United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. CENTRAL SITE DEVELOPMENT, LLC, Respondent.	OSHRC Docket No. 16-0642

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DECISION AND ORDER

John B. Gatto, United State Administrative Law Judge.

I. INTRODUCTION

This case arises from a fatality on October 7, 2015, at an apartment complex construction project, the Iris at Gateway (the "Worksite"), in Saint Petersburg, Florida, where Central Site Development, LLC, ("Central Site") was engaged in site development work. The Department of Labor's Occupational Safety and Health Administration ("OSHA") investigated and issued two citations[1] to Central Site for allegedly violating the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651–678. Citation 1 charged a "serious" violation of section 5(a)(1) of

[1] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 4–2010 (75 FR 55355), as superseded in relevant part by 1–2012 (77 FR 3912). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

the Act, 29 U.S.C. § 654(a)(1), commonly known as the "general duty clause," with a proposed penalty of $6,300.00, for allegedly exposing employees to a struck-by hazard.[2] Citation 2 alleged an "other-than-serious" recordkeeping violation of 29 C.F.R. § 1904.40(a), with a proposed penalty of $400.00. After Central Site timely contested the citation, the Secretary of Labor (the "Secretary") filed a formal complaint[3] with the Commission[4] charging Central Site with violating the Act and seeking an order affirming the citations and proposed penalties. A two-day bench trial was held in Clearwater, Florida.

There is no dispute that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c), that Central Site is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that its principal place of business is in Riverview, Florida (Compl. ¶¶ I-III; Answer ¶¶ I-III). Pursuant to Commission Rule 90(a), after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings. If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so. For the reasons indicated *infra*, the Court concludes both citations must be vacated.

II. BACKGROUND

Central Site had been at the Worksite for four months at the time of the fatality on October 7, 2015, that triggered the OSHA inspection (Tr. 26). The site covered 10 acres; at the time of the fatality, the site consisted mostly of "[c]leared dirt and a construction trailer." (Tr.

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[2] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§ 666(a), (b), (c). A "serious" violation is defined in the Act; the other two degrees are not. *Id.* § 666(k).

[3] Attached to the complaint and adopted by reference were the two citations at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[4] The Commission "serves as a 'neutral arbiter' between the Secretary and cited employers." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013) (*citing Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985). Congress vested the Commission with the "adjudicatory powers typically exercised by a *court* in the agency-review context." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151, 154 (1991) (emphasis in original).

27.) It was bounded on two sides by two-lane paved roads, an office building was on a third side, and an apartment building was on the fourth. There was only one entrance for vehicular traffic to the site (Tr. 27-29, 51).

On the day of the accident, Central Site had Albert Kimball, its supervisor and one other employee, Michael Montroy, an equipment operator supplied by Construct Corps, LLC, a temporary construction staffing agency (Tr. 24-25, 29, 31, 33, 42, 63, 64-65). Central Site subcontracted the underground pipe work to RAB Foundation Repair, LLC d/b/a API Services ("API"), whose foreman, Doug Miller, and four other workers were also on site that day (Tr. 164). Tri-City, the electrical subcontractor, was also on the site with two employees (Tr. 102).

Central Site began work at 7:00 a.m. on the day of the accident (Tr. 52). Kimball oversaw coordination among the subcontractors for the project (Tr. 94-95). He held a pre-planning meeting, as he did every morning, with Central Site's employees and the supervisors for API and Tri-City (Tr. 69, 76, 201). At trial, Kimball explained how he ran the daily pre-planning meetings: "in the morning we pre-plan what we're going to do and I indicate to everybody that this is what we're going to do today, the area where we're going to be working in. I also fill out a Hazard Sheet. I usually walk the site, check to see if there's any more hazards there." (Tr. 69.)

The equipment on site that day included a bulldozer and a roller owned by Central Site, a track hoe and a loader owned by API, and at least two dump trucks bringing in dirt (Tr. 43). The bulldozer was equipped with a rearview mirror and a working backup alarm (Tr. 130, 182). The task for the day was setting up a building pad near the construction trailer, approximately 300 feet from the single-entry point to the Worksite (Tr. 51-52). Kimball instructed Montroy to operate the bulldozer to place the dirt for the building pad (Tr. 52-53). As Kimball explained the process:

> [W]hen you're building apartment foundations, you use a bulldozer. And then you have to have compaction on the dirt that you're bringing in and you want to use a roller for that . . . the bulldozer would push the dirt over, it's on a pile where it came out of the truck, flat and the roller would roll that and compact the soil, making a stable foundation.

(Tr. 41.)

Meanwhile, API was laying pipe for the project. API foreman Miller estimated API averaged "a couple hundred feet" of pipe a day on the project (Tr. 194). At some point during that afternoon, Kimball learned the backfill soil in one area where API had laid pipe failed the required density test when moisture in the backfilled dirt made it too wet to achieve the score needed to pass the density test (Tr. 110-11). Kimball "wanted API to get their production done," so he directed API's crew to move over to another location to lay pipe while he attempted to correct the soil density problem (Tr. 111). Kimball told Montroy he was going to take over operation of the bulldozer and directed Montroy to use the roller to compact the building pad or to sign the tickets acknowledging receipt of the dump truck loads as they came in (Tr. 53).

Kimball used the bulldozer to scrape drier dirt from the area around the backfill, "pushing the drier material and mixing it with the wetter material." (Tr. 113.) Kimball then operated the bulldozer in forward and reverse over the area to compact the soil. Kimball and API's crew were working "[p]robably within 50 to 100 feet, facing each other" when they started out (Tr. 156). Miller corroborated Kimball's testimony that the work area was approximately 100 feet from API's work area at the time of the accident (Tr. 165). At the closest point, Kimball and the API crew were within 20 to 30 feet of each other (Tr. 181).

After Kimball had been operating the bulldozer for 30 to 45 minutes, Miller instructed his employee, Justin Smith, to retrieve a water pump from Miller's truck parked near the silt fence that enclosed the Worksite. As Smith returned with the pump, he crossed behind the bulldozer as Kimball operated it in reverse and was struck and killed (Tr. 55, 182).

Compliance Safety and Health Officer Elvin Santiago conducted the fatality investigation following a referral from the police department (Tr. 226). He arrived at the site approximately three hours after the accident, interviewed employees, and took measurements and photographs (Tr. 226-227). On March 10, 2016, Santiago sent an email to Central Site's counsel, which stated, "[p]lease provide a copy of the 2015 OSHA 300A (4 hours response required), I have a copy that is not completed and let's set up a closing conference, it could be by phone. Thank you." (Ex. R-19 at 4.) Santiago received an automated email response back stating: "[d]elivery to these recipients or groups is complete *but no delivery notification was sent by the destination server*." (Ex. R-19 at 6) (emphasis added). Santiago called Central Site's counsel "a few days

later" and left a voice message indicating he was going to recommend the two disputed violations (Tr. 306). In response to Santiago's voice message, Central Site's counsel sent an email to Santiago on March 16, 2016, indicating he had not received the email Santiago sent on March 10, 2016 (Ex. R-19 at 7). The Secretary subsequently issued the two disputed citations based upon Santiago's recommendation.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To implement its statutory purpose, "Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013).[5] "They also have a 'special duty' to comply with all mandatory health and safety standards." *Id.* Thus, "[t]he Secretary has rulemaking power and establishes the safety standards; investigates the employers to ensure compliance; and issues citations and assesses monetary penalties for violations." *Id.*

A. Citation 1

In Citation 1, the Secretary asserted Central Site committed a serious violation of the general duty clause "in that employees were exposed to the hazard of being struck by vehicular/equipment traffic." (Compl. Ex. A at 6). The citation further alleged the hazard resulted from employees "working in close proximity to vehicular traffic/construction equipment inside a construction work zone." (*Id.*)

Employee Exposure

[5] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Florida, which is in the Eleventh Circuit. "[I]n general, '[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.'" *Dana Container, Inc.*, 25 BNA OSHC 1776, 1792 n.10 (No. 09-1184, 2015) (*quoting Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted)). The Court applies the precedent of the Eleventh Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

While the multi-employer worksite doctrine applies to citations issued under section 5(a)(2), it does not apply to citations issued under the general duty clause. As the Commission explained in *Summit Contractors, Inc.*, "the statutory authority underlying the Commission's imposition of multi-employer liability derives from § 5(a)(2) of the Act, which imposes duties on an employer that, unlike those imposed under § 5(a)(1), need not benefit its own employees." *Summit Contractors, Inc.,* 23 BNA OSHC 1196, 1204-05 (No. 05-0839, 2010). Thus, "§ 5(a)(2), unlike its counterpart § 5(a)(1), 'does not base an employer's liability on the existence of an employer-employee relationship'." (*Id.*) (*quoting Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 828 (8th Cir. 2009)).

While the Secretary did not limit Citation 1's allegation to a backover hazard, as indicated *infra*, part of the Secretary's burden is to prove his proposed abatement "would materially reduce the likelihood that such injury *as that which resulted* from the cited hazard would have occurred." *Champlin*, 593 F.2d at 640 (emphasis added). The "injury" here was the death of a worker struck and killed by a bulldozer being operated in reverse, and the backover fatality provided the framework for this proceeding. Not surprisingly, given this burden of proof regarding the proposed abatement, much of the evidence and argument at trial involved backover injuries and fatalities.

The Secretary now asserts "the exposed employees upon which this citation is based are Kimball and [Central Site's] temporary laborers who Kimball supervised, not the deceased API employee."[6] (Compl't's Br. 18.) At trial, the Secretary's exposure focus was on the proximity of the subcontractors' employees, including the decedent, to Kimball's bulldozer. For example, the Secretary's counsel asked API foreman Miller a series of questions regarding the potential exposure of API's employees, something the Secretary now says is not at issue.

> Q.: What did Mr. Kimball tell you, if anything, about your ability to enter an area where equipment was operating such as him on the bulldozer or where vehicles were being driven around? Did he give you any specific rules or instructions on that?
>
> . . .

[6] The Court notes the Secretary stated in his brief "the Court's request that the parties brief whether the deceased API employee can be the basis of the section 5(a)(l) citation does not need to be briefed." (*Id.*)

> Were you ever instructed to stay out of the area where he or his crew were operating the roller or dozer?
> . . .
> Were you ever instructed to have you or your crew stay away from moving vehicles that might be driving through the Worksite?
> . . .
> Did Mr. Kimball ever tell you to stay—that if you see a vehicle driving around you're not allowed to enter that area where the vehicle is driving around?
> . . .
> When Mr. Kimball brought the dozer back to begin backfilling between ST-8 and ST-9, did he—did he stop in any way and make eye contact, or something with you and your guys, before he entered this area to begin with?
> . . .
> Did you receive any instructions from Mr. Kimball or anybody else at Central Site as to how close you and your employees should stay away from moving equipment?

(Tr. 176-177.)

Further, Kimball testified "there was only me and Michael out there." (Tr. 64.) Therefore, other than Montroy, the Secretary failed to prove by a preponderance of evidence that any other Central Site temporary employee was working on site the day of the accident. Therefore, the Secretary's new claim is not supported by the record considering the detailed examination of witnesses regarding the exposure of non-Central Site employees. (*See also e.g.* Tr. 48, 72-73, 75, 85-86, 149-150, 155-156, 169, 172, 176-177, 180-181, 214-216, 254-256).

Santiago also admitted he had no evidence indicating exposure of Central Site's temporary employees to struck-by hazards.

> Q.: [L]et's talk about the laborers, how deeply they may have been exposed?
> Santiago: I only spoke with one of the temp employees. I was not aware actually the first day of the site—when I went on the site, I was told there was only Mr. Kimball on the site. So I didn't learn about the laborers or the temp employees until later, so I only had an opportunity to talk to one.
> Q.: Okay. Did you have an understanding of generally where they were working and what they were doing?
> Santiago: No, sir, I didn't.

(Tr. 297-298.)

Santiago's investigation interview of Montroy was similarly unilluminating. At trial, Santiago testified Montroy told him he was assisting with the dump trucks after Kimball took over the bulldozer but when asked, "Once he got off the bulldozer, was he working on foot that day as opposed to working on another piece of equipment," Santiago responded, "I don't remember asking about it." (Tr. 300.)

Further, no evidence was adduced to show the proximity of employees to the dump trucks. The Secretary failed in his attempt to establish some parameters of the assignment.

> Q.: Did you have the opportunity to see Central Site Development's workers working near or assisting dump truck drivers as they would come in and dump dirt?
> Miller: No.
> Q.: You typically were never in that area?
> Miller: No.

(Tr. 164.) Santiago also speculated at trial that Montroy was exposed to the moving bulldozer because he "had to relinquish it." (Tr. 338.) That statement led to this exchange between Santiago and Central Site's counsel:

> Q.: So you're telling me that people can't hand over control of a moving vehicle . . . without having an Internal Traffic Control Plan? Is that what you're trying to convince us? . . . Mr. Montroy relinquished control of the bulldozer, but was the bulldozer moving when he got off of it?
> Santiago: It was not moving.
> Q.: Is that what you're contending?
> Santiago: No, no. What I'm contending is that when Mr. Kimball took it, it was moving.
> Q.: Did you see him take it when it was moving?
> Santiago: I didn't see it. You know I was not there. So, no, I didn't see it.

(Tr. 338.)

Santiago also attempted to cast a wide net in an effort to demonstrate Kimball was exposed to struck-by hazards earlier in the day, opining Kimball was exposed to the struck-by hazard "when he was walking around on-site" and "moving from one location of the Worksite to another." (Tr. 256.) When asked why he believed Kimball was exposed, Santiago stated, "he walked from one side of the site to another while vehicles were moving … [there were] multiple

vehicles on the site including dump trucks that were coming in. So every single vehicle that was on-site potentially could have struck Mr. Kimball or anyone walking." (Tr. 259-260.)

Santiago's assertion is so vague it is meaningless. It is also inadmissible opinion testimony.[7] Further, Santiago's assertion exceeds the Commission's standard for exposure. "Although [the employee's] testimony shows how close an employee *could* get to these machines, it does not establish how close any employee *actually came* to the zone of danger, either as their work required or through inadvertence." *Delek Ref., Ltd.,* 25 BNA OSHC 1365, 1374 (No. 08-1386, 2015), *rev'd in part on other grounds,* 845 F.3d 170 (5th Cir. 2016) (emphasis in original).

Finally, the Worksite was a 10-acre Worksite with no more than a dozen workers on-site the day of the accident. Kimball is one of the few workers there who drove his own vehicle onto the site. He testified he drove his truck over to the location of the bulldozer when he determined he would use the bulldozer to compact the deficient backfill area (Tr. 100, 149). There is no evidence Kimball was at any time exposed to a significant risk of harm from being struck by a moving vehicle. Likewise, while Kimball was operating the bulldozer, he obviously was not exposed to the cited hazard. Thus, the Court concludes the Secretary failed to establish any of Central Site's "worker exposure to the hazard." Therefore, Citation 1 must be vacated. Further, as indicated *infra*, even if the Secretary established worker exposure to the hazard, he failed to meet the fourth element of his prima facie general duty clause case.

[7] Santiago's opinion testimony is inadmissible. "Commission judges should not admit opinion testimony by a compliance officer on a subject about which only an expert may testify, unless the compliance officer has been shown qualified as an expert in that area." *Kaspar Electroplating Corp.*, 16 BNA 1517, 1519. Federal Rule 701 provides that "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. Thus, Rule 701(c) is intended "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 Notes of Advisory Committee on 2000 amendments. The Secretary made no attempt to qualify Santiago as an expert witness under Rule 702 of the Federal Rules of Evidence. Further, Santiago acknowledged he had no experience in construction work, site development, development of an internal traffic control plan, highway construction, implementation of the cited ANSI Standard, or the use of heavy equipment, including bulldozers (Tr. 312, 315-316). The Court does not credit Santiago's lay opinion testimony.

Alleged General Duty Clause Violation

"An employer commits a general duty clause violation when he fails to '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*.'" *Pepper Contracting Servs. v. Occupational Safety & Health Admin.*, 657 F. App'x 844, 847 (11th Cir. 2016) (emphasis added) (*quoting* 29 U.S.C. § 654(a)(1).

"In order to establish an employer's violation of the general duty clause, OSHA bears the burden to prove four elements." *Roberts Sand Co., LLLP v. Sec'y of Labor*, 568 F. App'x 758, 759 (11th Cir. 2014) (*citing Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1058 (No. 89–2804, 1993)). "Those four elements are: (1) that a condition or activity in the employer's workplace presented a hazard to employees; (2) that the cited employer or the employer's industry recognized the hazard; (3) that the hazard was causing or likely to cause death or serious physical harm; and (4) that feasible means existed to eliminate or materially reduce the hazard." *Id.* (citation omitted). *See also Champlin Petroleum Co. v. Occupational Safety & Health Review Comm'n*, 593 F.2d 637, 640 (5th Cir. 1979) (discussing the four factors OSHA must demonstrate to establish a violation of the general duty clause).[8]

1. Hazard Existed

As the Eleventh Circuit notes, a "serious violation" is one that carries "a substantial probability that death or serious physical harm could result." *ComTran Grp., Inc.*, 722 F.3d at 1309 (*quoting* 29 U.S.C. § 666(k)).

"There is no mathematical test to determine whether employees are exposed to a hazard under the general duty clause. Rather, the existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances." *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1060 (Nos. 89-2804 & 89-3097,

[8] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. Immediately after the split, the Eleventh Circuit stated in *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206 (11th Cir. 1981) (en banc), that any opinion issued by the Fifth Circuit before the close of business on September 30, 1981 is binding precedent on the Eleventh Circuit. After that date, however, only the decisions of the continuing Fifth Circuit's Administrative Unit B are binding on Eleventh Circuit, while Unit A decisions are merely persuasive. *Stein v. Reynolds Sec., Inc.,* 667 F.2d 33, 34 (11th Cir.1982).

1993) (consolidated) (*citing Nat'l Realty & Const. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973)).

There is no dispute that Central Site's employee was operating a bulldozer when he struck and killed an API employee. There is also no dispute Central Site had control over the Worksite and therefore controlled the conditions or practices over which it could reasonably have been expected to exercise control. Further, Central Site's counsel stipulated at trial that "[o]bviously, being struck by a bulldozer poses a hazard[.]" (Tr. 274). Thus, the Secretary met the first element of its prima facie case, showing the existence of a struck-by hazard.

2. Recognized Hazard

A "recognized hazard" is a condition that is "known to be hazardous." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979) (*quoting Georgia Elec. Co.*, 5 BNA OSHC 1112, 1115–1116 (No. 9339, 1977)). Central Site's counsel stipulated at trial that "it recognizes the hazard of being struck by heavy equipment." (Tr. 232.) Therefore, the Secretary has proven the cited hazard was recognized.

3. Hazard Likely to Cause Death or Serious Physical Harm

The Commission does not require there be a significant risk of the hazard coming to fruition, "only that if the hazardous event occurs, it would create a 'significant risk' to employees." *Waldon Healthcare Ctr*, 16 BNA OSHC at 1060. Thus, the Commission has made clear "the criteria for determining whether a hazard is 'causing or likely to cause death or serious physical harm' is not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious harm." *Waldon Healthcare Ctr*, 16 BNA OSHC at 1063.

It is self-evident being struck by a vehicle is likely to cause death or serious physical harm. Here, a bulldozer backed over an API employee, killing him. Further, the death of the decedent constitutes at least *prima facie* evidence that the struck-by hazard was likely to cause death or serious injury. *See e.g., Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977). Therefore, the Secretary has established the cited hazard was likely to cause death or serious physical harm to an employee.

4. Whether Feasible Means of Abatement Existed

"It has been long-established that OSHA does not impose absolute (or strict) liability on employers for harmful workplace conditions; instead, it focuses liability where harm can, in fact, be prevented." *ComTran Grp., Inc.*, 722 F.3d at 1306. While courts have emphasized the importance of proper instruction and adequate supervision in safety-related matters, "they have consistently refused to require measures beyond those which are reasonable and feasible." *Id.* *See* also *Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 564, 569 (5th Cir.1976) (discussing cases). "Rather it requires the employer to eliminate only 'feasibly preventable' hazards." *Champlin*, 593 F.2d at 640 (citation omitted). "It is the Secretary's burden to show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred." *Id.* (citation omitted). "The Secretary must specify the particular steps the employer should have taken to avoid citation, and he must demonstrate the feasibility and likely utility of those measures." *Id.* (*citing National Realty and Construction Co. v. Occupational Safety & Health Review Comm'n,* 489 F.2d 1257, 1268 (D.C. Cir. 1973).[9] "In other words, was it 'feasibly preventable'?" *Roberts Sand Co., LLLP*, 568 F. App'x at 759.

"Though resistant to precise definition, the criterion of preventability draws content from the informed judgment of safety experts." *Id.*, 568 F. App'x at 759–60 (*quoting National Realty*, 489 F.2d at 1266). "A proposed abatement measure is not feasible if 'conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program.'" *Id.* (*quoting id.*). *Accord Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2032 (No. 89-0265, 1997) (abatement feasible if "conscientious experts, familiar with the industry" would prescribe those means and methods to eliminate or materially reduce the recognized hazard) (*citing National Realty*, 489 F.2d at 1257).

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[9] *See also*, *Cargill, Inc.*, 10 BNA OSHC 1398, 1401 (No. 78–5707, 1982) (*citing Williams Enterprises, Inc.*, 4 BNA OSHC 1663, 1666 (No. 4533, 1976) (a "violation of the general duty clause cannot be sustained unless the Secretary is able (1) to establish the type of employer conduct necessary to avoid citation under similar circumstances and (b) to demonstrate the feasibility and likely utility of such conduct"); *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004), *aff'd*, 110 F.3d 1192 (5th Cir. 1997) (in a general duty clause citation, the "hazard must be defined in a way that apprises the employer of its obligations, and identifies conditions and practices over which the employer can reasonably be expected to exercise control").

As indicated *supra*, the citation alleged the hazard resulted from employees "working in close proximity to vehicular traffic/construction equipment inside a construction *work zone*." (Compl. Ex. A at 6) (emphasis added). The citation also asserts one abatement method is found in section 6.4 of the national consensus standard, ANSI/ASSE A10.47- 2015, the Work Zone Safety for Highway Construction, which is part of the American National Standard for Construction and Demolition Operations. (*Id.*)

Section 6.4 relates to Internal Traffic Control Plans (ITCP), which requires employers to "develop traffic control plans for *inside their work zones* to minimize backing and other conflicts between employees and work vehicles/equipment and to maximize the separation of vehicles and pedestrians." (Ex. R-14, § 6.4) (emphasis added). A "work zone" is defined as an "*area of a highway* with construction, maintenance/repair or utility work activities" (*Id.*, § 3.45) (emphasis added). Clearly the Worksite at issue here was *not* an "*area of a highway* with construction, maintenance/repair or utility work activities." Therefore, contrary to the citation's assertion, the alleged violation did not occur "inside a construction work zone."

Further, the "scope" section states it "covers employees engaged in construction, utility work, maintenance, or repair activities *on any area of a highway*." (R-14, § 1.1) (emphasis added). The Worksite at issue here was *not* "on any area of a highway." Likewise, an "activity area" is defined as the "section of the *highway* where the work activity takes place." (*Id.* § 3.2) (emphasis added). The Secretary presented no evidence that the work activity took place on a "section of the highway" or that the activity area of the Worksite involved "any area of a highway.[10] Further, an ITCP is intended "to control the flow of construction employees, work vehicles and equipment *within the work space*." (Ex. R-14, § 3.17) (emphasis added). The "work space" is the "portion of the *roadway closed to traffic* and set aside for workers, equipment and material." (Ex. R-14, § 3.44) (emphasis added). Again, the Secretary presented no evidence the

[10] The Secretary also argues Central Site had rules in its safety manual "that constitute a form of an ITCP that constitutes adequate feasible abatement, but [it] was not using those rules on the Worksite." (Compl't's Br. 11). The Court finds no merit in this argument. Section 6.4's requirements for an ITCP include: (1) a "diagram showing travel routes for construction equipment and employees within the activity space, access and egress points and the location of equipment and materials storage and staging areas;" and (2) a "plan for communicating changes in the ITCP to employees, equipment operators and truck drivers." (Ex. R-14, § 6.4.3.) The Secretary has not shown Central Site's safety manual requires either of those elements. Therefore, it does not "constitute a form of an ITCP."

work space involved a portion of the roadway closed to traffic and set aside for workers, equipment and material.

Nonetheless, the issue is whether the Secretary's proposed abatement method, was feasible and if implemented, would have eliminated or materially reduced the hazard. "If the proposed abatement 'creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility ....'" *CSA Equip. Co., LLC*, 24 BNA OSHC at 1476 (*quoting Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1875 n.19 (No. 92-2596, 1996); *Royal Logging Co.*, 7 BNA OSHC 1744, 1751 (No. 15169, 1979) (finding it proper to reject proposed abatement methods that "cause consequences so adverse as to render their use infeasible"), *aff'd*, 645 F.2d 822 (9th Cir. 1981)).

Alexander Eljallad, Central Site's project manager, was qualified by the Court as an expert in site development (Tr. 388, 400-401).[11] Given Eljallad was experienced and knowledgeable in the areas of site development and the operation of heavy machinery on a construction site,[12] the Court credits his expert testimony. Eljallad opined the abatement method proposed by the Secretary in the citation was not feasible for site development. As Eljallad explained,

> [The Worksite] is an open site, private site. It's more than five, ten acres—plus ten acres. It's a constant moving project, so the project is constantly progressing from short periods of time. The difference is that on the right-of-way, [the ITCP pertains to] that specific traffic. So you have other pedestrians walking, you have other vehicles on the shoulder. So it actually would have to provide maintenance of traffic and egress and ingress. . . .[A]t the highway, you're maintaining the exact same procedures constant, which is you're providing maintenance of traffic, right-of-way permits.

(Tr. 381-383.) In contrast to highway construction, Eljallad opined,

> [A site development project like The Worksite] is constantly an evolving, moving site. . . . [T]here's no way that you could use the same methods that you're using on an offsite turn lane to add onto the on-site turn lane. So what I mean, if you're going to do barricades or you're trying to use that same plan, it's going to cause

[11] Prior to his current position, Eljallad was Central Site's Safety Director for four years. Before that, he worked in field operations, performing site development, installing underground utilities, and operating heavy equipment (Tr. 376-377). *See also* Eljallad's CV for additional work experience and certifications (Ex. R-17).

[12] *See also* Eljallad's Expert Report (Ex. R-16).

> more people to be on-site. It's going to cause more harm, there's more conflicts will be in the way and it's not feasible.

(Tr. 389.)

Eljallad also opined he had never seen an ITCP used on a site development project (Tr. 389.) As he explained,

> As the job's progressing, you can't designate a path for people just to walk in an area. We designate work zones. So if I'm working from ST-8 to ST-9, that's a work zone. That's where we notify people you can't—make sure you announce yourself when you're walking in that area or you're going to do any work in that area. But if you want to designate a path just to walk around certain areas, there's other contractors on site. You can't just go ahead and designate paths for all of them. You can only designate areas to follow.

(Tr. 409.) The Court credits Eljallad's opinions and agrees with him that the abatement method proposed by the Secretary was not feasible for site development.[13]

Further, in 2012, the Secretary published a Request for Information "seeking information about backover incidents that occur when drivers or mobile equipment operators have an obstructed view to the rear." *Reinforced Concrete in Construction, and Preventing Backover Injuries and Fatalities,* 77 FR 18973-01 (March 23, 2012).

The Request for Information was occasioned by OSHA's identification of

> 358 fatal incidents over a six-year period, from 2005 through 2010. . . . Of these deaths, 142 occurred in the construction industry, and the remaining 216 occurred in general industry, shipyard employment, maritime, and agriculture industries. There were 279 fatalities involving struck-by hazards, and 73 fatalities involved caught-between hazards, 16 of which included workers caught between a loading dock and a tractor trailer, and 6 fatalities caused by falls from backing vehicles. Three types of vehicles caused a large number of deaths: 61 deaths involved dump trucks; 31 deaths involved tractor trailers; and 20 deaths involved garbage trucks. . . . Eight of the deceased workers were using cell phones when the backover incident occurred. Twenty-one fatalities involved vehicles with no driver. Twenty-five of the victims were acting as spotters for the vehicles that backed over them. In many of the cases, employers were using spotters to comply

[13] Santiago testified the ITCP could include "[s]eparation of employees, barricades, traffic, ways of traffic, spotter . . . it helps separate by separating the equipment and the employees or having a way to keep -- keep employees and vehicles on separate locations. Basically, you remove the struck-by hazard, okay." (Tr. 296.) Again, this opinion is inadmissible. *See* Note 7 *supra.*

> with the existing backover-related standards. In some these cases, OSHA cited employers under § 5(a)(1) of the Occupational Safety and Health Act of 1970, known as the General Duty Clause.

Id. The Request for Information discussed backover preventions methods, including the proposed means of abatement at issue, the ITCP.

> Internal traffic control plans (ITCP) is another method used to address backover construction equipment, workers, and vehicles at a Worksite to prevent vehicle impacts with workers. These plans can significantly reduce, or possibly eliminate, the need for vehicles to back up on a site. ANSI standard A10.47-2009, *Work Zone Safety for Highway Construction,* section 6.3 recommends that employers develop ITCPs and communicate them to employees. In addition, section 6.3.3 states that an ITCP should include a diagram of travel routes; a listing of all onsite personnel and equipment; a checklist of site-specific safety hazards and how to minimize these hazards; a list of safety notes defining site-specific injury prevention measures; and a plan for communicating the ITCP to workers, truck drivers, and equipment operators. *However, OSHA has no information on the effectiveness of this consensus standard.*

Id. (emphasis added.)

Thus, the Secretary concedes in his Request for Information that OSHA has no information on the effectiveness of the ANSI Work Zone Safety for Highway Construction standard. In *Champlin*, the Fifth Circuit held the Secretary failed to show the proposed abatement method "would have had any material effect on the likelihood of injuries of the type sustained here." *Champlin*, 593 F.2d at 641. Here, as in *Champlin*, the Secretary failed to show the proposed abatement method would have had any material effect on the likelihood of injuries of the type sustained here. Therefore, based on the foregoing, the Court concludes the Secretary failed to establish a feasible means of abatement. Thus, even if the Secretary had established worker exposure to the hazard, since he failed to carry his burden of proving the last element of his prima facie case, Citation 1 must still be vacated.

B. Citation 2

Alleged Violation of 29 C.F.R. § 1904.40(a)

Citation 2 asserts Central Site violated 29 C.F.R. § 1904.40(a), one of OSHA's recordkeeping standards, when it allegedly "did not provide an authorized government

representative the records within the four business hours." (Compl. Ex. A at 7). More specifically, it asserts that "[o]n or about 03/10/2016, at the job site - the employer did not provide OSHA *300 logs* after a request." (*Id.*) (emphasis added).[14]

Under the law of the Eleventh Circuit, "the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *ComTran Grp., Inc.*, 722 F.3d at 1307. *See also*, *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014) (same).

The Court Vacated Citation 2 at trial after concluding the Secretary failed to prove the second prong of his prima facie case, that the cited recordkeeping standard was violated. (Tr. 309.) The Secretary asserts in his brief, he "did present a prima facie case" but "this Court nonetheless determined that the citation would be vacated based on an assumption not supported by the record[.]" (Compl't's' Br. 21). He also asserts that in vacating Citation 2 at trial, the Court "assumed facts not in evidence." (Compl't's' Br. 20). In support of these assertions, the Secretary argues the Court "based its ruling on its assumption that the delivery notification (R-19 at 6) indicates that OSHA's email request was never received." (*Id.* at 21) (*citing* Tr. 310). The Court finds no merit in these assertions.[15]

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[14] Both the citation itself and, as indicated *infra*, the Secretary in his brief, incorrectly refer to the OSHA "300 logs." Santiago requested the OSHA *300-A* form. (*See* Ex. R-19 at 4) ("Please provide a copy of the 2015 OSHA 300A (4 hours response required), I have a copy that is not completed"). "The OSHA 300 form is called the Log of Work-Related Injuries and Illnesses, the 300-A is the Summary of Work-Related Injuries and Illnesses, and the OSHA 301 form is called the Injury and Illness Incident Report." 29 C.F.R. § 1904.29(a). As indicated *supra*, a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d). Therefore, the citations are a part of the complaint. Nonetheless, while Rule 15(b)(2) of the Federal Rules of Civil Procedure permits a party to "move—at any time, even after judgment—to amend the pleadings to conform them to the evidence," the Secretary's "failure to amend does not affect the result of the trial of that issue." Fed.R.Civ.P. 15(b)(2).

[15] In his brief, the Secretary "requests that this Court re-open the record as to this citation to ensure the record is complete by receiving all relevant evidence the parties intended to present before issuing a final ruling." (*Id.* at 21). The Secretary's "request" violated Commission Rule 40(a), which mandates that a "request for an order shall be made by motion" and a "motion shall not be included in another document, such as a brief or a petition for discretionary review, but shall be made in a separate document." 29 C.F.R. § 2200.40(a). Even if properly before the Court, the Court finds no basis to grant the Secretary's request. The Secretary's brief does not point to any

1. Cited Standard Applied

The cited recordkeeping standard mandates "[w]hen an authorized government representative asks for the records you keep under part 1904, you must provide copies of the records within four (4) business hours." 29 C.F.R. § 1904.40(a). Santiago sent an email to Central Site's counsel on March 10, 2016, at 10:00 a.m., asking him to "provide a copy of the 2015 OSHA 300A (4 hours response required)." Santiago was OSHA's compliance safety and health officer that conducted the Worksite investigation in this case. A "compliance safety and health officer" is "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d). Therefore, Santiago was "an authorized government representative" that asked for the records within the meaning of the cited recordkeeping standard. Central Site was required to use the OSHA 300-A form "for recordable injuries and illnesses." 29 C.F.R. § 1904.29(a). Therefore, Santiago asked for the records Central Site keeps under part 1904. Thus, the Court concludes the cited recordkeeping standard applied.

2. Whether Cited Standard was Violated

The Secretary asserts after emailing the request, Santiago "received an automated response that OSHA believes suggests the email was delivered but that no information as to whether the email was read was provided." (Compl't's' Br. 20) (*citing* Ex. R-19 at 6). What OSHA "believes" the automated response "suggests" is irrelevant. The Secretary has the burden of proving more than mere "suggestions," he must prove each element of his prima facie case. Since the records request was sent by email to Central Site's counsel, a condition precedent to a violation is proof that Central Site's counsel *received* the email requesting the records.

The automated response stated that "[d]elivery to these recipients or groups is complete *but no delivery notification was sent by the destination server*." (Emphasis added.) According to

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"relevant evidence the parties intended to present" that was not already in the record. Further, at trial, the Secretary stipulated that all his exhibits were "fully consumed within" Central Site's exhibits (Tr. 6-7), and all Central Site's exhibits, as well as Joint Exhibit 1, were admitted into the Record (Tr. 7). As the record also reflects, after the Court's ruling, the Court permitted the Secretary's counsel to make a proffer, which he did, "My proffer is that he – is that the evidence would show that they had a conversation on March 16th." (Tr. 310). The Secretary's brief also thoroughly addresses his proffer (Compl't's' Br. 20-21). However, as the Court concludes *infra*, any conversation that took place on March 16th has no bearing on whether the cited standard was violated.

the Secretary, "worst case scenario," the automated response "does not confirm delivery, but does confirm that the email was sent by OSHA." (Compl't's' Br. 20.) Indeed, the evidence shows the Secretary's "worst case scenario" did occur. Central Site's counsel indicated in an email to Santiago on March 16, 2016, that he did not receive the email sent by Santiago on March 10, 2016. Therefore, a preponderance of evidence shows the Secretary failed to establish Central Site received Santiago's request for a copy of its 2015 OSHA 300-A form.

The Secretary argues even assuming the email was not received by Central Site's counsel, Central Site "did understand that OSHA was requesting the 300 log" since Central Site's counsel "sent two emails on March 16, 2016, confirming that OSHA called letting him know that no 300 log was received and therefore a citation was being recommended." (*Id.*) (*citing* R-19 at 7). Again, the Court finds no merit in the Secretary's argument.

Santiago admitted the basis of the violation was that he did not receive a response to his March 10, 2016 email (Tr. 308). More importantly, the citation alleges a violation on or about *March 10, 2016*. Given the specific date referenced in the citation, and the limited window of four hours afforded by both the citation and the cited standard to provide the requested records, Central Site could not have cured the alleged violation *after* March 10, 2016. Therefore, the Court concludes the Secretary failed to establish Central Site's counsel received Santiago's email on March 10, 2016. Thus, the Court concludes the Secretary failed to prove the cited recordkeeping standard was violated. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT both Citation 1 and Citation 2 are **VACATED** without the imposition of any penalties.[16]

SO ORDERED.

/s/ John B. Gatto
John B. Gatto
Administrative Law Judge

Dated: July 7, 2017

[16] Having found the Secretary failed to carry his burden of proving either alleged violation, the Court finds it unnecessary to address Central Site's affirmative defenses.