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

SECRETARY OF LABOR, Complainant, v. ROADSAFE TRAFFIC SYSTEMS, INC., Respondent.	OSHRC Docket No. 18-0758

ON BRIEFS:

Ronald J. Gottlieb, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Merritt B. Chastain, III, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Houston, TX
For the Respondent

DECISION

Before: ATTWOOD, Chairman; and LAIHOW, Commissioner.

BY THE COMMISSION:

RoadSafe Traffic Systems, Inc., is a road construction company that provides traffic control, pavement marking, and pavement striping services. On November 14, 2017, a RoadSafe employee was struck and killed by a company vehicle while installing raised reflectors on a highway near Devers, Texas. Following the incident, the Occupational Safety and Health Administration conducted an inspection and issued RoadSafe a citation alleging a serious violation

of the Occupational Safety and Health Act's general duty clause, 29 U.S.C. § 654(a)(1),[1] for exposing employees working from the back of a moving vehicle to fall hazards.[2]

Following a hearing, Administrative Law Judge Sharon D. Calhoun affirmed the violation and assessed the proposed $12,675 penalty. For the following reasons, we affirm.

BACKGROUND

On November 14, 2017, a crew of four RoadSafe employees was replacing damaged or defective raised reflectors along a seven-mile stretch of a four-lane highway.[3] To install the replacement reflectors, the crew implemented a "rolling lane closure" that consisted of a three-vehicle convoy designed to create a buffer between the convoy's lead truck, from which the installation work was performed, and passing motorists. All three convoy vehicles traveled in the highway's right lane adjacent to live traffic in the left lane.

Foreman Alex Garcia drove the lead truck, the bed of which contained boxes of new reflectors and a machine that heated the quick-drying tar used to adhere the reflectors to the road. Leonard Mulero followed behind Garcia in another truck with a trailer, and behind him was a third truck driven by Oscar Bautista that was equipped with a rear-mounted attenuator designed to absorb the potential impact of a vehicle from behind. The fourth crew member, J.H., rode in the bed of the lead truck and was tasked with installing new reflectors as the convoy proceeded down the road. He sat on the edge of the truck's bed with his feet on the truck's lift gate, which was lowered so it was about eighteen inches from the ground. Whenever Garcia found a spot where a reflector had been removed, he would stop the lead truck slightly past the missing reflector and J.H. would exit from the rear of the truck bed, place hot adhesive on the road, and install a new reflector. After installing each reflector, J.H. sat back down on the edge of the truck's bed and the convoy continued to the next missing reflector.

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[1] The general duty clause provides that "[e]ach employer . . . shall 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).

[2] The Secretary initially issued RoadSafe a two-item citation alleging serious violations of 29 C.F.R. § 1926.601(b)(2)(ii) and 29 C.F.R. § 1926.601(b)(8). The Secretary subsequently amended the citation to allege in the alternative two separate violations of the general duty clause. Before the hearing, the Secretary withdrew Item 1 in its entirety and pursued Item 2 only with respect to the general duty clause violation.

[3] That morning, the crew had walked the stretch of highway and removed the reflectors they were replacing at the time of the incident.

All three vehicles drove at a speed of around five to twelve miles per hour between reflector stops and all three drivers were instructed to maintain a distance of around 200 feet between each truck to prevent passing motorists from entering the right lane. At some point, however, the second driver, Mulero, fell behind the lead truck and accelerated to catch up. Mulero was unable to stop his truck in time to avoid a collision with the lead truck even though he swerved into the left lane. He hit the lead truck and struck J.H., killing him.

DISCUSSION

To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The Secretary must also show that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-0469, 1992). Here, the judge found that the Secretary established each element of the alleged violation and that RoadSafe had actual knowledge of the hazardous condition. On review, RoadSafe challenges the judge's findings with respect to hazard, recognition, and abatement.[4]

I. Hazard

"To prove that a condition presents a hazard under the general duty clause, the Secretary is required to show that . . . employees [were exposed] to a 'significant risk' of harm." *A.H. Sturgill Roofing, Inc.*, 27 BNA OSHC 1809, 1810-11 (No. 13-0224, 2019) (quoting *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1170-72 (No. 91-3144, 2000) (consolidated)). 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 Health Care Ctr.*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993) (citing *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973)).

[4] RoadSafe does not dispute the judge's findings that falling from a moving vehicle was likely to cause death or serious physical harm, or that RoadSafe had actual knowledge of the hazardous condition.

The Secretary alleges that RoadSafe's employees were exposed to fall hazards while working from the back of a moving vehicle.[5] The judge found that the Secretary established the existence of the alleged hazard because a RoadSafe employee used the lowered lift gate "as a staging area or platform" as he rode in the bed of the moving truck. On review, RoadSafe principally argues that the Secretary failed to prove a hazard existed because the company took adequate steps to ensure its employee was protected from falling while engaged in this work. According to RoadSafe, those steps included requiring: (1) the lead truck to move slowly in the work zone; (2) the employee to be seated in the truck bed with both feet firmly on the lift gate; and (3) the employee to hold onto the lift gate's chain, which was covered with cloth. In addition, the company asserts that there is a material difference between "*riding* on the back of a vehicle for transportation purposes"—which the company does not dispute poses a fall hazard—and "*working* from the back of a vehicle" with the above precautions—which the company claims does not.

As an initial matter, we note that the basis for the alleged violation is not the fatal incident itself, but RoadSafe's practice of allowing J.H. to work from the bed of a moving truck without fall protection. Indeed, the Commission has made clear that "[e]ven though an accident may occur because of unforeseeable events, a violation of the general duty clause may exist if the employer failed to take precautionary steps to protect its employees from the occurrence of the general hazard . . . ." *Gen. Dynamics Corp. v. OSHRC*, 599 F.2d 453, 459 (1st Cir. 1979); *see also Bomac Drilling*, 9 BNA OSHC 1682, 1691-92 (No. 76-450, 1981) (consolidated) ("Under section 5(a)(1) case law, the 'hazard' that must be 'recognized' is not a particular set of circumstances at a specific location and specific point in time but rather the broader, more generic or general hazard.") (overruled on other grounds by *U.S. Steel Corp.*, 10 BNA OSHC 1752, 1757 (No. 77-1796, 1982)).

Moreover, as to RoadSafe's initial argument that it took adequate steps to ensure J.H. was protected from falling, we find that this contention conflates the hazard element of the alleged

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[5] Although not raised by RoadSafe on review, we note that the Secretary adequately defined the alleged hazard "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." *Arcadian Corp.*, 20 BNA OSHC at 2007 (citing *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986)). Indeed, although the citation focuses on the use of the lift gate as a work platform, the parties litigated the alleged hazard as RoadSafe's general practice of allowing employees to work from the back of a moving vehicle. *Mid South Waffles, Inc. d/b/a Waffle House #1283*, 27 BNA OSHC 1783, 1785 & n.5 (No. 13-1022, 2019) (noting that the parties agreed on the hazard being litigated).

general duty clause violation with the abatement element. *See*, *e.g.*, *Peacock Eng'g, Inc*., 26 BNA OSHC 1588, 1590 (No. 11-2780, 2017) ("The efficacy of [the employer's] work methods in avoiding injury . . . is a separate inquiry from whether an alleged hazard was present."). The steps RoadSafe alleges it took to address the cited hazard are relevant to whether the Secretary established a feasible means of abatement, but they do not bear on whether the cited conditions constituted a hazard. *Id.* Indeed, by pointing to the steps it allegedly took to mitigate the fall hazard, RoadSafe is in effect acknowledging its existence.

As for RoadSafe's other claims, we find that they lack merit. First, several RoadSafe job safety analyses (JSAs) identify and seek to address fall hazards when working from moving vehicles. Two JSAs for the Installation of Recessed Pavement Markers, which RoadSafe also applied to the installation of raised reflectors, list "Fall hazard" as a "Potential Health and Injury Hazard." And the company's JSA for applying pavement markings likewise identifies "Falls" as a hazard, while the JSA for Short Duration Work additionally directs that "[t]here shall be NO riding on back of tail or lift gates at any time."

Second, RoadSafe Chief Operating Officer Glenn Thompson corroborated that fall hazards are present when working from or riding in the back of a moving vehicle. Thompson explained that RoadSafe prohibited riding in the back of a truck because it "subjects an employee to risks from either . . . falling out of a vehicle, or if the vehicle's involved in a motor vehicle accident, people would be ejected from the back of a vehicle." When asked about the dangers of working on a highway adjacent to live traffic, Thompson stated, "[i]t's considered to be dangerous and risky, because you never know what the motorist is going to do." We therefore reject RoadSafe's attempt to distinguish between riding and working in the back of a moving vehicle because Thompson's testimony, taken together with Roadsafe's JSAs, establishes that fall hazards are present in both situations.

Finally, we note that RoadSafe's safety manual, which cites to a standard from the American National Standard Institute (ANSI), identifies falling from a moving vehicle as a hazard that should be addressed when performing specific tasks from the back or side of the vehicle:

> Co-workers shall only ride on the back of vehicles if [they] compl[y] with ANSI standard A10 47-2015 4.5.4:
>
> Employees placing traffic cones, barrels, and other channeling devices onto the roadway from the back or side of a moving vehicle shall be protected by perimeter

> protection or a fall restraint system. The personal fall restraint system shall be set up so that an employee cannot fall off the vehicle or strike the pavement.
>
> At no time shall any co-worker be outside of the perimeter protection of a moving vehicle. . . .

Although the ANSI standard itself does not address the specific work at issue here, we find that the company's safety manual is nonetheless consistent with Thompson's testimony about the existence of a fall hazard whenever an employee is working in the back of a moving vehicle.

For all these reasons, we find the Secretary established that a fall hazard existed and that RoadSafe's employees were exposed to a significant risk of harm.

II. Recognition

Hazard recognition may be shown by proof that "a hazard . . . is recognized as such by the employer" or by "general understanding in the [employer's] industry." *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) (quoting *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996)). An employer's work rules may establish recognition of a hazard under the general duty clause. *Id.*; *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 2016 (No. 13390, 1981). The Commission is reluctant, however, to rely solely on an employer's safety precautions to find recognition absent other "independent evidence." *See Mid South Waffles, Inc. d/b/a Waffle House #1283*, 27 BNA OSHC 1783, 1789 (No. 13-1022, 2019) (citing *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2007 (No. 89-0265, 1997)); *Cotter & Co. v. OSHRC*, 598 F.2d 911, 914-15 (5th Cir. 1979). Thus, the Commission has found recognition where, in addition to the employer's safety precautions, a supervisor also recognized the hazard. *See Mid South Waffles*, 27 BNA OSHC at 1789 (imputing executive's knowledge of fire hazard to establish employer's hazard recognition); *Mo. Basin Well Serv., Inc.*, 26 BNA OSHC 2314, 2318 (No. 13-1817, 2018) (imputing supervisor's recognition of hazard to employer); *Peter Cooper Corps.*, 10 BNA OSHC 1203, 1210 (No. 76-596, 1981) (imputing general manager's knowledge of hazard to establish employer's hazard recognition).

The judge found that RoadSafe recognized the cited fall hazard based on the company's various safety policies, as well as Chief Operating Officer Thompson's testimony about the

hazards associated with riding in the bed of a moving truck amid traffic.[6] On review, RoadSafe reiterates essentially the same arguments it made with respect to the hazard element—that the company did not recognize the fall hazard because of the precautions it took to mitigate the hazard. As explained above, this argument conflates the recognition element with that of abatement. *See Peacock Eng'g, Inc*., 26 BNA OSHC at 1590.

We agree with the judge that RoadSafe's safety manual and JSAs, together with Thompson's testimony, establish the company's recognition of a fall hazard. As noted, RoadSafe's safety manual and JSAs identify fall hazards and purport to address them. The JSAs also limit the work that employees can perform from the back of a moving vehicle, and when work is allowed, they require the vehicle to be equipped with safety measures like perimeter protection or grab bars. As mentioned above, Thompson, who previously served as the company's vice president in charge of safety compliance, confirmed that working on a highway adjacent to live traffic is "considered to be dangerous and risky, because you never know what the motorist is going to do." He further explained that in the event of a motor-vehicle accident, "people would be ejected from the back of a vehicle." As RoadSafe's Chief Operating Officer, Thompson's recognition of the hazard is imputed to RoadSafe. *See Mid South Waffles*, 27 BNA OSHC at 1788; *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1732 (No. 93- 373, 1996) (applying agency law's long-standing principle that corporation is charged with knowledge of its agents), *aff'd*, 122 F.3d 437 (7th Cir. 1997).

Accordingly, we find the Secretary established RoadSafe's recognition of the cited fall hazard.

III. Abatement

To establish the abatement element, the Secretary must "demonstrate both that the measure[] [is] capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard." *Arcadian Corp.*, 20 BNA OSHC at 2011 (*citing Beverly Enters. Inc.*, 19 BNA OSHC at 1190). Where an employer has taken measures to address a hazard alleged under the general duty clause, the Secretary must first show that those measures were inadequate.

[6] Although argued below to the judge, the Secretary does not raise industry recognition on review. Accordingly, that argument is abandoned. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1938 (No. 97-1676, 1999) ("The Commission need not review an issue abandoned by a party."); *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 n.4 (No. 90-2668, 1992) (declining to reach issues not raised on review).

U.S. Postal Serv., 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006). Finally, "[i]f the proposed abatement 'creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility . . . .' " *Acme Energy Servs.*, 23 BNA OSHC 2121, 2127 (No. 08-0088, 2012) (citing *Kokosing*, 17 BNA OSHC at 1875 n.19), *aff'd,* 542 F. App'x 356 (5th Cir. 2013) (unpublished).

In the citation, the Secretary asserts that RoadSafe could have abated the fall hazard by "using a trailer or vehicle specifically designed for installing reflector buttons on the freeway."[7] The judge agreed that this proposed abatement method was both feasible and effective because RoadSafe owned a specialized trailer that could have been used to install replacement reflectors. On review, RoadSafe challenges the judge's finding and argues (1) that the Secretary failed to establish its existing safety measures were inadequate and (2) that using the specialized trailer would expose employees to a greater hazard of being struck by passing traffic, and the Secretary failed to demonstrate otherwise.

Adequacy of Safety Procedures

Where "an employer has existing safety procedures, the burden is on the Secretary to show that those procedures are inadequate." *SeaWorld of Fla. v. Perez*, 748 F.3d 1202, 1215 (D.C. Cir. 2014). The Secretary may do so by demonstrating that "there was a more effective feasible means by which [the employer] could have freed its workplace of the hazard." *Ala. Power Co.*, 13 BNA OSHC 1240, 1243-1244 (No. 84-357, 1987) (citing *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986)). Alternatively, the Secretary may demonstrate that an employer's existing safety procedures were inadequate by showing that the employer failed to properly communicate those procedures to its employees, failed to take steps to discover noncompliance with those procedures, or failed to effectively enforce those procedures in the event of noncompliance. *See Ala. Power Co.*, 13 BNA OSHC at 1244 (citing *Inland Steel Co.*, 12 BNA OSHC 1968, 1976 (No. 79-3286, 1986)).

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[7] The Secretary proposed three other alternative methods of abatement before the judge, all of which she rejected. On review, the Secretary does not pursue these methods or otherwise dispute the judge's conclusion. Accordingly, we do not address them. *See Ragnar Benson, Inc.*, 18 BNA OSHC at 1938 ("[t]he Commission need not review an issue abandoned by a party"); *see also Pressure Concrete Constr. Co.*, 15 BNA OSHC at 2015 n.4 (declining to reach issues not raised on review).

The judge did not directly address the adequacy of RoadSafe's existing safety measures, but essentially found that holding onto the lift gate's chain for fall protection was inadequate since it was not supported by the company's own safety rules and that, in fact, J.H. was not holding onto the chain on the day of the incident. On review, Roadsafe argues this was error because the Secretary failed to establish its safety procedures—traveling slowly in a convoy and having employees sit on the truck bed with both feet on the lift gate while holding the lift gate chain—were inadequate to protect against the alleged fall hazard. In response, the Secretary asserts that the "primary failure" of RoadSafe's procedures is that, unlike the specialized trailer, none of them require the use of a seatbelt or straps to restrain the employee.

We find that RoadSafe's safety procedures were inadequate when compared to the protection offered by the specialized trailer the company used to install new reflectors. The record shows that the specialized trailer has a large container in the middle that holds hot adhesive and there are seats at each side of the container where employees can buckle in with straps. Thus, employees can remain secured in the seat as they reach out to place the hot adhesive and a reflector onto the road, effectively eliminating the existence of a fall hazard. In short, using the specialized trailer for reflector replacement work is a more effective means of protecting employees from the fall hazard than RoadSafe's alleged procedures.

Roadsafe's claims to the contrary are undermined by relevant industry documents as well its own JSAs. The American Traffic Safety Services Association (ATSSA) recommends in its Work Zone Worker Safety Field Guide that raised pavement markers be installed "from [a] special approved vehicle only" or "[o]n foot." Likewise, the ANSI standard referenced in RoadSafe's safety manual specifies that employees placing traffic control devices from a moving vehicle should have "perimeter protection or a fall restraint system." Both documents therefore support the Secretary's assertion that employees working from moving vehicles should be buckled or strapped in.

In addition, even if RoadSafe had a policy of requiring its employees to hold onto the lift gate's chain, such a policy would conflict with its own JSAs, which direct that the company's trucks be equipped with grab bars. Indeed, the 2013 JSAs for installing recessed reflectors and applying pavement markings allow riding on a truck's bumper platform only "if there is a grab bar for the rider to hang on to." Similarly, the 2017 version of the JSA for installing recessed pavement markings states that a grab bar must be "provided and fully maintained." Finally, the 2013 JSA

for pavement marking questions the viability of using a lift gate chain, and in fact, reveals that at least one RoadSafe regional office rejected such a use: "*Lift gates with chains . . . how many have chains vs other support mechanisms? Denver says no circumstance is it appropriate.*" Although it is clear from these JSAs that RoadSafe had a policy requiring the use of a grab bar while riding in a work vehicle, the safety documents in no way endorse the use of a lift gate chain as a means of fall protection.

Even if we were to consider holding onto a lift gate chain equivalent to holding onto a grab bar, the record establishes that use of the chain was not required by a company work rule nor was the practice adequately communicated to RoadSafe employees. When foreman Garcia was asked if RoadSafe advised using the chain as a handhold, he simply replied, "[n]o." Furthermore, as the judge found, the record lacks credible evidence that J.H. consistently held onto the chain on the day of the incident.[8] Accordingly, we find that RoadSafe's alleged policy of having employees hold the lift gate chain did not adequately protect them against fall hazards. *See Ala. Power Co.*, 13 BNA OSHC at 1244; *Inland Steel Co.*, 12 BNA OSHC at 1976.

For all these reasons, we conclude that the Secretary demonstrated that RoadSafe's existing safety procedures were inadequate.

Feasibility & Efficacy of Abatement

The judge found that using RoadSafe's specialized trailer was feasible and would materially reduce the cited fall hazard. In reaching this conclusion, the judge rejected RoadSafe's argument that using the trailer would place employees closer to the center line of the highway, exposing them to a greater hazard of being struck by passing traffic than riding in the back of the truck. On review, RoadSafe renews this argument and essentially asserts that the judge improperly

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[8] Although RoadSafe's foreman, Garcia, testified that J.H. regularly held the lift gate chain when seated in the truck bed, the judge found his testimony lacked credibility based on his demeanor. The Commission ordinarily accepts a judge's demeanor-based credibility determination, and we see no reason to disturb the judge's finding here. *Wiley Organics, Inc.*, 17 BNA OSHC 1586, 1595 (No. 91-3275, 1996) (citing *Waste Mgmt. of Palm Beach*, 17 BNA OSHC 1308, 1309-10 (No. 93-128, 1995)); *United States Steel Corp.*, 9 BNA OSHC at 1644; *cf. Aerospace Testing Alliance*, No. 16-1167, 2020 WL 5815499, at *5 (OSHRC Sept. 21, 2020) ("Because the injured employee's testimony is internally inconsistent and contrary to the testimony of all three other operators, we set aside the judge's credibility determination."). Accordingly, we reject RoadSafe's assertion that the judge erred in discrediting this testimony.

flipped the burden of proof by requiring RoadSafe to show that using the trailer posed a greater hazard instead of requiring the Secretary to show its use was feasible. In response, the Secretary argues that RoadSafe's position is logically inconsistent, as the company already uses the specialized trailer on large reflector placement jobs, and contrary to industry guidance.

We agree with the Secretary on both points. In support of its argument, RoadSafe points to testimony from Thompson that the company only used its specialized trailer on "long line jobs," which involve "laying out two, three, or four miles of brand[-]new pavement marking reflectors" in a continuous sequence. Thompson averred that the trailer was not used for the safety of employees, but "because it allows faster production, and it allows us to get off the highway quicker, to make it safer for the general public, and get the roadway reopened." Those same concerns, however, also support using the specialized trailer on jobs like the one at issue here, where RoadSafe's crew was working on an even longer, seven-mile stretch of road. Additionally, there is no support in the record for Thompson's assertion that using the trailer for intermittent work, like that being done on the day of the incident, would not be as fast as having an employee ride in the back of the truck and replace reflectors manually. In fact, his claim that the specialized trailer is more dangerous than riding in the back of a truck without perimeter protection directly conflicts with ATSSA's recommendation that a "special approved vehicle" be used to install raised pavement markers.

Moreover, the evidence shows that the trailer can be pulled away from the road's center line in between stops to replace missing reflectors. Indeed, when asked on cross-examination how close employees riding in the trailer would be to the center line, Mulero explained, "[i]t depends how close the driver – the lead truck is driving close to that line." And when pressed about whether using the trailer forces employees to remain closer to live traffic than working from the back of the truck, Mulero demurred. Thus, the weight of the evidence shows that the trailer could be pulled closer to the center line to replace missing reflectors, then drawn away again as the convoy proceeds down the road, therefore limiting employee exposure to passing motorists. Accordingly, we find that the Secretary has satisfied his burden of rebutting RoadSafe's assertion that using the specialized trailer was infeasible because it created a greater hazard to employees.[9] *Cf. Kokosing*,

[9] For these same reasons, we reject RoadSafe's argument that the judge improperly shifted the burden to the company to demonstrate a greater hazard.

17 BNA OSHC at 1875 & n.19 (finding feasibility not established where Secretary failed to rebut testimony that abatement method could cause additional hazards).

Finally, we find that this proposed abatement method was also feasible because RoadSafe does not otherwise dispute the trailer could have been used for this project. And because the trailer has straps that, as discussed above, would essentially eliminate the hazard of an employee falling, we also find that this proposed abatement method would be effective. Thus, we conclude that the Secretary has established the abatement element of the violation.[10]

ORDER

For all these reasons, we affirm Serious Citation 1, Item 2, and assess the $12,675 penalty.[11]
SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: December 10, 2021

[10] Commissioner Laihow notes that, while she fully agrees the Secretary has established that using the specialized trailer is a feasible and effective means of abatement, it is not necessarily the only method RoadSafe could use to materially reduce the cited fall hazard. *See, e.g., Cyrus Mines Corp.*, 11 BNA OSHC 1063, 1067 (No. 76–616, 1983) (''[The employer] is not required to adopt the abatement method suggested by the Secretary, even one found feasible by the Commission; it may satisfy its duty to comply with the standard by using any feasible method that is appropriate to abate the violation.'') (citations omitted); *Brown & Root, Inc.*, 8 BNA OSHC 2140, 2144 (No. 76–1296, 1980) (''[T]he employer may defend against a section 5(a)(1) citation by asserting that it was using a method of abatement other than the one suggested by the Secretary.''). Thus, RoadSafe may choose to implement another feasible and effective means of protecting employees from the cited fall hazard without having to resort to the specialized trailer.

[11] RoadSafe does not contest the serious characterization of the violation or the proposed penalty amount on review. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (assessing proposed penalty where not in dispute).

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor, Complainant v. RoadSafe Traffic Systems, Inc., Respondent.	OSHRC Docket No.: **18-0758**

Appearances:

Carlton C. Jackson, Esq.
Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Merritt B. Chastain, III, Esq.
Ogletree Deakins Nash Smoak & Stewart PC, Dallas, Texas
For Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

On November 14, 2017, a pavement marking technician installing raised pavement markers[1] on US Highway 90 near Devers, Texas, was fatally injured when the protection truck immediately behind him in his work convoy crashed into his work truck, causing him to fall underneath the protection truck. RoadSafe Traffic Systems, Inc. (RoadSafe), employer of the employee, notified the Occupational Safety and Health Administration (OSHA) of the accident. The next day, November 15, 2017, OSHA Compliance Safety and Health Officer (CSHO) James Jacob initiated an inspection of RoadSafe's worksite. As a result of OSHA's inspection, the Secretary issued a Citation and Notification of Penalty (Citation) to RoadSafe on April 17, 2018, alleging two serious violations[2] of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§

[1] During the hearing, raised pavement markers were referred to as markers, reflectors or buttons (Tr. 76).

[2] The Citation originally issued alleged violations of the standards found at §§ 1926.601(b)(2)(ii) and 1926.601(b)(8), proposing penalties in the amount of $12,675 for each alleged violation.

651-678 (Act). After the Complaint was filed, the Secretary filed an Unopposed Motion to Amend the Complaint and Citation to allege in the alternative two violations of Section 5(a)(1), the general duty clause, of the Act. Prior to trial, the Secretary voluntarily withdrew Citation 1, Item 1 (Exh. J-1, ¶5)[3]. Therefore, only Citation 1, Item 2 as amended remains at issue. At trial, the Secretary clarified the general duty clause in Citation 1, Item 2 was being alleged in lieu of the previously cited standard and not in the alternative (Tr. 7, 17, 18; J-1)[4].

Item 2 as amended alleges a serious violation of the general duty clause, asserting RoadSafe 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 fall hazards while using the liftgate of a moving vehicle as a work platform at the work site on US Highway 90 (Tr. 8-9; Exh. J-1, ¶5). The Secretary proposes a penalty of $12,675 for this Item (Tr. 9).

For the reasons set forth herein, the Court **AFFIRMS** Item 2 of the Citation as amended and assesses a penalty of $12,675.

JURISDICTION AND COVERAGE

RoadSafe timely contested the Citation on May 8, 2018. The Court held a hearing on March 27, 2019, in Conroe, Texas. Both parties filed post-hearing briefs on May 28, 2019. The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to §10(c) of the Act and RoadSafe admits at all times relevant to this action it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 18; Exh. J-1, ¶¶ 1 and 2). Based on the stipulations, admissions and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and RoadSafe is a covered employer under § 3(5) of the Act.

STIPULATIONS

The parties submitted the following stipulations as a joint exhibit:

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[3] Commission Rule 102, 29 C.F.R § 2200.102, provides the Secretary may withdraw a citation "at any stage of a proceeding." "[T]he Secretary's decision to withdraw a citation against an employer under the Act is not reviewable by the Commission." *Cuyahoga Valley Railway Co. v. United Transportation Union* 474 U.S. 3, 7 (1985). The Court acknowledges the Secretary's withdrawal disposes of Item 1.

[4] At the hearing, Exhibit J-1 was modified to exclude language that Item 2 was being amended to allege §5(a)(1) in the alternative.

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by Section 10 (c) of the Occupational Safety and Health Act of 1970(hereinafter "the Act"), 29 U.S.C. § 659 (c).

2. Respondent, RoadSafe Traffic Systems, Inc. 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).

3. As a result of an inspection at Respondent's workplace at the subject jobsite, Respondent was timely issued citations for serious violations pursuant to Section 9(a) of the Act, as set forth in Exhibit A to the Complaint in this proceeding, and the Secretary's Unopposed Motion to Amend Complaint and Citations.

4. Complainant timely received a notice of intent to contest the aforesaid citation and notification of proposed penalty on May, 9, 2018. (sic)

5. Complainant has voluntarily withdrawn Citation 1, Item 1, and will only proceed to trial with Citation 1, Item 2. Citation 1, Item 2 was initially cited as a violation of 29 CFR 1926.601(b)(8), but Complainant amended the Complaint and Citation to plead a violation of the general duty clause.

6. [Employee # 2] was an employee of RoadSafe Traffic Systems on or about November 14, 2017.

7. [Employee # 1] was an employee of RoadSafe Traffic Systems on or about November 14, 2017.

8. On November 14, 2017, RoadSafe Traffic Systems employees were replacing damaged raised pavement markers on US Highway 90 near Devers, Texas. The employees were applying a thermoplastic chemical on the highway and replacing the damaged raised pavement markers with new raised pavement markers.

9. During the installation of the raised pavement markers, Respondent utilized a three truck convoy. Workers from the lead truck applied the thermoplastic chemical on which they placed the raised pavement marker. The middle truck was positioned between the lead truck and the rear truck. The rear truck was equipped with a Truck Mounted Attenuator ("TMA").

10. On November 14, 2017, [Employee # 1], a pavement marking technician, was the employee responsible for applying the thermoplastic chemical to the road and placing the raised pavement markers on the thermoplastic chemical.

11. [Employee # 1] performed this task while riding in the bed of a Terrastar International work truck equipped with a Waltco lift gate. During this process, the lift gate was in a lowered position.

12. [Employee # 1] was struck by the first trailing vehicle, a Ford F-450 towing a trailer.

(Exh. J-1)

At trial, Respondent abandoned its employee misconduct or supervisory misconduct defense (Tr. 43).

BACKGROUND

RoadSafe Traffic Systems, Inc. (RoadSafe) is a road construction company which provides traffic control, pavement marking and pavement striping for the Department of Transportation (DOT), states, municipalities, utilities and railroads. In addition to the services it provides for governments, RoadSafe provides pavement marking services for private airports, military bases and parking lots. Pavement marking involves painting or putting thermoplastic chemical[5] on highway center lines and installing reflective marking devices (Tr. 194, 247-248; Jt. Exh.1 ¶¶ 8, 9, 10).

On November 14, 2017, a RoadSafe crew was assigned to re-install road reflectors to the center line of Highway US-90 near Devers, Texas, a four-lane highway (two lanes in each direction) with a speed limit of 65 miles per hour. The crew worked in the far right lane of the highway (Tr. 134). The work spanned approximately seven miles of the highway where reflectors on the center line had previously popped off or had been removed because they were damaged (Tr. 132). The entire seven-mile distance was considered by RoadSafe to be the work zone (Tr. 314). The work in that work zone was part of a punch list of items to complete an ongoing project (Tr. 105, 106). The crew working this portion of the punch list included the Foreman,[6] the pavement marking technician (Employee #1), the protection truck driver (Employee #2), and the driver of a truck equipped with a Truck Mounted Attenuator (TMA) (Employee #3) (Tr. 128).

[5] Thermoplastic chemical was referred to at the hearing as bituminous tar adhesive, bituminous material or adhesive. It has to be heated to 300 to 340 degrees Fahrenheit to achieve flowable status to install the reflectors (Tr. 315). A melting machine is transported on the vehicles to keep the bituminous tar adhesive at the correct temperature (Tr. 50).

[6] At the time of the hearing, the Foreman had been employed by Roadsafe for ten years, nine of which as Foreman. He has twenty years of experience in road construction (Tr. 103, 104, 153).

The far right lane where the crew worked was not completely closed for the seven-mile work area. Instead, the crew utilized a three-vehicle convoy in a rolling lane closure to install the road reflectors (Tr. 108, 129-130).[7] A rolling lane closure is where the lane of the work area is closed only within the parameters of the convoy so traffic will not enter in the work area. The area of the lane closure moved with the convoy as it proceeded along the highway in the direction of traffic. Traffic moved freely in front, behind and in the left lane adjacent to the work area in the rolling lane closure (Tr. 134).

The first truck in the convoy (work truck), a Terrastar International work truck equipped with a Waltco liftgate, was driven by the Foreman. The pavement marking technician (Employee #1)[8] rode in the bed of the Foreman's truck. Following was a Ford F-450 pulling a trailer (protection truck), driven by Employee #2[9] to protect Employee #1 from passing motorists. The TMA (crash truck) was the last truck in the convoy and was driven by Employee #3[10] (Tr. 49, 110-111). It was designed to take the impact of any vehicle approaching from behind (Tr. 231). While they worked, the crew wore bright yellow safety vests with reflective tape and hard hats (Tr. 150).

The speed of the convoy was set by the Foreman who testified he drove his truck at a speed of 5 to 10 miles per hour (sometimes up to 12 miles per hour) (Tr. 114, 138, 159, 160).[11] He testified he never accelerated or braked quickly because it was a slow operation (Tr. 138). Employee #2 testified the Foreman sometimes drove 25 to 30 miles per hour in long stretches where reflectors did not need to be installed (Tr. 64). The Foreman provided instructions to the drivers of the protection truck and the TMA to follow at a distance of five or six skips which was

[7] This same crew minus the Foreman, earlier in the day, removed the defective road reflectors using two trucks with Employee #2 walking on the highway between the trucks to remove defective road reflectors (Tr. 106-107).

[8] Employee #1 is the employee who died as a result of the accident on November 14, 2017.

[9] Employee #2 had been employed by RoadSafe for one and one-half months at the time of the accident. He was terminated on November 21, 2017 (Tr. 33, 71). He testified his work at RoadSafe included driving the combination (a truck with a trailer or attachment) and since he was fairly new, he did a lot of "ground stuff" such as removing or applying buttons. Earlier on the day of the accident he and Employee #1 worked together, with employee #1 driving the truck and him walking behind chiseling the buttons and throwing them on the truck (Tr. 34, 37, 38, 46, 47, 48).

[10] Employee #3 had been employed with RoadSafe for five years, has a commercial driver's license and drives big trucks for the company. He has been in the construction business for ten years (Tr. 231).

[11] The Foreman testified in a deposition unrelated to this OSHRC proceeding that he traveled between 10 and 12 miles per hour during this type of process. In the instant case, he did not recall that prior testimony (Tr. 115, 117).

200 to 240 feet (Tr. 130-132, 240). Employee #2 testified the Foreman instructed them to keep a good distance (Tr. 73).

To install the reflectors, the Foreman would drive the work truck until he saw a location with a missing road reflector, at which time he positioned the work truck so the back of it was across from where the reflector needed to be installed (Tr. 141). He then stopped so Employee #1 could exit the bed of the work truck to apply the bituminous tar adhesive and install the road reflector. Once the road reflector was installed, Employee #1 got back in the bed of the work truck and the Foreman drove to the next location (Tr. 112-113). The process was repeated throughout the seven-mile work zone on Highway US-90. The reflectors were 80 feet apart, however the stretches along the highway between where reflectors needed to be installed varied (Tr. 111-113). The pavement marking process is a start and stop operation (Tr. 319).

While riding in the bed of the work truck, Employee #1 sat behind the driver's side, in front of the melting machine containing the bituminous tar adhesive which was tied to the gates on the side of the work truck (Tr. 50, 119, 120; Exhs. C-12A, R-16, p. 2). The liftgate of the work truck was in the down position as the convoy traveled so Employee #1 could enter and exit the bed of the work truck, using the liftgate as a step and as a footrest while seated in the bed of the work truck (Tr. 51, 74, 121, 137, 139, 233, 234; Exhs. C-12, C-12A, R-16, p. 2). When down, the liftgate was 18 inches from the ground. A chain covered in black fabric was attached to the liftgate and the back of the work truck on the driver's side (Tr. 80, 137, 142, 161, 2; Exh. R-16, p. 2). The reflectors to be installed were on the liftgate in a bucket and a box (Tr. 167, 169-170).

By using the large left side view mirror and open driver's side window the Foreman could observe the location of Employee #1. He could see when Employee #1 completed installing the road reflector and resumed his place in the bed of the work truck (Tr. 123, 126, 152, 232). The Foreman testified Employee #1 only stood up when in the work truck when it was stopped; and testified "no" at the hearing when asked whether he ever saw Employee #1 sitting on the tailgate of the truck (Tr. 119, 120-121).

RoadSafe has a bituminous application trailer, a specially configured vehicle to allow Employees to ride with fall protection when working from it to install road reflectors (Tr. 125, 315). When in that trailer, employees are seated and are secured by fall protection as they work. The trailer is 6 inches from the pavement and is between 6 and 12 inches from the center line. The

bituminous application trailer is used only when working on a "long line job" where reflectors are being installed for the very first time for a series of miles (Tr. 135, 315-316). If only a few reflectors need to be installed in a short distance, Roadsafe allows its employees instead to use a work truck and convoy (Tr. 135). Because the bituminous application trailer was not available and since the work covered a short distance with frequent stops, the Foreman's supervisor (identified only as Chris) made the decision for the crew to use a three-truck convoy to complete the work (Tr. 126, 127).

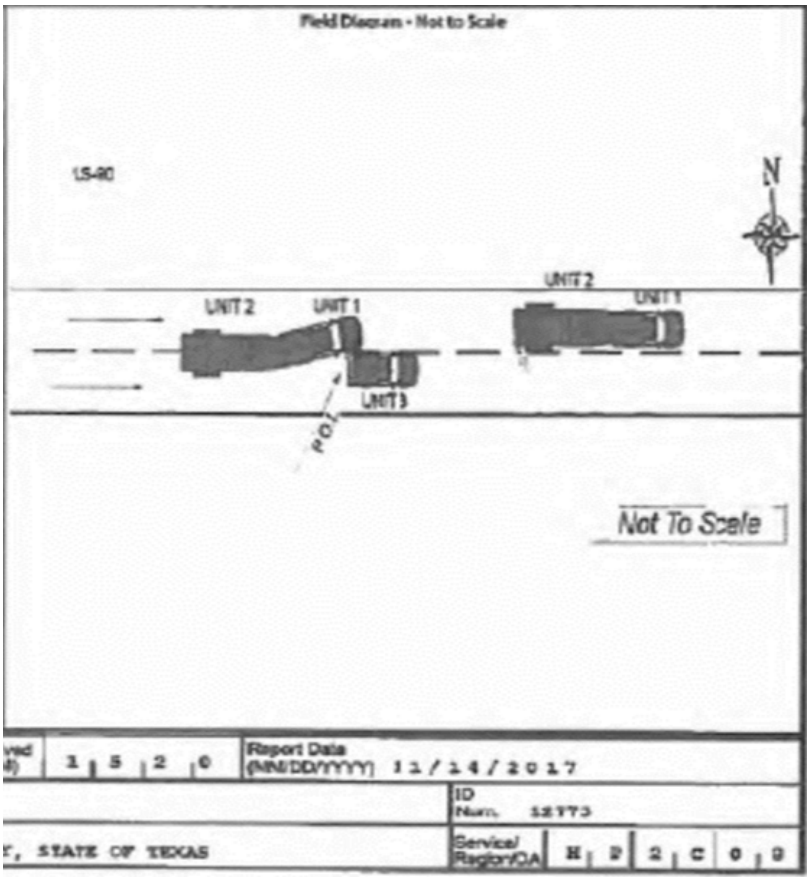
The crew had made approximately 30 stops installing as many reflectors without incident when at approximately 3:00 p.m. the second truck in the convoy, driven by Employee #2, unexpectedly increased its speed and rear-ended the work truck carrying Employee #1 (Tr. 142, 146). The Foreman saw the second truck rapidly approaching at approximately 30 miles per hour. He yelled at Employee #1 to watch out. The work truck had stopped so Employee #1 could replace a reflector. It had been stopped for 5 to 10 seconds when the Foreman saw the protection truck approaching fast, and he screamed Employee #1's name telling him to be careful. According to the Foreman, Employee #1 tried to get back to the bed of the truck when the protection truck hit the work truck (Tr. 146, 147, 148, 159). In his interview statement to OSHA, Employee #3 stated he saw Employee #1 jump from the back of the truck to avoid being hit in the collision (Exh. C-2, p. 00054). Employee #2 testified Employee #1 jumped from the bed of the work truck (Tr. 54-55).

Employee #2 had veered his truck to the left, apparently trying to avoid a collision, but putting it in the direct line of where Employee #1 was located in the bed of the truck. Employee #1 either tried to jump out of the way of the approaching truck or was ejected from the truck as a result of the impact. He was pinned under the axel of the protection truck (Exh. C-2, p. 00055). After the impact, the Foreman exited the work truck and discovered the location and condition of Employee #1. He testified Employee #2 approached him then and said "I'm sorry, I'm sorry; I don't know what happened." (Tr. 149) The Foreman said to him "Man, you killed [Employee #1]." (Tr. 149) According to the Foreman, Employee #2 responded "Man, you know, I got a lot of problems, you know. I don't know what happened." (Tr. 149-150) During his interview with CSHO Jacob, Employee #2 said as he was adjusting mirrors, he knew he was too close and was going to hit the work truck (Exh. C-2, p. 00054).

After the accident Employee #3 approached and the Foreman told him to call 911 (Tr. 240). In response to the 911 call, State of Texas Department of Public Safety investigator Nathaniel Godfrey arrived at the scene of the accident seven minutes after it occurred. Once onsite, he conducted his investigation and prepared a Texas Peace Officer's Crash Report regarding the accident. His report provides in relevant part the following narrative opinion of what happened:

> Unit #3 was traveling E/B on US-90. Unit #1 towing unit #2 was following behind unit #3. The passenger of unit #3 was sitting outside the rear of the vehicle on the left back quarter side laying down center stripe road markers, when unit #1 towing unit #2 struck the left back quarter of unit #3, ejecting the passenger causing him to roll under unit #2 where he came to rest.

(Exh. C-11, p. 2) The following diagram of the accident was included in the report:



(Exh. C-11, p. 2)

RoadSafe notified OSHA of the fatality accident. On November 15, 2017, CSHO Jacob initiated OSHA's inspection at RoadSafe's Houston office and truck yard (Tr. 178). During the

inspection, CSHO Jacob[12] conducted an opening conference, did a walk around of the truck yard to observe the trucks involved in the accident, took photographs and conducted interviews. He scheduled another visit to go to the incident site, made a return visit to interview Employee #2, and a final visit in April 2018 to conduct additional interviews (Tr. 179, 180). As a result of his inspection, CSHO Jacob determined Employee #2 misjudged the convoy speed and sped up to keep close to the work truck (Exh. C-2, p. 00054).

The Secretary obtained a copy of RoadSafe's policy prohibiting employees from riding in the back of vehicles in certain circumstances. It provides:

> It is permissible to WORK in or on the back of our vehicles as the job requires. However, RIDING in the back of vehicles, without the benefit of seat belts, is NOT permitted when not working. Examples of 'not working' include when the vehicle is moving to or from the yard to the work location, or between work locations when actual pavement marking is not occurring or traffic control devices are not being deployed.

(Exh. R-1, pp. 41, 43) (emphasis in original).

Based on CSHO Jacob's inspection, he recommended the issuance of the citations initially issued in this case alleging violations of two motor vehicle standards of Subpart O- Motor Vehicles, Mechanized Equipment, and Marine Operations. Those citations were subsequently amended to allege two violations of the general duty clause, one of which remains at issue in the in this case.

Credibility

The Court recognizes how difficult it was for the crew members who observed the tragic accident resulting in the death of their co-worker. The Court also realizes the shock each crew member may have experienced as a result. In such situations recall of the events may be affected. In assessing the credibility of the witnesses in this case, the Court is cognizant of this and therefore attributes more weight to the recollections made closer in time to the occurrence of the accident. The Court's credibility determinations are not a reflection on the truthfulness or character of the witnesses. Instead they are based on what the Court determines are the most reliable recollections of the circumstances surrounding the accident.

[12] CSHO Jacob has been employed with OSHA for four years and his job duties include conducting construction and general industry inspections and incident investigations (Tr. 176). Prior to his employment with OSHA, CSHO Jacobs was a civilian safety specialist with the United States Marine Corps for ten years. His job duties included conducting ship inspections for safety and health and he formulated several safety and health programs (Tr. 177).

The Court credits the testimony of Employee #2 that Employee #1 was in the bed of the work truck at the time of the accident. His testimony is consistent with the Public Safety investigator's report of the accident and with Employee #3's interview statement to CSHO Jacob. As Employee #2's testimony is consistent with the Public Safety investigator's report, and there is no evidence in the record Employee #2 provided any information to the Public Safety investigator for his report, the Court is not persuaded Employee #2's recollection of the events should be discredited because of any alleged personal injury action against him regarding the accident, as Respondent contends. During his testimony, Employee #2 appeared remorseful and did not appear to try to distort his recollection of the events.

The Foreman's testimony that Employee #1 was on the pavement and attempting to get back into the work truck is discredited as being inconsistent with the Public Safety investigator's report, the testimony of Employee #2, and Employee #3's interview statement to OSHA during the inspection. Further, in his interview with CSHO Jacob during the inspection, he stated that when he saw the protection truck coming up behind them fast he "tried to push the gas" on the work truck to increase the distance (Exh. C-2, p. 00054). He testified at the hearing he had stopped the work truck so that Employee #1 could install the road reflector (Tr. 146, 147, 148, 159). During his testimony the Foreman seemed nervous and his testimony was confusing and defensive. He was clearly upset by the accident. When the Foreman testified, he appeared to be making an effort to say the right thing, as if he were trying to please his employer.

The Court credits Employee #3's statement to CSHO Jacob during the inspection that Employee # 1 was working on the rear lift gate (Exh. C-2, p. 00054). The Court further credits his testimony Employee #1 sat on the back of the truck with his feet on the tailgate when the work truck would start to move looking for the next button (Tr. 236). During his testimony Employee #3 appeared confident and forthcoming.

The Citation

The Citation as amended alleges a serious violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 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 fall hazards:
>
> > (a) On or about November 14, 2017, at the work site on US Highway 90, employees were exposed to fall hazards while using the lift gate of a moving

vehicle as a work platform.

As a feasible means of abatement, the Citation alleges:

> Feasible means to abate this hazard include but is not limited to prohibiting the use of a lift gate of a moving vehicle as a work platform and/or only using a trailer or vehicle specifically designed for installing reflector buttons on the freeway.

(Tr. 8-9; Exh. J-1, ¶5)

ANALYSIS

Elements of a § 5(a)(1) Violation

> Section 5(a)(1) of the Act mandates that each employer "furnish to each of his employee's employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). To establish a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Pegasus Tower,* 21 BNA OSHC 1190, 1191, 2005 CCH OSHD ¶ 32,861, p. 53,077 (No. 01-0547, 2005).

Erickson Air-Crane, Inc., No. 07-0645, 2012 WL 762001, at *2 (March 2, 2012).

In addition to the above-quoted elements of a § 5(a)(1) violation, the Secretary must also establish the employer had either actual or constructive knowledge of the hazardous condition. *Deep South Crane & Rigging Co.,* 23 BNA OSHC 2099 (No. 09-0240, 2012), *aff'd Deep South Crane & Rigging Co. v. Seth D. Harris,* 24 BNA OSHD 1089 (5th Cir. 2013).

Whether an Activity or Condition at the Site Constituted a Hazard

The amended Citation provides employees "were exposed to fall hazards while using the liftgate of a moving vehicle as a work platform."

In a recent decision the Commission reiterated

> In a general duty clause case, "[the] hazard must be defined in a way that apprises the employer of its obligations, and identified conditions and practices over which the employer can reasonably be expected to exercise control" *Arcadian Corp*, 20 BNA OSHC [2001, 2007 (No. 93-0628, 2004)]; *Peron Corp*., 12 BNA OSHC [1833, 1835 (No. 82-388, 1986)]. The Secretary must show, among other things, that the hazard was present. *Wheeling-Pittsburgh Steel Corp*., 16 BNA OSH 1218, 1221 (No. 89-3389, 1993).

Mid South Waffles, Inc. d/b/a Waffle House #1283, 27 BNA OSHC 1783, 1785 (No. 13-1022,

2019).

The Secretary defined the hazard in this case as a *fall hazard* while using the liftgate of a moving vehicle as a work platform. He asserts the employees were not protected from falling from the moving vehicle. The evidence adduced at trial shows Employee #1 rode on the liftgate when the convoy was moving in the work area: Employee # 2 testified:

> Q. Did [Employee #1] ever sit on the rear of the lift gate and apply the- -
>
> A. He – yes. He did at one point. Yes. He did when - - like I said, because we, me and him, we covered the point where we had not to remove all these buttons. About - - I would say about 50 or 60. So he sat on the back to cover that distance. After we covered that distance, then he repeated the same process.
>
> Q. Okay. So when you were coming up intermittently on the buttons that you had removed, he would - -
>
> A. Yes.
>
> Q.-- go up and down from the bed to the tailgate to the ground, to put on the liquid and to remove the buttons.
>
> A. Yes, sir.
>
> Q. But when you had to travel a distance, he would sit on the tailgate.
>
> A. Yes. He only did it once, but if I - - just to cover that distance that we were going forward, he just sat on it once, from what I remember.

(Tr. 55-56). Although the evidence does not show Employee #1 sat on the liftgate for shorter stretches to install the road reflectors, it shows he sat in the bed of the work truck with his feet on the liftgate while the work truck was moving during those stretches (Tr. 112-113). Regarding what appears to be activity immediately prior to the accident, Employee #2 testified:

> Q. Yes. You said that he would get the liquid from the bed of the pickup truck –
>
> A. Yes.
>
> Q. --jump down to the lift gate and then on to the ground and put the liquid down and then put the marker down. Correct?
>
> A. Yes, sir.
> Q. Okay. So as he was in the back of the pickup, in the bed of the pickup, was the

truck stationary or was it moving?

> A. It was slightly moving, coming to a very stop, and I wasn't sure-- at this point, this is where, you know--once he was doing that and applying-- repeating the process, I gave him a good distance. And while I was coming to a complete stop with them, at the very end, he was on the tailgate. . .

(Tr. 53-55). The Foreman's testimony also confirms, regarding the way they performed the work, Employee #1 was in the bed of the work truck while it was moving (Tr. 118-119).

RoadSafe's regular practice for employees installing road reflectors when using a convoy to accomplish this task was to allow them to ride in the bed of the work truck. It considered riding for this purpose to be "work activity." Glen Thompson,[13] RoadSafe's Chief Operating Officer testified an employee is considered "working" in the back of the truck because he is in a "work zone, moving at a slow speed in a published state-designated work zone" (Tr. 291). Therefore, the Court finds employees riding in the bed of the work truck is not disputed.

RoadSafe disputes however, the Secretary's position the employees were not protected from falling from the work truck while it was moving. It argues Employee #1 was more than adequately protected from falling because he had four points of contact while riding in the work truck while seated with feet placed on the liftgate and when holding with one hand onto the fabric wrapped chain connected to the liftgate (Tr. 279). Thompson testified this is more protection than even OSHA requires (Tr. 279). No credible evidence was adduced at trial that when Employee #1 was riding on the tailgate or immediately prior to the accident, he was holding onto the chain on the liftgate while the work truck was moving. RoadSafe produced no work rules or policies requiring employees to hold onto the chain for fall protection. Moreover, the Foreman testified holding onto the chain was not sanctioned by RoadSafe, that it was just something Employee #1 would do (Tr. 162-163).

The Secretary further described the fall hazard as occurring when the employee used the liftgate of a moving vehicle as a work platform. RoadSafe does not dispute the liftgate was used as a work platform. The uncontroverted evidence shows the liftgate was used as a staging area or

[13] In November 2017, Mr. Thompson was Vice President of Operations for RoadSafe, and was in charge of the safety compliance department handling investigations. He ran the fleet department and maintained the safety standards with the DOT. He also was responsible for the operational excellence campaigns to improve quality of service and safety (Tr. 248-249).

platform for the reflectors which were in a bucket and box on the liftgate for Employee #1 to install once the work truck arrived at the designated area (Tr. 167, 169-170). The evidence does not show the reflectors were removed from the liftgate before the work truck moved along stretches of highway. The liftgate remained in a down position throughout the convoy's movement along the highway.

The Court finds the Secretary has adequately defined the hazard and Employee #1 was unprotected from falling while riding on the back of the work truck. Therefore, Employee #1 was exposed to a fall hazard while riding on the back of the moving work truck while using the liftgate as a work platform.

Whether the Employer or its Industry Recognized the Hazard

The Secretary asserts RoadSafe recognized riding in the back of a truck created a fall hazard, and provides as support, RoadSafe's Employee Handbook, ANSI standard A10 47-1015 4.5.4, a Job Safety Analysis and OSHA 300 logs reflecting instances when RoadSafe employees had fallen from trucks (Secretary's brief, pp. 10-13). RoadSafe disagrees, arguing none address the hazard of falling from a moving vehicle as cited by OSHA in this case.

RoadSafe points out the Co-Worker Safety Handbook prohibits riding on vehicles only when transiting between work locations unless actively setting up or taking down temporary traffic control devices. It argues the ANSI standard relied upon by the Secretary addresses putting down and taking up traffic control devices, a different work activity than what the employees in this case were engaged in. Regarding the JSA alleged in support by the Secretary, RoadSafe argues it too only prohibits riding on the back of a vehicle when transiting between work locations (RoadSafe brief, pp.19-20). And RoadSafe argues the circumstances regarding the incidents set forth in the OSHA 300 logs do not address the cited hazard.

The evidence adduced at trial shows RoadSafe recognized the cited hazard. RoadSafe's Safety Manual provides:

> It is permissible to WORK in or on the back of our vehicles as the job requires. However, RIDING in the back of vehicles, without the benefit of seat belts, is NOT permitted when not <u>working.</u> Examples of 'not working' include when the vehicle is moving to or from the yard to the work location, or between work locations when actual pavement marking is not occurring or traffic control devices are not being deployed.

(Exh. R-1, pp. 41, 43) (emphasis in original) RoadSafe's Job Safety Analysis for Short Duration Work to protect against fall hazards provides "[t]there shall be NO riding on back of tail or lift gates at any time." (Exh. C-7, p. 3)(emphasis in original) Further, Chief Operating Officer Thompson testified employees are not permitted to ride in the back of a vehicle for transportation because it "subjects an employee to risks from either (a) falling out of a vehicle, or if the vehicle's involved in a motor vehicle accident, people would be ejected from the back of a vehicle." (Tr. 254)

The distinction RoadSafe makes between riding in the back of a vehicle when working as opposed to transiting is illogical. The hazard of falling when riding unprotected on a vehicle is the same whether a worker is working or transiting. Thompson's testimony alone establishes RoadSafe's recognition of the cited fall hazard. The Secretary has established employer recognition of the hazard.

Whether the Hazard was Likely to Cause Death or Serious Physical Harm

To establish this element, the Secretary presented evidence of prior OSHA inspections citing violations for falls from the bed or back of moving vehicles (Exh. C-22). Exhibit C-22 shows situations where employees suffered injuries such as skull fractures, facial injuries and other injuries requiring hospitalization. It also includes situations where employees died as a result of their falls from moving vehicles.

It cannot reasonably be disputed that falls from moving vehicles are likely to cause death or serious physical harm. Therefore, RoadSafe argues the conditions set forth in the examples of prior instances set forth in Exhibit C-22 are different from the conditions here and involve falls from the bed of the truck or lift gate directly to the pavement. RoadSafe relies on CSHO Jacob's alleged testimony that a fall in this case would be first to the lift gate and then to the pavement (RoadSafe's brief, p. 23). RoadSafe mischaracterizes CSHO Jacob's testimony. He testified in response to RoadSafe's questioning, that a fall first to the liftgate was only one possibility (Tr. 210). The Court finds no merit in RoadSafe's argument. As CSHO Jacob testified, the employee would still be exposed to a fall (Tr. 210).

RoadSafe also disputes CSHO Jacob's characterization of the violation as being of high severity because Employee #1 died. RoadSafe argues Employee #1's death was not because he fell from the work truck but because he was hit by the protection truck while on the road trying to

get back into the bed of the work truck (RoadSafe's brief, p. 24). The Court discredits this version of the accident. The credible evidence shows Employee #1 was on the work truck at the time of impact. Public Safety investigator Nathaniel Godfrey's Crash Report provides he was ejected from the vehicle (Exh. C-11, p. 2). The Court finds the Public Safety Accident Report to be reliable. The report was made on the same day of the accident. Its content was not disputed by either party at the hearing. Therefore, the Court credits the Public Safety Crash Report over testimony to the contrary, including testimony that Employee #1 jumped from the work truck.

Employee #1 suffered fatal injuries as a result of his fall from the work truck. The Secretary has established the hazard of falling from a moving vehicle is likely to cause death or serious physical harm.

Whether a Feasible Means Existed to Eliminate or Materially Reduce the Hazard

As a feasible means of abatement, the Secretary set forth in the Citation prohibiting the use of a liftgate as a work platform and/or using a trailer or vehicle specifically designed for installing reflector buttons on the freeway. In addition, the Secretary set forth in his post-trial brief that employees could install the road reflectors on foot and employees could ride in the cab of the work truck on the passenger side and exit to install each road marker (Secretary's brief, p. 17).

> The Secretary has the burden of "demonstrat[ing] both that the [proposed abatement] measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enters.*, 19 BNA OSHC at 1190, 2000 CCH OSHD at p. 48,981. "Feasible means of abatement are those regarded by conscientious experts in the industry as ones they would take into account in 'prescribing a safety program.'" *Id.* at 1191 (quoting *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973)). 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 ...." *Kokosing*, 17 BNA OSHC at 1875 n.19, 1995-1997 CCH OSHD at p. 43,727 n.19. But the Secretary is not required to show that the proposed abatement would completely eliminate the hazard. *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122, 1993-1995 CCH OSHD ¶ 30,048, p. 41,279 (No. 88-572, 1993).

Acme Energy Servs., No. 08-0088, 2012 WL 4358852, at *6 (OSHRC Sept. 19, 2012), *aff'd Acme Energy Servs. v. OSHRC*, 542 F. Appx. 356 (5th Cir. 2013).

In his brief for the first time, the Secretary proposed as a feasible means of abatement having the employees install the road reflectors by foot. The Secretary posits this would be feasible

as demonstrated by the employees having removed the defective reflectors by foot on the morning of November 14, 2017, with an employee walking between a two-truck convoy. Since the post-hearing briefs were filed simultaneously, RoadSafe did not address this proposed feasible abatement method. The evidence shows the road reflector installation process is different from the removal process, as it requires the use of a melting machine with bituminous tar heated to at least 300 degrees, and at a minimum a two-step installation process. The Secretary did not address how installing the road markers by foot is feasible in light of the differences between the installation and removal processes. Nor did he address how this proposed abatement method impacts RoadSafe's policy of limiting the time employees are on the road in order to reduce their exposure to hazards from traffic. Therefore, the Court finds the Secretary has failed to establish installing the road reflectors by foot is a feasible means of abatement.

The Secretary's proposed feasible abatement of having employees ride in the passenger side of cab of the work truck and exit to install each road marker also fails. The Court is persuaded by RoadSafe's argument the employees would be exposed to a greater hazard of traffic from the right side of the work truck. The Secretary did not address in his brief prohibiting the use of the liftgate as a work platform as a feasible means of abatement, as alleged in the amended Citation. Nor was evidence adduced at the trial regarding this. The Court therefore rejects this proposed abatement method.

The Court now turns to the Secretary's proposed feasible abatement measure regarding the use of a specially configured vehicle. RoadSafe already uses a specially configured vehicle called a bituminous application trailer for installing road markers when long distances are involved. The bituminous application trailer allows employees to ride with fall protection when working from it to install road reflectors (Tr. 125, 189, 315). RoadSafe does not use the bituminous application trailer however for work involving short distances with frequent stops, such as in this case. Although it uses the bituminous application trailer for work involving long distances, RoadSafe asserts it is not used for the safety of employees, but rather to allow faster production (RoadSafe's brief, p. 15). It argues the employees on short distances would be exposed to a greater hazard because of prolonged exposure to the center line of the highway in proximity to live traffic (RoadSafe's brief, p. 15).

RoadSafe's argument regarding the infeasibility of using the bituminous application trailer

for short distances is perplexing. Employees using it for long distances are exposed to the same hazards as those on short distances, potentially for longer periods of time. RoadSafe's argument suggests it values expediency over Employee safety. RoadSafe has not argued that the frequent stops made on short distances impacts production significantly, if at all. Nor has it shown the hazards to which employees are exposed on short distances are any different than those on long distances. The Court is not persuaded use of the bituminous application trailer on short distances exposes employees to a greater hazard. The Court finds use of the bituminous application trailer would materially reduce exposure to fall hazards when installing road reflectors on short distances and is a feasible means of abating the fall hazard, as demonstrated by use of the bituminous application trailer by RoadSafe for long distances.

The Secretary has established a feasible means of abating the fall hazard.

Whether RoadSafe had either Actual or Constructive Knowledge of the Hazard

The Secretary must prove that the employer had either actual or constructive knowledge of the violative conditions. To prove knowledge, the Secretary can show that a supervisor had either actual or constructive knowledge of the violation and such knowledge is generally imputed to the employer. An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *American Engineering & Development Corp*., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc*., 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992). Where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *ComTran Crp., Inc. v. U. S. Dep't of Labor*, 722 F.3d 1304, 1307-08 (11th Cir. 2013). A supervisor's knowledge of a subordinate employee's violative conduct may be imputed to the employer even when the supervisor himself is simultaneously involved in the same violative conduct. *Quinlan v. U. S. Dept. of Labor*, 812 F.3d 832 (11th Cir. 2016).

Here, the Foreman drove the work truck with Employee #1 riding in the bed of the truck using the liftgate as a work platform to install road reflectors. He was aware there was no fall protection available on the work truck. Although the liftgate has a chain connecting it to the bed of the work truck, the Foreman testified the company did not advise using the chain as a handhold (Tr. 162-163). The Court discredits the Foreman's testimony that Employee #1 used the chain on

the liftgate for fall protection. This testimony was not corroborated by any other witness. The Foreman had actual knowledge Employee #1 worked without the use of fall protection while riding in the bed of the work truck while it was moving. In addition, because it was RoadSafe's practice to use work truck convoys for short distances when installing road reflectors, management including higher level officials, such as Glenn Thompson, were aware employees worked without fall protection. Knowledge is established.

The Secretary has established a violation of §5(a)(1) of the Act.

CHARACTERIZATION OF THE VIOLATION

The Secretary characterized the violation of § 5(a)(1) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

As a result of his review of OSHA citations relating to prior inspections for falls from trucks and his review of OSHA 300 logs for Roadsafe, CSHO Jacob determined falling from the back of a truck posed a serious hazard which could result in serious injuries or death (Tr. 181, 187-188; Exh. C-22). Employee #1's injuries were fatal. The violation is properly characterized as serious.

PENALTY DETERMINATION

"In assessing penalties, section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc*., No. 00-1052, 2005 WL 696568, at *3 (OSHRC February 25, 2005) (citation omitted). "Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors." *Natkin & Co. Mech. Contractors*, No. 401, 1973 WL 4007, at *9, n. 3 (OSHRC April 27, 1973).

CSHO Jacob considered in calculating the gravity of the violation that only one employee was exposed and determined the gravity based penalty for the violation in Item 2, Citation 1 as

amended was of high severity and greater probability because an employee was killed and because that employee and other employees perform worked on a regular basis from the rear liftgate of trucks and were not protected from falling (Tr. 191).

No reduction in the gravity-based penalty was given. Roadsafe employs 1700 employees so no penalty reduction for size was given (Tr. 192). No penalty reduction for history was given because Roadsafe had been previously cited for a high gravity safety violation under an OSHA State Plan. And no penalty reduction for good faith was given because the cited violation in this matter was determined to be of high-greater gravity.

Upon consideration of the gravity of the violation, RoadSafe's size, history and good faith, OSHA's proposed penalty is appropriate, and the Court assesses a penalty in the amount of $12,675 for Item 2 of the Citation as amended.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 2 of the Citation, alleging a serious violation of § 5(a)(1) of the Act, is **AFFIRMED** and a penalty in the amount of $12,675 is assessed.

SO ORDERED.

/s/
Sharon D. Calhoun
Administrative Law Judge
Washington, DC

Dated: September 30, 2019