



employed by Schaad where the record established that both Schaad and a reasonable employer familiar with the worksite knew that armed guards could encounter a shot-by hazard requiring the use of personal protective equipment (PPE) to protect the armed guards from the potentially deadly harm of being shot in the torso.<sup>2</sup> Dec. 13-14, 47-59, 63. For the same reason, the ALJ erred in finding that Schaad lacked fair notice of its obligations under § 1910.132(a). Dec. 59-62.

## **Statement of Facts**

### **I. Introduction**

On March 20, 2016, [Redacted] a Schaad armed security guard, was shot and killed during an attempted armed robbery of Schaad's client, the Pennsylvania Turnpike Commission. Dec. 1-2; Hearing Transcript (Tr.) 46. OSHA subsequently issued a serious citation alleging a violation of 29 C.F.R. § 1910.132(a) for Schaad's failure to require Mr. [Redacted] to use PPE, i.e., a bulletproof vest, and

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<sup>2</sup> As the ALJ noted, various terms are used to describe the type of PPE at issue in this case. Dec. 2 n.3. The Secretary uses the terms bulletproof vests and vests for the sake of simplicity and not to describe any specifically required PPE. See Dec. 2 n.3 (noting that this latter issue was not contested).

Schaad timely contested the citation. Dec. 2-3, 6; Secretary's Exhibit (Ex. C-) 1. ALJ Dennis L. Phillips held a hearing on October 24 and 25, 2017, and on November 20, 2018, issued a decision vacating the citation. Dec. 3, 63.

## **II. Hearing Evidence**

### **A. Schaad and the Pennsylvania Turnpike Commission Contract**

Schaad provides armed and unarmed security services throughout Pennsylvania. Dec. 4. It has approximately 380 security guards of which approximately sixty-five are armed.<sup>3</sup> Dec. 5, 6; Tr. 124.

Schaad requires its armed guards to have a background in law enforcement and to successfully complete lethal weapons training under a state law known as Act 235. Dec. 11, 15, 27; Tr. 128. Schaad provides its armed guards—and only its armed guards—with guidance on the use of lethal force when faced with the threat

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<sup>3</sup> The ALJ misconstrued hearing testimony in finding that sixty-five percent of Schaad's guards were armed guards. See Dec. 6 (citing Tr. 124 and Stipulation 3 as support for statement that “[a]bout 65% of Respondent's employees are armed security guards”); Tr. 124 (witness seeking and obtaining clarification that question was how many armed guards “by number” rather than by percentage and answering 65).

of lethal force being used against them. Dec. 10, 26-27; Tr. 126-27; Ex. C-4.

In 1997 Schaad obtained a contract to provide the Pennsylvania Turnpike Commission with armed security. Dec. 4; Ex. C-3. Schaad viewed its armed security guards for the Turnpike contract as a deterrent to an armed robber, and required the armed guards to wear a uniform that resembles that of a police officer. Dec. 30-31, 52; Tr. 137, 142-43; Ex. C-5. Timothy Lenahan, Schaad's general manager, acknowledged that the uniform increased the risk that a person "that's out to do harm" would shoot the security guard because he mistook the guard for a police officer. Dec. 26; Tr. 122, 137.

Under the Turnpike contract, a Schaad armed guard met with a Pennsylvania Turnpike Commission teller each morning between 5:00 am and 7:00 am. Dec. 6-7; Tr. 53, 88, 95-97. The Schaad armed guard accompanied the teller, who drove an unmarked van containing bags of money, from tollbooth station to tollbooth station along the turnpike. Dec. 6-7. At each tollbooth station, the van stopped and the teller provided tollbooth personnel with money to make change and received the prior day's toll revenue. Dec. 7, 19-

20, 21. The Schaad armed guard got out of the van to observe the teller enter and exit the tollbooths or a nearby building, but stayed with the van. Dec. 7, 21, 22; Tr. 88, 95-96.

On March 20, 2016, Mr. [Redacted] was working the Turnpike security job. Dec. 1-2. At approximately 7:00 am, when the van arrived at the Fort Littleton turnpike exchange, a toll collector told Mr. [Redacted] that an armed robbery was taking place and Mr. [Redacted] got out of the van to assist. Dec. 1-2, 7-8. The robber shot Mr. [Redacted] in the torso, killing him, and also killed the toll collector who had asked Mr. [Redacted] for assistance. Dec. 9. State police shot and killed the robber. Dec. 9-10. Fifty-eight thousand dollars was in the van at the time of the attempted robbery. Tr. 175; Ex. C-9 at 2.

**B. Schaad’s Use of Bulletproof Vests and the Security Industry’s Recognition of the Hazard**

In 2008 and 2009, Schaad spent approximately \$30,000 on bulletproof vests for its armed security guards. Dec. 4, 14; Tr. 131-34; Ex. C-6. Mr. Lenahan explained that Schaad did so as an “invest[ment] in officer safety” and that he had discussed the investment with Schaad’s president and sole shareholder, Russell Wantz, Jr., so that he could “go to sleep knowing that we’ve done

everything we can to provide safety for . . . our officers.” Dec. 4; Tr. 130-31. Mr. Lenahan also explained that Schaad encouraged its armed guards to wear the vests, “because its added protection level or safety.” Tr. 137.

At least six of Schaad’s armed security guards who worked the Turnpike job generally or always wore a bulletproof vest while performing that service. Matthew Titus, Ann Allman, Robert Buford, and Robert Stover always or “religiously” wore the vest. Dec. 20, 31; Tr. 50, 54-55, 75-78, 99, 145. John Spadafora and Jeffery Aster usually wore the vests but did not when it was “real hot,” such as when the temperature reached ninety-five degrees. Dec. 21; Tr. 53, 90. Additionally, Mr. Lenahan testified that active law enforcement officers who also worked for Schaad wore their vests. Tr. 145.

Mr. Redacted was not wearing a bulletproof vest on March 20, 2016, when he was shot and killed. Dec. 4. According to Mr. Lenahan, the “older element [e.g., Mr. Redacted] didn’t prefer to wear them because of comfort.” Dec. 12; Tr. 46.

The Secretary’s expert, Dr. Daniel J. Benny, testified that

the Pennsylvania Turnpike Commission job was a “high-risk assignment in a high-risk environment.” Tr. 183. He explained that armed guards hired to protect persons transporting money face a hazard of being shot on the job, because robbers “focus on individuals transporting money” and sometimes use a weapon to commit their crime. Tr. 175-76; *see also* Ex. C-8 at 6 (Dr. Benny’s report stating that “most . . . robberies related to money are armed robberies with the perpetrator using a firearm 40.8% of the time”). Schaad’s use of a uniform increases the risk to the security guard because it identifies the guard as a threat that a determined robber will want to eliminate. Tr. 176, 185.

Industry research confirmed Dr. Benny’s conclusion that Schaad’s armed security guards faced a hazard while performing the Pennsylvania Turnpike Commission job. Tr. 178-83, 189-90. The on-job fatality rate for security guards in 2009 was more than double the rate for all workers, and nearly two thirds of the security guard fatalities were the results of “assaults or other violent acts.” Tr. 179, 190; *see also* Tr. 65 (OSHA compliance officer testifying that study showed 75% of fatalities of security guards were caused by gunshots). In addition, Dr. Benny testified, based on his forty-

five years' experience in the industry, the security industry recognized the shot-by hazard Schaad's armed security guards faced while performing the Turnpike job. Tr. 174-80, 189-91.

Dr. Benny also testified that use of a bulletproof vest would materially reduce the shot-by hazard. Tr. 180-83. Research confirmed that using a bulletproof vest quadrupled the chances of surviving a shot to the torso. Tr. 182. If he were asked to recommend a safety program for Turnpike guards, he would recommend that vests be mandatory. Tr. 180, 183; Ex. C-8 at 7-8.

Schaad's expert, Eddie Sorrells, testified that the absence of any prior robberies in the previous nearly twenty years that Schaad performed the Turnpike job indicated that Schaad's armed security guards faced a "lower risk" of something happening. Tr. 206. In his view, this history and the use of an unmarked van gave "rise to the conclusion that this is not a high level of risk." Tr. 207.

Mr. Sorrells testified that Schaad went "above and beyond" what other security companies did when it purchased bulletproof vests for its security guards. Tr. 209. He acknowledged, however, that security companies require their guards to wear bulletproof vests when their contracts with their clients require such use. Tr.

209, 218. He similarly acknowledged that because Schaad had already provided its armed guards with vests, it was appropriate after Mr. Redacted death for Schaad to require its armed guards to wear the vests. Tr. 220-21. If Schaad had not already purchased the vests, he testified, he would need to know more about the situation before he would recommend the mandatory use of vests for armed guards working the Turnpike job. Dec. 41; Tr. 221.

### **III. The ALJ Decision Vacating the Citation**

In his decision, the ALJ set forth findings of fact that he characterized as the “most influential to the conclusions of law for this case.” Dec. 13. Among these findings are three “undisputed” facts: (1) “that [Schaad’s] armed security guards face a hazard of being shot on the job;” (2) “that the severity of being shot while not wearing PPE is high, potentially leading to death;” and (3) “that a bulletproof vest would reduce the harm to an employee if the employee were shot in the torso.” Dec. 13-14. The ALJ also found that, “[y]es, just as being shot is undisputedly a severe hazard, a bullet-proof vest is a form of PPE.” Dec. 61.

Nonetheless, the ALJ vacated the citation on the ground that the Secretary failed to show that 29 C.F.R. § 1910.132(a) applied to

Mr. [Redacted] work. Dec. 48-59, 63. In the ALJ's view, the standard did not apply because the Secretary failed to prove that either Schaad or a reasonable employer familiar with the Schaad worksite would recognize that Mr. [Redacted] encountered a hazard within the meaning of the standard.<sup>4</sup> Dec. 48-59.

The ALJ determined that the Secretary's evidence that Schaad recognized the hazard was "rebutted" by Schaad's evidence that an "unmarked van . . . masked the money transfer process" and that Schaad had not previously suffered an incident involving the use of lethal force. Dec. 52-55. As a result, the Secretary failed to prove Schaad's knowledge of the hazard because the Secretary did not prove that Schaad had "actual knowledge of the likelihood of its occurrence." Dec. 54.

The ALJ similarly ruled that the Secretary failed to establish that a reasonable employer familiar with the circumstances of

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<sup>4</sup> In determining that the Secretary failed to prove Schaad's actual knowledge of a hazard, the ALJ analyzed whether Schaad had actual knowledge of a significant risk of harm. Dec. 48-55. In the context of applying the term "hazard" as used in standards such as § 1910.132(a), whether a significant risk of harm exists is the same as whether a hazard exists. *See, e.g., Weirton Steel Corp.*, 20 BNA OSHC 1255, 1259 (No. 98-0701, 2003) ("Whether a hazard exists depends on whether there is a significant risk").

Schaad's worksite would have recognized a hazard requiring the use of bulletproof vests. Dec. 55-59. In the ALJ's view, the Secretary's evidence of the hazardousness of the armed security work was outweighed by industry practice of not providing vests, Schaad's lack of prior incidents, Schaad's policy of requiring its armed security guards to have a law enforcement background, and the use of an unmarked van on the Turnpike job. Dec. 57-59. The ALJ also determined that, even if the standard applied, the Secretary failed to provide fair notice that Schaad had to require Mr. [Redacted] to wear a bulletproof vest on March 20, 2016. Dec. 59-62.

### **Discretionary Review is Warranted**

The ALJ erred in determining that the Secretary failed to establish that 29 C.F.R. § 1910.132(a) applied to the hazard of armed guards being shot while working the Turnpike detail. Contrary to the ALJ's decision, ample evidence in the record established that both Schaad and a reasonable employer familiar with the circumstances of the Turnpike job knew or would realize that a bulletproof vest was necessary to protect armed guards from the hazard of being shot. Similarly, and contrary to the ALJ's decision, Schaad had fair notice of its obligations under §

1910.132(a). The Commission should grant review to ensure that employees exposed to deadly, even if relatively infrequently-occurring, hazards receive protection before (rather than after) a company suffers its first fatality.

**I. The Secretary Established that 29 C.F.R. § 1910.132(a) Applied to Schaad’s Armed Security Work for the Pennsylvania Commission Turnpike.**

Under 29 C.F.R. § 1910.132(a), an employer must require its employees to use PPE “wherever it is necessary by reason of hazards . . . capable of causing injury.”<sup>5</sup> The standard applies where “either . . . the employer had actual notice of a need for

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<sup>5</sup> Section 1910.132(a) provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

There is no dispute that bulletproof vests are a type of PPE. The dispute is whether Mr. Redacted use of a vest was “necessary by reasons of hazards” he “encountered” while performing the Turnpike job.

protective equipment or . . . a reasonable person familiar with the circumstances surrounding the hazardous condition would recognize that such a hazard exists.” *Weirton Steel Corp.*, 20 BNA OSHC at 1264. The Secretary established both Schaad’s and a reasonable person’s knowledge of a hazard requiring Mr. [Redacted] to use PPE while providing armed security services to the Turnpike Commission, and therefore established that the standard applied. The ALJ’s contrary conclusion is unsupported by the record.

**A. Schaad had Actual Notice of the Need for Mr. [Redacted] to Wear his Protective Vest.**

The ALJ determined that the Secretary failed to prove Schaad’s knowledge of the hazard because, in the ALJ’s view, the Secretary did not prove that Schaad had “actual knowledge of the likelihood of its occurrence.” Dec. 54. To show Schaad’s actual knowledge of the hazard, however, the Secretary had to show only that Schaad recognized that a shooting was a realistic possibility, i.e., “more than a speculative possibility.” *Weirton Steel*, 20 BNA OSHC at 1260; *see also Beverly Enters.*, 19 BNA OSHC 1161, 1172 (Nos. 91-3144, et al., 2000) (under significant risk analysis, the Secretary need only show “nontrivial” risk, or “realistic possibility” of harm, or

that harm could happen “upon other than a freakish or utterly implausible concurrence of circumstances”); Dec. 50, 53. The Secretary met this burden.

Multiple pieces of evidence show that Schaad recognized that a shooting was a realistic possibility that Schaad’s guards could “encounter” while performing the Turnpike security detail. See *supra* p. 12 n.5 (quoting § 1910.132(a)). Schaad entered into a contract requiring it to provide armed security guards for people transporting significant sums of money, and Schaad’s standard operating procedures for performing the contract expressly designated those guards a “deterrent” to an attempted robbery during that work. Dec. 4, 30-31; Tr. 143, 175; Exs. C-3, C-5, C-9 at 2. Schaad’s standard operating procedures for the Turnpike contract also prescribed how its armed guards should respond to an attempted robbery. Dec. 29-30; Ex. C-5. Moreover, Schaad instructed its armed guards on the use of lethal force when facing a threat of lethal force. Dec. 10, 26-27; Tr. 126-27; Ex. C-4. Mr. Lenahan, Schaad’s general manager, recognized that Schaad’s uniform made the guards a target for an assailant. Tr. 137. And, eight years before Mr. Redacted death, Schaad spent approximately

\$30,000 on bulletproof vests and encouraged its armed guards to wear them for the protection they provided in the event of a shooting. Dec. 4, 14; Tr. 131-34, 137, 145-46; Ex. C-6.

In determining that the Secretary failed to overcome Shaad's "rebuttal," Dec. 51, the ALJ implicitly found that the Secretary's evidence was sufficient to establish a prima facie showing of Schaad's knowledge of the cited shot-by hazard. See Dec. 51-54. Nevertheless, the ALJ found that Schaad "rebutted" the Secretary's showing that Schaad recognized that a shooting was a realistic possibility because (1) an unmarked van "masked the money transfer process" and (2) Schaad had not suffered any prior incidents in the "previous 45 years . . . (including during the near 20 years of providing armed guard security to the [Pennsylvania Turnpike Commission])." Dec. 53-55. The ALJ's conclusion does not withstand analysis.

The "mask[ing]" an unmarked van provided was at least partially obviated when the armed uniformed security guard got out of the van to observe the teller; Schaad knew, and the ALJ found, that the guard was "a target" because of his uniform. Dec. 52, 54;

Tr. 137. The use of an unmarked van therefore does not undermine the evidence of Schaad's awareness of the hazard.

The absence of prior incidents also does not diminish Schaad's awareness that a shooting was a realistic possibility. A realistic possibility encompasses unlikely events likely to cause severe harm if they occur. *See, e.g., Beverly Enters.*, 19 BNA OSHC at 1172 (equating "realistic possibility" of harm with harm that could happen "upon other than a freakish or utterly implausible concurrence of circumstances"); *Pratt & Whitney Aircraft, Div. of United Techs. Corp. v. Donovan*, 715 F.2d 57, 63 (2d Cir. 1983) (significant risk of harm concept includes "[u]nusual or infrequent hazards" that pose a "meaningful possibility of injury"). Similarly, "as the severity of the potential harm increases in a particular situation, its apparent likelihood of occurrence need not be as great." Dec. 48 (quoting *Weirton Steel Corp.*, 20 BNA OSHC at 1259); *see also Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977) (the seriousness of the recognized hazard "warranted precautions against even the slightest possibility of its occurrence").

Here, Schaad knew that the severity of the potential harm in an attempted robbery was great. See Dec. 14 (finding it undisputed that the “severity of being shot while not wearing PPE is high, potentially leading to death”); Dec. 31 (quoting Mr. Lenahan’s testimony that all he could do was “hope and pray” that all of his armed guards wore their vests); Dec. 50 (“the evidence regarding severity of the harm is undisputed and undeniable: being shot in the torso could lead to an employee’s death,” and as a result, the “severity related to this hazard is high”); Dec. 54 (“the record is replete with undisputed evidence regarding actual knowledge of the severity of the hazard”). Thus, the absence of a prior shooting is entirely consistent with the evidence demonstrating that Schaad knew a shooting was a realistic possibility that faced Mr. [Redacted] on March 20, 2016, while performing the Turnpike job; and the Secretary had no obligation to rebut Schaad’s evidence that it had not previously experienced a shooting. See *Arcadian Corp.*, 20 BNA OSHC 2001, 2008-10 (No. 93-0628, 2004)(rejecting employer’s argument that lack of prior accidents outweighed evidence that employer recognized the cited hazard).

In addition to improperly weighing the evidence regarding the use of an unmarked van and the absence of prior incidents, the ALJ also ignored evidence showing that Schaad recognized that a shooting was a realistic possibility. See Dec. 52-55. This evidence includes Shaad's policies on the use of lethal force and on how to respond to an attempted robbery as well as its purchase of bulletproof vests and encouragement to its armed guards to wear them. Dec. 4, 10, 14, 26-27, 29-30; Tr. 126-27, 130-34, 137, 145-46; Exs. C-4, C-5, C-6. The ALJ justified his approach on the ground that an employer's "safety policy *alone* cannot be used to establish the employer's knowledge of an alleged hazard." Dec. 54 (emphasis added). This was error because Schaad's safety policies do not stand alone in this record.

Instead, the record also includes evidence that the Pennsylvania Commission Turnpike contract required the use of armed guards, Dec. 4; Ex. C-3; guards transporting significant sums of money face a risk of an armed robbery, Tr. 78, 175-76; Schaad's guards protected a teller transporting significant sums of money, Dec. 4, 6-7; Tr. 175; Ex. C-9 at 2; wearing a uniform makes the guard a target for robbers, Dec. 52; Tr. 137, 176, 185; being

shot is highly likely to cause death or serious physical harm, Dec. 14, 61; bulletproof vests provide meaningful protection from being shot, Dec. 14; Tr. 130, 182; and at least some in the industry recognize the hazard. *Infra* pp. 20-23.

When evidence of an employer's safety policies does not stand alone, those policies are "properly . . . considered" in determining whether the employer "recognized the hazard in question." Dec. 57 (quoting *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1485 n.8 (No. 88-2691, 1992)). And when the evidence of Schaad's safety policies is "considered in conjunction with" the other relevant evidence in this record, Dec. 57, the question of Schaad's actual knowledge of the hazard requiring the use of bulletproof vests is not a close call. *See, e.g., Lukens Steel*, 10 BNA OSHC 1115, 1124 (No. 76-1053, 1981) (employer's safety practices established its awareness of need for PPE). The ALJ therefore erred in finding that Schaad did not have knowledge of the cited hazard, and § 1910.132(a) applied.

**B. The Private Security Industry Recognized the Hazard.**

The ALJ also erred in determining that the Secretary failed to show that a reasonable person (or employer) familiar with the circumstances surrounding the Turnpike job would recognize that a

shot-by hazard existed. The Secretary presented expert testimony from Dr. Benny, who had forty-five years' experience in the security industry, that the security industry recognized the hazard of being shot while protecting persons transporting money. Tr. 174-80, 189-91; *see also supra* p. 7 (discussing evidence establishing high fatality rate for security guards caused by assaults, violent acts, and gun shots). The Secretary also presented testimony that at least six security guards who worked the Turnpike job always or almost always wore their bulletproof vests. Tr. 50, 53-55, 75-78, 90, 99, 145. And, the Secretary explained that it was not necessary to examine industry practice when the hazard is readily apparent, and supported his contention that the hazard here was readily apparent with citations to case law establishing the hazardous nature of armed security work. *See* Dec. 57.

The ALJ found the Secretary's evidence insufficient because (1) other security companies did not provide vests to their security guards; (2) Schaad's lack of prior incidents and the Turnpike Commission's use of an unmarked van "affected the likelihood assessment of the risk of the hazard [Schaad's] armed guards faced;" (3) only "some" of Schaad armed guards used vests; and (4)

nothing “connect[ed]” the cases establishing the hazardous nature of armed security work “to the particular worksite in this case.”<sup>6</sup>

Dec. 57-59. The ALJ erred.

The Secretary need not prove the security industry uniformly uses PPE to prove that that a reasonable employer familiar with the circumstances surrounding the hazardous condition would recognize that a hazard warranting the use of PPE exists. *Weirton Steel Corp.*, 20 BNA OSHC at 1264; *accord Voegelé Co. v. OSHRC*, 625 F.2d 1075, 1078-79 (3d Cir. 1980). Moreover, the ALJ underestimated the extent to which the security industry used bulletproof vests. *See* Dec. 57. Even where security companies do not voluntarily provide vests to their armed guards, they require their armed guards to use bulletproof vests when their use is part of the contract with their clients. Tr. 209, 218.

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<sup>6</sup> The ALJ also referred to the fact that “all of Respondent’s security officers had documented law enforcement officer experience as a prerequisite to being hired as an armed security guard for” Schaad. Dec. 59. The ALJ did not explain the relevance of this fact to the industry’s recognition of the hazard, however, and this fact does not support the ALJ’s finding on this point. The record does not support the ALJ’s suggestion that armed security guards with law enforcement experience are less likely to encounter the cited shot-by hazard than armed security guards without that experience.

It is immaterial that the lack of prior incidents and the Turnpike Commission's use unmarked van "affected the likelihood assessment of the risk of the hazard [Schaad's] armed guards faced." Dec. 58. Even a lower likelihood is sufficient to meet the Secretary's burden to demonstrate a realistic possibility of the hazard occurring, particularly in light of the principle that "[a]s the severity of the potential harm increases in a particular situation, its apparent likelihood of occurrence need not be as great." *Weirton Steel Corp.*, 20 BNA OSHC at 1259. And, for the same reasons that the use of an unmarked van and the lack of prior shootings did not undermine the evidence that Schaad recognized the hazard, these factors likewise do not undermine the evidence that the security industry recognized the hazard. *See supra* pp. 15-17.

The ALJ similarly erred in discounting the testimony that most of Schaad's armed security guards wore bulletproof vests. Although the "older element," such as Mr. [Redacted] did not regularly wear their vests, the record shows consistent use by every other employee discussed at the hearing.<sup>7</sup> Tr. 46, 50, 53-55, 75-78, 90, 99, 145.

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<sup>7</sup> The record shows that six out of seven armed guards (including Mr. [Redacted] consistently wore bulletproof vests while working the

Employee use does not have to be unanimous for it to be probative evidence that a reasonable person familiar with the circumstances would recognize that armed security guards performing the Turnpike job were exposed to a shot-by hazard warranting the use of a bulletproof vest. *See General Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2066 (Nos. 78-1443 & 79-4478, 1984) (employee practices are relevant to reasonable person inquiry and relying on fact that most employees did not wear safety shoes to find that Secretary failed to establish that a reasonable person would have recognized a hazard requiring the use of safety shoes), *aff'd*, 764 F.2d 32 (1<sup>st</sup> Cir. 1985).

Also contrary to the ALJ's analysis, the Secretary "connect[ed]" the case law establishing the hazardous nature of armed security work "to the particular worksite in this case." The Secretary cited

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Turnpike job. Tr. 46, 50, 53-55, 75-78, 90, 99, 145. In addition, active law enforcement personnel who were Schaad armed guards consistently also wore their bulletproof vests. Tr. 145. Against this evidence, is Mr. Redacted failure to wear his vest on March 20, 2016, and Mr. Lenahan's statement that an undisclosed number of "older" guards did not prefer to wear their vests. Tr. 46. Accordingly, the most reasonable reading of the record in this case is that most of Schaad's armed security guards familiar with the circumstances of the Turnpike job regularly wore bulletproof vests.

case law establishing that the “possibility of a face-to-face encounter with a criminal is an ordinary and obvious risk incident to employment as an armed security guard.” *Atlanta Braves, Inc. v. Leslie*, 378 S.E.2d 133, 135 (Ga. App. 1989), *quoted in* Secretary of Labor’s Post-Hearing Brief 19. The Secretary explained that this principle applied, as shown by additional case law and common sense, to armed security guards protecting persons transporting money—the task Mr. [Redacted] was performing on the day of his death. Dec. 57. And the Secretary did so to support his argument that the hazard requiring Mr. [Redacted] to wear a bulletproof vest was “readily apparent,” and that therefore industry practice was not relevant to whether a reasonable person would have recognized the hazard that cost Mr. [Redacted] his life. *See Fleming Foods of Neb., Inc.*, 6 BNA OSHC 1233, 1235 (No. 14484, 1977) (“it is not necessary to examine industry practice when the hazard is readily apparent”).

In sum, the Secretary established that a reasonable person or employer familiar with the circumstances of the Turnpike security job would have known that Mr. [Redacted] was exposed to the shot-by hazard, and § 1910.132(a) therefore applied. The ALJ erred in concluding otherwise.

## **II. Schaad had fair notice of § 1910.132(a)'s requirements.**

The ALJ held that even if the standard applied, “the Secretary provided insufficient notice of the requirements of the standard such that [Schaad] would be deprived of due process if held accountable under the standard.” Dec. 59-62. The sole basis for this ruling is the ALJ’s belief that neither Schaad nor its industry realized that Mr. [Redacted] was exposed to a hazard within the meaning of § 1910.132(a). Dec. 59-62. As shown above, both Schaad and the security industry recognized the cited hazard, and therefore the ALJ erred in concluding that Schaad lacked notice that it had to require Mr. [Redacted] to wear his bulletproof vest. *Weirton Steel Corp.*, 20 BNA OSHC at 1264.

The standard provides clear notice that, for a recognized hazard capable of causing injury, the employer must require its exposed employees to wear PPE that protects the employees from the hazard. See 29 C.F.R. § 1910.132(a). Getting shot obviously can cause injury, and Schaad indisputably knew that bulletproof vests provide meaningful protection for employees exposed to that hazard. Dec. 14; Tr. 130. Moreover, OSHA publicly posted an interpretive letter in 2014 explaining that bulletproof vests were a

form of PPE within the meaning of § 1910.132(a). Dec. 5; Ex. C-10. In addition, prior to Mr. [Redacted] death, OSHA had issued at least three citations for the failure of armed guards to wear bulletproof vests. Exs. C-11 through C-13. Schaad therefore had fair notice of its obligation to require Mr. [Redacted] to wear his vest. *See Weirton Steel Corp.*, 20 BNA OSHC at 1264; *Lukens Steel Co.*, 10 BNA OSHC at 1123.

### **Conclusion**

For the foregoing reasons, the Commission should direct the ALJ's decision for review.

KATE O'SCANNLAIN  
Solicitor of Labor

EDMUND C. BAIRD  
Acting Associate Solicitor of Labor  
for Occupational Safety and Health

HEATHER R. PHILLIPS  
Counsel for Appellate Litigation

/s/ Ronald Gottlieb  
RONALD J. GOTTLIEB  
Senior Trial Attorney  
U.S. Department of Labor  
Constitution Ave., N.W.  
Washington, D.C. 20210  
(202) 693-5494  
gottlieb.ronald@dol.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of December, 2018, I served a copy of the foregoing Secretary of Labor's Petition for Discretionary Review by email on:

L.C. Heim, Esquire  
KATHERMAN HEIM & PERRY  
345 East Market Street  
York, PA 17403  
[lc@khlaw.us](mailto:lc@khlaw.us)

/s/ Ronald Gottlieb  
RONALD J. GOTTLIEB  
Senior Trial Attorney  
U.S. Department of Labor  
Office of the Solicitor  
Room S-4004  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
(202) 693-5494  
gottlieb.ronald@dol.gov