



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street N. W., Ninth Floor
Washington, D. C. 20036-3457

SECRETARY OF LABOR

Complainant,

v.

WAL-MART STORES, INC.,

Respondent.

OSHRC Docket No 09-1013

APPEARANCES:

Jeffrey Rogoff, Esquire, Darren Cohen, Esquire, Kathryn Stewart, Esquire
Sudwiti Chanda, Esquire
U.S. Department of Labor, Office of the Solicitor, New York, New York
For the Complainant.

Baruch Fellner, Esquire, Michael Billok, Esquire, Jason Schwartz, Esquire
Daniel Rathbun, Esquire
Gibson, Dunn and Crutcher LLP, Washington, D.C.
For the Respondent.

BEFORE: Covette Rooney
Chief Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review commission (“the Commission”) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). After an employee fatality in one of Respondent’s stores on November 28, 2008, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of the store. The store was located in Valley Stream, New York, and the inspection was from November 28, 2008 to May 26, 2009. As a result of the inspection, OSHA issued Respondent a citation on May 29, 2009. The citation alleged a single violation of section 5(a)(1) of the Act, the general duty

clause, and proposed a penalty in the amount of \$7,000. The citation, as amended, alleges a violation as follows:

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, maintaining queuing lines, metering, comprehensive barricade systems, etc. There shall be an adequate number of trained crowd managers and supervisors.¹

¹ As an affirmative defense not listed in its amended answer, Respondent asserts that the motion to amend the citation should not have been granted because the amendment was not “authorized” by the OSHA area director (“AD”) who issued the original citation. In an order dated September 1, 2009, Respondent’s “Motion to Compel Secretary to Proceed through Federal Rule 15, or in the Alternative, for a More Definite Statement per Federal Rule 12(e),” was denied. The grounds for denial were that (1) the Secretary had complied with Commission Rule 34(a)(3) by amending the citation within the complaint, and (2) the Federal Rules relied upon by Respondent did not apply. A further order dated October 15, 2009, was not to the contrary. Further, as the Secretary notes, her order 05-2007 (72 Fed. Reg. 31160-01, June 5, 2007) stated that all matters relating to legal representation in OSHA matters are delegated exclusively to the Solicitor of Labor and his or her representatives. Respondent has presented no Department of Labor regulation or order, and no cases have been found, that require the Solicitor of Labor to seek authorization from an AD before filing a motion to amend a contested citation. The conclusion that pleadings in administrative hearings may be easily amended is supported by the right of Administrative Law Judges to *sua sponte* amend complaints to conform to the evidence presented at trial. *Thomas Indus. Coatings, Inc.*, 2010 WL 5128947, Oct. 18, 2010. See also *Lang Mfg. Co.*, 554 F.2d 903 (8th Cir. 1977); *Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir. 1977). The Commission has also allowed pleadings to be amended during and at the conclusion of a hearing without the approval of the AD. *John and Roy Carlstrom*, 6 BNA OSHC 2101 (No. 13502, 1978); *Rodney E. Fossett*, 7 BNA OSHC 1915 (No. 76-3944, 1979); *New York State Elec.and Gas*, 88 F.3d 98 (2nd Cir. 1996). Respondent’s opposition to the Secretary’s amendment of the original citation is denied.

Respondent filed a timely notice of contest and a timely answer to the Secretary's complaint. In its answer, Respondent admitted the jurisdictional allegations and generally denied the remaining allegations in the complaint. Respondent also asserted 12 affirmative defenses. Pretrial discovery was conducted, and all pretrial motions filed by the parties were resolved. A six-day hearing was held from July 7 through 14, 2010, in New York, New York. Both parties have submitted post-trial briefs and reply briefs.

Background

Respondent ("Respondent" or "Wal-Mart") is the largest general merchandizing retailer in the United States, with approximately 4,200 stores. It sells at the retail level a wide range of consumer products, including clothing, appliances, electronics, toys, sporting goods, home products and food items. The Valley Stream store ("the Store") opened in 2003. It was remodeled in 2007, resulting in a maximum occupancy of 3,490 people. Each year on the day after Thanksgiving, most Wal-Mart stores conduct an event called "Blitz Day" or "Black Friday," where deep discounts are offered on popular items. The event is designed to start the Christmas shopping season and traditionally results in high sales volume and profits that place the particular store "in the black." The Store is among Respondent's top 15 stores in sales volume for Blitz Day, and during 2006 and 2007, it had 70 and 90 million dollars in sales volume, respectively. Although the Store normally opens its doors at 7:30 a.m., the doors open at 5:00 a.m. on Blitz Day. The event is heavily advertised, and each year a large number of customers are expected to take advantage of the deeply discounted products. On November 27, 2008, customers began to form a line outside the Store at 5:30 p.m. for the next day's Blitz Day. By 5:00 a.m. the next day, a large number of customers had congregated outside the Store in anticipation of its opening. Although Wal-Mart's corporate office provided guidance and "action plans" for Blitz Day events, each store manager had responsibility for conducting all aspects of the Blitz Day event at his or her store, including the flow of customers in, through and out of the store. When the Store's doors opened at 5:00 a.m. on November 28, 2008, the customers surged into the vestibule of the Store, knocking two doors off their hinges. A Wal-Mart employee assigned to assist customers in the vestibule was knocked to the ground and, shortly thereafter, he died.

Stipulations

The parties have stipulated to the following:

1. The parties agree that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 651 *et seq.*
2. The parties agree that at all relevant times Respondent was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and was an employer within the meaning of section 3(5) of the Act.
3. Respondent timely contested the citation at issue and the proposed penalty pursuant to section 10(c) of the Act.

The Secretary's Proposed Findings of Fact

The following findings of fact proposed by the Secretary are relevant and accepted:

1. Wal-Mart Stores, Inc., is a Delaware corporation and maintains its principal office in Bentonville, Arkansas. Respondent owns approximately 4,200 stores throughout the United States and is divided into divisions, regions, markets and stores. The Valley Stream store is within Market 45.
2. The principal office establishes safety policy for all Wal-Mart stores. Prior to 2009, the principal office did not establish crowd management and/or crowd control measures for Blitz Day events at its stores.
3. The day after Thanksgiving "Blitz Day" sales event is Wal-Mart's largest sale and shopping day of the year and its biggest annual sales event. For the 2008 event, the Valley Stream store opened its doors at 5:00 a.m. to sell discounted items from 5:00 a.m. to 11:00 a.m. during the sale day while supplies lasted.
4. The Valley Stream store manager was responsible for developing and implementing policies for the flow of customers in and out of that store during the 2008 and previous Blitz Day events.
5. During the 2005-2008 events at the Valley Stream store, the doors providing access to the store vestibule were knocked off their hinges by customers entering the store.
6. During the blitz event at the Valley Stream store in 2007, the glass over the vestibule doors shattered as the customers went into the store and an employee sustained a minor injury from the glass.

7. Respondent expected heavier customer traffic than normal for the 2008 Blitz Day event.

8. The Valley Stream store hired 20 temporary employees to work each night during the November – December 2008 holiday season including the Blitz Day event.

9. Prior to 2009, employees at the Valley Stream store were not provided training by Respondent regarding procedures to ensure the safe and orderly entrance of customers into the store or procedures to reinstate order in the event that a large group of customers became unruly.

10. Customers began “lining up” outside the Valley Stream store at 5:30 p.m. in anticipation of the store opening at 5:00 a.m. the following morning for Blitz Day 2008.

11. For the 2008 event, the outer vestibule doors were opened at 5:00 a.m., and, as customers rushed in, a door was pushed off its hinges and fell on a temporary employee.

Respondent’s Proposed Findings of Fact

The following findings of fact proposed by Respondent are relevant and accepted:

1. Respondent’s annual day after Thanksgiving Blitz Day sale is comparable to Black Friday sales at retail stores across the United States.

2. Respondent’s home office distributed Blitz Day planning materials via the internet. The individual store managers had primary responsibility and discretion for planning Blitz Day events at their stores.

3. Respondent’s Asset Protection employees assist store managers in planning for Blitz Day. The work assignment for Asset Protection employees involves primarily accident reduction and theft prevention.

4. Respondent provided training at the store level on preventing and removing slip, trip and fall hazards.

5. Respondent instructed its employees to contact the police in case of an emergency.

6. On Blitz Day 2005 at the Valley Stream store a door popped off its hinges.

7. The Nassau County police were present at the Valley Stream store when the doors were opened for Blitz Day 2006.

8. Before opening the doors for Blitz Day 2007 at the Valley Stream store, employees stood between the store's entrance and the crowd of customers to create enough space to open the doors.

9. A vestibule door was knocked off its hinges when it was opened during the 2007 blitz event at the Valley Stream store.

10. An employee received a minor laceration from falling glass when the doors were opened during Blitz Day 2007 at the Valley Stream store.

11. The Valley Stream store expected 900 customers for the 2008 blitz event based upon annual trends.

12. For Blitz Day 2008 at the Valley Stream store, the crowd outside the store before the doors opened was larger and more intense than prior blitz events. The approximately 2,000 customers waiting in line became unruly at 3:00 a.m. The crowd continued to grow until the doors were opened at 5:00 a.m.

13. During the evening prior to Blitz Day 2008, barricades had been placed in an "L" shape configuration outside the store doors to control the line of customers. The barricade was 40 feet from the store entrance and ran along the sidewalk adjacent to the store.

14. Shortly before the 5:00 a.m. opening for the 2008 Blitz Day at the Valley Stream store, an unknown number of customers rushed from their cars in the parking lot and cut in front of customers waiting in line.

15. Respondent had contracted for two security guards to be present at the opening of Blitz Day 2008 at the Valley Stream store. One security guard was present when the doors were opened.

16. Customers surged into the store when the doors to the vestibule were opened at 5:00 a.m. during Blitz Day 2008. The crowd pushed the doors off their hinges.

17. Customers slipped and fell in the vestibule, and employees were directed to render assistance to the fallen customers.

18. An employee was seen on the floor when the doors were opened. Employees attempted to surround the fallen employee and protect him from the incoming crowd of customers.

19. Upon entering the store, some customers turned back into the vestibule and vandalized the store's security devices, causing them to become unbolted from the floors. Other customers hoarded televisions and attempted to resell them on the sales floor.

Expert Testimony

Before proceeding with an analysis of the factual testimony and exhibits presented by the parties, it is necessary to perform my gatekeeping function with respect to the expert testimony offered by the Secretary. *Daubert v. Merrill Dow Pharm.*, 509 U.S. 579 (1993).

The Secretary proffered the expert testimony of Paul Wertheimer in regard to two issues: (1) the ineffectiveness of Respondent's crowd management and crowd control measures at the subject Blitz Day event, and (2) the measures Respondent could have taken in 2008 to reduce the hazards of employees being struck or asphyxiated due to crowd crush, crowd surge or crowd trampling. (Tr. 319-21). As an initial matter, it is necessary to evaluate the testimony of Mr. Wertheimer under Rule 702 of the Federal Rules of Evidence ("FRE 702"). Mr. Wertheimer was accepted as an expert who potentially could assist the court in understanding the facts and issues in the case. (Tr. 357). His testimony now, however, must be evaluated to determine its relevance and reliability pursuant to *Daubert, supra*.

FRE 702 reads as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule of evidence was amended in the year 2000 to include the current language in response to the Supreme Court's decision in *Daubert v. Merrill Dow Pharm.*, 509 U.S. 579 (1993); *see also Daubert v. Merrill Dow Pharm.*, 43 F.3d 1311 (9th Cir. 1995). In *Daubert*, the Supreme Court set forth the standard for admitting expert scientific testimony in a federal trial by first rejecting the "general acceptance" standard

commonly applied by courts in analyzing expert testimony.² See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Court stated that FRE 702 places a “gatekeeping” duty upon trial courts to determine whether testimony offered by an expert is relevant and reliable. Simply because a witness is accepted as an expert in a particular field is not enough; the testimony must be analyzed to determine whether it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence (relevance) and whether the reasoning or methodology underlying the testimony is valid (reliability).

Daubert set out four “general observations” that should be considered when evaluating the reliability of expert testimony: (a) is the theory or technique employed by the expert of assistance to the court and has the theory or technique been tested; (b) has the theory or technique been subject to peer review and publication; (c) what is the error rate for the theory or technique; and, finally, (d) has the theory or technique been generally accepted within the community of which the witness claims to be an expert. *Daubert* at 593-94. The Court stated that the list of observations is not exhaustive and is meant to be applied flexibly. The court, quoting Judge Weinstein, noted that “[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.” *Id.* at 595-96. (citation omitted).

On remand, the Ninth Circuit stated: “Our task then, is to analyze not what the expert says, but what basis they have for saying it...This means that the expert’s bold assurance of validity is not enough, rather, the party presenting the expert must show that the expert’s findings are based on objective, independent validation of the expert’s

² In *Kumho v. Carmichael*, 526 U.S. 132 (1999), the Supreme Court held that FRE 702 and *Daubert* apply to all expert testimony, including technical and other specialized knowledge that purportedly assist the trier of fact to understand evidence or to determine a fact in issue.

methodology. *Daubert*, 43 F.3d 1316.³ The Ninth Circuit was particularly concerned about the reliability of proffered expert testimony based upon research which is not independent of the litigation. The Ninth Circuit stated: “[E]xperts whose findings flow from existing research are less likely to have been biased toward a particular conclusion by a promise of enumeration; when an expert prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a parties’ interest....[testimony proffered by an expert that] is based directly on legitimate preexisting research unrelated to the litigation provides a more persuasive basis for concluding that the opinions he expresses” are reliable. *Id.* at 1317. The Ninth Circuit concluded, upon applying the *Daubert* factors, that the proffered expert testimony was personal opinion without any reliable support and, therefore, inadmissible evidence.⁴

At the time of the hearing, Mr. Wertheimer was the sole proprietor and founder of a business called “Crowd Management Strategies and International Crowd Safety Consulting Service.” He offers crowd management planning services as well as training, educational courses, and assistance in establishing guidance and standards in crowd safety. He is a member of the National Fire Protection Association (“NFPA”) and has served as a member of the Technical Committee of Assembly Occupancies and Membrane Structures of the NFPA since 1995. That committee addresses crowd safety and management issues. With respect to his experience in the field, the city of Cincinnati, Ohio appointed him as chief of staff of a citizens’ task force that was formed as a result of injuries sustained by people attending a rock concert in 1979. He authored the report of that committee, which made recommendations to prevent recurrences of injuries by

³ As to the factors considered by the Supreme Court in determining reliability, the Ninth Circuit found them illustrative rather than exhaustive; it also found that the factors were neither equally applicable nor applicable in every case. *Id.* at 1317.

⁴ In *General Elec. v. Joiner*, 522 U.S. 136, 146 (1997), the Court stated: “Trained experts commonly extrapolate from existing data but nothing in *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.” **Black’s Law Dictionary** 905 (9th ed. 2009) defines “*ipse dixit*” as “He himself said it; a base assertion resting on the authority of an individual.” *Ipse dixit* means, in other words, “It is so because I said it is so.”

implementing crowd safety techniques. He also served on a committee with members of Cincinnati's police and fire departments to review special event licenses. He was employed by the city of Cincinnati for eight and one-half years. After that, he was employed by the Lexington Center Corporation, located in Lexington, Kentucky, as an assistant executive director from 1982 to 1984. The firm managed large facilities such as retail shopping malls, convention centers, hotels and arenas throughout the country. There, Mr. Wertheimer was responsible for crowd management consulting on various events, from tractor pulls to concerts. He also was a liaison with the Lexington Police Department for special events, and he provided lobbying efforts to adopt safety regulations for crowd safety. (Tr. 302-05, 343).

In the early 1990's, he formed a sole proprietorship called "Paul Wertheimer and Associates." In that capacity he, along with others, compiled a report at the behest of the Walworth County Planning Commission, located in Wisconsin, that recommended crowd management techniques for the Alpine Valley Music Theater. In 1992, he created his current business. Mr. Wertheimer maintains a database that tracks incidents at concerts and other public assembly events worldwide. He specializes in concert and live entertainment events. He personally researches crowd management techniques for all types of crowds, including live entertainment, parades, political events, sports events and community events. Mr. Wertheimer has produced pamphlets dealing with crowd safety at rap concerts, heavy metal concerts and other events for producers of those events. In particular, he produced a pamphlet entitled "You and the crowd," which gave advice on how to avoid difficult crowd situations. He has provided consulting services and presentations in other countries, *i.e.*, to the British Home Office in matters relating to crowd safety for outdoor events, and to the South African and Denmark governments after crowd related injuries in those countries. (Tr. 306-10).

Mr. Wertheimer received a bachelor's degree in speech in 1972. He completed a 16-hour training course in crowd management sponsored by a company called "Skewser International Security." He has published an article in a book entitled "Engineering for Crowd Safety," which was peer-reviewed. (Tr. 343). He has never written a crowd management plan, nor has he seen such a written plan for the retail industry. Based upon

his background, Mr. Wertheimer was allowed to testify as an expert regarding matters specifically delineated by the Secretary. (Tr. 319-21, 339-43, 349).

The Secretary retained Mr. Wertheimer to compile a report and provide testimony specifically for this case. She asserts that the opinions of Mr. Wertheimer are based on his experience over a 30-year period in the field of crowd management as applied to the facts of this case. As a basis for his opinion, Mr. Wertheimer reviewed the following:

- a. documents produced by Respondent in this litigation,
- b. employee statements and surveillance and employee videos of Blitz Day 2008,
- c. documents created by Respondent in preparation for Blitz Day 2008,
- d. professional literature contained in his personal files,
- e. articles related to crowd management, and
- f. information regarding barricades.

Mr. Wertheimer also conducted a six-hour inspection of the Store during the 2009 Blitz Day event, during which he took measurements as well as photographs and a video of the event.

The Party's Arguments in regard to the Opinion Testimony of Paul Wertheimer⁵

The Secretary argues that crowd management is not “hard science” and that the professional experience, education, training and personal observations of the expert must be the primary consideration. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247 (5th Cir. 2002). Indeed, she maintains that the real life experiences of the expert are more reliable than “experiments” and empirical studies. *Id.* at 247-48. Moreover, expert testimony has been held admissible even though there was no known rate of error and no independent verification of the expert’s testimony. *Id.* at 246. *See also Heller v. Shaw Indus.*, 167 F.3d 146, 155 (3rd Cir. 1999). In this case, the Secretary urges, Mr. Wertheimer used “concrete” examples from his previous work experiences and based his opinions upon

⁵ Wal-Mart raised the issue of Mr. Wertheimer’s expertise to assist the Court at trial. (Tr. 353). The undersigned permitted the Secretary to proceed with her expert witness subject to her hearing the testimony of Mr. Wertheimer and observing his demeanor at the hearing. Wal-Mart’s further arguments as to Mr. Wertheimer’s testimony are set out in its post-hearing filings. R. Brief, pp. 33-42; R. Reply Brief, pp. 24-27.

those experiences. The Secretary points to the fact that Mr. Wertheimer was allowed to testify and render expert opinion based upon his experience in crowd management in *Marshall v. D.C. Caribbean Festival*, 2004 WL 3257066 (D.D.C. Oct 26, 2004).

Wal-Mart argues that Mr. Wertheimer's opinions are not based upon sufficient facts or data. He performed no tests, experiments or simulations as a basis for his opinions. He could not identify a single empirical study that supported his conclusions, and there was no evidence that his opinions were the product of reliable principles and methods. Mr. Wertheimer acknowledged that objective crowd safety standards do not exist for the retail industry. Further, he could not state whether his recommended crowd management techniques would have abated the alleged hazards at the subject Blitz Day event. Wal-Mart also notes Mr. Wertheimer's only academic credential, a bachelor's degree in speech, and his non-certification in crowd management by any organization, which according to Wal-Mart, indicates a deficient educational background in crowd management. Wal-Mart further notes that there is no evidence of Mr. Wertheimer having received any formal training in crowd management or of his knowledge in that discipline having been tested. In sum, Wal-Mart contends that Mr. Wertheimer's expertise in crowd management is based upon self-education and work experience.

Mr. Wertheimer acknowledged that, although he recommended that Wal-Mart develop a crowd management plan, he had never seen a plan of that nature for a retail event. Similarly, he was unaware of any publication, textbook or other materials that required a risk assessment, which he recommended in this case, for an event with less than 2,000 participants.⁶ Mr. Wertheimer had not independently tested the effectiveness of the methods he recommended for crowd management. (Tr. 475, 513, 532, 624-25).

As the Ninth Circuit stated in *Daubert*, the gatekeeper function involves an analysis of not what the expert says but what basis he relies upon for his expert opinion. 32 F.3d 1311. As noted above, the Supreme Court has provided four "observations" that may be applied to test the basis underlying expert testimony. *See Daubert supra*. Moreover, FRE 702 requires expert testimony to be the product of reliable principles and

⁶ There were less than 2,000 customers present at the cited event.

methods which must be applied reliably to the facts of the case. The Supreme Court has cautioned, however, that expert testimony based solely upon the *ipse dixit* opinion of the expert should not be admitted.⁷

The parties agree that the discipline known as “crowd management and control” is not based on science. That fact, however, does not relieve the Secretary’s expert from providing an analysis for reliability. The preponderance of the evidence in the record supports a conclusion that Mr. Wertheimer’s opinions and recommendations were based solely on his personal experiences. There was no evidence that his opinions were based in whole or in part on the knowledge of other experts in the field collected over an extended period of time. Further, there was no evidence they were based on peer-reviewed texts or publications. Mr. Wertheimer conceded that he was unaware of the effectiveness of his recommendations. He was also unaware of anyone having tested his recommendations in a retail setting. Further, that the expert recommendations were generated solely for this litigation does not bolster their reliability. Finally, there was no evidence that other experts agreed with Mr. Wertheimer’s recommendations and conclusions. In a case of this nature, with the potential to have a significant impact upon the retail industry throughout the country, it is essential the expert testimony presented be based upon more than the opinions of one individual, particularly where there was no indication his views represented the industry at large. Stated another way, if Mr. Wertheimer cannot explain how his opinions satisfy FRE 702’s requirements, then his opinions are not admissible. After a thorough review of his testimony, and having observed the witness’s demeanor at

⁷ “Expert testimony is reliable where it has ‘a traceable, analytical basis in objective fact.’” *Bragdon v. Abbott*, 524 U.S. 624, 653 (1998) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997)). “[O]pinion evidence that is connected to existing data only by the *ipse dixit* of the expert” should not be admitted. *Kumho*, 526 U.S. at 157 (citing *Joiner*, 522 U.S. at 146). It is within the trial court’s discretion to determine what are reasonable criteria to be used to determine reliability in a particular case and whether the proposed testimony meets those criteria. *See Kumho*, 526 U.S. at 158 (decision to exclude expert evidence within trial court’s discretion where based on “failure to satisfy either *Daubert*’s factors or any other set of reasonable reliability criteria”); *Roniger v. Mccall*, No. 97 Civ. 8009, 2000 WL 1191078, at *3 (S.D.N.Y. Aug. 22, 2000).

the hearing, I find that the witness's testimony does not meet the requirements of FRE 702. The witness's testimony and his reports are therefore excluded.

Witness Testimony

The Secretary presented six witnesses and Wal-Mart called two witnesses in its case-in-chief. In addition, the Secretary offered six depositions, which, without objection, were accepted as testimonial depositions. The Secretary also presented 226 exhibits, which included videos of the 2008 event. Wal-Mart, in turn, presented 23 exhibits. The relevant testimony is as follows.

Dennis Fitch⁸

Mr. Fitch worked at the Store from December 2007 to March 2010, as an overnight stocker. He worked during the 2008 and 2009 Blitz Days. Wal-Mart did not train him in crowd control or in how to ensure the safe and orderly entrance of customers into the Store. He arrived at the Store at 10:00 p.m. for the 2008 event. At about 2:00 a.m. he and other employees were told to go outside the Store and attempt to keep the customers waiting outside in a line. A barricade had been set up outside, and a member of management instructed him at about 4:45 a.m. to remove the barricade. He complied with the instruction. He was also directed, along with other employees, to attempt to move the customers away from the doors. He remained outside the Store from about 3:00 a.m. to 4:45 a.m. He was trying to keep the customers in line and "keep attitudes in check." At one point he helped a lady "get her face off of the glass." The crowd pushed up against the doors when he removed the barricade. He was standing about one foot away from the doors when they were opened. All he can remember at that time is "feeling pressure." He was pushed to the ground by the crowd, and people were stepping on him. He felt pain, and he experienced difficulty in breathing. At some point he was helped to his feet by Assistant Manager Rydell. This occurred after the customers had pushed him from outside the doors into the vestibule. He was concerned for his safety when the customers pushed him to the ground. He was helped to the customer service desk, where he

⁸ I observed Mr. Fitch's demeanor on the stand and found him to be a credible witness. His testimony was also generally consistent with other employee testimony.

removed some of his outer clothing “so I [could] breathe.” He saw customers and other employees knocked to the ground by the crowd. (Tr. 67-72, 75-81, 86-93).

After approximately two minutes at the service desk, Mr. Fitch felt revived. He returned to the vestibule, and he helped ten to 20 people who had fallen get back on their feet. Both of the front doors had been knocked completely off their hinges, and he carried one of the doors away from the vestibule. He recalled helping “one or two” employees who had fallen. He saw customers running through the Store and employees being pushed out of the way. (Tr. 92-96).

Before the 2009 Blitz Day event, Wal-Mart trained Mr. Fitch and all of the other employees in the Store in crowd management. This was accomplished through a two-hour video. Instead of the plastic barricade used in 2008, a steel barrier was set up in a zig-zag pattern outside the Store for Blitz Day 2009. Mr. Fitch stated that for Blitz Day 2009, pamphlets were given to customers and employees were standing on ladders to control the line of customers. (Tr. 97-99).

During cross-examination, Mr. Fitch stated that prior to 2008, Wal-Mart had trained him in regard to slips, trips and falls. He also understood that the Store should call 911 if customers became unruly. He was instructed to stay out of the way of the crowd. During the 2008 event, the crowd was calm until about 4:30 a.m., when the customers became disorderly and were yelling profanities; some were shouting “push, push, push.” He heard statements “about busting the door open.” He asked police who were in the area “for help,” but they declined. (Tr. 101-02, 105).

Justin Rice⁹

Mr. Rice first worked for the Store as a sales associate during May 2007. He later became a department manager at the Store. He worked at the Store during Blitz Days 2007, 2008 and 2009. (Tr. 113-115).

For Blitz Day 2007, he arrived at around 4:00 a.m. He was told go outside the Store with five other employees to remove customers from pressing against the doors. The large crowd was in a long line that stretched along the side of the building to the next

⁹ Based on his demeanor, I found Mr. Rice to be a credible and knowledgeable witness.

building. Many customers were pressing against him and stepping on his feet. He and other employees were being pushed against the doors by customers. However, they were able to create a space between the doors and the customers by holding hands and walking sideways. The customers were so close to him that “if I picked my head up I could have kissed them on their forehead.” When the doors began to open, the crowd pushed him against the doors as he was yelling at them to stop pushing. As the crowd pushed into the Store, panes of glass over the door shattered and fell over him. He was cut by the falling glass as he put his hand up to protect himself. He saw many people fall in the vestibule, and it appeared to him that the vestibule was about to fall apart from the force of the people entering the Store. Mr. Rice described the opening of the Store during the 2007 event as “a dangerous scene.” He was concerned for the safety of employees. Approximately two months before the 2008 event, he had a conversation with Store Manager Sooknanan about his experiences during the 2007 event. He suggested methods to make the 2008 event safe. He was of the opinion that more employees should be assigned to be outside with the crowd. He also told Mr. Soonkanan that he had been cut by glass during the 2007 event. (Tr. 122-35).

Mr. Rice arrived for work at 4:45 a.m. for Blitz Day 2008. He was assigned to the vestibule area to assist eight to ten other employees in preventing the doors from being pushed in and broken by the crowd outside the doors. The employees were leaning against the doors to counterbalance the pressure from the customers pushing against the outside of the doors. He himself was pushing his body against the door. The crowd outside the doors in 2008 was much larger than the crowd in 2007. At 5:00 a.m. the doors were unlocked by Assistant Manager Rydell; however, it was difficult to open the doors because of the pressure being exerted by the customers. Hundreds of customers came through the doorway as soon as the doors were opened. The two doors were knocked off their hinges by the crowd and employees were holding the doors in the middle of the vestibule. He observed customers falling to the floor of the vestibule as they rushed into the Store. Mr. Rice was pushed against the vending machines in the vestibule, and he tried, unsuccessfully, to climb on top of them to get away from the crowd. He saw an employee lying on the floor of the vestibule and customers stepping on him. He and other

employees made a circle around the fallen employee to protect him from the crowd. Customers continued to step on the employee for approximately two minutes after he and the other employees attempted to protect him. Mr. Rice stated he had not received any training from Wal-Mart in crowd control or crowd management prior to the 2007 or 2008 Blitz Day events. (Tr. 132, 140-44, 147-48, 153-59, 171-72, 175).

Mr. Rice arrived at work at about 4:45 a.m. for Blitz Day 2009. Wal-Mart had provided him with crowd control training by way of a videotape approximately two months before the event. The doors to the vestibule and the Store had been open for customers “all day” before the sale started at 5:00 a.m. Customers formed lines in the Store at each department where items were on sale. Customers waiting in line were given “tags” which entitled them to a sale item. A tag was handed out for each sale item, but once the limited sales items were claimed no further tags were distributed for those items. There was no customer pushing or pressure at the doors, and no customers fell as a result of customer traffic inside or outside the Store. (Tr. 160-63).

Mr. Rice was trained to greet customers if they came within ten feet of him, and he recalled someone telling him to step aside when the doors opened during the 2008 event. As to the 2007 event, he was facing away from the vestibule when he was outside trying to move customers away from the doors. The police arrived after the doors were opened for the 2008 event, and they restored order to the crowd. (Tr. 167, 174).

Salvatore D’Amico

Mr. D’Amico worked for Wal-Mart from October 2004 to 2009. During that time he worked as a loss prevention associate, an assistant store manager, an asset protection coordinator and a market asset protection manager. He was the assistant store manager at the Store and the market asset protection manager for Market 45, which included the Store. None of these positions involved crowd control or crowd management. As market asset protection manager, he was responsible for cash management, safety and accident reduction; he was also responsible for theft reduction at the seven stores located in Market 45, which included stores in Connecticut and New York. During November 2008, Julius Blair, the asset protection coordinator, and Andrew Gilroy, the asset protection associate assigned to the Store, were his subordinates and reported to him. As the asset

protection manager during November 2008, he reported to the regional asset protection manager. The chain of command from that level was the divisional asset protection director and, finally, the vice-president of asset protection, who at that time was Monica Mullens. Her office was located in Bentonville, Arkansas. (Tr. 179-89).

Mr. D'Amico worked as the assistant manager at the Store during the 2005 event. He arrived at work at about 4:00 a.m., and a crowd was lined up outside the Store by the front entrance and along the Store's wall. He was stationed in the vestibule at the front of the Store. Mr. D'Amico described the crowd surge when the doors were opened at 5:00 a.m. as "the crowd is anxious, [they] want to get in and get hold of whatever merchandise it is that they're there for." The initial surge lasted for 15 to 20 minutes, and the doors came off their hinges during that time. Mr. D'Amico also worked at the Store during the 2006 event. Cones and balusters were set up to keep the crowd of customers from extending into the parking lot. The doors came off their hinges when the Store opened for the 2006 event as a result of customers pushing against them. (Tr. 190-203).

Mr. D'Amico was the asset protection coordinator at the Farmingdale New York location during Blitz Day 2007. He was responsible for complying with the "holiday playbook," which required him to ensure that fire exits were inspected and that police and security were obtained. He was also responsible for having knowledge of blitz items and ensuring that all asset protection employees were prepared for safety and crowd control. This included interacting with customers waiting outside and keeping them informed of items on sale. This was a company-wide requirement issued by corporate headquarters located in Bentonville, Arkansas. (Tr. 203-09; Sec. Exh. 71).

Mr. D'Amico was responsible for creating the Market 45 "Black Friday" action plan, which he sent to Mr. Sooknanan, the Store's manager, and to Julius Blair and Andrew Gilroy, the asset protection coordinator and associate, respectively, at the Store. The action plan contained recommended actions to be taken during Blitz Day 2008, such as two-way radios to be distributed to designated employees, a ten-foot buffer area to be established between the vestibule door and the line of waiting customers, and the placement of cones and barricades to keep waiting customers on the sidewalk and away from the parking area. The plan also called for two employees to walk along the line of

customers and urge them to walk slowly and carefully when the doors to the Store opened. However, the plan did not mention contacting police during the event and, for 2008, the recommendation that cones be used as crowd control devices was not followed by the Store's manager. Mr. D'Amico became aware that plastic barricades were to be used in lieu of cones when he visited the Store the day before Blitz Day 2008. Although directives were issued by corporate headquarters and others in the chain of command as to actions to be taken for Blitz Day, Mr. D'Amico was not required to comply with them "100%"; rather, he possessed the flexibility to implement those which he believed were prudent for his market. In response to information he received and forwarded to the Store that heavier customer traffic was expected for the 2008 blitz event, Mr. Sooknanan hired 100 temporary employees. The Store had contacted the Nassau County police department to alert them of the blitz event, but Mr. D'Amico was not aware of any commitment that the police would be present for the event. (Tr. 221-27, 232-35, 238; Sec. Exh. 11).

Mr. D'Amico arrived at the Store at 4:00 a.m. for the 2008 Blitz Day event. He noticed a crowd of customers lined up against the vestibule doors and glass walls. He was concerned that there was no buffer zone between the doors and the crowd, as planned. He believed that it was important to create a buffer zone, so he quickly devised a plan. The plan was for him to go outside with some employee volunteers to create a wedge, or space, between the vestibule doors and the crowd. He had a hurried conversation with the Mr. Sooknanan about the crowd pressing against the doors and the need to do something quickly. Mr. D'Amico described his plan to create a wedge, and Mr. Sooknanan nodded his assent. Around 4:30 a.m., he and six to eight volunteer employees went outside to form a line along the front of the Store doors. The idea was to create two lines of employees between the doors and the crowd and slowly step back "one step at a time to make a buffer zone." The crowd, however, wasn't moving; as he put it, "they were not responding." His co-worker, Mr. Blair, turned to him and "just gave me a look of it's no go." At that point, Mr. D'Amico directed all of the employees to get inside the store to make sure they were safe. (Tr. 240-49).

At approximately 4:45 a.m., Mr. D'Amico heard popping noises coming from the vestibule doors. He saw the glass wall moving because of the crowd pressing against the

doors and walls. He was concerned that the crowd was too close to the doors and walls, and “a lot of things were happening all at once.” He had a second conversation with Mr. Sooknanan minutes before the doors were scheduled to open. He expressed his concern about the crowd pressed against the doors and recommended that the doors not be opened because of the unruly crowd and the lack of police presence. Mr. Sooknanan rejected his suggestion and ordered the doors to be opened as planned at 5:00 a.m. Mr. D’Amico instructed the employees stationed in the vestibule to “step over to the sides, up against the wall” when the doors were opened, because, based upon his experiences at other Blitz Day events, he wasn’t sure what would happen. (Tr. 243-47).

Mr. D’Amico was standing immediately inside the doors leading to the vestibule when the outside doors were opened. He observed the “excited” crowd rushing into the vestibule, which he described as “a surge of customers” that pushed him backwards against a line of vending machines bisecting the vestibule. At that point “there was not much that I could do,” so he climbed to the top of the vending machines to get away from the crowd. Other employees had climbed up onto the top of the vending machines as well. From that vantage point he could see that the vestibule was filled with people, and he heard noises coming from the crowd and the doors. He then saw the door frame and doors come off their hinges. There was confusion in the vestibule, and the doors were pushed in by the crowd.¹⁰ (Tr. 250-256).

During cross-examination, Mr. D’Amico stated that he was responsible for safety at the Store during the 2008 event. This consisted of preventing slips, trips and falls. He was also responsible for developing a crowd management plan, which included the flow of customers in and out of the Store, as part of his safety responsibilities. He believed the police should be called in the event that customers became unruly. He stated, however, that he had been trained and had resources available to perform crowd management functions as part of his safety responsibilities. He noted that Wal-Mart had an Emergency

¹⁰ By his demeanor and description of events as they occurred on Blitz Day, particularly the actions of the crowd before and during the opening of the doors, Mr. D’Amico’s testimony did not reflect the pandemonium and uncontrolled frenzy of the crowd as depicted in the several videos entered into evidence. *See especially* Sec. Exhs. 25, 28 and 143. I found him a reluctant witness who attempted to minimize the crowd’s actions.

Procedures Manual that detailed actions to be taken in case of acts of terrorism, acts of violence, and emergencies such as tornados (Tr. 259-60, 264-65).

Mr. D'Amico began his preparations for Blitz Day 2008 during September of that year for the seven stores he was responsible for. In addition to developing the Market 45 Action Plan, he had weekly conference calls with asset protection coordinators and assistant managers. He also participated in weekly conference calls with store managers. He discussed security needs and directed asset coordinators to contact local police departments. In regard to Blitz Day 2008, Mr. D'Amico stated that in his six years of experience in retail stores, he had never seen a crowd of such size or intensity. At approximately 4:30 a.m. he was standing outside of the Store with a police officer when he heard a commotion within the crowd. The police officer stated to him that the situation was "hopeless" and left the area. (Tr. 271-75, 278-79).

Anthony Ciuffo

Mr. Ciuffo is the area director for OSHA's Long Island office. In that capacity, he issued the citation at issue. The alleged violation is classified as a "serious" violation because the investigation his office conducted developed evidence that, in his opinion, employees at the Store were exposed to serious harm or death during the 2008 Blitz Day event. He considered the severity and probability of the violation to be high, and he proposed a penalty of \$7,000.00. Mr. Ciuffo was not a witness to the events that occurred at the Store's 2008 Blitz Day, and he offered no relevant facts regarding the events that occurred at that time. (Tr. 658-63).

Jaime Thompson¹¹

Mr. Thompson began working at the Store in November 2007. He began as a stock handler and then worked as a customer service manager. Since 2009, he has been a department manager. He worked during the Store's Blitz Day events in 2007, 2008 and 2009. Mr. Thompson arrived at the store before 5:00 a.m. for the 2008 Blitz Day event. He attended a meeting with the Store manager and was instructed to "be safe" and take

¹¹ I observed Mr. Thompson's demeanor and found him to be a credible witness.

care of the customers. As customer service manager, he was responsible for answering customers' questions. Before the doors were opened, he was in the vestibule on top of the vending machines holding one of the interior doors open because he believed the door would close on its own. From his vantage point on top of the vending machines, he saw three or four employees in the vestibule and the crowd outside before the doors were opened. The crowd was "pushing," and he heard the Store manager and other employees engage in a "countdown" before the doors were opened. The assistant manager opened the doors and ran back into the Store. The customers came into the vestibule and pushed the left-side door. The door "broke" and fell on one of the employees. He heard the door crack and hit the employee on the head. The employees in the vestibule tried to turn the crowd away. Mr. Thompson tried to pick the door up but was unable to do so because of the "amount of customers coming in." He and other employees were able to remove the door, but customers continued to "walk on" the fallen employee. Several customers were also on the ground next to the fallen employee. (Tr. 855-58, 876, 883, 889-96).

During cross-examination, Mr. Thomson said he had received training from Wal-Mart as to methods to prevent customer slips, trips and falls. It was his understanding that if customers became unruly, the Store should call 911. When he arrived at the Store on Blitz Day 2008, he saw police leaving from outside the Store. He saw a woman who looked pregnant pressed up against the doors before they were opened. (Tr. 896).

Alton Calhoun¹²

Mr. Calhoun worked at the Store from July 2005 to December 2009. He was an inventory control specialist for eight months and was a support manager for the rest of the time he worked at the Store. He received no training from Wal-Mart regarding crowd management or how to protect employees from unruly crowds. He worked each Blitz Day from the years 2005 to 2009. (Tr. 898-901).

During Blitz Day 2005, his assignment was to make sure the line of customers was straight and there was "no rowdiness." He was standing at the door when the crowd rushed in, and he described the scene as a "bum's rush." The customers were pushing to

¹² Upon observing his demeanor, I found Mr. Calhoun to be a credible witness.

get in, and the door came off its hinges. He said the crowd was “rowdy.” Mr. Calhoun had the same duties for the 2006 event. He saw the crowd lined up outside the door and was concerned the doors would come off again as the crowd was pushing against them. When the doors were opened, the crowd pushed the doors off their hinges. He held onto one door to make sure it didn’t fall on anyone and then placed it to one side. (Tr. 901-10).

During the 2007 event, the crowd was pressed against the doors when they were opened. Mr. Calhoun was holding the right-side door as the crowd rushed in. He saw customers fall as they came into the vestibule, but they were able to get up and enter the store.¹³ The glass was pushed out of the door, and he also saw a boot go through the glass above the vestibule door. For the 2008 blitz event, Mr. Calhoun’s duties were crowd control, supervising and ensuring the doors were opened. His duties included keeping customers in line and preventing the crowd from being “rowdy.” He was stationed at the right side of the door in the vestibule when he opened the door. The Store manager had told him “stand to the side” when he opened the door. He had difficulty opening the door as customers were pressed against it. When the door began to open the crowd continued to push against it and he tried to keep the door on its hinges. However, the “whole door came off” its hinges, and the glass came out of the door. The crowd rushed in in the same manner as previous years, and customers were falling during the rush. He tried to keep customers from falling, and he attempted to slow the crowd down. He left the vestibule area and proceeded to the front doors by climbing over the vending machines and using the exit door. At that time he saw an employee on the floor of the vestibule with a door on top of him. Customers were also on top of the employee. He and other employees attempted to “clear out the front” and “get people off of people.” (Tr. 911-21, 924).

During cross-examination, Mr. Calhoun said he had been trained in preventing slip, trips and falls. He was also instructed to call 911 or the police if a crowd became unruly. During the 2008 event, he was outside with the crowd before the doors opened. He ensured that customers did not have shopping carts to prevent them from striking each other. Although the crowd initially was responsive to his requests, shortly before 5:00

¹³ Mr. Calhoun made this same statement in regard to the 2006 event. (Tr. 924).

a.m. the crowd became unruly and customers started yelling “push, push, push.” At this point, he and the other employees were ordered back into the Store. Shortly before the doors were opened, customers who were waiting in their cars left their cars and went to the front of the line in front of customers who had been waiting in line. (Tr. 923-26).

Deposition of Bibi Azeem (Secretary’s Exhibit 144)

Ms. Azeem began working at the Store in September 2003, and she still worked at the Store at the time of her deposition. Before working for Wal-Mart, she had had about 17 years of retail experience. She worked on each Blitz Day event at the Store from 2004 to 2009. For Blitz Day 2007, Ms. Azeem entered the Store at a back entrance at 5:00 a.m. She went to the front of the Store to “see what was going on.” She saw a large number of people rushing into the store through the vestibule. Customers were also running in a main corridor inside the Store. She watched the crowd for about 20 minutes, during which time most of the customers were running in the Store. (Pp. 11-16, 30-32, 36-46).¹⁴

Before the 2008 blitz event, flyers had been distributed that advertised sales on “big-ticket” items such as televisions, computers and play stations. The sale was limited to the hours of 5:00 to 11:00 a.m. that day, such that customers were not assured of being able to purchase items at the sale price. The number of items on sale was also limited. Ms. Azeem arrived at the Store that day at about 4:50 a.m. She went to the front of the Store to see “all the crazy people that came in at 5:00 a.m. in the morning to shop.” She walked into the vestibule area before the doors opened, at which time she saw a large number of people pressed up against the doors, including a woman who appeared to be pregnant. Ms. Azeem also saw customers getting out of their cars when the doors were about to be opened and cutting in at the front of the line. (Pp. 49, 54-58, 73-78, 149).

As in previous years, there was a countdown led by Store Manager Sooknanan before the doors were opened. She moved back into the Store before the doors opened because she was fearful that she would be hit and knocked down by the crowd. From her vantage point inside the Store, she saw employees attempting to open the doors. Doing so was difficult, as customers were pressed against the doors. She then saw customers

¹⁴ Deposition pages are designated as “Pp.”

rushing into the Store, and some of them fell. She and another employee were helping those customers to their feet and picking up their shoes and handbags. She helped 20 to 30 people who had fallen. The crowd was running into the store, and there was a lot of pushing and shoving. Customers continued to run throughout the Store, and some were falling as they ran to various departments. (Pp. 79-81, 85-90, 117, 161).

Ms. Azeem heard someone yelling there was an accident involving a pregnant woman who was at the customer service desk. Ms. Azeem went to that area and saw a woman who seemed to be pregnant lying on the floor. She attempted to calm the woman until an ambulance arrived. Ms. Azeem also saw an employee who had fallen in the vestibule when she was at the front of the Store. Customers were stepping over him, and employees were trying to help him. The Store was closed at some point after she saw the fallen employee. She left the Store at 6:00 p.m. that evening. (Pp. 92-96, 106-07).

For the 2009 blitz event, Ms. Azeem received training in crowd management and control. She was also assigned to a “response team,” which was responsible for assisting customers who had an accident and for taking statements. During the 2009 event, lines were formed inside the Store at each department having sale items. Customers waiting in those lines were given tickets for the items on sale. A customer given a ticket was assured of getting the item on sale. When Ms. Azeem arrived for work at 4:00 a.m. for the 2009 event, the Store was already open; it had remained open from the previous day, and she saw customers waiting in line inside the Store. She also saw that barricades had been placed in a zig-zag pattern outside the Store and that employees were stationed on raised platforms to observe customers as they entered the Store. Unlike previous years, third-party security personnel were present. (Pp. 129-30, 135-40, 143).

Deposition of Julius Blair (Secretary’s Exhibit 145)

Mr. Blair began working for Wal-Mart in June 2007. He worked at various locations, but primarily at the Store, until April 2010. His prior experience, from 2000 to 2007, was as a security guard in retail stores. His job at the Store, from 2007 to 2010, was that of asset protection coordinator. At the time of his deposition, he was an asset protection associate. As asset protection coordinator, he reviewed cash shortages and supervised the unloading of trucks; he was also involved in prosecuting shoplifters. In

2008, his immediate supervisor was Mr. D'Amico, the asset protection manager. Before 2008, Mr. Blair had received training in slips, trips and falls, but he had had no training in crowd management or in restoring order to an unruly crowd. (Pp. 50-61, 71-73, 149).

Mr. Blair worked during Blitz Day 2007 at the Store. He arrived at work about a half hour before the doors were opened to allow customers to enter. Customers were in front of the entrance doors at that time. They were not in a line, and no barricades were in place. Mr. Blair was at the customer service desk when the doors were opened. About six employees were in the vestibule at that time. Vending machines had been placed in the vestibule to separate the entrance doors from the exit doors. When the doors were opened, customers ran and pushed their way through the vestibule and into the Store. The doors were pushed off their hinges, and he saw customers running and pushing for 30 to 45 minutes after the doors opened. He saw employees stepping to the side to avoid being injured as the running customers entered the Store. He suggested to the Store's manager that barricades be put in place for future Blitz Day events to control the crowds and make it easier to open the doors. (Pp. 74-78, 82, 88-95, 102).

A crowd larger than other years was anticipated for the Store's 2008 event. Mr. Blair's supervisor, Mr. D'Amico, was responsible for instituting crowd control measures for the event, and Mr. Blair was aware of the action plan Mr. D'Amico had devised. On Mr. D'Amico's instructions, Mr. Blair called the local police and requested their presence at the 2008 event. He contacted the police several times to remind them, and he was told that an officer would be present at the time the Store opened.¹⁵ Mr. Blair made other preparations for the event. He made sure the sale merchandise was in stock, and he placed employees at fire exits and other designated places. He also set up the barricades in front of the Store.¹⁶ Barricades were used rather than cones due to the large number of

¹⁵ Mr. Blair did not know specifically what the police would do, other than control the crowd, when they were at the Store. He did not tell the police what the Store wanted them to do. (Pp. 195-98, 200).

¹⁶ Mr. Blair believed that the barricades would keep the crowd from knocking the doors off their hinges. He and the safety committee at the Store, however, were aware of the need to control the crowd because of prior blitz events. He knew the crowd would be

customers anticipated. They were placed ten feet from the front entrance doors the night before the event. They were later moved so that they were 40 feet from the front doors. The Store's manager told Mr. Blair to assign employees to the vestibule area in case the barricades didn't work. (Pp. 104, 107-08, 111-15, 142, 148, 152-53, 182-84, 188).

Mr. Blair arrived for work at 3:10 a.m. for the 2008 event. He saw customers in front of the barricades, and when he asked them to get behind the barricades they refused to do so. He went into the Store and contacted the police. Four police cars arrived but left shortly thereafter. Store Manager Sooknanan and Mr. D'Amico arrived at about 3:45 a.m. Mr. Blair informed them of the unruly nature of the crowd and that the police had arrived and left. At 3:45 a.m., Mr. Blair instructed two of his subordinates to walk along the line of customers and attempt to calm them down by answering their questions and encouraging them to walk slowly and carefully. He and Mr. D'Amico also walked along the line of customers and tried to calm them down until around 4:10 a.m. As of 4:00 a.m., with an hour until opening time, the police had not returned.¹⁷ (Pp. 14, 36-40 116-22).

Mr. Blair and Mr. D'Amico were concerned about keeping the space between the vestibule doors and the barricades clear. Around 4:30 a.m. he and other employees tried to move the crowd from the doors, but the customers in front were being pushed by the customers behind them. He told the employees to get back in the Store as it was not safe outside. Many customers were also milling around the parking lot, and the crowd was out of control. Mr. Blair told Mr. D'Amico that customers were in the buffer zone in front of the doors, and Mr. D'Amico directed him to call the police again. According to Mr. Blair, Mr. D'Amico went back outside and tried to calm the crowd while he waited for the police. One policeman arrived and he attempted, without success, to move the customers

running, tripping and getting hurt. Mr. Blair believed that talking to the customers would help keep them calm. (Pp. 148, 155, 160-61).

¹⁷ Blair recalled that an "altercation" erupted in the crowd. The police were there at that time and went to stop it. The police then left. The crowd then became very unruly and he was concerned more altercations would occur if the doors were opened. (Pp. 212-14).

out of the buffer zone. The policeman told Mr. D'Amico that it was too dangerous for him to be there alone and he left. (Pp. 220-25, 229, 233-36).

At 4:45 a.m., Mr. D'Amico spoke with Mr. Sooknanan. It was decided to send employees out again to form a wedge between the doors and the crowd. About ten employees went outside to move the crowd, but the attempt was not successful. Mr. Blair told Mr. D'Amico at 4:50 a.m. by walkie-talkie it was not safe to try to move the crowd. The crowd continued to grow and push into the buffer zone. People were disorderly and were pushing, and Mr. Blair heard cursing. The crowd was not responding to instructions. Mr. D'Amico asked if it was safe for the employees to be outside. Mr. Blair answered that it was not. Mr. D'Amico ordered all the employees back inside the Store. At 4:50 a.m., Mr. Blair and the other employees entered the Store. He again told Mr. D'Amico of the situation outside. Mr. D'Amico then spoke again with Mr. Sooknanan. (Pp. 238- 44).

Mr. Blair and Mr. D'Amico decided to put additional employees inside the vestibule doors to help open the doors. At 5:00 a.m. the Store manager ordered the doors to be opened and about ten employees attempted to open the doors. The crowd pushed to get into the Store as the doors began to open and the pressure from the crowd knocked the doors off their hinges. The doors were pulled inward in the same manner as happened in the 2007 event. Assistant Manager Rydell unlocked the doors and immediately ran into the store. Minutes before the doors were opened, Mr. D'Amico told employees to stand to the side. Mr. Blair positioned himself to the side of the doors to avoid being pushed over by the crowd. He heard and saw glass cracking and popping as the crowd pressure quickly knocked the doors over. One employee caught the left door as it was falling and put it to one side (Pp. 224-26, 245, 250-55).

Mr. Blair saw customers rushing into the vestibule and tripping over each other. He noticed a woman starting to fall and he reached out to help her. Many customers fell as the crowd came into the Store, and he helped many of them to get up. He saw one employee who was lying on the floor. He tried to help him up, but the employee was not moving. People were "piled up" on the employee. He rolled the employee over, and he determined that he was not breathing. There was a great deal of pushing and shoving. Mr. Blair continued to assist fallen customers by picking them up and pushing them into the

Store. An unknown person closed and locked the door leading into the Store from the vestibule. Mr. Blair waited for EMS personnel to arrive. The police were called and, upon their arrival, they stopped customers from entering the Store. (Pp. 225-27, 246, 258-62).

Mr. Blair received crowd control and management Training from Wal-Mart after the 2008 event. The training was a computer-based two-hour video. During the 2009 blitz event, the Store remained open for 24 hours. Customers entered the Store and formed lines in the departments with sale merchandise. Tickets were given out to customers, which assured them they could purchase the sale item. The number of tickets handed out equaled the number of items available for sale. When all of the tickets were given out, the sale ended and the balloon designating the sale area was taken down. In addition, steel barricades were placed outside the Store in a zig-zag configuration. Employees were stationed outside on platforms, and they told customers what to expect in the Store. These procedures had not been in place during the 2008 event. (Pp. 280-88).

Deposition of Monica Mullens (Secretary's Exhibit 148)

Ms. Mullens has worked for Wal-Mart since 1998. In June 2007, she became the vice-president of asset protection and safety for all Wal-Mart stores in the United States. She held this same position on May 20, 2010, the date of her deposition. Her office is in Wal-Mart's corporate headquarters in Bentonville, Arkansas. Ms. Mullens is responsible for overseeing the firm's accident and inventory performance. She is also responsible for security, and she helps to oversee emergency management and disaster response to occurrences such as fires and natural disasters. She has oversight responsibility for compliance with OSHA standards. As of May 10, 2010, Wal-Mart operated about 4,200 retail outlets in the United States; in November 2008, there were 3,900 such outlets. Ms. Mullens testified that the store manager is the highest-ranking member of management in each store; however, the asset protection coordinator at each store is responsible for, among other things, store safety and safety audits. (Pp. 12, 20-32, 36).

Ms. Mullens discussed the safety duties of the asset protection coordinator; these include scheduling and attending safety meetings with the store safety team, conducting safety tours of the store, and ensuring that claims are processed properly. The coordinator also accompanies OSHA and fire marshal officials during their inspections. The

coordinator reports to his or her market asset protection manager; each such manager is responsible for six to 12 stores and, in that regard, ensures that those stores have active safety teams and programs that facilitate accident prevention and reduction. Asset protection and safety are two separate divisions under Ms. Mullens' supervision. The corporate office establishes safety standards for stores in the United States. Individual stores, however, are responsible for identifying "accident opportunities," which are based on the experiences of each individual store with general support information provided from the corporate office. An example of such information from the corporate office would be how to prevent slips, trips and falls in the stores. (Pp. 37-38, 42, 50, 61-64).

All employee injuries and accidents are to be reported by individual stores on the "wire," a computerized system for transmitting information between stores and corporate headquarters. Each store is able to go to the website and determine the "best practice" to eliminate accidents. A manager from each store must enter all employee accidents involving lost time or medical attention on the website; this information must also be filed with Claims Management, Inc. ("CMI"), a third-party claims administrator Wal-Mart created. Store managers and market asset protection managers may access accident reports for all stores, and information regarding employee accidents may also be obtained from CMI. Ms. Mullens said that to her knowledge, no employee had been struck by or asphyxiated by customers entering Wal-Mart stores during Blitz Days before November 28, 2008; however, it is her understanding that employees have been struck by various objects or persons and that employees could potentially be struck by customers during Blitz Days. Each store manager is responsible for creating his or her store's safety plan for the holiday season, including Blitz Day. The plan must be established before the holiday season. The plan can be developed together with the market asset protection manager, but the store manager has the ultimate responsibility for the plan. (Pp. 61-64, 70-72, 91-96, 107-09, 130-32, 158).

The Market 45 Action Plan was not the safety plan for the Store. However, the "holiday play book" for Blitz Day 2008, which was developed by corporate headquarters and was distributed to the individual stores, stated that stores should provide maps to customers to facilitate finding products and that announcements should be made during

the sales hours for customers to be aware of safety. The playbook also stated that managers should consider talking to customers before the store opened to advise them of merchandise location and to also advise them to not throw merchandise, to not run, and to maintain a safe environment. Each store was further directed to develop and have in place for Blitz Day 2008 an action plan for crowd control and customer safety. The plan was to address slips, trips and falls that could lead to injuries. The plan was to also address controlling customer traffic. Ms. Mullens stated that “good traffic control measures would contribute to the reduction of slips, trips and falls in that it would try to control the flow or movement of the crowd or individual customers so as to prevent or mitigate their potential for falling or slipping or tripping.” (Pg. 159-62, 171-76).

Ms. Mullens discussed Wal-Mart’s sale of a Harry Potter book in its stores, including the Store, in July 2008. This was a nationwide event and large crowds were expected. A similar sale was held in 2007. For the 2008 event, Wal-Mart developed a “Harry Potter Book Release Playbook” that it distributed to all participating stores. The stores were to open at 12:01 a.m., and colored bracelets were to be handed out to customers waiting in line to ensure they would be able to buy a book; customers were required to get their bracelets at a sign-up table before they were allowed to get in line. The playbook also set out “best practices for crowd control,” which Ms. Mullens described as “an additional level of customer service, a sense of order and help [to establish] a smoother flow of traffic.” The playbook suggested opening one door initially and stationing management at the front of the store. Once the initial traffic subsided, all doors could be opened. Management was to spend time outside talking to the crowd and answering their questions. The critical time was right before the first door was opened, since customers had been waiting in line and would be excited about purchasing the book. Customers were to be organized in single file or no more than two abreast, which would present a sense of structure and order as customers approached the front of the store. It was also important to “meter” customers into the store, that is, to allow only two people at a time to enter the store, to maintain a smooth flow of traffic, and to encourage customers not to run. Like the other Wal-Mart stores, the Store received the playbook.

Ms. Mullens was not aware of wristbands being used at other sales events. (Pp. 185-200, 203-04, 208-09).

Ms. Mullens testified that Wal-Mart employees were trained in preventing slips, trips and falls. Before the 2008 blitz event, however, they were not trained in how to restore order when a crowd has become unruly or how to prevent such an occurrence in the first place. All Wal-Mart employees were trained in crowd management and control before the 2009 blitz event. Specific crowd training was provided to the stores in New York State under a settlement agreement between Wal-Mart and Nassau County.¹⁸ All of Wal-Mart's other stores were given similar event management training. The training was held by asset protection personnel and third-party safety experts, and it was geared to the level of employee participation in blitz events. Managers, for example, received more comprehensive training than lower-level employees. All employees involved in Blitz Day events, however, received training prior to Blitz Day 2009. (Pp. 223-32, 242-43).

Wal-Mart developed an event management plan that all of its outlet stores, including those in New York State, were to follow, starting with the 2009 blitz event. The training to be done depended upon the category of each store. "Tier One" stores required the most comprehensive crowd management in terms of equipment and staffing. "Tier Three" stores, on the other hand, were low-volume stores that did not require the same degree of crowd management as the "Tier One" stores. A "Tier One" store was one where "death or serious injury related to crowd management occurred in any of the three most recent yearly events" or where crowd density was above a certain level; crowd density is determined by transactions per square foot. The Store has been designated a "Tier One" store. All stores are required to follow the instructions set out in the event management plan. (Pp. 243, 249, 252-54, 260). *See also* Secretary's Exhibit 74.

The plan allows stores to have a "hard opening," that is, the store opens at 5:00 a.m., or a "soft opening," where it remains open for 24 hours prior to the blitz event. "Tier One" stores are required to erect podiums outside (for employees to communicate

¹⁸ Under the agreement with Nassau County, Wal-Mart hired independent third-party experts in crowd management to develop its training plan. (Pp. 227-32).

with customers) and to have in place steel or concrete barricades to maintain a path of travel. The barricades are placed in a serpentine queue, such that customers are required to switch “back and forth” in the direction of travel. In addition, lines are formed inside the store for high-demand merchandise; this pertains to “Tier One” stores, like the Store, which remain open for 24 hours before the event. Ms. Mullens acknowledged that Wal-Mart is not “able to control a crowd.” She stated, however, that the techniques adopted will manage and use the environment, that is, the crowd will be managed as it enters, moves through and exits the store. Using tickets or similar procedures for customers waiting in line in the store is an option that may be used at the discretion of the store manager.¹⁹ Metering, which involves having the number of customers who enter equal the number who exit, is another technique that can be used to avoid exceeding a store’s capacity. The Store’s capacity in 2008 was 3,400 to 3,800. (Pp. 262-72, 277, 280, 284).

Deposition of Earl Sanders (Secretary’s Exhibit 150)

Mr. Sanders worked at the Store during its Blitz Day 2008 event. He had worked at the Store since September 2005, and in November 2008 he was the customer service manager. He arrived at work for Blitz Day at 4:00 a.m. He was told to stay out of the way of the crowd and to be safe. When he got to the Store, he saw a large number of customers milling around outside. The customers were not in a line. Before the doors were opened, he went into the vestibule and climbed on top of the vending machines to watch the crowd outside. Other employees were also on top of the vending machines. There was a countdown before Assistant Manager Rydell, along with others, opened the doors. The crowd quickly rushed in, and Mr. Sanders saw the doors come off their hinges. He also saw broken glass. As the crowd rushed in, it made a lot of noise. The customers were pushing against the vending machines, and he was concerned they would be pushed over. He climbed down and made his way into the Store through the exit doors, and he stood at a place where he could see into the vestibule. He saw an employee fall to the floor. A woman who appeared pregnant had fallen as well, and employees were attempting to help her. Several other customers had fallen, and employees were also

¹⁹ The Store used such procedures for large items for its 2009 blitz event. (Pp. 277).

assisting them. Mr. Sanders was taking videos of what he saw with his cell phone. At some point he got back up on the vending machines to continue videotaping what was happening. (Pp. 10, 21-22, 26, 35, 40, 45-46, 50-53, 57-63, 70, 80).

When the employee fell to the floor, Mr. Sanders observed that one of the doors was on top of him. Customers coming into the vestibule were trampling over him and all of the glass had broken away from the doorframe. Employees attempted, without success, to move customers away from the fallen employee. The police arrived, and they were able to move people away from the fallen employee. The Store was closed at that point, but it reopened later in the day. (Pp. 14-19, 68).

Deposition of Dennis Smokes (Secretary's Exhibit 151)

Mr. Smokes has worked for Wal-Mart since April 2005. He worked during the Store's blitz events for the years 2006 through 2009. For the 2006 event, he reported for work at 4:00 a.m. He saw a long line of customers waiting to get into the Store; however, he was working in the receiving area that day, and he did not observe the crowd as it entered the Store. He arrived at work for Blitz Day 2007 at 4:00 a.m. He again observed a large crowd waiting to enter the Store. He went to the vestibule area to watch the events when the doors were opened. Mr. Smokes and other employees were in the vestibule for about an hour before the doors were opened. The employees were instructed to stay out of the way of the customers. Vending machines had been placed in the middle of the vestibule to prevent customers from entering the Store through the exit doors. After a countdown by employees, the doors were opened and customers rushed in. Too many people were trying to get in, and the doors were knocked off their hinges. The customers were running and pushing to get into the Store, and some were falling. He and other employees helped the customers to their feet as quickly as possible because of the other customers who were rushing in. Employees were engaged in helping customers who had fallen for about ten minutes after the doors were opened. The broken doors were removed by employees and taken to the back of the Store. (Pp. 14, 27, 30-37, 42-48).

Mr. Smokes attended a meeting held by the Store's manager before the 2008 blitz event. The manager stated that a large crowd was expected and he was concerned that everyone be safe. The discussion included providing customers with Store maps; this,

however, did not transpire. Employees who were assigned to open the doors were instructed to move out of the way of the customers. There was also a general discussion about the doors coming off their hinges during previous Blitz Days. Mr. Smokes did not recall if management made any recommendation in this regard, other than a statement that efforts be made to “try not to have them come down again.” (Pp. 60-64).

Mr. Smokes arrived at work at 4:00 a.m. for the 2008 blitz event. A large crowd was already assembled outside the front doors. Around 4:20 a.m., he went to the vestibule to observe the crowd and to be helpful when the doors opened. He anticipated that customers would fall, and he wanted to help them. The Store manager held a brief meeting with employees in the vestibule shortly before the doors were opened. He told the employees to “be safe” and to have a good day. Mr. Smokes knew that he had to get out of the way of the crowd when the doors were opened to avoid being run over. Minutes before the doors were to open, he and other employees noticed a woman who seemed to be pregnant pressed up against the door by the crowd. The door was opened to let her in. Mr. Smokes had been concerned that she “could have been hurt really bad out there.” The doors were closed after the woman was allowed in, after which the employees engaged in the traditional countdown that preceded opening the doors. (Pp. 67-79).

Before the doors could be completely opened, the crowd began to rush in. The crowd forced its way into the vestibule and knocked the doors off their hinges. Mr. Smokes heard glass crashing, and metal broke off the doors. The breaking of the doors in 2008 sounded the same as in 2007. Employees in the vestibule caught one of the doors as it fell and placed it to one side. The vestibule filled quickly with customers, and some of them became jammed at the door leading into the Store. The situation was made worse by the customers continuing to come into the vestibule. He attempted to help customers who had fallen, but he was concerned that he would be knocked down. Finally, Mr. Smokes made his way into the Store from the vestibule. The crowd in the vestibule was “shoulder to shoulder,” and it took him about 15 minutes to get into the Store because the crowd was so unruly. He felt very hot and very weak during this time. He was leaning on people as he made his way into the Store, and customers were pushing against him. He remembered thinking: “Do not fall.” He was concerned that if he fell, no one would help

him up. Getting into the Store left him exhausted because of the large crowd and the heavy clothing he was wearing. He sat down for about 15 minutes just to revive himself. He left for the day at around 10:30 a.m. (Pp. 85-95, 98, 105-11).

Mr. Smokes was at the Store during the 2009 blitz event. He had received crowd management and control training before the event. The doors of the Store stayed open all night, which allowed customers to enter the Store rather than waiting in line outside. Customers formed lines inside the Store for some items. Tickets were given out to customers waiting in line for particular items, and when all tickets for that item had been given out, the balloon designating that particular sale item was removed. This was to inform customers that that sale item was no longer available. (Pp. 118-24).

Deposition of Prakash Steve Sooknanan (Secretary's Exhibit 152)

Mr. Sooknanan began working for Wal-Mart in January of 1993 as a cart retriever/cashier at another store location. After being in that position for two years, he became a customer service manager, and, after two more years, he became a district loss prevention supervisor. He next became a "co-manager in training" and then became a co-manager. In December 2005, he became manager of the Store. He stayed in that position until February 2010. At the time of his deposition, he was market manager for eight stores in Connecticut. Before November of 2008, neither he nor any other employees in the Store were trained in crowd control or management. (Pp. 12-37, 40-43).

The Store opened in 2003. Mr. Sooknanan knew that from 2003 to 2006, the only crowd control measures at the Store for blitz events were to use shopping carts as a barricade to control the line of customers and to pass out hot chocolate. The shopping carts were lined up along the sidewalk from the entrance for about 50 feet. Mr. Sooknanan did not work at the Store during the 2004 event, but he knew of the crowd control measures used for that event. He also knew the doors were knocked off their hinges during the 2005 event. The use of shopping carts as a barrier became a problem in 2006, since customers needed the carts inside the Store. Customers were going in and out of the Store looking for carts. (Pp. 63, 69-70, 75-76, 103).

Mr. Sooknanan was the Store manager during the 2006 blitz event. The items on sale were sold on a first-come, first-served basis. Customers were not assured of being

able to buy an item at the sale price, as only a limited number were available at that price, and customers were not entitled to a “rain check” to buy the item at the sale price at a later time. The Store contacted the police to inform them of the 2006 event, as a large crowd was anticipated. The police advised that they would be present at the mall “at large” rather than only at the Wal-Mart event. Mr. Sooknanan’s intent was for the police to maintain order while customers waited in line rather than to ensure orderly entry into the Store. Cones were put in place outside the Store to designate where the line of customers should form. Mr. Sooknanan directed Store maps to be given to customers during the blitz event for either 2006 or 2007. He discontinued the practice because the maps were discarded on the floor, causing a tripping hazard.²⁰ He recalled that the map contained a request that customers refrain from running as they entered the store to avoid injuring fellow shoppers and employees. (Pp. 96-100, 103-05).

For the 2006 event, Mr. Sooknanan directed employees to stay out of the way of customers as they entered the Store; however, employees were also directed to assist customers if they fell. Mr. Sooknanan knew the doors had been knocked off their hinges in the 2005 event, and he wanted to prevent that from happening in 2006. He ordered that vending machines be put in the vestibule to separate the entrance from the exit, to prevent customers from entering the Store through the exit doors, and to prevent confusion in the vestibule. He did not arrange for off-duty police officers to be present. (Pp. 105-11).

Mr. Sooknanan arrived at the Store about an hour before the doors were scheduled to be opened for the 2006 event. Customers were lined up outside the entrance at that time. He instructed employees to stand to the side when the customers entered the Store and to help the customers if they slipped or fell. Customers ran into the Store when the doors opened, but he did not recall customers pushing or falling. The doors opened easily and did not come off their hinges during the 2006 event. (Pp. 112-17).

The crowd control measures used in 2006 were also used in the 2007 event, except that shopping carts were not utilized to designate the customer line. The police

²⁰ Employees were assigned to the Store entrance to pick up debris and other items that could cause slips, trips and falls during the 2006 event. (Pp. 97).

were again notified of the event, but they were not required to be at the Store when the doors were opened. Employees were told to walk along the line of customers and inform them of the merchandise on sale. Mr. Sooknanan stated he preferred to have a police presence because he always had an “issue” with the lines outside becoming disorderly. His expectation for the 2007 event was that the police would be present within the mall area in case of emergencies; however, he did not expect them to be present when the doors were opened. (Pp. 119-26).

Mr. Sooknanan created a written blitz plan for the 2007 event. The bullet points for the plan were developed by corporate headquarters. The plan established assigned locations for certain employees, and shopping carts were to be prepared for the “customer rush.” Mr. Sooknanan arrived at the Store one hour before the 5:00 a.m. opening. He told employees to stand aside when the doors were opened. Several employees were assigned to work in the vestibule to assist customers who fell. As in prior years, vending machines were used to bisect the vestibule. When the doors were opened, customers rushed into the Store. The rush of customers made Mr. Sooknanan uncomfortable, as they bunched up at the front doors. Customers were running into the Store from the vestibule, and customers outside the vestibule put pressure on the doors and pushed them off their hinges. He recalled a glass panel over a door being broken during the 2007 event.²¹ The line of people waiting outside for the 2007 event was gone about 45 minutes after the doors opened. (Pp. 121, 131-33, 136-43, 147, 220-22, 159, 236).

Mr. Sooknanan testified that the highest sales amount for a Wal-Mart store for the 2007 event was 1.2 million dollars. He stated that it was anticipated that 1.4 million dollars in total sales would be made at the Store during the 2008 event. He also stated that the Store was in the top five percent in total sales for blitz events nationwide and that he

²¹ Mr. Sooknanan’s deposition testimony indicated a remarkable lack of memory for the relevant events that occurred during the 2007 event, particularly as to what occurred when the doors were opened. He was in a location that allowed him to testify about some events, but he did not recall certain events that other employees related that were adverse to Wal-Mart’s defense. To the extent that his testimony conflicted with that of other employee testimony, I credit the latter.

pushed his employees to achieve the highest number of sales for the 2008 event. Before that event, Mr. Sooknanan held a meeting with all department managers to ensure that each department had identified the items for sale in their department. Mr. Sooknanan noted that Blitz Days have the largest price cuts for a limited number of items; the items for sale at reduced prices are located throughout the store. (Pp. 188-90; 195-201).

For the 2008 event, Mr. Sooknanan decided to use barricades to control the line of customers outside due to concerns expressed to him by Justin Rice, that is, that the crowd for the 2007 event was unruly and cones were not adequate to keep customers in line. There were also concerns about the crowd pushing at the doors during the 2007 event. Thus, in preparation for Blitz Day 2008, Mr. Sooknanan instructed employees to construct a barricade 40 feet from the front doors, and in an “L” shape, to keep customers from pressing up against the doors before the Store opened. He also instructed employees to open the doors at 3:00 a.m. in an effort to avoid their rushing into the Store at 5:00 a.m. It was his belief that too many customers were at the doors during previous Blitz Days; this made opening the doors difficult, and he believed the barricade would solve the problem. The plan was to have the barricade removed when the doors were opened at 5:00 a.m. The employees were instructed to encourage the customers to remain calm and to walk into the Store. Employees were also to assist customers if they fell and to pick up their personal effects. (Pp. 159-60, 164-68, 203-05, 238, 242)

Mr. Sooknanan left the store at 11:00 p.m. on November 27, 2008. At around 3:00 a.m. the next day, the Store’s assistant manager telephoned Mr. Sooknanan to tell him that customers had jumped over the barricade and were up against the doors. The assistant manager sounded frightened, and he was afraid to open the doors at 3:00 a.m. because he believed that customers would rush into the Store. Mr. Sooknanan telephoned Julius Blair, who confirmed that customers had breached the barricade and had become unruly. Mr. Sooknanan told Mr. Blair to contact the police, and he believed, by 3:30 a.m., that the crowd was under control. He also had a telephone conversation with Mr. D’Amico around 4:00 a.m. Mr. D’Amico stated that he was going outside with the crowd to help restore order. (Pp. 244-47).

Mr. Sooknanan arrived at the Store at about 4:00 a.m. He noted that the line of customers extended beyond the Store property line. He entered the Store and held a meeting around 4:15 a.m. with a group of employees. He told them to stay out of the way of the customers when they entered the Store but to assist them if they slipped, tripped or fell. Mr. D'Amico advised him after the meeting the barricade had been "compromised" and the line of customers was "out of control" and becoming aggressive. Mr. Sooknanan then personally observed that some employees had moved the crowd back from the doors, but he could not see how far from the doors the crowd was at that time. He did not recall Mr. D'Amico recommending to him that the doors not be opened at 5:00 a.m.²² It was his intent that the employees standing between the doors and the customers would step to the side at 5:00 a.m. and the customers would proceed into the store. At about 4:45 a.m., Mr. D'Amico told him it was not safe for the employees to be outside with the crowd. Mr. Sooknanan ordered the employees to come inside, and the customers pressed up against the doors. Mr. Sooknanan then had a brief meeting with Mr. D'Amico. They devised a plan for a few employees to return outside and wedge themselves between the doors and the crowd. At around 4:50 a.m., the employees went outside and attempted to push the crowd back without success. Mr. Blair was one of those trying to move the crowd back. Mr. D'Amico told Mr. Sooknanan at about 4:55 a.m. that the plan did not work. Mr. Sooknanan considered not opening the doors at 5:00 a.m., as the customers were up against the doors and he did not see an easy way to open them. He noticed that the doors and the glass wall of the vestibule were shaking. He said that "if I didn't open the building ... the glass was going to come down and cause serious damage to people." Several employees in the vestibule helped to open the doors. The doors to the Store from the vestibule were opened first, and the outside doors were opened at 5:00 a.m. Mr. Sooknanan assisted a woman customer to the service desk when the doors were opened. He did not observe any pushing at that time. When he returned to the front of the Store, he saw customers running, pushing and falling in the vestibule. He saw some customers

²² Mr. D'Amico testified that he advised Mr. Sooknanan to refrain from opening the doors until the police arrived. I credit Mr. D'Amico's testimony in this regard.

on the floor of the vestibule, and, as more customers rushed in, he observed falling customers at the Store's entryway. He was aware that several employees were injured during the 2008 blitz event. One employee was injured when he fell to the floor in the vestibule and was trampled by customers. (Pp. 249-82, 291, 314, 315).

For the 2009 blitz event, the Store opened at 7:00 a.m. on Thanksgiving Day and stayed open until 10:00 p.m. the next day. Customers waited in lines inside the Store rather than outside. Tickets were given to customers for the limited items for sale in each department, and an employee told customers when a sale item was sold out. Barricades were set up in a zig-zag fashion outside the Store. Employees were stationed on elevated platforms to inform customers of sale items and the quantities available. (Pp. 297-301).

Prakash Steve Sooknanan²³

Mr. Sooknanan also testified at the hearing. That testimony largely replicated his deposition testimony, set out *supra*. His further testimony at the hearing established that he had worked for Wal-Mart for 18 years in various positions. It also established that he had never before seen a crowd like that at the Store on Blitz Day 2008 in all his years with Wal-Mart. He estimated that 600 to 800 customers were in line before the Store opened for the 2007 event. It had been anticipated that there would be a 12 to 14 percent increase in customers for the 2008 event. (Tr. 988, 997).

Casey Choust

Mr. Choust is executive vice-president of retail operations of the Retail Industry Leaders Association ("RILA").²⁴ The RILA is a national association for retailers. Its membership includes stores such as Target, Best Buy, Wal-Mart and Safeway. Mr. Choust oversees the work-safe committee within RILA, and he managed the committee from 2007 to 2009. The committee consists of the top safety executives within the retail industry. The committee members meet in person or by telephone once a month to

²³ Wal-Mart called two witnesses in its case-in-chief. The first was Mr. Sooknanan. The second was Mr. Choust, whose testimony is set out *infra*.

²⁴ Mr. Choust did not appear as an expert witness, and he is not employed by the National Retail Federation, another national organization representing retailers.

discuss safety matters in the industry, such as ergonomics, material handling, protective clothing and employee safety. Before November 2008, the committee did not discuss safety hazards created by crowds to which employees were exposed. In particular, the committee did not discuss safety issues caused by crowds during Black Friday or similar events. Wal-Mart is a premier member of the RILA by virtue of its annual membership fee of \$250,000.00. The RILA engages in lobbying activities, and a Wal-Mart representative is a member of its board of directors. (Tr. 1129-36).

Discussion

In any action brought under the Act, the Secretary's burden is to establish the alleged violation by a preponderance of the evidence. That term is defined as "the quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by the proponent are more probably true than false." *Ultimate Distrib. Sys.*, 10 BNA OSHA 1568 (No. 79-1269, 1982). Further, reasonable presumptions and inferences may be drawn based upon the record evidence *See* FRE 301; *American Iron & Steel Inst. v. OSHA*, 557 F.2d 825, 831 (3rd Cir. 1978); *Republic Steel Corp. v. OSHA*, 448 U.S. 917 (1980).²⁵ The Secretary cited section 5(a)(1) of the Act in this matter. Section 5(a)(1) mandates that each employer "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)). This section of the Act has been described as a "catchall provision" designed to redress hazardous conditions not covered by a specific standard. *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1196 (1997). In *UAW v. General Dynamics*, 815 F.2d 1570, 1577 (D.C. Cir. 1987), the D.C. Circuit Court of Appeals stated as follows:

If an employer knows a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which employees are exposed,

²⁵ Presumption is a rule of law that requires the existence of a presumed fact be taken as established when underlying facts are established. An inference is a conclusion as to the existence of a particular fact reached by considering other facts in the usual course of human understanding. *Graham, Fed. Rules of Evid. in a Nutshell*, 401.6, 301.7 (1996).

he has a duty under section 5 (a)(1) to take whatever measures may be required by the Act, over and above those mandated by the safety standard, to safeguard his workers.

The courts and the Commission have developed a four-part test to determine whether a violation of the general duty clause has occurred. The test elements are: (1) does a condition or activity in the workplace present a hazard to an employee; (2) is the condition or activity recognized as a hazard; (3) is the hazard causing or likely to cause death or serious physical harm to employees; and (4) does a feasible means exist to eliminate or materially reduce the hazard. *Wiley Organics, Inc. v. OSHRC*, 124 F.3d 201 (6th Cir. 1997); *Beverly Enter., Inc.*, 19 BNA OSHC 1161, 1168 (No. 91-3144 *et seq.*, 2000). The Secretary must define the alleged recognized hazard in a manner that gives fair notice to the employer of its obligation under the Act. However, as the Commission held in *Beverly Enter., supra*, deficiencies in the original description of the hazard in the citation and complaint may be cured in the course of litigation. 19 BNA OSHC at 1169.

The first issue to determine is whether a “hazard” existed at the Store on or about November 28, 2008, as alleged. A hazard may exist in a workplace even though no accident or injury has actually occurred. *Titanium Metals Corp. v. Usery*, 579 F.2d 536, 542 (9th Cir. 1978). Further, “the existence of a hazard is established if the hazard can occur under other than a freakish or utterly implausible concurrence of circumstances.” *Walden Healthcare Center*, 16 OSHC 1052. 1060 (Nos. 89-2084 & 89-3097, 1993). The Commission has held that “the precise contours of a significant risk analysis under section 5 (a)(1)” have not been established. *Beverly Enter., supra*, at 1170. Also, a showing of a specific threshold at which there is a significant risk of injury is not essential to establishing a violation of section 5(a)(1). *See Titanium Metals, supra*.

The Secretary asserts that Wal-Mart’s employees were exposed to the “hazards of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling,” as alleged in the amended citation and complaint. The facts in the record support a finding that the cited hazard existed at the Store. The facts show that Respondent, through advertising on an annual basis beginning in 2004, caused a large congregation of shoppers to appear at the Store for the annual blitz event. The shoppers would begin lining up in front of the Store by midnight or earlier in order to enter the Store at 5:00

a.m. for the purpose of purchasing coveted goods at deeply discounted prices for friends, family and themselves. Selected popular items in each department were offered in limited numbers for the limited time of 5:00 a.m. to 11:00 a.m. on that day only. The record shows that Blitz Day is Wal-Mart's largest sales event of the year.

Wal-Mart's advertising created a strong sense of competition among shoppers for the limited sales items. The sale merchandise was offered on a first-come, first-served basis, and no one was assured of being able to get the desired item. It is reasonable to infer that this sense of competition was greatest for the shopper who intended to purchase sale items in more than one department. Time and speed, therefore, would be of the essence for those shoppers. The competitive nature of such circumstances is accentuated by the fact that the Store is generally within the top ten of Wal-Mart's outlets in the entire country for sales made during Blitz Day. As Mr. Sooknanan's testimony indicated, the 2008 event was an opportunity for the Store to become the number one outlet in sales nationally for the event, and his preplanning was designed to achieve that goal.

People began waiting in line for the 2008 event at the Store at 5:00 p.m. the day before. By 3:00 a.m. the crowd was large and had become so unruly that the assistant manager became frightened. He refused to open the doors at 3:00 a.m., as Mr. Sooknanan had directed. The police were called on several occasions and either could not or would not control the crowd. Altercations were observed among customers. In addition, while plastic barricades had been put in place to keep the customers 40 feet from the front entryway of the Store, the crowd had breached the barricades and was pressed up against the front doors. As the 5:00 a.m. opening time approached, customers waiting in cars left their cars and attempted to cut into the front of the line. The crowd at that time consisted of approximately 1,000 customers, many of whom were pushing in an attempt to get closer to the head of the line. The customers at that point were out of control.

Moments before opening the doors, the Store's management became concerned about the crowd and whether the doors could be opened. About ten employees were

assigned to the vestibule to assist in opening the doors.²⁶ The employees were told to assist customers who fell upon entering the vestibule and to help them pick up their personal items. They were also told to stand to the side as the customers rushed in and to “be safe.” Vending machines had been placed in the vestibule, which resulted in the vestibule area being bisected. It also resulted in a smaller space for the customers to be in before they actually entered the Store itself. Put another way, a large number of people would be squeezed into a small entry area once the doors were opened.

The crowd continued to push against the glass doors and the glass walls began to shake. The Store manager was concerned that the walls would fall, and he ordered the doors to be opened as scheduled at 5:00 a.m. The frenzied crowd stampeded into the vestibule as the doors were 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. 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.

The record also shows that the employees who attempted to move the crowd away from the outside of the vestibule doors shortly before 5:00 a.m. were exposed to being struck by customers who were pressing against the doors. The attempt to move the customers away from the doors was unsuccessful. It nonetheless exposed the employees

²⁶ The vestibule is an enclosed area that customers must enter first to reach the front doors of the Store. The vestibule has a two-door entry and a two-door exit. The doors and walls of the vestibule are glass. The front doors into the Store itself are glass as well.

who were engaged in the attempt to being crushed and/or trampled by the uncontrolled crowd.²⁷ Accordingly, the Secretary has established by a preponderance of the evidence the first element of a section 5(a)(1) violation.

The second element requiring analysis is whether Wal-Mart or the retail industry recognized the hazard to which employees were exposed. The Secretary, in her opening statement and post-hearing filings, acknowledges that she is not relying upon industry recognition to establish this element. Rather, since Wal-Mart had delegated preparations for its Blitz Day events to the individual store managers, the Secretary is relying upon the actual knowledge of the Store's management to satisfy the recognition element. *See Brennan v. OSHRC*, 494 F.2d 460 (8th Cir. 1974). There, the Eighth Circuit held that actual knowledge of a hazard by an employer is sufficient to establish a violation. Also, where an employer is shown to have actual knowledge that a practice is hazardous, the issue of fair notice does not exist. *UAW v. General Dynamics*, 815 F.2d 1570 (D.C. Cir. 1987); *Pratt & Whitney v. Secretary of Labor*, 649 F.2d 96 (2nd Cir. 1981).

Actual knowledge of a hazard may be gained by means of 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 (8th Cir. 1981). A supervisor's actual knowledge of a hazard is imputed to the employer. *Caterpillar, Inc. v. OSHRC*, 122 F.2d 437 (7th Cir. 1997). *See also W.G. Fairfield Co.*, 285 F.3d 499 (6th Cir. 2002); *Georgia Elec. Co. v. Marshall*, 595 F.2d 309 (5th Cir. 1979); *Titanium Metals Corp. v. Usery*, 579 F.2d 536 (9th Cir. 1978); *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993 (No. 89-0265, 1997); *Anoplate Corp.*, 12 BNA OSHC 1678 (No. 80-4109, 1986). Evidence of an employer's voluntary safety efforts may be used to demonstrate actual knowledge of the hazard. *See Pepperidge Farm, supra*. An employer's knowledge that a condition is hazardous does not depend upon the occurrence of prior accidents. *See St. Joe Minerals, supra*. The obvious and glaring nature of a hazard may be sufficient for showing employer recognition. *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317 (5th

²⁷ There is no evidence that employees stationed within the Store were exposed to a hazard once the crowd of customers actually reached the inside of the Store.

Cir. 1984). A hazard is not unforeseeable simply because an accident or injury has not occurred before. *Arcadian Corp.*, 20 BNA OSHC 2001 (No. 93-0628, 2004).

The evidence of record establishes that crowd-related incidents occurred during Blitz Day events at the Store for the years 2005 to 2007. Mr. D'Amico and Mr. Calhoun testified that a large crowd of customers had gathered outside the doors before the doors were opened for the 2005 event. Mr. Calhoun described the crowd as a "bum's rush" as they pushed and rushed into the vestibule. The doors to the vestibule were knocked off their hinges as customers pushed their way into the Store. Store Manager Sooknanan was aware that the doors had been knocked off their hinges by the crowd and that two customers reported being injured by the crowd rush. (Secretary's Exhibit 152, p. 78).

A large crowd also gathered at the Store for the 2006 event. Vending machines were put in the vestibule, bisecting the area. As the vestibule doors were opened the crowd pushed and rushed into the Store. Once again, the vestibule doors were knocked off their hinges by the incoming crowd. One of the doors was put to the side to "make sure it didn't fall on somebody." (Tr. 910). Mr. Sooknanan assigned employees to the vestibule to help customers who fell when entering the area. He so assigned them because he knew, based on prior experience, that some customers would fall when the initial surge of the crowd entered the vestibule. He also instructed those employees to stand to the side as the customers entered and to "be safe." In giving those instructions, Mr. Sooknanan recognized that employees could be injured if they remained in the path of the rushing crowd. However, by also telling employees to help fallen customers to their feet, he was directing them to go into the zone of danger to accomplish that task.

For the 2007 event, a large crowd once again formed outside the vestibule doors in anticipation of opening. This time, the crowd was larger and more unruly than in past years. Customers were pressed against the front doors, and, as the doors were opened, the crowd rushed into the vestibule and knocked the doors off their hinges. Glass panels above the doors shattered, and glass shards fell on customers and employees. Mr. Sooknanan again stationed employees in the vestibule and instructed them to stand to the side in order to be safe as the crowd rushed in. As before, however, those employees were directed to assist customers who fell as they entered the vestibule. Before the doors

were opened at 5:00 a.m., employees were directed to go outside and move the customers away from the front doors. Customers were pressed against the doors and putting pressure on the glass walls. The crowd was unruly and would not comply with the employees' requests to move back. 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. Employees were also exposed to being struck by falling doors and broken glass. Mr. Rice's hand was lacerated when it was struck by falling glass. Mr. Sooknanan was present at the time and observed the hazards to which his employees were exposed.

Mr. Sooknanan believed that keeping the customers away from the front doors for the 2008 event would solve the problem of customers rushing into the vestibule when the doors were opened. He also believed this would keep the crowd from pushing the doors down. To accomplish this goal, Mr. Sooknanan directed plastic barricades to be placed 40 feet from the front doors and along the sidewalk where the customers were to form a line. As in prior years, vending machines bisected the vestibule, which created a smaller area for customers as they rushed into the Store. Mr. Sooknanan also stationed a large number of employees in the vestibule to open the doors and assist customers who fell.

For reasons that are not clear from the record, Mr. Sooknanan told the assistant manager to open the vestibule doors at 3:00 a.m. while he (Mr. Sooknanan) was away from the Store. The assistant manager phoned Mr. Sooknanan at 3:00 a.m. and informed him that the crowd outside was out of control and that he was afraid to open the doors. Mr. Sooknanan then phoned another employee at the Store, who verified that the crowd was out of control. At this point, based on his experience with prior Blitz Days, Mr. Sooknanan was on notice that employees stationed in the vestibule to open the doors and assist customers would be exposed to injury if the doors were opened. Mr. Sooknanan arrived at the store at 4:00 a.m. About 4:45 a.m., he and Mr. D'Amico agreed to a plan to move the crowd away from the front doors. The effort failed. Despite the experiences of previous years, the Store had not developed any plans in advance of what should have been anticipated, that is, the uncontrolled entry of a large and unruly crowd into the Store when the front doors were opened. Further, there was no guidance from the corporate

office in regard to handling such situations. Mr. Sooknanan and the other management staff at the Store consequently had no reliable methods available to them to prevent what happened when the doors were opened. Mr. D'Amico called the police minutes before the scheduled opening time and requested their assistance. By 5:00 a.m. the police had not arrived, and Mr. D'Amico advised Mr. Sooknanan to not open the doors until the police were present. Mr. Sooknanan nonetheless ordered the doors to be opened as scheduled, and, as graphically depicted in the videos received in evidence, a stampede of frenzied customers pushed, ran and jostled their way into the vestibule.²⁸ 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. Mr. Sooknanan's knowledge is imputable to Wal-Mart. *See Caterpillar, supra*. The Secretary has shown, by a preponderance of the evidence, the "recognized hazard" element.

As to the third element, the Secretary must demonstrate that the hazard caused or was likely to cause death or serious physical harm to employees. The Secretary is not required to show that an accident was likely, "but rather that if an accident were to occur, death or serious physical harm would be the likely result." *See Beverly Enter., supra*, at 1188. In this case, 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. It 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. Employees were also exposed to being struck by falling doors and broken glass, which could also result in serious injury or death.²⁹ The Secretary, therefore, has shown the third element of the analysis by a preponderance of the evidence.

²⁸ *See* Secretary's Exhibits 25-33, 143.

²⁹ There is evidence that a door fell on an employee who was stationed in the vestibule for the 2008 event. He was then stepped on and trampled on by customers who were

The fourth element of the analysis is whether feasible means exist to eliminate or materially reduce the hazard. *See Wiley Organics, supra; Beverly Enter., supra.* To satisfy this element, the Secretary must establish by a preponderance of the evidence that an abatement method will significantly reduce the hazard; the hazard need not be completely eliminated. *Pratt & Whitney Aircraft*, 8 BNA OSHC 1329 (No. 13591, 1980). Feasibility has been defined as economically and technologically capable of being done. *Basoid Div. v. OSHRC*, 660 F.2d 439, 447 (10th Cir. 1981). A determination of whether a method of abatement is feasible may be accomplished by reference to the employer's own methods of abatement. *See St. Joe Minerals, supra*, 647 F.2d at 844. The methods of abatement adopted by an employer after an event may be better calculated to eliminate the recognized hazard than the methods chosen by the employer before the event. *Id.* *See also Armstrong Steel Erectors, Inc.*, 18 BNA OSHC 1630, 1632 (No. 97-0250, 1997). The Commission, moreover, has held that where a single abatement measure is insufficient to eliminate or substantially reduce the hazard, an employer may be required to institute a combination of actions to achieve abatement of the hazard. *See Pepperidge Farm, supra.*

As found above, the hazard in this case was the congregation of a large crowd of customers who were highly motivated to enter the Store at a specific time to compete with one other to obtain one or more of a limited supply of deeply discounted popular items. Many of the customers had waited in line for many hours to secure a preferred spot near the front of the line. Customers who left their cars shortly before the opening time and then attempted to push their way to the front of the line exacerbated the situation. When the doors were opened, hundreds of people tried to force themselves into a small space that was not designed to accept the entry of such a large group of people. The crowd forcing themselves into the front doors and into the vestibule caused damage to the building and potential injuries to employees who were assigned to assist customers.

rushing into the vestibule. Other employees tried to help him, without success. Shortly after the incident, the employee was pronounced dead. However, there is no evidence that his death was caused by being struck by the door or being stepped on or trampled on.

In presenting their respective cases, both parties concentrated on whether it was feasible to control the crowd that was waiting to enter the Store. However, the abatement measures Wal-Mart adopted pursuant to its settlement agreement with Nassau County virtually eliminated the situation that had occurred in 2008. For the 2009 blitz event, the Store stayed open for 24 hours prior to the beginning of the 5:00 a.m. sales event. The Store remaining open in this manner avoided a large and unruly crowd congregating outside and then rushing into the Store, as occurred in 2008. Order was further maintained during the 2009 event by having customers form individual lines inside the Store in order to buy particular sale items in particular departments after 5:00 a.m. The customers in these lines received tickets or tags that ensured they would be able to purchase the sale items, which were limited in number. Once all of the tickets or tags were given out for a particular item, the balloon designating the sale for that item was removed and customers were informed that no more of those items were available. Another measure used was putting steel barricades in place, in a “serpentine” configuration, outside the Store. This measure assisted in the orderly entrance of customers into the Store.

The procedures Wal-Mart adopted for the 2009 event, at the Store and at its other stores throughout the United States, eliminated the crowd crush, crowd surge and trampling hazards to which employees who worked in the vestibule of the Store during the 2008 blitz event were exposed. Thus, by its own actions, Wal-Mart has demonstrated that feasible means existed to eliminate or materially reduce the cited hazard at the Store. *See St. Joe Minerals, supra*. The Secretary has thus established, by a preponderance of the evidence, the fourth and final element of the analysis.

For the foregoing reasons, the Secretary has demonstrated that Respondent Wal-Mart violated section 5(a)(1) of the Act as set out in the amended citation and complaint.

Affirmative Defenses

Wal-Mart asserted 12 affirmative defenses in its amended answer. Wal-Mart has the burden of establishing the truth of a given defense by a preponderance of the evidence. *Capform, Inc.*, 16 BNA OSHC 2040, 2043 (No. 91-1613, 1994). Wal-Mart’s asserted affirmative defenses, and the disposition of those defenses, are as follows:

1. The complaint fails to state a claim upon which relief may be granted relief.

Denied. Respondent failed to address this affirmative defense in its post-hearing brief, and there is nothing in the record to support a conclusion that relief may not be granted by the commission. To the contrary, as set out above, the Secretary has established by a preponderance of the evidence that Wal-Mart violated Section 5(a)(1) of the Act as alleged and that feasible means to abate that violation exist.

2. Abatement of the cited conditions would result in a greater hazard to employees.

Denied. Wal-Mart has not provides any evidence to show that eliminating a waiting crowd outside the Store will result in a greater hazard to employees.

3. The citation fails to describe with particularity the nature of the violation as required by Section 9(a) of the Act.

Denied. Section 9(a) requires that the citation “describe with particularity the nature of the violation.” The purpose of this requirement is to apprise the Respondent of the alleged violation in order to abate the hazardous condition and to provide a basis for the employer to decide whether to contest the citation. *Del Monte Corp.*, 4 BNA OSHC 2035 (No. 11865, 1977). An inartfully-drawn citation may not be vacated unless it adversely affects the employer’s ability to defend against the citation. *Ringland-Johnson, Inc.*, 551 F.2d 1117, 1118 (8th Cir. 1977); *Brobham-Parker Lumber Co.*, 11 BNA OSHC 1201, 1202 (Nos. 78-0660 & 78-0661, 1983). As the record demonstrates, and upon considering the detailed and extensive pretrial discovery and preparation of Respondent, Wal-Mart’s ability to defend against the allegations in the complaint was not adversely affected in any way. In fact, the record supports a conclusion that Wal-Mart was expertly and exhaustively defended in this matter.

4. By using a citation as the initial means for announcing a new area of enforcement through use of the general duty clause, the Secretary failed to provide adequate or fair notice to Respondent of what the Act requires of employers to prevent the issuance of citations and proposed penalties.

Denied. There is ample evidence in the record that Wal-Mart had actual knowledge of the alleged hazards to employees over at least a three-year period at the

Store. Where actual knowledge of the hazardous condition is established, as in this case, the issue of fair notice does not exist. *UAW v. General Dynamics Land Sys. Div.*, 815 F.2d 1570 (D.C. Cir. 1987); *Pratt & Whitney Aircraft Div. v. Secretary of Labor*, 649 F.2d 96 (2nd Cir. 1981); *Continental Oil Co. v. OSHRC*, 630 F.3d 446 (6th Cir. 1980), *cert denied*, 450 U.S. 965 (1981); *Magma Copper Co. v. Marshall*, 608 F.2d 373 (9th Cir. 1979); *General Elec. Co.*, 10 BNA OSHc 2034 (No. 79-504, 1982); *Cape & Vineyard Div., New Bedford Gas & Elec. Light Co. v. OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975).

5. The citation is in violation of Section 4(b)(4) of the Act, as it is directed to an issue of public safety not within OSHA's jurisdiction. In addition and/or alternatively, OSHA is attempting to preempt a state police power – public safety during public events – without specific authority from congress.

Denied. As the Secretary points out, the issue in this case is employee safety and Respondent's obligation to provide for that safety while its employees are engaged in employment activities. The record in this case supports the conclusion that Wal-Mart created a hazardous condition in the Store to which its employees were exposed. Moreover, the settlement agreement between Respondent and Nassau County provided for a reasonable and effective means, without the assistance of police, of abating the hazards associated with an out-of-control crowd attempting to enter the store.

6. Abatement of the cited condition is economically and technologically infeasible.

Denied. Wal-Mart failed to provide any evidence in support of this defense.

7. In the absence of any recognition of or consensus practice to manage or control crowds in the mercantile industry, the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, requires rulemaking in lieu of a citation under section 5(a)(1).

Denied. As stated previously, Wal-Mart was engaged in a hazardous activity at the Store for a least a three-year period prior to the instant violation. Thus, with its actual knowledge of an existing hazardous condition to which its employees were exposed, the issue of fair notice of conduct required to eliminate the hazard does not exist. And, as noted *supra*, Wal-Mart and Nassau County successfully developed effective means of eliminating the hazard after the 2008 event, as shown by the 2009 event.

8. Wal-Mart took reasonable precautions to protect employees from the hazards alleged in the citation and complaint. It engaged in good faith efforts to comply with the Act, the standards issued under the Act, and guidance issued by the Secretary.

Denied. There is evidence in the record that Respondent trained its employees in the prevention of trip, slip and fall hazards to customers. Also, exposed employees were instructed to “stay out of the way” of the on-rushing crowd of customers. As the record in this case illustrates, however, these instructions were plainly inadequate to protect employees from the cited hazard. Thus, it cannot be found that Wal-Mart’s instructions were in any way intended to eliminate the hazardous condition existing in the Store.

9. Respondent engaged in good faith efforts to comply with the Act, standards issued under the Act, and guidance issued by the Secretary.

Denied. This defense appears to be duplicative of affirmative defense 8. There is no evidence in the record that Wal-Mart engaged in a good faith effort to eliminate the hazardous condition that existed at its workplace.

10. The complaint contains allegations that are barred by the six-month statute of limitations set out in section 9(c) of the Act, 29 U.S.C. § 658(c).

Denied. Wal-Mart’s arguments with respect to this defense were rejected in pre-hearing orders dated October 15, 2009 and September 1, 2009.

11. The citation is inconsistent with other enforcement actions taken by the Secretary.

Denied. Wal-Mart presented no evidence in support of this affirmative defense.

12. The general duty clause, set out Section 5(a)(1) of the Act, is unconstitutionally vague as applied to Wal-Mart.

Denied. *See Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419 (D.C. Cir. 1983), *cert denied*, 466 U.S. 937 (9184); *Donovan v. Royal Logging Co.*, 645 F.2d 822 (9th Cir. 1981); *Nat’l Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

Respondent’s asserted affirmative defenses have all been denied. Item 1 of Serious Citation 1, as amended, is accordingly AFFIRMED.

Penalty

Section 17(j) of the Act requires that due consideration be given to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, good faith, and prior history of violations. The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury and the likelihood that an injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 (No. 76-2644, 1982). In this case, as in every case, the gravity of the violation is the starting point and most important factor in penalty assessment. *See Caterpillar, Inc.*, 17 BNA OSHC 1731, 1734 (No. 93-0373, 1996). The record shows Wal-Mart exposed its employees to the hazards that were present at the Store during Blitz Day 2008 for a three-year period, that is, Blitz Days 2006, 2007 and 2008. During these events, as many as ten or more employees were exposed to the hazards of falling glass, falling broken doors, and crowd crush. Although the employees were exposed to these hazards for a period of 15 to 30 minutes after the opening of the doors, Respondent's precautions to protect its employees were minimal and ineffective. The record also supports the conclusion that employees were exposed to serious injury or death and that the probability of injury was high. Based upon these factors, the proposed penalty of \$7,000.00 is found to be appropriate. That penalty is accordingly assessed.

Findings of Fact and conclusions of Law

All findings of fact relevant and necessary to a determination of the contested issues have been made above. Federal Rules of Civil Procedure, Rule 52(a). Wal-Mart is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, and the Commission has jurisdiction of this proceeding. All proposed findings of fact and conclusions of law inconsistent with this decision are DENIED.

ORDER

1. Serious Citation1, Item 1, is AFFIRMED as a serious violation, and a penalty in the amount of \$7,000.00 is assessed.

/s/ Covette Rooney
Covette Rooney
Chief Judge

Dated:
Washington, D.C.