to handle were those at checkout counters.<sup>14</sup> Ex. 152 at 309. Both common sense and Wal-Mart’s own

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<sup>14</sup> Likewise there is no evidence that Wal-Mart’s Blitz Day crowds were in any way comparable to the day-to-day business operations of other retailers, and no evidence in support of Wal-Mart’s (and the Chamber of Commerce’s) claims that the Secretary is

special preparations for Blitz Day 2008 establish that a large crowd of waiting customers, who are competing to buy a limited number of items at deep discounts, is a far cry from the “day-to-day experience of Wal-Mart’s 4,200 stores.” Wal-Mart Br. 20. Moreover, Wal-Mart’s records of employee and customer claims for injuries allegedly sustained during Blitz Days held in 2005, 2006, 2007, and 2008, document the potential hazardousness of large, unmanaged crowds specially gathered for these large sales events. *See supra* pp. 7-11 and nn.4-8.

Third, Wal-Mart argues that no hazard existed because only one employee had suffered a non-serious injury at the Valley Stream store on previous Blitz Days – when Mr. Rice’s hand was cut on Blitz Day 2007.<sup>15</sup> Wal-Mart. Br. 21. This argument misses the mark. The relevant inquiry is the risk of injury, not the actual occurrence of prior injuries. *See, e.g., Arcadian Corp.*, 20 BNA OSHC 2001, 2008 (No. 93-0628, 2004) (because OSH Act is designed to prevent first injury, hazard from exploding vessel could exist even if there was no history of explosions); *accord Illinois Power Co. v. OSHRC*, 632 F.2d 25, 29 (7<sup>th</sup> Cir. 1980) (“the mere absence of a previous accident is not persuasive evidence that a hazard cognizable under the Act does not exist”). Moreover, Wal-Mart’s focus on the absence of

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attempting to regulate “inherent” and unavoidable daily interactions between retailers and customers. Wal-Mart Br. 19-20, 27-28; AC Br. 4-7. OSHA Area Director Anthony Ciuffo’s response, during cross-examination, that a crowd as small as three people could be hazardous does not suggest OSHA would ever issue a citation for such a small crowd. *Cf.* Tr. 716 (Mr. Ciuffo testifying that it was primarily the Blitz Day 2007 crowd that he relied upon in determining that Wal-Mart recognized the hazard).

<sup>15</sup> Wal-Mart’s suggestion, Wal-Mart Br. 28, that the risk of injury from broken doors and glass is not covered by the citation, is incorrect. Being struck by glass a crowd causes to fall fits squarely within the language of the citation. Similarly, Wal-Mart’s effort to minimize the significance of Mr. Rice’s injury is off base. Although his injury was minor, this was because Mr. Rice fortuitously put up his hand in time to protect the more sensitive areas of his face and neck. In addition, Mr. Rice testified that a second pane of glass fell *completely out*. Tr. 130-31 (emphasis added).

prior employee injuries fails to address the voluminous evidence of the real danger Wal-Mart's employees faced as they were "stampede[d]" by the 2008 Blitz Day crowd. Dec. 45; *supra* pp. 15-19.

Finally, Wal-Mart asserts that no hazard existed because "the tragic events of Blitz Day 2008 were caused by 'freakish and unforeseeable circumstances'" and the "completely unprecedented" nature of the "extreme and antisocial behavior of the crowd." Wal-Mart Br. 22 (quoting *Tuscan/Lehigh Dairies*, 22 BNA OSHC 1870, 2009 WL 2329316 at \* 14 (No. 08-0637, 2009) (ALJ)). Wal-Mart is wrong. To begin with, Wal-Mart's characterization of the crowd's conduct is unfounded. Wal-Mart expected a larger crowd than the crowd that had gathered for Blitz Day 2007, and the record evidence demonstrates that the 600 to 800 customers who had gathered in 2007 presented a hazard to Wal-Mart's employees. *E.g.*, Tr. 117-25 (Mr. Rice testifying that he thought pressure from crowd was going to cause vestibule to collapse and that 2007 Blitz Day was a "dangerous scene" for customers and employees).

In addition, prior Blitz Day crowds had repeatedly rushed into and through the Valley Stream store vestibule, pinning people against doors, knocking doors off hinges, knocking people to the ground, and trampling on fallen people. *See, e.g.*, Dec. 4, 47 (doors knocked off by intruding crowd every year from 2005 through 2008); Tr. 919 (testimony that a customer threw a boot through the vestibule door at Valley Stream store in 2007); Ex. 127 at 1079 (Valley Stream store reached its capacity by 5:10 a.m. on Blitz Day 2005, and there was a crowd of 3000), Ex. 151 at 44-49, 53 (deposition testimony of Mr. Smokes describing people pushing and falling in 2007 and Wal-Mart employees helping fallen people up), Ex. 2 (Mr. D'Amico's 2008 Action Plan to address "fights/disputes/arguments"). Similar scenarios had taken place at other stores on Blitz Day. Ex. 127 at 363 (crowd angered at others cutting

in line), at 523-24 (crowd overpowered SWAT team at the door), at 533 (ten police cars could not control crowd), at 680-81 (police dealing with fight, unable to control crowd of 200), at 909-11 (everyone outside was pushing and shoving; 250 customers cut in line).

Given this evidence, there was nothing freakish or unforeseeable about the crowd's size or behavior on Blitz Day 2008. Moreover, Wal-Mart's argument runs afoul of the well-established principle that the key issue is the nature of the hazard, rather than the foreseeability of a particular accident related to the hazard. *See, e.g., Arcadian Corp.*, 20 BNA OSHC at 2008 (noting that a hazard is not unforeseeable simply because an accident or injury has not occurred before); *accord Brennan v. OSHRC (Vy Lactos Labs, Inc.)*, 494 F.2d 460, 463 (8<sup>th</sup> Cir. 1974).

3. *Wal-Mart Recognized the Crowd-Related Hazards at the Valley Stream Store on Blitz Day 2008.*

Actual knowledge of a hazard by an employer is sufficient to establish a violation of the General Duty Clause. *Vy Lactos*, 494 F.2d at 464. Such actual knowledge may be gained by an employer through, among other things, prior accidents, prior injuries, employee complaints, and warnings communicated to the employer by an employee. *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 845 (8<sup>th</sup> Cir. 1981); *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2007, 2030-31 (No. 89-0265, 1997). An employer's knowledge that a condition is hazardous does not depend on the occurrence of prior accidents, *St. Joe Minerals Corp.*, 647 F.2d at 845, and the obvious and glaring nature of a hazard may be sufficient to show employer recognition. *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5<sup>th</sup> Cir. 1984). Additionally, evidence of an employer's voluntary safety efforts may be used to demonstrate actual knowledge of a hazard. *Pepperidge Farm*, 17 BNA OSHC at 2007, 2030-31. Importantly, where the Secretary establishes the employer's actual knowledge of a

hazard, she does not need to also prove that the hazard was recognized by the employer's industry. *Nelson Tree Servs., Inc. v. OSHRC*, 60 F.3d 1207, 1210 (6<sup>th</sup> Cir. 1995). And, a supervisor's actual knowledge of a hazard is imputed to the employer. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441 (7<sup>th</sup> Cir. 1997).

The record evidence amply demonstrated that Wal-Mart had actual knowledge of the crowd related hazards at its Valley Stream store on Blitz Day 2008.<sup>16</sup> This actual knowledge stems from two sources: Mr. Sooknanan's (and other Valley Stream supervisors') actual knowledge of the crowd-related hazards, which is imputed to Wal-Mart, and the Wal-Mart corporate office's actual knowledge of crowd-related hazards.

a. *The Valley Stream Store Supervisors Had Actual Knowledge of Crowd-Related Hazards.*

As the ALJ correctly found, "based upon previous blitz events, and the unsuccessful attempts earlier that morning to move the customers away from the front doors, Mr. Sooknanan knew and recognized that allowing an uncontrolled entry of customers into the small space of the vestibule would endanger employees in that area, especially since he had told them to help customers who fell." Dec. 49. Mr. Sooknanan had actual knowledge that previous Blitz Day crowds had proven hazardous, and he took measures each year (albeit ineffective ones) to try to alleviate crowd-related hazards. For example, on Blitz Day 2006, Mr. Sooknanan handed customers a map that contained a written request to customers not to run to avoid injuring Wal-Mart's employees, and to wait to enter until the doors were completely opened. Ex. 69; Tr. 1030-31. He made the request so that the store's doors

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<sup>16</sup> Wal-Mart and the Chamber of Commerce's contentions, Wal-Mart Br. 25-28; AC Br. 16-17, that the retail industry did not recognize crowd-related hazards are therefore irrelevant to whether the Secretary established a violation of the General Duty Clause. *Nelson Tree Servs.*, 60 F.3d at 1210.

would not be knocked off their hinges again, as had occurred on the previous year's Blitz Day. Ex. 152 at 106-07.

On Blitz Day 2007, the crowd came "too close for [Mr. Sooknanan's own] comfort," and knocked glass out of the store's entry door, injuring Mr. Rice. Dec. 16; Tr. 1039, 1047. "As in prior years, customers fell as they entered the vestibule, and employees pushed their way into the rushing crowd to render assistance, exposing themselves to being pushed to the floor and trampled by the crowd." Dec. 48. Valley Stream store management was also informed by Wal-Mart corporate headquarters that many claims of injury were related to crowd management, and that the store needed to take steps to manage crowds. Ex. 12 at 2, Ex. 15 at 2, Ex. 55 at 5, Ex. 148 at 133-53.

Valley Stream store managers Mr. Rice and Mr. Blair also voiced their concerns about the Blitz Day 2007 crowd to Mr. Sooknanan, and suggested measures for Blitz Day 2008 to avoid a repeat of the "dangerous scene" that the 2007 crowd had created. Dec. 26; Tr. 124-25, 135, 1042-43, 1047-48; Ex. 152 at 202, 207-08, 220-22. In response to these concerns, Mr. Sooknanan implemented a few half-hearted measures to avoid crowd-related incidents. Dec. 39; Tr. 998-99; Ex. 152 at 160, 205, 220-22. Even so, Mr. Sooknanan anticipated that the 2008 crowd would stampede into the store when the doors were first opened, just as crowds had done on prior Blitz Days. Ex. 53 at 2:22 to 2:31. And, he merely repeated the same instructions to employees he had given in past years to "be safe" and to "stand to the side as the customers entered," but to assist any fallen customer in getting back up.<sup>17</sup> Dec. 47-49. On the morning of Blitz Day 2008, when Mr. Sooknanan realized that his

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<sup>17</sup> Wal-Mart argues that Mr. Sooknanan's admonition to employees to "be safe," and to "stand to the side as the customers entered," constituted a "common-sense acknowledgement that customers might slip or bump into employees." Wal-Mart Br. 28. To the contrary, such

meager and ineffectual crowd management measures had failed, he attempted to contact the police because “there were too many people outside for us to open the building.” Ex. 152 at 289. Mr. D’Amico came to the same conclusion and advised against opening the doors until the police had arrived. Dec. 40 n.22.

This evidence demonstrates that Mr. Sooknanan, Mr. D’Amico, Mr. Blair, and Mr. Rice all had actual knowledge of the crowd-related hazards that existed at the Valley Stream store on Blitz Day 2008. This knowledge was imputable to Wal-Mart. *See, e.g., United States v. Ladish Malting Co.*, 135 F.3d 484, 493 (7<sup>th</sup> Cir. 1998) (explaining when knowledge of employees provides a company with knowledge); *Caterpillar, Inc. v. OSHRC*, 122 F.3d at 441 (supervisor’s knowledge is imputed to employer); *Puffer’s Hardware, Inc. v. Donovan*, 742 F.2d 12, 18 (1<sup>st</sup> Cir. 1984) (employer’s safety program constitutes evidence of actual knowledge of hazard); *Carlyle Compressor Co. v. OSHRC*, 683 F.2d 673, 676 (2d Cir. 1982) (danger of flying metal shafts recognized because shafts had been expelled from machine on prior occasions).

Rather than rebut this evidence establishing the Valley Stream store management’s knowledge, Wal-Mart points to Mr. Sooknanan’s “sincere belief that his planning for Blitz Day 2008 was adequate based on his experience in prior years.” Wal-Mart Br. 25. But this

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warnings show that Mr. Sooknanan recognized that being positioned in the way of a surging crowd of people exposed the employee to serious injury from being pushed, struck, run over, or trampled. Nor does Wal-Mart’s assertion that the “be-safe” admonition came “in the context of an event that employees perceived as fun and non-threatening” advance Wal-Mart’s argument. Wal-Mart Br. 29. As an initial matter, the record establishes that Wal-Mart’s employees did not universally perceive the event as non-threatening. *See, e.g., Tr.* 124-25; Ex. 144 at 81-82. Even if they did, their perception of the hazard would not support a determination that no hazard existed. *See Tri-State Roofing & Sheet Metal, Inc. v. OSHRC*, 685 F.2d 878, 881 (4<sup>th</sup> Cir. 1982) (ALJ properly discounted testimony of employees that condition was safe because the “particular views of workmen are not necessarily, and often times are not, the best determination as to what is safe and what is unsafe”).

purportedly good faith implementation of safety measures serves to confirm, rather than negate, Mr. Sooknanan's recognition of the crowd-related hazards. *Waldon Health Care Center*, 16 BNA OSHC at 1061-62 (employer's safety efforts help establish recognition).

Wal-Mart also argues that the knowledge of crowd-related hazards that Mr. Sooknanan gained as events took place on Blitz Day 2008 cannot be used to show Wal-Mart's recognition of the hazard. Wal-Mart Br. 30-31. This argument fails to address that fact that Wal-Mart was at all times required to use all feasible measures available to protect its employees from the crowd-related hazards its employees faced both before and during the store opening. *See, e.g., Fluor Constructors Int'l, Inc.* 17 BNA OSHC 1947, 1953 n.26 (No. 92-2342, 1997) ("an employer must provide all the protection that is feasible and capable of producing a material reduction in a hazard, even if the hazard's elimination would not be achieved").

By 3:00 a.m. of Blitz Day 2008, Mr. Sooknanan's knew that his inadequate crowd management measures had failed, and that the crowd posed a danger. Tr. 1012-15. Even so, he made the situation for Wal-Mart employees even more hazardous when he and Mr. D'Amico sent six to eight employees outside to try to wedge themselves between the crowd and the vestibule doors. Tr. 241-42; Ex. 152 at 264. Then, when that measure failed to contain the crowd, he directed eight to ten employees to stand in the vestibule and attempt to counteract crowd pressure on the doors as they opened by pushing against the shaking and creaking doors. Dec. 48-49. By stationing employees directly in harm's way, Mr. Sooknanan unnecessarily (and knowingly) exposed them to the recognized hazards of being struck, crushed, or trampled by a crowd Mr. Sooknanan admittedly knew was anxious to start "running towards that great item." Ex. 53.

b. *Wal-Mart's Corporate Office Had Actual Knowledge of the Hazard.*

Wal-Mart not only had actual knowledge of the hazard through its Valley Stream store management, but also through its corporate office, which expressly recognized the crowd-related hazards posed by Blitz Day 2008.<sup>18</sup> In preparation for Blitz Day 2008, Wal-Mart advised all of its stores (including the Valley Stream store) that 36% of “*total [injury] claims [were] directly related to crowd control,*” and instructed its stores to focus on crowd management for the upcoming Blitz Day. Ex. 12 at 2 (emphasis added), Ex. 15 at 2, Ex. 148 at 152. In addition, in the five years preceding Blitz Day 2008, more than a dozen Wal-Mart employees reported suffering crowd-related injuries on Blitz Days, and over one hundred customers reported crowd-related injuries. *See supra* pp. 7-11 and nn.4-8. The documentation of these crowd-related injuries and incidents also contain numerous statements by Wal-Mart expressly recognizing the need to implement crowd management measures to reduce the risk of injury during Blitz Day sales. *See supra* pp. 9-11 and nn.6-7.

With respect to this evidence of corporate knowledge, Wal-Mart asserts that to prove a violation the Secretary had to establish that the Valley Stream store itself recognized the hazard, and that injuries at other stores should therefore not be taken into account. Wal-Mart Br. 25. This is incorrect. Wal-Mart, not the Valley Stream Store, was the cited employer, and therefore it is Wal-Mart's recognition of the hazard that counts. *Pepperidge Farm*, 17 BNA OSHC at 2007, 2030-31 (relying on evidence that corporation's home office recognized hazard that was present at particular plant); *cf. Wal-Mart Stores, Inc. v. Secretary*

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<sup>18</sup> The ALJ did not address the evidence establishing Wal-Mart's corporate knowledge of the hazard.

*of Labor*, 406 F.3d 731, 737 (D.C. Cir. 2005) (repeat characterization properly based on violation occurring at different store).

Wal-Mart also argues that the customers' claims of injuries should be disregarded as a basis for Wal-Mart's knowledge because "the OSH Act is concerned only with *employee* safety" and customers and employees "have different motives . . . as well as different fields of movement." Wal-Mart Br. 21-22. This argument is not well-founded. Wal-Mart stationed its employees in front of the entrance doors and in the vestibule and therefore these employees were directly in the same "field of movement" as Wal-Mart's customers. Indeed, Mr. Sooknanan instructed his employees to enter the surging crowd to help fallen customers get back to their feet. Dec. 39; Ex. 152 at 168. Regardless of their motives for being in the store's vestibule, both Wal-Mart's customers and Wal-Mart's employees therefore faced the same crowd-related hazards of being asphyxiated or being struck due to crowd crush, crowd surge, or crowd trampling.

4. *Blitz Day 2008 Crowd-Related Hazards Were Likely to Cause Death or Serious Physical Harm to Wal-Mart's Valley Stream Store Employees.*

In evaluating the likelihood of death or serious harm, the relevant inquiry is not the likelihood of an accident, but rather the likelihood that, "*if* an accident were to occur, death or serious physical harm would be the likely result." *Beverly Enter.*, 19 BNA OSHC at 1188 (emphasis in original); *see also Waldon Healthcare Center*, 16 BNA OSHC at 1060 (employer's claim that "disease is fatal only 1 percent of the time is self-defeating"). Furthermore, in evaluating the likelihood that death or serious physical harm will result if an accident occurs, the Commission exercises judgment, which is informed not only by its experience in occupational safety and health but by common sense. *See, e.g., Wal-Mart Stores*, 406 F.3d at 736 (ALJ is free to consider any plausible circumstances that might

eventuate in serious physical harm in determining whether a violation was serious); *Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Secretary of Labor*, 649 F.2d 96, 98 (2d Cir. 1981) (noting similarity between “substantial probability” test of § 17(k) and “likely” test of § 5(a)(1)).

The abundant testimonial and video evidence on the crowd-related hazards present at the Valley Stream store on Blitz Days overwhelmingly demonstrated that the “[Blitz Day 2008] hazards of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling” were “likely to cause death or serious physical harm” to employees. Complaint 3; 29 U.S.C. § 654(a)(1); Tr. 1099-1101. As highlighted by the ALJ, at the 5:00 a.m opening:

The frenzied crowd stampeded into the vestibule as the doors opened, and bedlam ensued. The initial wave of the large crowd pushing to get into the Store was forced into the small space of the vestibule. Customers and some employees were pushed against the vending machines. The crush of the crowd knocked both doors off their hinges, and the doors fell. Some employees attempted, without success, to keep the doors from falling. Some customers were pushed to the floor by frenzied customers behind them. Employees attempted to assist fallen customers to their feet, and they were also pushed to the floor. One of the doors actually fell on an employee. As customers continued to rush in they stepped on top of the door that had fallen on the employee as they made their way to the Store’s entrance.

Dec. 45; *see also* Tr. 89-92 (testimony of Mr. Fitch regarding his inability to breathe easily because of pressure on his chest); Tr. 891-93 (testimony of Mr. Thompson regarding door falling on Mr. Damour and crowd trampling Mr. Damour); Ex. 25 (video of crowd rushing through vestibule doors and knocking doors off); Ex. 28c (video of people running through vestibule, people carrying doors, and people falling); Ex. 31g (video of people entering vestibule), Ex. 34h (video of people crushed together in vestibule), Ex. 143a & b (video of people rushing into and through vestibule), Ex. 151 at 109 (deposition testimony of Mr. Smokes regarding his difficulty breathing after being caught up in the crowd).

Moreover, regardless of whether the crowd's trampling of Mr. Damour actually caused his death, it cannot be disputed that: (1) Mr. Damour was struck by a store door that the crowd knocked off its hinges; (2) Mr. Damour was knocked to the ground; (3) the crowd trampled on Mr. Damour while he was on the ground; and (4) Mr. Damour was therefore put at risk of serious injury and death as a result of being knocked to the ground and trampled. *E.g.*, Tr. 891-93. Reaching the conclusion that the Blitz Day 2008 crowd-related hazards posed a danger to Wal-Mart employees, including Mr. Damour, does not, as Wal-Mart argues, eliminate the Secretary's burden of proof. Wal-Mart Br. 32. Instead, it is the application of common sense to the evidence.<sup>19</sup> *See Nat'l Realty Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973) (common sense supported determination that death or serious injury was likely). Therefore, and as the ALJ correctly concluded, "falling and being trampled on by a large and frenzied crowd, especially in the small space of the vestibule, would likely result in serious injury or death." Dec. 49.

Wal-Mart claims that the prior Blitz Day experiences of its 4200 stores prove that the crowds generated by these sales events were not likely to cause serious injury. Wal-Mart Br. 32. This claim is factually and legally baseless. Even assuming that the Blitz Day events at other stores were comparable to Blitz Day 2008 at the Valley Stream store, evidence of a

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<sup>19</sup> This application of common-sense is also supported by the professional literature on crowd-related hazards, which was admitted into evidence without objection. Ex. 24, Ex. 39, Ex. 44. This evidence explains that asphyxiation or serious physical harm is a likely result from an accident involving a crowd "competitive[ly] rushing toward some objective." Ex. 24 at 4, Ex. 39 at 1 ("only sixty pounds of pressure on a person's chest can cause asphyxiation in less than a minute"), Ex. 44 1, 3, 12 (noting that crowd rushes at stadiums "have been blamed for countless deaths in the past thirty-five years"). And, the nature of the event generating the competitive crowd is irrelevant. *See, e.g., Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977) (falling debris likely to cause death or serious injury regardless of the industry in which it occurs).

prior accident is not required to prove that a hazard is likely to cause death or serious physical harm. *Illinois Power Co.*, 632 F.2d at 29; *Arcadian Corp.*, 20 BNA OSHC at 2008. Moreover, the record does not even support Wal-Mart's assertion that no employee had received a serious injury on Blitz Days at Wal-Mart stores. Wal-Mart actually recorded on its OSHA 300 logs nine serious crowd-related employee injuries related to Blitz Day events. *See supra* p. 8 n.5. Moreover, four or five additional injuries should have been recorded because Wal-Mart's records show that the employees were placed on restricted work status and taken to a hospital.<sup>20</sup> *Id.*; 29 C.F.R. § 1904.7 (employers must record an injury that results in restricted work or transfer to another job or medical treatment beyond first aid).

5. *Feasible Means Existed to Eliminate or Materially Reduce the Crowd-Related Hazards Present on Blitz Day 2008.*

In demonstrating whether feasible means exist to eliminate or materially reduce a hazard, the Secretary must establish that an abatement method will significantly reduce the hazard; the hazard need not be completely eliminated. *Pratt v. Whitney Aircraft*, 8 BNA OSHC 1329, 1335 (No. 13591, 1980), *aff'd in part, rev'd in part*, 649 F.2d 96 (2d Cir. 1981).

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<sup>20</sup> Wal-Mart's suggestion, Wal-Mart Br. 32-33, that none of the customers suffered serious injuries is similarly without record support. Wal-Mart admitted that two Valley Stream store customers were injured; one of these injuries was allegedly severe enough to totally disable her for a period of time, and Wal-Mart settled the claim for \$25,000. Ex. 127 at 559, 586, 590. Wal-Mart had notice of many other customer injuries. *See* Ex. 127 at 226-30 (broken arm; claim settled for \$5,000), at 321-23, 332 (fractured ankle), at 502 ("Clmt had finger . . . fractured"), at 677-80, 707-08 (concussion; \$7,000 in medical bills), at 926-27 (broken knee; fractured tibia), at 961 (broken ribs), at 1153 (fractured rib), at 1083 (torn cartilage or meniscus of knee and other injuries leading to \$16,789 in medical bills), at 1334, 1336 (fractured knee cap; claim settled for \$31,000), at 1356 (fractured rib), at 1404 (fractured fibia); Ex. 148 at 1164-18 (stipulating that Wal-Mart had no information contravening customers' allegations).

A determination of whether a method of abatement is feasible may be accomplished by reference to the employer's own methods of abatement. *St. Joe Minerals*, 647 F.2d at 844.

Wal-Mart claims that the abatement measures proposed by the Secretary are infeasible. Wal-Mart Br. 33-40. Wal-Mart also alleges that holding it accountable for its inadequate crowd management measures on Blitz Day 2008 somehow amounts to an impermissible application of "strict liability." Wal-Mart Br. 14-19. These assertions are belied by the fact that Wal-Mart successfully implemented virtually the same crowd management measures proposed by the Secretary at its Valley Stream store for the day-after-Thanksgiving sale held in 2009. Dec. 51; Ex. 74 (2009 Event Management Plan), Ex. 48 at 22-23 (response to interrogatory describing measures used in 2009), Ex. 75 (2009 Crowd Management Plan implementation power point), Ex. 76 (2009 Event Management National Plan Tier Breakdown), Ex. 77 (Landmark Event Staffing Services Proposal for 2009). And, the Secretary also pointed to evidence showing that these measures were available prior to 2008, and that Wal-Mart effectively used some of them at certain prior sales events. *See, e.g.*, Ex. 70, Ex. 148 at 231-32.

By keeping the Valley Stream store open for twenty-four hours prior to the beginning of the 5:00 a.m. opening for the 2009 day-after-Thanksgiving sales event, Wal-Mart prevented a large crowd from congregating outside and then rushing into the store. Dec. 51. Wal-Mart further managed the crowd at the sale by: having customers form individual lines inside the store to buy particular items; giving customers in line tickets or tags for purchase of items and informing customers when particular items were no longer available; and using barricades in a serpentine configuration to assist in the orderly entrance of customers into the store. Dec. 51. Wal-Mart's assertion, Wal-Mart Br. 39, that the Valley Stream store's day-

after-Thanksgiving sale in 2009 had a larger than normal police presence, does not refute the fact that Wal-Mart was able to materially reduce crowd-related hazards in 2009 through the use of such techniques as metering and a soft opening.

Given this evidence, the ALJ correctly found that the procedures Wal-Mart adopted for the 2009 event abated the cited crowd crush, crowd surge and trampling hazards that were present at the Valley Stream store on Blitz Day 2008. Dec. 51. “Thus, by its own actions, Wal-Mart has demonstrated that feasible means existed to eliminate or materially reduce the cited hazard at the Store.” *Id.*; see also *St. Joe Minerals*, 647 F.2d at 844.

Wal-Mart also argues that because Mr. Wertheimer’s testimony was excluded, there is no testimony about the crowd management techniques Wal-Mart should have used and their effectiveness, and the Secretary consequently did not prove that there were any feasible means of abatement. Wal-Mart Br. 34-35. As an initial matter, the Secretary notes that the ALJ erroneously excluded Mr. Wertheimer’s testimony. Contrary to the ALJ’s finding, Dec. 13, Mr. Wertheimer’s testimony was based in part on the knowledge of other experts and on peer-reviewed texts and publications, and other experts agreed with his recommendations and conclusions.<sup>21</sup> Moreover, Wal-Mart is also wrong on this point; in addition to Mr.

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<sup>21</sup> In addition, and as the Advisory Committee Notes to the 2000 Amendments to the Federal Rules of Evidence state, “the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience,” and “[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.” Fed. R. Evid. 702 Advisory Committee Notes to 2000 Amendments. Moreover, where “the relevant reliability concerns may focus upon personal knowledge or experience, inquiries into an expert’s qualifications, the reliability of his proffered opinion and the helpfulness of that opinion frequently overlap to a significant degree.” *United States v. Frazier*, 387 F.3d 1244, 1296 (11<sup>th</sup> Cir. 2004); see also *United States v. Simmons*, 470 F.3d 1115, 1122-23 (5<sup>th</sup> Cir. 2006) (holding psychologist’s testimony regarding rape victim behavior reliable because “there are areas of expertise, such as the social sciences[,] in which the research, theories and opinions cannot have the exactness of hard science methodologies”); *id.* at 1123 (“other

Wertheimer's testimony, the Secretary presented evidence on the measures Wal-Mart adopted in 2009, and the fact that these measures materially reduced crowd-related hazards. *See Pitt-Des Moines Inc.*, 16 BNA OSHC 1429, 1434 (No. 90-1349, 1993) (employer proved technological feasibility by adopting abatement measure); *Sugar Cane Growers Coop. of Florida*, 4 BNA OSHC 1320, 1324 (No. 7673, 1976) (post-inspection agreement to adopt abatement measures evidence of feasibility of abatement).

In addition, the professional literature entered into evidence at trial emphasizes the effectiveness (and therefore feasibility) of training in addressing crowd-related hazards. *E.g.*, Ex. 23 at 4, Ex. 38 at 1, Ex. 44 at 4. Indeed, unlike in 2008 and prior years, in 2009 Wal-Mart had a crowd management plan developed and implemented by people with the necessary training, who conducted crowd management training of Wal-Mart employees. *See* Ex. 148 at 231-32. Moreover, the beneficial effect of crowd management measures such as extended hours, use of queue lines inside and outside the store, staffing the event with trained individuals who communicate with the crowd, limiting the number of people who enter the store at any time, and distribution of tickets for merchandise, is undeniably obvious; no explanatory testimony is required to understand that these measures will decrease the likelihood of a crowd congregating outside of a store and then stampeding inside and through the vestibule upon the opening of the doors.<sup>22</sup>

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indicia of reliability are considered under *Daubert*, including professional experience, education, training, and observations”).

<sup>22</sup> To rebut the feasibility of these measures, Wal-Mart relies on the testimony of Mr. Wertheimer and Mr. Ciuffo, and on the fact that no hazardous crowd gathered in 2009. Wal-Mart Br. 35-40. But the inability of Mr. Ciuffo and Mr. Wertheimer to name more than five crowd control experts fails to establish that qualified crowd-management firms and personnel were unavailable to Wal-Mart. *See* Ex. 45 (directory of firms providing crowd management services), Ex. 148 at 231-32 (personnel who developed Wal-Mart's plan had twenty years of

Because Wal-Mart could have implemented these feasible and effective measures in 2008, the Secretary easily met her burden of proving that Wal-Mart's safety precautions in 2008 were inadequate. *See supra* p. 27 n.12 (noting that this burden is part of establishing a feasible means of abatement). The evidence simply does not support Wal-Mart's claim that Mr. Sooknanan's attempts to address crowd-related hazards in 2008 were adequate or reasonable. Wal-Mart Br. 16-18. Most of the measures had proven to be ineffective for prior Blitz Days, and there was no reason to expect that they would ensure orderly entry of the crowd into the store on Blitz Day 2008.

The only measure Mr. Sooknanan tried in 2008 that he had not tried before was using plastic construction barricades. But setting up the barricades forty feet from the entrance was not sufficient to ensure that customers would stay behind the barricades; Wal-Mart's untrained employees were not able to keep the crowd from pushing against the vestibule in 2007, and Mr. Sooknanan had no reason to believe they would be able to keep a crowd behind the barricades in 2008. Moreover, even if the crowd had stayed behind the barricades until the doors opened, the barricades would have done nothing to ensure an orderly entrance into the store at the 5:00 a.m. opening. At a minimum, Wal-Mart should have materially reduced the crowd-related hazards its employees faced on Blitz Day 2008 by not placing its employees directly in the zone of danger by asking them to wedge themselves into the crowd and to apply counter-pressure against the shaking vestibule doors.

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experience). Similarly, Wal-Mart's speculation that factors other than the implementation of crowd control measures could have had a calming effect on the 2009 crowd does not undermine the reasonable inference that the crowd control measures Wal-Mart implemented in 2009 effectively and materially reduced the likelihood that an unmanaged crowd stampeding into a store would present a hazard to Wal-Mart's employees.

Although Wal-Mart asserts that the measures Mr. Sooknanan implemented for Blitz Day 2008 are similar to the crowd control measures listed in the citation, Wal-Mart Br. 15-18, Wal-Mart ignores the fact that Mr. Sooknanan and Wal-Mart's other employees had no training in how to implement crowd management measures such as establishing barricades and having employees provide customers with information. Rather than consult with someone with crowd-management expertise, Mr. Sooknanan and Wal-Mart relied on their uninformed and proven-to-be ineffective approach to crowd management—the unfounded hope that the crowd members would listen to untrained associates asking them to stay away from the doors and to walk calmly rather than stampede through the vestibule.

This approach was plainly inadequate given that it had failed on prior Blitz Days, and it therefore contravened Wal-Mart's obligation to abate Blitz Day 2008 crowd-related hazards to the extent feasible. *E.g., General Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC*, 599 F.2d 453, 464 (1<sup>st</sup> Cir. 1979) (employers must abate a recognized hazard to the maximum extent feasible). Indeed, Wal-Mart's efforts during Blitz Day 2008 at the Valley Stream Store do not even measure up to the crowd management measures Wal-Mart implemented at other stores for another event at which large crowds were expected. Dec. 31 (describing crowd management measures taken for July 2007 Harry Potter book release, including requiring customers to sign up at table to obtain a bracelet before getting in line, organizing the line in single file or no more than two abreast, and allowing only two customers at a time to enter the store); *see also* Ex. 70.

B. *The ALJ Properly Rejected Wal-Mart's 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Defenses.*

In its briefing notice the Commission noted its interest in Wal-Mart's second (greater hazard), fifth (citation directed to an issue of public safety not under OSHA jurisdiction),

sixth (technological infeasibility), eighth (that Wal-Mart took reasonable protective precautions), ninth (that Wal-Mart used good faith efforts to comply with the OSH Act), tenth (statute of limitations), and eleventh (inconsistent enforcement) defenses to the citation. Certain of these claims constitute affirmative defenses; Wal-Mart has the burden of establishing an affirmative defense by a preponderance of the evidence. *Capform Inc.*, 16 BNA OSHC 2040, 2043 (No. 91-1613, 1994). As the ALJ correctly found, Wal-Mart's asserted defenses are meritless. Dec. 2 n.1, 51-54.

1. *The ALJ Correctly Found that Wal-Mart Provided no Evidence of Greater Hazard Disproving the Feasibility of Abatement Measures.*

Because feasibility is an issue in establishing a violation of the General Duty Clause, the "greater hazards defense" as used in section 5(a)(2) (standards-based) jurisprudence does not apply in General Duty Clause (section 5(a)(1)) cases. *Royal Logging Co.*, 7 BNA OSHC 1744, 1751 (No. 15169, 1979), *aff'd*, 645 F.2d 822 (9<sup>th</sup> Cir. 1981). Where the employer demonstrates, however, that the means of abatement specified by the Secretary create other hazards such that the means of abatement are considered infeasible, a citation must be vacated. *Id.*

Wal-Mart contends that the Secretary failed to rebut evidence that confronting the crowd at the Valley Stream store on Blitz Day 2008 and refusing to open the doors at 5:00 a.m. would have posed a "greater hazard" to Wal-Mart's employees. Wal-Mart Br. 40-41. But the whole purpose of using crowd management techniques is to prevent these types of crowd-related hazards from ever arising. Ex. 24 at 4, Ex. 38 at 1; Dec. 31 (discussing the testimony of Monica Mullins, Wal-Mart vice-president of asset protection and safety, about Wal-Mart's use of crowd management measures to establish "a sense of order and . . . smoother flow of traffic"). And, Wal-Mart did not provide any evidence that "eliminating a

waiting crowd outside the [Valley Stream] Store will result in a greater hazard to employees.” Dec. 52. Indeed, Wal-Mart ably eliminated an unmanaged crowd through implementation of crowd management measures for its day-after-Thanksgiving sale at the Valley Stream store in 2009.

It was therefore Wal-Mart’s failure to implement appropriate crowd management techniques that allowed these alleged greater hazards to arise on Blitz Day 2008. Wal-Mart cannot fail to implement appropriate abatement measures and then claim that the hazardous conditions that consequently arise excuse its violation of the General Duty Clause. Dec. 48-49 (lack of adequate planning and guidance left store without any reliable methods to prevent exposure to crowd-related hazards upon the opening of the doors); *cf. Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1166 (5th Cir. 1981) (employer cannot plan a method of work that precludes compliance with OSHA standards and then argue that compliance was not possible because of the method of work chosen; employer must if possible plan a method of work that enables him to comply with OSHA standards).

2. *Wal-Mart’s Obligation under the OSH Act to Protect its Employees from Workplace Hazards is Not Preempted by Public Safety Concerns.*

As the ALJ correctly found, Wal-Mart was properly cited for failing to fulfill its obligation under the OSH Act to provide for its employees’ safety while they are engaged in employment activities. Dec. 53. Wal-Mart’s employees were working at their place of employment when Wal-Mart failed to free that place of employment of the crowd-related hazards Wal-Mart itself created, and that failure exposed employees to the risk of death or serious injury. The citation is therefore squarely authorized by the OSH Act as it is directed at requiring Wal-Mart to abate a workplace hazard. 29 U.S.C. § 654(a)(1). And, Wal-Mart’s crowd management measures implemented for the day-after-Thanksgiving sale at the Valley

Stream store in 2009 demonstrated Wal-Mart's ability to abate the hazards associated with an unmanaged crowd even without the assistance of police. Dec. 53; *see also* Dec. 31 (describing effective crowd management measures implemented at Harry Potter book release). Wal-Mart's argument that the citation improperly addresses an issue of public safety, Wal-Mart Br. 45-48, is therefore without merit.

Wal-Mart also believes that the citation is invalid because the protective measures it requires will also prevent injuries to customers. Wal-Mart Br. 46. Wal-Mart is likewise wrong on this point. Just as the benefit to the public from an OSHA standard does not make the standard any less valid, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107-08 (1992), enforcement of the General Duty Clause is not somehow restricted, simply because members of the public will also benefit. *See Marquette Cement Mfg.*, 568 F.2d at 910 (referring to abatement measures that would have protected members of the public to the same extent as they would have protected employees).

3. *Wal-Mart Failed to Provide Any Evidence of Technological Infeasibility.*

As the ALJ correctly noted, Wal-Mart failed to provide any evidence in support of its claim that abatement of the cited condition was economically and technologically infeasible. Dec. 53. Further, Wal-Mart's abatement of crowd-related hazards at its Valley Stream store's day-after Thanksgiving sale in 2009 established that abatement of the hazard was technologically feasible. *Sugar Cane Growers Coop. of Florida*, 4 BNA OSHC at 1324 (post-inspection agreement to adopt abatement measures evidence of feasibility of abatement).

4. *Wal-Mart's Precautions Were Not Reasonably Protective of its Employees.*

The reasonableness of an employer's attempt to address a recognized hazard must be judged in accordance with the employer's obligation to abate the hazard to the extent feasible. *See General Dynamics Corp.*, 599 F.2d at 464 (“we cannot accept a standard for the precautions which should be taken against . . . a [recognized] hazard which is any less than the maximum feasible”). If the employer's measures leave room for a material reduction of the recognized hazard through the implementation of other measures, the asserted reasonableness of employer's measures is not a valid defense. *See id.*

The record evidence shows that for Blitz Day 2008 and prior Blitz Day events, Wal-Mart trained its employees primarily in the prevention of trip, slip, and fall hazards to customers. Dec. 54. Employees were also instructed generally to “stay out of the way” of the onrushing crowd. Dec. 54. The ALJ correctly found that “these instructions were plainly inadequate to protect employees from the cited hazard.” Dec. 54. The numerous customer and employee claims of injuries at past Blitz Day events demonstrated that Wal-Mart's minimal instructions were not intended to, and did not eliminate the hazardous conditions posed by large unmanaged crowds gathered for sales events. *Id.*; *supra* pp. 7-11. Crowd-related problems had occurred at prior Blitz Day events; even so, the only new measure taken for Blitz Day 2008 was the purchase of a few plastic construction barricades. *Supra* pp. 4-7, 12-15. Even the few steps Wal-Mart took did not plan for the movement of people into and through the Valley Stream store's vestibule, which is where most of the prior crowd-related problems had occurred. Dec. 45-49. Indeed, Wal-Mart chose to position its employees directly within this dangerous area as the crowds surged into the store. Wal-Mart therefore

did not take reasonable precautions to protect employees from the hazards alleged in the citation.

5. *There is No Record Evidence that Wal-Mart Engaged in a Good Faith Effort to Eliminate Crowd-Related Hazards on Blitz Day 2008.*

A good faith belief that safety measures are adequate is not a defense to a failure to implement feasible abatement measures that would materially reduce the hazard. *See General Dynamics*, 599 F.2d at 464 (“we cannot accept a standard for the precautions which should be taken against . . . a [recognized] hazard which is any less than the maximum feasible”). In any event, as the ALJ noted, for the same reasons that Wal-Mart cannot be said to have taken reasonable precautions to protect employees from crowd-related hazards on Blitz Day 2008, it did not engage in good faith efforts to comply with its obligations under the OSH Act. Dec. 54. And, other than noting Mr. Sooknanan’s “sincere belief that his planning for Blitz Day 2008 was adequate based on his experience in prior years,” Wal-Mart Br. 25, Wal-Mart appears to have abandoned this good faith claim, as it has failed to argue it in its opening brief. *See American Sterilizer Co.*, 18 BNA OSHC 1082, 1089 n.15 (No. 91-2494, 1997) (“an issue raised in a petition for review or direction for review but not addressed in the party’s brief is treated as abandoned”).

6. *The OSH Act’s Statute of Limitations is Not Implicated as the Citation Amendments Relate Back to the Original Date of the Citation.*

The Secretary’s complaint amended the citation “to provide a more complete description of the violative condition.” Complaint 2. The amended citation added language describing the recognized hazards as (1) “struck by” hazards in addition to asphyxiation, and (2) “crowd surge or crowd trampling” hazards in addition to “crowd crush.” Complaint 3. The amended language also alleged that the recognized hazard was present at “East 77 Green

Acres Mall,” as opposed to the “East entrance of 77 Green Acres Mall.” Complaint 3. And, the amended citation changed “Large sales events” to “Special events anticipated to attract the public,” in describing a proposed abatement method of having a person qualified in crowd management techniques plan for the events. Claiming that the amendments introduce new factual matters, Wal-Mart argues that the amendments do not relate back to the date of the citation and therefore are barred by the OSH Act’s requirement that citations be issued within six months of the violation. Wal-Mart Br. 42-45 (citing 29 U.S.C. § 658(c)). Wal-Mart is wrong, and the ALJ correctly rejected Wal-Mart’s claim. Dec. 54 (basing rejection on pre-hearing orders issued on October 15, 2009, and September 1, 2009).<sup>23</sup>

Wal-Mart’s argument ignores the well-established test for determining whether an amendment relates back to the initial pleading: whether the “amendment asserts a claim . . . that arose out of the conduct, transaction or occurrence set out—or attempted to be set out—in the original pleading.” Fed. R. Civ. Proc. 15(c)(1)(B); *CMH Co.*, 9 BNA OSHC 1048, 1052 (No. 78-5954, 1980) (“Rule 15(c) is applicable to Commission proceedings.”); *see also Vicon Corp.*, 10 BNA OSHC 1153, 1157 (No. 78-2923, 1981) (“An amendment to a claim arising out of conduct described in the original pleadings relates back to the date of those pleadings.”). The amendments to the citation satisfy this test because the violative conduct alleged in both the original citation and amended citation is the same: Wal-Mart’s failure to protect its employees from recognized crowd-related hazards at the Valley Stream store on Blitz Day 2008 by implementing feasible and effective crowd management measures. *See*

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<sup>23</sup> Wal-Mart incorrectly suggests, Wal-Mart Br. 43 n.6, that ALJ Sommer did not squarely address Wal-Mart’s statute of limitations argument. *See* Order (Oct. 15, 2009) (applying *Vicon Corp* and *CMH Co.* in determining that amendments were not barred by the OSH Act’s statute of limitations for issuing citations).

*Vicon Corp.*, 10 BNA OSHC at 1157 (explaining why amendment changing relevant standard related back); *CMH Co.*, 9 BNA OSHC at 1052-55 (amendment adding party related back); Charles Alan Wright, Arthur A. Miller, Mary Kay Kane, *6A Federal Practice & Procedure* § 1497 at 87-89 (2010) (amendments that “expand or modify the facts alleged in the earlier pleading meet the Rule 15(c)(1)(B) test”).

Contrary to Wal-Mart’s argument, the terms “being struck” and “crowd surge or crowd trampling” do not allege hazards materially different than the term “asphyxiation by crowd crush,” the hazard alleged in the original citation. The recognized hazard alleged in both the original and amended citations was the hazard of death or serious physical harm to employees as a result of the unmanaged entry of a crowd into the store. The risks of death by asphyxiation and death or serious harm from being struck by the crowd or by doors knocked off their hinges by a surging crowd are simply different potential consequences of the same hazardous condition. Abating the originally cited asphyxiation hazard from crowd crush would necessarily have abated the struck-by hazard from crowd surge and crowd trampling. Complaint 3 (recommending virtually identical abatement methods as original citation); Tr. 765-66, 776-77 (Area Director Ciuffo’s testimony that original asphyxiation charge encompassed lesser struck-by hazard and that trampling may cause asphyxiation). Moreover, even if these amendments could be viewed as alleging different hazards, they arise from the same conduct described in the original citation and therefore relate back to the date of that citation. Fed. R. Civ. Pr. 15(c)(1)(B).

Wal-Mart’s claims that the amendments improperly changed the geographic and temporal scope of the crowd-related hazards are moot, given that the ALJ expressly limited the violation to the failure to abate the hazard in front of the entrance and in the vestibule

surrounding the entryway doors. Dec. 45-46. These areas are plainly covered by the factual allegations in the original citation at the “East entrance of 77 Green Acres Mall, Valley Stream, NY.” Citation. It is similarly irrelevant that the amended proposed abatement language referencing “Special events anticipated to attract the public” may encompass more events than the citation’s original phrasing “Large sales events.” Complaint 3. Wal-Mart’s obligation to implement crowd management measures with respect to this citation was litigated only with respect to Blitz Day 2008, an event covered under both phrases.<sup>24</sup>

Even if Wal-Mart were correct that the citation amendments should not relate back to the date of the citation, there is no support for Wal-Mart’s argument that the complaint should be dismissed and the citation vacated. Wal-Mart Br. 42, 45. To the contrary, the citation should still be affirmed. Even if the amendments to the citation were time barred, the amended citation also repeats or encompasses the original allegations. There is no reason to dismiss these original allegations, which the Secretary established at trial.

7. *The ALJ Properly Rejected Wal-Mart’s Claim of Inconsistent Enforcement.*

Before the ALJ, Wal-Mart asserted as an affirmative defense a claim that the citation was inconsistent with OSHA’s prior enforcement actions. In its brief to the Commission, Wal-Mart also asserts that the ALJ improperly excluded evidence it claims would have

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<sup>24</sup> Although Wal-Mart asserts, Wal-Mart Br. 44-45, that it is “self-evident” that the different phrasing increases the potential for failure-to-abate, repeat, and willful citations, and for expanded penalties, the increased risk is non-existent. Wal-Mart already abated the hazard at the Valley Stream day-after Thanksgiving sale in 2009 (negating the possibility of a failure-to-abate violation). And, nothing in the citation’s amendments affects the Secretary’s burden, or Wal-Mart’s defenses, with regard to any future repeat or willful citations. In such future cases the characterization of the subsequent violation will turn on the similarity between it and the violation proven in this case, and Wal-Mart’s heightened awareness of the need to protect its employees from any future crowd-related hazards occurring at similar events.

supported this defense. Wal-Mart Br. 56-57. The ALJ properly rejected the purported defense and the evidence proffered to establish it. Dec. 54.

As an initial matter, Wal-Mart points to no authority establishing the existence of a defense of inconsistent enforcement. This is because none exists. The Secretary's alleged failure to issue citations for other crowd-related incidents is irrelevant to Wal-Mart's obligation to abate a recognized hazard that endangers its employees. *Cf. UAW v. General Dynamics, Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. 1987) (General Duty Clause requires employer to abate a hazard it recognizes, even if an applicable standard allows the condition).

Even if there were such a thing as an inconsistent enforcement defense, Wal-Mart's proffered evidence does not establish any meaningful inconsistency. Wal-Mart complains it was precluded from introducing evidence that the Secretary had not previously issued a citation for other crowd disasters. It is well settled, however, that an employer may not infer from the Secretary's failure to issue a citation after a prior inspection that a condition is not hazardous. *E.g., Donovan v. Daniel Marr & Son Co.*, 763 F.2d 477, 484 (1<sup>st</sup> Cir. 1985) ("An employer cannot, however, rely on the Secretary's failure to issue citations"); *Seibel Modern Mfg & Welding Corp.*, 15 BNA OSHC 1218, 1223-24 (No. 88-821, 1991) (discussing various cases applying this principle). And, to the extent Wal-Mart means to raise the affirmative defense of *selective prosecution*, this defense also fails on the merits, as Wal-Mart has failed to proffer any evidence that would support such a defense. *See, e.g., Vergona Crane Co.*, 15 BNA OSHC 1782, 1788 (No. 88-1745, 1992) (defense requires showing that alleged selective enforcement had a discriminatory effect and was motivated by a discriminatory purpose).

C. *Wal-Mart's Remaining Arguments Are Without Merit.*

Wal-Mart's remaining claims, Wal-Mart Br. 48-59, were not specified in the Commission's Briefing Order, and the Commission should therefore decline to address them. *See Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1535 n.4 (No. 86-360 & 86-469, 1992) (noting and following Commission's practice of ordinarily addressing only those issues specified in the briefing order). In any event, the remaining grab bag of issues raised by Wal-Mart lack merit.

Although Wal-Mart continues to argue (as it argued below) that the citation violates its due process rights to fair notice, that the Secretary must use rulemaking rather than adjudication to address crowd-related hazards, and that the citation does not state the hazard with sufficient particularity, Wal-Mart Br. 48-55, Wal-Mart fails to address the ALJ's well-founded rejection of those claims. Dec. 52-53. As the ALJ correctly found, Wal-Mart's actual knowledge of the crowd-related hazards defeats its claim that it lacked fair notice. Dec. 52-53 (citing cases). Similarly, Wal-Mart's actual knowledge of the crowd-related hazards defeats Wal-Mart's claim that the Administrative Procedure Act required OSHA to conduct rulemaking to hold Wal-Mart accountable for its failure to comply with its known obligation under the General Duty Clause to free its worksite of recognized hazards. Dec. 53. And, the citation described with sufficient particularity the nature of the violation to enable Wal-Mart to vigorously and exhaustively defend itself against the allegation that it had violated the General Duty Clause by not abating the recognized hazard presented by an unmanaged crowd as it entered and stormed its way through the Valley Stream store's vestibule. Dec. 52 ("An inartfully-drawn citation may not be vacated unless it adversely affects the employer's ability to defend against the citation.") (citations omitted); *see also*

*Arcadian Corp.*, 20 BNA OSHC at 2007-08 (Commission can redefine hazard itself if it finds the Secretary's formulation too broad).

Wal-Mart also challenges the ALJ's exclusion of testimony by Dr. Arthur J. Barsky purporting to show that the behavior of the Blitz Day 2008 crowd was exceedingly rare. Wal-Mart Br. 55-56. But Dr. Barsky was not an expert in crowd behavior or crowd management techniques, and therefore was not qualified to provide expert testimony on those subjects. *See* Secretary's Motion to Exclude the Expert Testimony of Arthur J. Barsky, M.D. 2-5 (June 11, 2010). Furthermore, his testimony was not relevant; as previously explained, *supra* pp. 32-34, the relevant inquiry is the nature of the hazard and Wal-Mart's actions and inactions, rather than any purportedly unique or unforeseeable crowd behavioral dynamics.

Likewise, the ALJ properly excluded the Secretary's guidance on workplace violence, and the testimony of a former OSHA official and of a state official, who allegedly would have testified that the OSH Act "does not require employers to protect their employees against violent acts of the general public," and that "OSHA and the safety industry before [Blitz Day 2008] did not recognize [the] alleged hazards to employees of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling." Wal-Mart Br. 56. The ALJ correctly excluded the Secretary's guidance on workplace violence, as it is wholly irrelevant to Wal-Mart's duty to abate the recognized crowd-related hazards that endangered its employees. Likewise the ALJ properly excluded as irrelevant testimony about the industry's or OSHA's alleged lack of recognition of crowd-related hazards before 2008, because this case turned on Wal-Mart's actual recognition of the hazard. And, for the reasons explained in her pre-trial orders, the ALJ properly limited Wal-Mart's other,

overbroad and burdensome discovery requests. Order (Feb. 17, 2010), Order (Feb. 22, 2010).

Wal-Mart is also wrong in arguing that the Secretary's complaint lacked the necessary authorization because neither "Area Director Ciuffo [n]or any other identified representative of OSHA" authorized the amendments to the citation contained in the complaint. Wal-Mart Br. 58. The Secretary, not OSHA, is responsible for prosecuting contested citations, and the Solicitor's Office assists the Secretary in performing that function. Secretary's Order 5-2007 ¶¶ 4C, 5, 72 Fed. Reg. 31160, 31161 (2007); *superseded by* Secretary's Order 4-2010 ¶¶ 4C, 5, 75 Fed. Reg. 55355 (2010) (assignment of responsibility to the Solicitor and reservation of authority to the Secretary); *see also Field Operations Manual Ch. 5 § XI. C. 2.* (Mar. 26, 2009) (prohibiting Area Director from amending a citation after a timely notice of contest has been received), *superseded by Field Operations Manual Ch. 5 § XI C. 2.* (Apr. 22, 2011) (same). And, neither OSHA nor the Secretary delegated any authority to Mr. Wertheimer, and Wal-Mart's claim, Wal-Mart Br. 59, that she did so is factually and legally unfounded. Thus, and as the ALJ correctly found, neither the Secretary nor the Solicitor's Office needed OSHA's input or approval to amend the citation in accordance with Commission Rule 34. Dec. 2 n.1.

## CONCLUSION

For the foregoing reasons, the Commission should affirm the citation and assess the proposed penalty of \$7,000.

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## CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served may be served and filed electronically. I further certify that a copy of the Brief for the Secretary of Labor was electronically served on August 29, 2011, on the following:

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