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. UNITED STATES POSTAL SERVICE, Respondent.	OSHRC Docket No. 16-1813

ON BRIEFS:

Amy S. Tryon, Senior Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Elena S. Goldstein, Deputy Solicitor of Labor; Kate O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.

For the Complainant

James C. Colling, Esq.; Eric D. Goulian, Esq.; Deborah M. Levine, Esq.; United States Postal Service, Denver, CO

Arthur G. Sapper, Esq.; Melissa A. Bailey, Esq.; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, D.C.

For the Respondent

DECISION AND REMAND

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued the United States Postal Service a citation alleging a repeat violation of the Occupational Safety and Health Act's general duty clause, 29 U.S.C. § 654(a)(1), for exposing employees of a postal station in Des Moines, Iowa to an "excessive heat" hazard. In the summer of 2016, two of the station's letter carriers began feeling ill while delivering mail and were treated at a hospital or urgent care clinic. The Secretary alleges that both carriers became ill due to excessive heat.

Administrative Law Judge Sharon D. Calhoun vacated the citation.[1] For the reasons discussed below, we set aside her decision and remand for further proceedings.

DISCUSSION

To establish a violation of the general duty clause, the Secretary must show: (1) "that a condition or activity in the workplace presented a hazard," (2) "that the employer or its industry recognized this hazard," (3) "that the hazard was likely to cause death or serious physical harm," and (4) "that 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 also must prove that the employer "knew, or with the exercise of reasonable diligence could have known, of the violative conditions." *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1535 (No. 86-360, 1992) (consolidated). Here, the judge vacated the citation on the ground that the Secretary failed to prove the cited conditions posed a hazard. The judge also found that if a hazard had been proven, however, the Secretary would have established a feasible and effective means of abatement to address it. The judge did not address any of the other elements required to prove a general duty clause violation.

For the same reasons stated in *USPS*, No. 16-1713, slip op. at 3-13 (OSHRC Feb. 16, 2023) (consolidated), we find that the Secretary has established that an excessive heat hazard was present in this case. Accordingly, we reverse the judge on this element of the Secretary's burden. We turn next to the judge's finding that the abatement element was otherwise established. To prove abatement, the Secretary must "specify the particular steps a cited employer should have taken to avoid citation, and demonstrate the feasibility and likely utility of those measures." *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1191 (No. 91-3144, 2000) (consolidated). On review, the Secretary broadly argues that he established the feasibility and efficacy of the abatement measures he proposed below, briefly naming a few. While he does not describe those proposals in detail,

[1] In addition to her decision in this case, the judge also issued separate decisions in four additional cases (Docket Nos. 16-1713, 16-1872, 17-0023, 17-0279), each involving a general duty clause citation issued by OSHA to the Postal Service alleging employee exposure to an excessive heat hazard in four other cities. These four additional cases were directed for review and consolidated by the Commission for disposition. Our decision vacating all four of those citations has been issued today. *USPS*, No. 16-1713, slip op. (OSHRC Feb. 16, 2023) (consolidated). To the extent relevant, we rely on the analysis in that decision throughout our opinion here. Not only do the issues and the parties' arguments overlap in all five cases, but evidence common to all five cases was heard by the judge at a single hearing. *Id.* at 2-3.

the Secretary specifically argued before the judge in support of the same means of abatement raised and addressed in *USPS*: work/rest cycles, emergency response plans and monitoring, analyzing Postal Service data on employee heat-related illnesses, reducing time outdoors, using air-conditioned vehicles, acclimatizing employees, and training employees on heat safety.[2] With the exception of this last measure—training employees—we find that the Secretary has failed to show these proposed measures were feasible and/or effective for the same reasons set forth in *USPS*. *USPS*, slip op. at 13-30.

With regard to training, there is no dispute that the Postal Service provided heat safety training at the Des Moines station. The Secretary argued below that this training was deficient for many of the same reasons we found lacked merit in *USPS*—based on our analysis in that decision, we find these arguments lacking here as well. *Id.*. at 30-33. But the Secretary also specifically alleged that a supervisor in the Des Moines station had been given no heat safety training, despite having been a supervisor for more than six months, and that safety talks at the Des Moines station were held at a time when employees known as "City Carrier Assistants" (CCAs) were not present.[3] The Postal Service has not specifically addressed either of these claims below or on review.

The judge agreed with the Secretary that the Postal Service failed to provide "effective training" to its Des Moines supervisors on the recognition of heat-related illnesses and the proper response to employees reporting symptoms of such illnesses. Specifically, the judge pointed to three incidents in which carriers from the Des Moines station had followed the Postal Service's practice of informing their supervisors that they were experiencing symptoms of a possible heat-related illness. Apart from one supervisor providing water to a carrier and then leaving, the judge found that these supervisors took no action to assist the carriers, including the one who the Secretary alleged was never trained on heat safety.

That supervisor, who assumed that role at the Des Moines station in December 2015, was at the station on June 9, 2016, when one of the citation incidents occurred. The affected carrier notified this supervisor that she was not feeling well in the following text message exchange:

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[2] For the reasons stated in *USPS*, we find that these measures were not proposed by the Secretary as alternatives but were alleged in terms of a comprehensive heat stress safety program. *USPS*, slip op. at 14-16.

[3] The station employs both "City Letter Carriers," which are "career employees," and "City Carrier Assistants," which are "non-career employees."

> 12:45 p.m., Carrier: "I'm not feeling so well. Definatley [sic] to do with the heat. I've been trying to hurry but i am still a little behind. Just letting you know."
>
> 1:14 p.m., Carrier: "Feeling very weathered by the heat.... as of right now i have 9 swings left."
>
> 1:17 p.m., Supervisor: "[D]o the best you can I know it really hot out right now do you need any water or anything like that."
>
> 1:34 p.m., Carrier: "Ice would be great. Did they tell you that they want me to have an 8 hr day?

The supervisor testified that she did not respond to the carrier's last message requesting ice because she was busy and did not see it.

At around 3 p.m., the carrier felt too ill to continue working and drove back to the Des Moines station without having finished her route. On the way, she vomited out the window of her vehicle. Three carriers who were at the station when she arrived described her appearance as "extremely red," "dazed," and "shaking"; one said she looked "like she was going to die." The supervisor similarly acknowledged that the carrier looked "flushed," and said her collar was wet with sweat and that she indicated she was not feeling well. The supervisor told the carrier to sit down, asked why she did not inform her first before returning to the station, and then called the station manager. According to the supervisor, the station manager said to instruct the carrier to finish her route, which she did; the carrier then "stormed out" to go speak to a union representative. After speaking with the union representative, the carrier went to an urgent care clinic.

The supervisor testified that she had never been trained by the Postal Service on heat-related illnesses prior to this incident, apart from sometimes receiving emails with heat safety information and seeing a heat safety poster in the breakroom. She said that "[a]ll the safety talks were performed in the morning before [she] reported to work." According to the supervisor, her lack of training directly affected the way she responded to the carrier's complaints: "Due to not being correctly educated on heat exposure, I wasn't aware of how it was affecting her." None of this testimony was rebutted by the Postal Service.

We agree with the judge that this evidence supports the Secretary's argument that the Postal Service's training at the Des Moines station was deficient and that adequately training supervisors on heat safety would have materially reduced the risk posed by excessive heat to the carriers at the station. An expert on heat stress who testified for the Secretary, Dr. Thomas Bernard, stated that if employees are not trained on heat safety, including how to recognize and respond to symptoms of heat-related illness, they are unlikely to understand the significant risks involved and to respond

appropriately. Given that the Postal Service instructs carriers to contact their supervisors whenever they experience heat stress symptoms, providing this training to supervisors is critical to ensuring that they can identify when a carrier is in crisis and respond appropriately. And the feasibility of providing such training is demonstrated by the fact that a heat-related safety talk was given to Des Moines employees in May 2016, and the supervisor who lacked training was required to attend a mandatory heat safety training shortly after the incident in early July 2016.

We find that the record also supports the Secretary's claim that CCAs in the Des Moines station missed heat safety talks because they were given in the morning when CCAs are usually not present. The supervisor responsible for conducting these talks acknowledged that they were usually given at around 8:00 a.m., even though CCAs normally do not arrive until around 9:30 a.m. He said that if a carrier was absent on the day of a talk, he would later "pull them aside and go over what we talked about." But he did not say he would do that for the CCAs, apart from posting written copies of the talks on two bulletin boards above the time clocks so that any employee could read them.

In sum, the evidence shows that an excessive heat hazard was present at the worksite and that the Postal Service could have feasibly and materially reduced that hazard by ensuring that all employees, including supervisors and CCAs, were trained on heat safety. We therefore vacate the judge's decision and remand for the judge to address the remaining issues in this case, including the other elements of the alleged general duty clause violation.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: February 17, 2023