United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
United States Custom House
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NOTICE OF DECISION

IN REFERENCE TO:

Secretary of Labor v. United States Postal Service
OSHRC Docket No.: 13-0217

The Decision mailed on September 10, 2014, will be submitted to the Commission's Executive Secretary on September 24, 2014. The Decision will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary unless, within that time, a member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.

Any party that is adversely affected or aggrieved by the Decision may file a petition for discretionary review by the Review Commission. **A petition may be filed with this Judge within ten (10) days from the original date of this notice. Thereafter, any petition must be filed with the Review Commission's Executive Secretary within twenty (20) days from the date of the Executive Secretary's notice of docketing. (See Paragraph No. 1).**

The Executive Secretary's address is as follows:

Executive Secretary
Occupational Safety and Health Review Commission
One Lafayette Centre
1120 20th Street, N.W., Room 900
Washington, D.C. 20036-3457

For the full text of the Commission rules governing the review process, see Commission Rules 90 through 95, which are published in 29 C.F.R. §2200.90-95.

Peggy S. Ball

Judge Peggy S. Ball
U.S. Occupational Safety and Health Review Commission

Dated: September 10, 2014

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

NATIONAL ASSOCIATION OF LETTER CARRIERS (NALC),

Authorized Employee Representative

OSHRC Docket No. 13-0217

Appearances:

Charles W. Gordon, Jr., Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri,
For Complainant

Leigh K. Bonds, United States Postal Service, Western Area Law Office, Sandy, Utah
For Respondent

Manuel L. Peralta, Jr. Director-Safety Health, NALC, Washington, D.C.
Authorized Employee Representative

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). In response to a report that a letter carrier for Respondent had died during the course of his duties, the Occupational Safety and Health Administration ("OSHA") initiated

an inspection of the United States Postal Service ("Respondent") on July 24, 2012, at Respondent's worksite in Independence, Missouri, which included the location where the letter carrier was found, as well as the Harry S. Truman Postal Station. As a result, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging one willful violation of Section 5(a)(1) of the Act—the general duty clause—with a proposed penalty of $70,000.00. Respondent timely contested the Citation.

The trial took place on February 25–27, 2014, in Kansas City, Missouri. Both parties have submitted post-trial briefs. After reviewing the parties' respective briefs and the record, the Court finds that Respondent committed a willful violation of the general duty clause by failing to adequately protect its employees from the hazards associated with working in extreme heat.

II. Stipulations[1]

The parties stipulated to the following:

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission ("OSHRC") by Section 10(c) of the Act.

2. Respondent the United States Postal Service (USPS) is a [sic] an independent establishment of the executive branch of the Government of the United States with a principal office and place of business at 14200 E. 32nd Street, Independence, MO 64055, and at all times hereinafter mentioned, a workplace consisting of mail routes in Independence, MO. USPS is, and at all times hereinafter mentioned was, engaged in providing mail services under a universal service obligation.

3. Respondent is an employer within the meaning of the Act, and by virtue of the Postal Employees Safety Enhancement Act, the OSH Act became applicable to the USPS in the same manner as to any other employer. Pub. L. No. 105-241, 112 Stat. 1572–1573 (1998); *see also* 29 U.S.C. § 652(5).

4. On or about July 23 and 24 of 2012, USPS employed letter carrier employees to work delivering mail on mail delivery routes in Independence, MO, including a route that included the street address 3525 Cottage, Independence, MO, 64055, hereinafter "the Worksite".

1. The parties' stipulations reproduced herein can also be found in the parties' *Joint Factual and Legal Stipulations*, which was filed with the Court as Complainant's Exhibit 63 (Ex. C-63).

5. J.W. was a 55-year old USPS letter carrier with over 27 years of experience. USPS employed him at the Truman Station of the Independence Post Office.

6. On July 23, 2012, he returned to work after a five week absence for knee surgery and annual leave delivering mail along the Worksite.

7. On that day, the Kansas City metropolitan area was under an excessive heat warning issued from the national weather service [sic].

8. The National Weather Service defines an excessive heat warning as follows: "The warning is used for conditions posing a threat to life or property." The impact on this specific warning stated,

> These prolonged hot and humid conditions will lead to an increased risk of heat related stress and illness including heat exhaustion and heat stroke. These conditions are especially dangerous to those working outside.

9. J.W. returned to regular duty on July 23, 2012. This required him to work outside, carrying mail and operating an un-air-conditioned delivery vehicle, from about 8:00 a.m. to about 5:30 p.m.

10. During the afternoon of July 23, 2012, the temperature was approximately 104 degrees F and the humidity was approximately 24% and the heat index was 105 degrees F.

11. At around noon, J.W. spoke to his supervisor, Herb Harvey, on the telephone.

12. After this telephone call on July 23, 2012, J.W.'s supervisor did not remove J.W. from his route.

13. After this telephone call on July 23, 2012, J.W. supervisor did not arrange for any assessment or evaluation of J.W.'s condition.

14. J.W. returned to work the next morning, July 24, 2012. The weather was the same, and the area was still under an excessive heat warning. During the afternoon, the temperature was approximately 102 degrees F and the humidity was 28% and the heat index was 104 degrees F.

15. Again, J.W. was on his route by 7:40 a.m. At around noon, he called Mr. Harvey.

16. After this telephone call on July 24, 2012, J.W.'s supervisor did not remove J.W. from his route.

17. After this telephone call on July 24, 2012, J.W.'s supervisor did not arrange for any assessment or evaluation of J.W.'s condition.

18. After this telephone call on July 24, 2012, J.W.'s supervisor did not go into the field to assess or evaluate J.W.'s condition.

19. After this telephone call on July 24, 2012, J.W.'s supervisor did not send anyone into the field to assess or evaluate J.W.'s condition.

20. J.W. collapsed on his route at about 2:50 p.m. His core rectal temperature was 108.7°F when measured at the hospital.

21. J.W. died later that day as a result of hyperthermia.

22. The parties agree to the admissibility of Mr. Behrend's emails identified on Complainant's Exhibit List.

23. Before July 23, 2012, USPS had in its files a power point presentation that mentioned the need to acclimate. It said:

> Persons working in either indoors or outdoors in high temperatures should take special precautions including allowing 10–14 days to acclimate to high temperatures.

24. Before July 23, 2012, USPS also had an OSHA Fact Sheet that addressed the need to acclimate. It provided:

> Allow workers to get used to hot environments by gradually increasing exposure over a 5-day work period. Begin with 50% of normal workload and time spent in the hot environment and then gradually build up to 100% by the fifth day. New workers and those returning from an absence of two weeks or more should have a 5-day adjustment period.

25. USPS did nothing to acclimate J.W. for his return to work.

26. USPS had in its files materials that said if a person is experiencing signs of heat induced illness certain steps should be taken, including the need to "act immediately," the need to move the victim to a cool shaded area and give cool water, the admonition, "Don't leave the person alone," and the need to 'treat all heat disorders seriously." The materials also acknowledge that "sometimes people don't notice their own heat stress symptoms. Their survival depends on co-worker's ability to recognize symptoms and seek medical help." One document acknowledges that "it's essential that workers—and their supervisors—understand the risks and how to protect against them."

27. As of July 23 and 24 of 2012, USPS did not have a program or procedure to do any of the following:

> Acclimatize letter carriers returning to work after an extended absence (i.e., five days or more) to work in the heat.
>
> Required supervisors to go into the field and conduct in-person evaluations of letter carrier complaining of heat induced symptoms.

28. USPS knew before July 23 of 2012 that excessive heat could pose a risk to the safety and health of its letter carriers, including, under some circumstances, the risk of serious injury or death.

29. USPS had the OSHA Fact Sheet—Protecting Workers from the Effects of Heat in its possession prior to July 23, 2012.

30. The documents that USPS has produced in this case numbered 1 through 00040174 are genuine and authentic and no further foundation for the introduction of the documents into evidence need be established.

31. The report of the Jackson County medical Examiner, Mary H. Dudley, M.D., dated August 22, 2012, concerning the death of J.W., III is genuine and authentic and no further foundation for introduction of the report into evidence need be established. Moreover, the parties agree to the admissibility of this report.

32. The weather and heat advisories and warnings of the National Weather Service for the Kansas City metropolitan area for the period July 1, 2012, through July 24, 2012 are genuine and authentic and no further foundation for introduction of the records into evidence need be established. Moreover, the parties agree to the admissibility of these records.

III. Jurisdiction

The parties have stipulated that the Act applies and that the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). (Ex. C-63). Further, as noted above, the parties stipulated that Respondent is an employer within the meaning of the Act, and by virtue of the Postal Employees Safety Enhancement Act, the OSH Act became applicable to the USPS in the same manner as to any other employer. Pub. L. No. 105-241, 112 Stat. 1572–1573 (1998); *see also* 29 U.S.C. § 652(5).

IV. Findings of Fact[2]

A. Structure of Post Office Operations

This case involves the operations of the Truman Station of the Independence, Missouri Post Office. The United States Postal Service is divided into seven Areas, which are, in turn, divided into Districts. The Truman Station is located in the Mid-America District, which includes 8,000 employees and consists of most of Missouri and parts of eastern Kansas. (Tr. 492). The Mid-America District is comprised of multiple post offices, which are grouped for

2. The information contained in this section does not necessarily constitute the entirety of the Court's findings of fact. Additional facts can be found in Section V, *infra*.

administrative purposes into stations. The Independence Post Office is comprised of three stations—Truman, Englewood, and the Main Office. (Tr. 49). Post Offices, such as Independence, are typically run by Managers of Post Office Operations (MPOOs or POOMs) or by Postmasters, who report to the District Manager. (Tr. 125–26). Individual stations, such as Truman, are run by Station Managers, who report to Postmasters. These stations also employ floor supervisors, who handle day-to-day operations involving the distribution and collection of mail. (Tr. 51).

The Mid-America District is presided over by District Manager Gail Hendrix. (Tr. 492). During the week of the incident at issue, Steve Erbland served as the Acting MPOO over the Independence Post Office. (Tr. 124). Mike Behrend served as the Officer-in-Charge or Acting Postmaster in June 2012 and left sometime in July 2012. (Tr. 836). David Dyer was the Truman Station Manager in July 2012 and Herb Harvey was his opening supervisor. Mr. Dyer and Mr. Harvey supervise over 50 letter carriers, who are responsible for 38 separate mail routes. (Tr. 725, Ex. R-1 at 106).

The workday at Truman Station begins with Mr. Harvey ensuring that the mail is properly prepared for the arrival of the letter carriers so the mail can be cased (sorted and put in delivery order) and loaded into the mail trucks. (Tr. 722). Depending on the amount of mail, this process can take an hour or more. (Tr. 729). Once the mail has been cased and loaded, the letter carriers leave the station to perform their routes, which usually begin somewhere between 7:30 a.m. and 8:00 a.m. (Tr. 726). Routes are assigned based on a bidding system, and it is not unusual for a letter carrier to have a route for a long period of time. (Tr. 728–29). In some instances, letter carriers call in sick, which requires the opening supervisor to split up the absent carrier's route and distribute sections of that route to other carriers. (Tr. 724). Those sections

are typically given to letter carriers who are on a voluntary sign-up sheet, known as the OTDL, or overtime desired list, which provides overtime opportunities to carriers on a 10- or 12-hour basis.[3] (Tr. 726).

A standard workday for a letter carrier lasts from 7:00 a.m. to approximately 4:00 p.m. (Tr. 727). However, a carrier who has been assigned overtime from the OTDL list is required to return to the office by 5:30 p.m. (Tr. 727). This requirement is motivated by two things: (1) collected mail needs to be placed on an outgoing truck before 6:00 p.m.; and (2) penalty overtime, or double-time pay, kicks in after a ten-hour workday. (Tr. 727). In order to minimize double-time pay, Mr. Harvey confers with his letter carriers at the beginning of the day to come up with an estimate as to the amount of time required to complete each route. (Tr. 92, 735–36). If a carrier needs to change the projected return time, he calls into the office between 12:15 and 1:15 p.m. to inform Mr. Harvey. (Tr. 736). If it is clear the carrier will not make the projected time, Mr. Harvey has the option to either send additional help or authorize additional overtime. (Tr. 738).

During the course of the workday, a carrier delivers mail through a combination of walking and driving routes, known as relays. (Tr. 534–35). Some relays consist entirely of indoor delivery to businesses, some allow for curbside delivery to CBUs (centralized box units), and some require walking from house to house in a residential neighborhood. (Tr. 784–85). The vehicles driven by most Post Office carriers are Grumman LLVs, or long life vehicles. (Tr. 66–67). These trucks do not come with air-conditioning, though they are equipped with a fan in the driver-side window. (Tr. 176). While on their route, letter carriers are authorized to take two 10-minute breaks and one 30-minute lunch break per day. (Tr. 83, 739–40). Throughout the

3. The OTDL is a product of the bargaining unit contract between the union and management. (Tr. 725–26).

day, carriers are also allowed to take so-called "comfort breaks", which most people understand to be bathroom breaks. (Tr. 83–84, 850).

B. Respondent's Safety Program

The Mid-America District has a safety manager, Donna Goza, who is responsible for a group of safety specialists and driving safety instructors. (Ex. C-68 at 19). Although she is the top safety official for the Mid-America District, Ms. Goza testified that she does not have authority over other managers and supervisors in the district. (Ex. C-68 at 38–39). For the most part, Ms. Goza is responsible for disseminating safety-related information, including, as is germane to the present case, heat safety tips, talks, posters, and other materials.[4] (Ex. C-68 at 28–29). Ms. Goza does not generate such materials herself, nor does she review the materials prior to sending them along to MPOOs, Station Managers, and other members of management. (Ex. C-68 at 96, 104).

During the time period at issue herein, Respondent's heat safety program was, at best, informal. Ms. Goza stated that she had not received heat safety training prior to 2013. (Ex. C-68 at 27). Thus, with respect to heat-related issues, Ms. Goza served mostly as a conduit for information—she received information from various sources, including a member of the IT Department, which she then transmitted to members of the management team with the expectation that such information would be disseminated to the letter carriers.[5] (Tr. C-68 at 78–88). Such information included safety tips and talks to be provided to letter carriers, as well as

4. Some of the materials that Ms. Goza sent out to the management team included the following documents: (1) a Power Point presentation entitled "Heat Stress"; (2) Preventing and Treating Heat Illness; (3) Summer Weather Preparedness; (4) a color poster describing the signs of heat illness; (5) a safety talk entitled "Heat Stress"; and (6) a heat safety fact sheet entitled "Water. Rest. Shade." (Exs. C-28 to C-35). Many of these documents were sent out multiple times by Ms. Goza, as indicated in the emails to which the foregoing documents were attached. (*Id.*).

5. The information contained in the emails referenced in footnote 3 was sent to managers listed on the ACE email distribution list. (Ex. C-68 at 29–31, 69). Letter carriers are not assigned email addresses by Respondent, which means that it is incumbent upon their managers and supervisors to provide them with safety information. (Ex. C-68 at 31).

weather warnings from the National Oceanic and Atmospheric Administration (NOAA). (Exs. C-68 at 48–66, C-25). Notwithstanding the expectation that such information would be shared with letter carriers, there was no meaningful system to follow up on the training provided. (Ex. C-68 at 96, 154). For that matter, it is not clear that Ms. Goza had a clear enough understanding of the materials such that meaningful follow up could take place. (Ex. C-68 at 27, 40, 104).

Once the materials were sent to management, it was expected that meetings would be held to disseminate the information amongst the letter carriers. This was normally done through what were known as "stand-up talks". These stand-up talks were typically provided by a floor supervisor, such as Mr. Harvey, or by the station manager, at the beginning of the day while carriers were sorting and casing their mail routes. (Tr. 158, 770). According to Mr. Harvey, he had provided numerous talks on heat and heat-related issues throughout the summer of 2012. (Tr. 791–95). However, Ms. Goza testified that many of these talks were not properly documented, and, according to the letter carriers, the information they received was fairly basic—stay hydrated and seek shade. (Tr. 71–72, 84–85, 104, 172, 457, 789). This is consistent with the testimony of Mr. Dyer and Mr. Harvey, who testified they had not received training on Respondent's policy for dealing with excessive heat but rather merely relayed information they gleaned from emails, stand-up talks and documents to be posted or distributed. (Tr. 252–53, 258). In fact, Mr. Harvey testified that he relied, for the most part, on "common sense" when it came to heat-related issues. (Tr. 258). This rather informal characterization of the training provided by management stands in stark contrast to the voluminous amount and gravity of material that had been provided to management by Ms. Goza. (Exs. C-28 to C-35).

C. July 23, 2012

On July 23, 2012, the National Weather Service had issued an excessive heat warning, indicating that "prolonged hot and humid conditions will lead to an increased risk of heat related stress and illness including heat exhaustion and heat stroke. These conditions are especially dangerous to those working outside." (Ex. C-63 at ¶ 8). In fact, the Kansas City metropolitan area, of which Independence is a part, had been under such heat advisories for most of the previous week, as well as many other days during the month of July. (Ex. C-25). On July 23, 2012, the temperature reached approximately 104° F, the humidity was approximately 24%, and the heat index was 105° F. (Ex. C-63 at ¶ 10). Although this information was available to station managers and supervisors, neither Mr. Dyer nor Mr. Harvey reviewed it.[6] (Tr. 252–58).

As noted above, J.W. was a letter carrier for the Truman Station. July 23 was his first day back at work after being absent for five weeks due to knee surgery. (Ex. 63 at ¶ 6). J.W. was on the OTDL, so Mr. Harvey assigned him an hour-and-a-half of overtime to go along with his normal route. (Tr. 742–43). According to Mr. Harvey, he assigned J.W. an overtime route that consisted primarily of mounted (driving) delivery because of his recent knee surgery. (Tr. 742). J.W. completed his overtime route first—as most of the letter carriers do—and then moved on to his regular route, which consisted of approximately 3–4 hours of walking relays during the hottest part of the day. (Tr. 824–25).

Around noon on July 23, 2012, J.W. called Mr. Harvey at the station and reported he was not feeling well, that he was "hot, real hot", and that he was not likely able to finish his route in time. (Tr. 541–42, 824). It is at this point that the parties' versions of the events of July 23 diverge. Through the testimony of Jay Bryant, the letter carrier sent out to assist J.W., and K.W.,

6. Ms. Goza testified that she regularly received weather reports and extreme heat advisories and that she forwarded them along to members of management, but she also testified that she did not always do so. (Ex. C-68 at 52–54).

J.W.'s wife, Complainant asserts J.W. had requested that he be able to come back to the Truman Station and was told by Mr. Harvey that he needed to stay hydrated and keep delivering. (Tr. 62, 485). Respondent, on the other hand, points out that Mr. Harvey has consistently stated that he inquired as to how J.W. was feeling and whether he needed to return to the station, to which J.W. responded that he did not. (Tr. 744–45; Ex. R-1).

In support of its position regarding the conversation between J.W. and Harvey, Complainant points to two events. First, Complainant introduced an email drafted by Steve Erbland in response to a request from Gail Hendrix that he gather the "facts" regarding what had occurred on the afternoon of July 23. (Ex. C-6). Specifically, Ms. Hendrix had asked Erbland, "Did the carrier call the station Mon or Tues; and if so, what was the conversation with Supervisor according to the Supervisor? Rather, than hearsay by the family, what are the facts?" (Ex. C-6). Mr. Erbland responded: "The supervisor stated when the employee called the office on Monday afternoon and said he was wanting to come back he told him he needed to keep delivering and stay hydrated. I do know another [carrier] was sent from another area and provided assistance on the route." (*Id.*). Second, Complainant also points to testimony from another carrier, David Lutes, who testified that he also called in to report problems delivering on July 23. (Tr. 96–97). Mr. Lutes testified that in response Mr. Harvey berated him and accused him of "laying down on him." (Tr. 96–97). Given this interaction, Complainant contends that Mr. Harvey's characterization of his conversation with J.W. is not credible.

Respondent, on the other hand, argues that Mr. Erbland's account of Harvey's conversation with J.W. was not based on a direct conversation between Erbland and Harvey, but rather based on second-hand accounts from other managers or supervisors. (Ex. 67 at 115–17).

Further, Respondent also points out that Mr. Harvey testified that he did not recall making the statements that Mr. Lutes has attributed to him.

The testimony of Mr. Bryant and Mrs. J.W. regarding the statements made to them by J.W., who reported statements made to him by Mr. Harvey, are hearsay[7]. However, the Court still finds Mr. Harvey's characterization of his conversation with J.W. to be less than credible. There are two separate accounts that undermine his version of events. First, the email from Mr. Erbland to Ms. Hendrix, which was dated the day after J.W. died, indicates that Harvey, identified as "the Supervisor", specifically stated that J.W. needed to "keep delivering and stay hydrated." (Ex. C-6). While Mr. Erbland hedged and stated that he did not recall whether he gathered this information directly from Mr. Harvey, the Court finds this testimony hard to believe. Ms. Hendrix asked Mr. Erbland to specifically gather the facts about the conversation "according to the Supervisor." (Ex. C-6). Given the clear mandate from his superior, and considering Ms. Hendrix's predilection towards fact gathering,[8] it seems highly unlikely that Mr. Erbland would have been so cavalier in his approach to this issue. Second, Mr. Lutes testified to a conversation that he had with Mr. Harvey on the same day (July 23rd), wherein Mr. Harvey did not express the same level of concern as he testified to later with respect to his conversation with J.W., and, in fact, appeared to be hostile to Mr. Lutes' suggestion that he would be unable to

7. While Mr. Harvey's statements qualify as an admission of a party-opponent under F.R.E. 801(d)(2), J.W.'s repetition of such statements to Mr. Bryant or decedent's wife does not fit under any known exception. Contrary to the arguments of Complainant's counsel at trial, such statements do not fit under either the present sense impression or the excited utterance exception to the hearsay rule. The present sense impression exception, F.R.E. 803(1) requires that the statement must have been made while the speaker was perceiving the event or condition, or immediately thereafter. *See Cody v. Harris*, 409 F.3d 853 (7th Cir. 2005). By the time he spoke with Bryant, it had been almost 3 hours since J.W. spoke with Harvey. He spoke with his wife even later. Nor does it fit under the excited utterance exception under F.R.E. 803(2), because such statements were not precipitated by a "startling event". F.R.E. 803(2); *see also Brunsting v. Lutsen Mountains Corp.*, 601 F.3d 813 (8th Cir. 2010). The Court does not find that being told one cannot break free from their route constitutes a startling event; nevertheless, even if it did, the Court does not find that a statement made three hours or more after the fact was made while under the excitement such an event would engender. *See U.S. v. Alexander*, 331 F.3d 116 (D.C. Cir. 2003).

8. For further indications of this, see Section IV.F, *infra*. *See also* Exs. C-14, C-66.

complete his route in a timely manner. (Tr. 98–99). With respect to this conversation, Mr. Harvey only testified that he did not recall speaking with Mr. Lutes. (Tr. 769).

Based on the foregoing, the Court finds that, at the very least, Mr. Harvey was not credible in his characterization of his conversation with J.W. What is clear is that J.W. was having trouble carrying out his duties due to the heat and that, in response, Mr. Harvey waited more than three hours to send someone out to assist him, which, in and of itself, stands in stark contrast to the level of concern that Mr. Harvey purportedly expressed during his conversation with J.W. on July 23. (Tr. 54, 744–45). When Jay Bryant was sent out to assist J.W., it was not for the purpose of assessing him but, rather, for the purposes of ensuring that the route was completed prior to the 5:30 p.m. cut-off time. (Tr. 66; Ex. R-1 at 27).

Once Mr. Bryant arrived to assist J.W., he observed that J.W. was walking slowly and appeared to be struggling. (Tr. 55). He further observed that J.W. looked really hot and uncomfortable, that he was breathing heavily, and could not catch his breath. (Tr. 69–70). Although J.W. was reluctant to relinquish his duties, Mr. Bryant ended up completing most of J.W.'s remaining walking relays. (Tr. 63–69). Once they finished the remaining relays, they returned to the station with J.W. returning approximately 10–15 minutes after Mr. Bryant.

When J.W. returned home, he dragged his feet as he came into the house, took off his uniform, and sat in the living room in his underwear, which, according to Mrs. W., was unusual for him. (Tr. 483–84). He barely ate any dinner and fell asleep on the couch, which was also unusual. (*Id.*). According to Mrs. W., he was still speaking slowly and had trouble choking down his morning toast before he went to work the next day. (Tr. 489).

D. July 24, 2012

At the beginning of the day on July 24, 2012, Mr. Bryant reported to Mr. Harvey that he did not expect to see J.W. report to work because of what he observed at the end of the day on July 23, 2012. (Tr. 753–54). Shortly thereafter, J.W. arrived at work and was given his regular route along with a mounted relay based on his being on the OTDL list. (Tr. 754–55). The weather did not change much from the day before, as the area was still under an excessive heat warning from the National Weather Service. During the afternoon, the temperature was approximately 102° F, the humidity was 28%, and the heat index was 104° F. (Ex. C-63 at ¶ 14).

Around noon, J.W. again called into the station and spoke with Mr. Harvey. (Tr. 755). He again stated that the heat was dragging him down, that he was tired and feeling sick, and that he thought he would need some help. (Ex. R-1 at 28). Mr. Harvey testified that he told J.W. to "take care of himself" and that he would find out where everyone was and send help later. (Tr. 756). This was the last contact that anyone at the Truman Station had with J.W. Approximately 3 hours later, J.W. collapsed on his route at 3525 Cottage Avenue in a residential neighborhood. (Ex. C-63 at ¶ 20).

J.W. was discovered by Alan Leroy Earle, who was driving by at the time. Mr. Earle described J.W. as unconscious, in distress, and breathing rapidly. (Tr. 34). He had blood coming from his head and he felt as if he was "burning up. He was very, very hot." (Tr. 35). These observations were more or less confirmed by Officer Ricky Pope, who arrived in response to the 911 call. (Tr. 40). J.W. was taken to a nearby hospital where his body temperature was measured at 108.7° F. (Ex. C-19). He died shortly after arriving at the hospital. The coroner later determined that J.W.'s death was caused by hyperthermia.[9] (Ex. C-19).

9. The coroner's report also indicates that a significant contributing cause was from an acute myocardial infarction,

E. Other Incidents Involving Heat-Related Illness

i. David Lutes

David Lutes is currently a carrier for the Main Office of the Independence Post Office; however, at the time of the incident in July 2012, he was working out of the Truman Station. (Tr. 90–91). On July 23, 2012, Mr. Lutes also suffered from a heat-related incident. (Tr. 91). As per office policy, Lutes called into the Truman Station around 1:00 p.m. and indicated to Mr. Dyer that the amount of work in his route was going to take him past the 5:30 p.m. cutoff time. (Tr. 96). This was a concern because Mr. Ebel, amongst other carriers, had been told that they would be disciplined for coming in past the 5:30 p.m. cutoff time, at which point Respondent was obligated to pay penalty (or double) overtime. Dyer told Lutes that they did not have extra help at that time and that Lutes should call in again at 2:00 p.m. with another update. (Tr. 97). When Lutes called in around 2:00 p.m., he indicated that he was still behind schedule, that he was in pain and that his stomach was upset.[10] (Tr. 98). In response, Lutes testified that Mr. Harvey said, "[Y]ou must be laying down on me. . . . You must be slumped over the wheel to be going that slow."[11] (Tr. 98). Around 5:00 p.m., another letter carrier was sent out to help Lutes finish the route so that he could return by the 5:30 p.m. cutoff.

After he finished his shift and returned home, Mr. Lutes still felt ill, so his wife made him go to the emergency room. (Tr. 102). After running a number of tests, the hospital determined that he had heat distress and kept him overnight for observation. (Tr. 102). Mr. Lutes called in

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also known as a heart attack. (Ex. C-19). Dr. Parmet testified that this was likely the result of J.W.'s blood thickening due to the excessive heat. (Tr. 406).

10. In this case, as in others, Respondent makes much of the fact that Mr. Lutes did not specifically say that he was suffering because of the heat. The problem with this argument, as will be shown later, is that it illustrates Respondent's failure to properly implement a heat stress management program and training regime that equips managers and supervisors with the tools necessary to identify signs and symptoms of heat-related illness.

11. Lutes testified that he believed he was on speakerphone and that Mr. Dyer was influencing the course of the conversation because he had a hard time hearing Mr. Harvey and because the tone of the conversation was uncharacteristic of Mr. Harvey. (Tr. 97–99).

to work the next day through the ERMS system, which is an 800 number for post office workers to report an absence. (Tr. 111). Mr. Lutes does not recall telling Mr. Harvey or Mr. Dyer that he had been to the hospital for heat-related illness; however, he does remember speaking with the Postmaster, Pat Clark, who was at the Truman Station when he returned to work a few days later. (Tr. 113). He also recalled that, while in the hospital, someone from the office called his cell phone to ask whether he would be reporting to work the next day to which his wife responded that he was in the hospital. (Tr. 111).

ii. David Ebel

On July 24, 2012, the day that J.W. passed away, David Ebel also suffered from heat-induced illness. (Tr. 148). At some point in the afternoon, Mr. Harvey contacted Mr. Ebel to see if he was available to help complete the remainder of Mr. J.W.'s route. (Tr. 771). At the time of the call, Mr. Ebel was feeling nauseous and light-headed. (Tr. 148–50). As he was speaking to Mr. Harvey on the phone, Mr. Ebel threw up. (Tr. 151, 771). Mr. Harvey stated that Mr. Ebel did not sound good, but told him to continue his route and to get back in time.[12] (Tr. 151). Nobody was sent to check on Mr. Ebel, nor was he given any instruction as to how to address his symptoms. (Tr. 151–52).

When Mr. Ebel returned to the Truman Station, he was not feeling well. (Tr. 152–53). Initially, Mr. Harvey was going to send him back out to complete J.W.'s route, but he reconsidered after looking at Mr. Ebel. (Tr. 153, 772). According to Mr. Ebel, Mr. Dyer then said, "No. Ebel is going back out. Give him a bottle of water." (Tr. 153–54). Ebel went back out to complete the route. (Tr. 154–56; Ex. R-1 at 67). Respondent contends that Mr. Dyer

12. As noted above, Respondent points out that Mr. Ebel did not state that he was suffering specifically from heat-related issues; however, the Court finds that Mr. Ebel's, as well as other letter carriers', failure to identify their symptoms as being specifically related to the heat does not absolve Respondent of its responsibility to monitor the safety and health of its employees, especially in light of the NWS extreme heat warnings on the days in question.

could not have said this because he was at the hospital until 6:00 p.m., which means that he could not have been at the station when Ebel returned. (Tr. 684). This is not exactly true, as Mr. Dyer returned from the scene of the accident to switch cars at the Truman Station. (Tr. 682). Mr. Dyer testified that he did not recall going back into the office, but none of Respondent's witnesses specifically rebutted Mr. Ebel's testimony that a conversation took place between him and Mr. Dyer. (Tr. 683). Mr. Ebel's and Mr. Harvey's testimony was consistent regarding their particular interaction. Someone sent Mr. Ebel back into the field because there is a record in the Daily MSP Route Report, which tracks delivery points along a given route. (Tr. 776, Ex. R-1 at 67). Given Mr. Ebel's stated condition, the Court finds that it is unlikely that he volunteered to go back out.

iii. Timothy Canfield

On July 19, 2012, five days before J.W.'s death, letter carrier Tim Canfield had to be taken to the hospital due to heat-related illness. (Tr. 174). On that day, Mr. Canfield reported to his supervisor that he had stopped sweating, was having a hard time breathing, and was not feeling well. (Tr. 174–75). Canfield testified that he told his supervisor that he would continue working and switch from walking relays to driving relays in order to make it easier on himself. (Tr. 174). Nobody from the station went out to check on Mr. Canfield, nor were any steps taken to evaluate his condition. (Tr. 174–176). After his conversation with management, Mr. Canfield called his wife, who contacted his doctor. (Tr. 178). Mr. Canfield was directed to go to the hospital immediately, whereupon he was diagnosed with acute renal failure related to heat. (Tr. 180). Respondent notes that Mr. Canfield was not disciplined for leaving his route.

In addition, a day before Mr. Canfield's incident, Mary Holcomb, a letter carrier at the Truman Station, reported feeling ill due to heat while working at the station. She was taken away in an ambulance. (Tr. 543; Ex. C-68 at 213).

F. Management Discussions of Heat and Sick Leave Usage

With the exception of Harvey Colston, who was called by Respondent, each of the letter carriers who were called to testify stated that they were given the message that heat was not an excuse for a delay in delivering the mail. (Tr. 73, 104, 159, 169, 834). This stands in stark contrast to the numerous documents distributed to Respondent's management team by Respondent's safety manager and to the testimony of both Dr. Thomas Bernard and Dr. Alan Parmet. (Exs. C-28 to C-35). Respondent attempts to explain that this message was limited in scope and taken out of context—Mr. Behrend and Mr. Harvey testified that, with respect to the admonition that "heat is no excuse", they were merely speaking about the impact of heat on employees who perform their work indoors. (Tr. 798, 847). The Court is not convinced. In addition to the testimony of the letter carriers, there were a number of memos and emails exchanged amongst members of management that illustrate Respondent's attitude towards heat's effect on performance:

- Mr. Behrend, who served as the Officer-in-Charge or Acting Postmaster in June 2012, and left sometime in July 2012, testified in a sworn statement that District Manager Gail Hendrix and Acting Senior MPOO Steve Erbland told him numerous times that "heat does not matter". (Tr. 245–46).
- This message was conveyed to managers working under Mr. Behrend, as well as to letter carriers. (Tr. 261–64; Exs. C-9 at 1–2, C-10 at 1–2).

- Notwithstanding the information available at the time, Ms. Hendrix characterized as an assumption the concept that heat/weather creates performance concerns. Specifically, she wrote to her managers:

> Assumption: Weather causes performance concerns. . .
> Reality: We live in the Midwest and we experience variation in weather.
> Reality: Our REGULAR CARRIERS have at least 10+ years [sic] experience. They are professional letter carriers, and we provide uniform allowances to support their needs in dealing with variation in weather conditions. We have provided and paid for time to train letter carriers, which includes training for variation in weather conditions. We have invested in their success. We should expect a return on our investment.

(Ex. C-14 at 2; Tr. 499–502).

This point of view is further reflected in the correspondence between managers regarding the use of sick leave. Instead of viewing the correlation between the extreme heat conditions and the use of sick leave as a safety and health problem, management perceived the problem as one of abuse and its resultant impact on production. For example, on July 2, 2012, Mr. Behrend wrote the following email to his boss, Eric Henry, who reported directly to Gail Hendrix:

> Boss,
>
> I am going to need your help as some of the employees in Independence seem to just give up on delivering mail when it's hot out. It has been brought to my attention that the employees in Independence were not abusing sick leave until 2 weeks ago when the hot weather set in. I will assure you that attendance will be addressed with all employees failing to meet a regular schedule. However, this is costing the company money we don't have and I know this.

(Ex. C-9 at 1–2). This message, albeit in slightly different form, was then relayed to the managers under Mr. Behrend's supervision. (Ex. C-10 at 1–2).

Later that month, after Mr. Canfield had to be taken to the hospital, Anthony Mitchell, the president of the local letter carrier's union, expressed his concern that Respondent was going to see more carriers getting sick if Respondent continued to work them long hours in extreme heat. (Tr. 434–36; Ex. C-12). This prompted Mr. Behrend to write an email to Mr. Henry,

which characterized Mr. Mitchell's statement regarding the impact of heat upon sick leave as a threat of a work slowdown. (Ex. C-12).

Most of the correspondence between members of Respondent's management team reflects a similar tone of suspicion regarding the use of sick leave and the impact of its use on the bottom line. (Exs. C-6 to C-14). The one exception to this was an email drafted by Donna Goza. On July 20, 2012, Ms. Goza wrote an email to managers in the Mid-America District, which stated, "We've had six (6) reported incidents involving the current weather condition—are safety talks being given to your employees?" (Ex. C-68 at 227–30). Based on the evidence and testimony at trial, it does not appear that Ms. Goza's inquiry was acted upon or heeded until after J.W. collapsed on his route four days later.

V. Discussion

A. Citation 1, Item 1

Complainant alleged a willful violation of the Act in Citation 1, Item 1 as follows:

> Section 5(a)(1) of the Occupational Safety & Health Act of 1970: 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 recognized hazards related to working outside during periods of excessive heat.
>
> a) On July 24, 2012, at job sites located on mail routes in Independence, Missouri, with the afternoon temperature in excess of 100 degrees F and the job sites under an excessive heat warning from the National Weather Service, the employer exposed employees to the recognized hazard of excessive heat during mail delivery. This included a letter carrier who had just returned to work after a five week absence and was not acclimated to the heat. Beginning at approximately 7:30 a.m., that employee worked in the heat walking a mail route outside delivering mail from an enclosed vehicle without air-conditioning. At approximately, [sic] 12:15 p.m., the employee reported to his supervisor symptoms of heat induced illness. At approximately 2:50 p.m., the employee collapsed while walking a mail route. At that time, the temperature was 102 degrees F, the humidity was 28%, and the heat index was 104 degrees F. The employee's core body temperature on arriving at the hospital was 108.7 degrees F, and he died as a result of his exposure to excessive heat. This included another letter carrier who reported symptoms of heat induced illness that day

but was required to finish his route.

b) On July 24, 2012, at job sites located on mail routes in Independence, Missouri, with the afternoon temperature in excess of 100 degrees F and the job sites under an excessive heat warning from the National Weather Service, the employer exposed employees to the recognized hazard of excessive heat during mail delivery. This included a letter carrier who had just returned to work after a five week absence and was not acclimated to the heat. Beginning at approximately 7:30 a.m., that employee worked in the heat walking a mail route outside delivering mail from an enclosed vehicle without air-conditioning. At around 12:00 noon, the employee called his supervisor and reported symptoms of heat induced illness and asked to go home; the employer required the employee to continue working in the excessive heat. That afternoon, the temperature was 104 degrees F, the humidity was 24%, and the heat index was 105 degrees F. The next day the employee returned to work in the same conditions and collapsed at approximately 2:50 p.m. while walking a mail route. The employee's core body temperature on arriving at the hospital was 108.7 degrees F, and he died as a result of his exposure to excessive heat. This included another letter carrier who called into his supervisor around 2:00 p.m. on July 23 and reported feeling ill because of the heat. He was pressured to continue working and was finally relieved at around 5:00 p.m. After his shift he reported to the hospital emergency room and was admitted with heat induced illness.

Among other methods, feasible and acceptable means of hazard abatement include:

(i) acclimatizing employees returning to work after an extended absence to working in the heat;
(ii) training supervisors and other employees in the proper response to employees reporting heat induced illness symptoms, which includes stopping work, getting to a cool place, and providing help, evaluation, and medical assistance;
(iii) requiring trained supervisors to go into the field and conduct in-person evaluations of employees complaining of heat induced symptoms, arranging for medical attention or other assistance as necessary;
(iv) establishing work rules and practices that encourage employees to seek assistance and evaluation when experiencing heat stress symptoms; and,
(v) establishing a heat stress management program which incorporates guidelines from the ACGIH's threshold limit values and biological exposure indices and/or the National Institute for Occupational Safety and Health (NIOSH) document, "Working in Hot Environments;" such a program should be tailored to the particulars of the employer's work, and may include, the following:

1. Providing adequate amounts of cool (50 degrees to 60 degrees F), potable water and electrolyte replacements (specific recommendations should be made by medical consultation) in the work area and require employees to drink frequently, e.g., one cup every 20 minutes.
2. Provide a work/rest regimen.
3. Training employees about the effect of heat-related illness, how to report and

recognize heat-related illness symptoms and how to prevent heat-related illness.

4. Including a heat acclimatization program for new employees or employees returning to work from absences of three or more days.
5. Providing a cool, climate-controlled area where heat-affected employees may take their breaks and/or recover when signs and symptoms of heat-related illnesses are recognized.
6. Providing shaded areas where heat-affected employees may take their breaks and/or recover on worksites that don't have access to climate-controlled areas.
7. Providing specific procedures to be followed for heat related emergency situations and procedures for first aid to be administered immediately to employees displaying symptoms of heat-related illness.
8. Using dermal patches for monitoring core temperature to better identify when workers need to be removed from the work area.
9. Allowing employees to modify their work schedules in the summer months to begin an hour to two hours earlier, and end their shift one to two hours earlier.
10. Monitoring the National Weather heat advisories or alerts and physically checking on carriers in the field during heat advisories or alerts.

See Citation and Notification of Penalty at 6–8.

B. Complainant Established a *prima facie* Violation of the Act

To establish a *prima facie* violation of Section 5(a)(1) of the Act, also known as the general duty clause, Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (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 and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co.*, 17 BNA OSHC 1869 (No. 92-2596, 1996); *see also* 29 U.S.C. § 654(a)(1). The evidence must also show that the employer knew or with the exercise of reasonable diligence, should have known of the hazardous condition. *Otis Elevator Company*, 21 BNA OSHC 2204 (No. 03-1344, 2007).

For the most part, it appears that Respondent does not contest the existence of a violation of the general duty clause—almost all of Respondent's brief is directed towards the willful characterization. That said, as Respondent has not specifically conceded the point, the Court shall address each of the elements of Complainant's *prima facie* case.

i. Letter Carriers Were Exposed to the Hazard of Extreme Heat

There is no real dispute over the fact that J.W., as well as the other carriers in the Independence Post Office, were exposed to extreme heat on July 23 and 24 and that such heat was a hazard. The fact that heat was a hazard on those particular days is supported by Respondent's own safety materials, the National Weather Service reports, and the expert testimony of both Dr. Bernard and Dr. Parmet.

The National Weather Service issued warnings for the Kansas City Metropolitan area, which includes Independence (and expressly lists it as such), indicating that "dangerously hot temperatures will occur . . . in which heat illnesses are likely and can be life threatening." (Ex. C-17 at 6). Those warnings were supported by the actual temperatures on those two days, as the heat indices for July 23 and 24 were 105° F and 104° F, respectively. *See Post Buckley Schuh & Jernigan, Inc.*, 24 BNA OSHC 1155 (Docket No. 10-2587, 2012) (ALJ) (finding that temperatures in the range of 84° F with 63% humidity to 99° F with 29% humidity were in the range where an individual could suffer serious physical harm or death).

According to Dr. Parmet, a person's normal core body temperature is approximately 98.6° F. (Tr. 449). In order to regulate that temperature, the body dissipates heat through sweating. (Tr. 449–51). However, when temperatures reach into the high 90's, the body begins to have trouble keeping its core temperature at a normal level. (Tr. 449–451). This is particularly pronounced when an individual has not properly acclimated to working in hot temperatures because "his skin is not trained to lose heat as efficiently" as someone who has been continually working in a high heat environment. (Tr. 467). Dr. Parmet testified as to the effects of such high heat on the body; specifically, he mentioned that the blood thickens, making it more difficult for the body to process oxygen, and that at a certain temperature, the proteins in

the blood can be permanently altered, like an egg in a frying pan. (Tr. 462). Both doctors testified that prolonged exposure can lead to heat exhaustion, heat stroke, and even death. (Tr. 225–26, 463).

Using metrics from the ACGIH and NIOSH, Dr. Bernard concluded that the temperatures on July 23 and 24, 2012, were a hazard to both acclimated and unacclimated letter carriers alike.[13] (Tr. 204–13). This stands to reason, since at least three individuals on those two days suffered from heat-related illnesses—Ebel, Lutes, and J.W. Based on the foregoing, the Court finds that Respondent's employees were exposed to the hazard of extreme heat.

ii. Respondent and its Industry Recognized the Hazard

Respondent stipulated that it recognized the hazard heat posed to its letter carriers. (Ex. C-63 at ¶ 28). The documents distributed by Ms. Goza clearly identify this fact and discuss the warning signs and symptoms of heat stroke and heat exhaustion, and also identify precautionary measures that should be taken to prevent heat-related illness. (Ex. C-28 to C-35). The stipulations, coupled with the numerous documents in Respondent's possession, establish that Respondent recognized the hazard posed by excessive heat. *See General Land Dynamics Systs. Div., Inc.*, 15 BNA OSHC 1275, 1285 (No. 83-1293, 1991) (safety bulletins issued by employer underscored actual recognition of the hazard).

In addition, the industry clearly recognized the hazard of excessive heat. The CDC-NIOSH documents admitted into evidence clearly indicate that the industry recognizes working in hot temperatures constitutes a hazard. Further, both Dr. Parmet and Dr. Bernard testified that

13. Even though he used a more complex analysis than would be expected of Respondent, Dr. Bernard pointed out that the National Weather Service warnings would serve as a sufficient proxy to determine when heat posed a hazard to letter carriers. (Tr. 214–15).

industry in general has considered heat to be a hazard for at least 30 years, if not longer. (Tr. 193–96, 221–24, 451–53).

iii. The Hazard was Likely to Cause Death or Serious Physical Harm

As with the previous element, Respondent has stipulated that excessive heat exposure is likely to cause death or serious physical harm. (Ex. C-63 at ¶ 28). One of the materials that was sent to the management group by Ms. Goza stated: "ACT IMMEDIATELY! If not treated heat exhaustion can advance to heat stroke or death!" (Ex. C-30 at 22). Another document, a Power Point presentation created by Respondent, stated that "although heat-related illness and death are readily preventable, exposure to extremely high temperatures caused an annual average of 381 deaths in the U.S." (Ex. C-30 at 6). Further, the hazard at issue in this case caused the death of J.W., as well as other serious physical harm, such as Mr. Canfield's acute renal failure. *See Marquette Cement Mfg. Co.*, 568 F.2d at 910 ("The fact that the activity in question actually caused death or serious injury constitutes at least *prima facie* evidence of likelihood."). Thus, the Court finds that Complainant has established that the heat on July 23 and 24, 2012 was likely to cause death or serious physical harm.

iv. Feasible Means of Abatement Existed to Eliminate or Materially Reduce the Hazard

To prove a violation of the general duty clause, Complainant must "specify the particular steps a cited employer should have taken to avoid citation, and . . . demonstrate the feasibility and likely utility of those measures." *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973). As part of his burden, Complainant "must define the hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices which are within the employer's control." Mark A. Rothstein, *Occupational Safety and Health Law* 290 (2013) (citing *Beverly Enterprises, Inc. v. Herman*, 119 F. Supp. 2d 1 (D.D.C.

2000)). A feasible abatement measure is one that will eliminate or materially reduce the hazard. *See Arcadian Corp.*, 20 BNA OSHC 2001 (No. 93-0628, 2004). The Court finds that Complainant has met his burden.

In the Citation, Complainant identified five primary abatement methods, one of which involves a heat stress management program that requires the implementation of specific protocols once the temperature reaches a point where excessive heat becomes a hazard. This is important from the standpoint of feasibility—the proposed abatement measures require an overarching program; but the actual implementation of such program is, for the most part, limited to situations where heat is a hazard. As Dr. Bernard testified, this determination does not require the same level of academic or scientific rigor he employed to determine threshold limit values for heat exposure; instead, Respondent can rely on the National Weather Service reports and advisories, which it already receives and distributes to members of management, to determine when the heat stress management protocol should be implemented. (Tr. 214–15). The Court shall address each of the proposed abatement methods.

First, Complainant proposed a program of acclimatization for new employees and employees returning to work after an extended absence. Acclimatization or acclimation is the process by which an employee is reintegrated into the work environment in a manner which allows the body to be better equipped to regulate its temperature through sweating and salt retention. (Tr. 453–54). Specifically, NIOSH recommends gradually increasing an employee's workload/exposure to heat over the course of the first week and allowing frequent breaks. (Ex. C-22 at 2). Not only has this been recognized as a feasible abatement method through NIOSH since 1986, but Respondent recognized it as well. In one of the documents distributed by Ms. Goza, a Power Point presentation entitled "Heat Stress", Respondent addressed the need for

acclimatization by stating, "Persons working in either indoors or outdoors in high temperatures should take special precautions including allowing 10–14 days to acclimate to high temperatures." (Ex. C-30, C-63 at ¶ 23). Notwithstanding the existence of this document, which was created by Respondent, Respondent admits that it did not have an acclimatization program.

Both Dr. Bernard and Dr. Parmet testified that the need for an acclimatization program is well-recognized across all industries. (Tr. 316–17, 455–56). Further, the extent to which Respondent specifically recognized this need and produced materials extolling the virtues of such a program is sufficient to find that such an abatement method is feasible.

The second and third abatement methods propose a training program that trains both supervisors and employees in the proper response to reports of heat-induced symptoms and requires supervisors specifically to go into the field to conduct in-person evaluations of employees reporting such symptoms. Significantly, Dr. Bernard testified one of the early symptoms of heat stroke is confusion and poor decision-making ability, which compromises the sufferer's ability to self-assess. (Tr. 229) As with the first proposed abatement method, Respondent had a number of tools at its disposal that not only recognized the importance of a heat-stress management program, but also recommended measures, such as training, that should be taken in order to prevent heat-related illness. (Exs. C-28 to C-35). The problem, however, was that the training was deficient at best. The letter carriers who testified at trial all stated they had either received no training whatsoever, or that the training they received was limited to an admonishment to hydrate or find shade. (Tr. 71–72, 84–85, 104, 172, 437). This was particularly evident in the case of Mr. Bryant, who came to assist J.W. on July 23, 2012. Mr. Bryant testified that he did not have proper training in how to address or even identify signs and symptoms of heat stress in a fellow letter carrier. (Tr. 71). Further, this lack of training is

similarly evident in the interactions involving Mr. Dyer, Mr. Harvey, Mr. Lutes, and Mr. Ebel, none of which illustrate the type of hands-on approach suggested in both NIOSH and Respondent-generated literature.

Although Respondent proffered evidence that safety talks were given on the topic of heat-related illnesses, there is very little evidence to indicate what was discussed and virtually no evidence of a robust training regimen. Ms. Goza stated that she does not follow up with management to ensure the quality of the training; in fact, as noted above, she had very little training herself prior to the incident involving J.W.. (Tr. C-68 at 27, 96, 104). Further, many of the documents sent to the management team from Ms. Goza were not extensively reviewed for quality control or compliance, nor were they systematically compiled as part of an overarching training program; rather, Ms. Goza received the documents, briefly reviewed them, and then forwarded them via email. (C-68 at 76–88). The effect of this *ad hoc* program is evident in the testimony of Mr. Harvey, who stated that he premised most of his training and understanding of heat hazards as "common sense." (Tr. 258). Dr. Bernard concluded, and the Court agrees, that the implementation of a training program is a feasible means of abatement and that the existing program of training is deficient.

The fourth proposed abatement method is to establish work rules and practices that encourage employees to seek assistance and evaluation when experiencing heat stress symptoms. As part of a comprehensive heat-stress management program, this abatement method is an affirmation of the training that both employees and managers should receive. The problem, however, is that letter carriers had been given the inconsistent message that heat was not an excuse for delays in delivery. In response, many of the letter carriers felt as if they had to "work through it" in order to ensure that they complied with their expected delivery times and the 5:30

p.m. cutoff time. (Tr. 104, 156). Respondent points out that there was not a single case of discipline issued for failure to meet the 5:30 p.m. cutoff time; however, based on the testimony of the letter carriers, the Court finds that the threat of such discipline was real and influenced employee behavior in such a way as to place them in a situation where they might disregard symptoms of heat-related illnesses. This much was evident in the testimony of Ebel, who testified that he was told to work through the discomfort and then file a grievance after the fact. (Tr. 156). Ultimately, the Court finds that this is a simple abatement method to implement, as it is a necessary corollary to the training that needs to be provided to managers and employees alike.

Finally, Complainant proposed that Respondent should establish a heat stress management program, which would be tailored to the particulars of Respondent's workplace and incorporate NIOSH guidelines. Complainant initially proposed ten elements to include as a part of this program; however, based on Dr. Bernard's testimony, Complainant only addressed eight of them in his brief. They are: (1) providing adequate amounts of cool water; (2) providing a work/rest regimen; (3) training employees about the effects of heat-related illness; (4) including a heat acclimatization plan for new employees and employees returning from extended absences; (5) providing a cool, climate-controlled area for heat-affected employees to take breaks; (6) in the absence of a climate-controlled area, providing a shaded area for employees to take breaks; (7) providing specific procedures to be followed in a heat-related emergency; and (8) monitoring the National Weather Service heat advisories and alerts and checking on carriers in the field during heat advisories or alerts. Items (3), (4), and (7) have been addressed above, so the Court will limit its discussion to the remaining items.

The first item, providing adequate amounts of cool water, is something that Respondent did. Respondent provided a cooler full of bottled water that was available for the employees. (Tr. 731). According to most sources, however, merely providing water is not sufficient. (Ex. C-22 at 2). NIOSH provides that water should be drunk frequently (approximately 1 cup every 15 to 20 minutes) and that reminders should be given to drink water because extreme heat can cause an insufficient thirst drive. (Ex. C-21 at 6). In *Post Buckley*, the court found that a heat stress management program was deficient because, although the respondent provided water, it did not specifically encourage employees at risk to drink it in a purposeful way. *See Post Buckley*, 24 BNA OSHC 1155. Although Respondent's employees perform their work unsupervised, this item could easily be implemented through a more robust and meaningful training program.

The second item requires providing a work/rest regimen. A work-rest regimen mitigates the impact of excessive heat by implementing cycles of work and rest throughout the course of the day. (Tr. 330–31; Ex. C-21 at 5). Such a work cycle allows the body to rid itself of excess heat, slows the production of internal body heat, and provides greater blood flow to the skin. (Ex. C-21 at 5). Respondent did not have a work/rest regimen; rather, employees exposed to excessive heat were expected to rely on the same break regimen that was in place throughout the year regardless of weather—two 10-minute breaks and one 30-minute lunch break. This is clearly insufficient, as it does not take heat into consideration. Instead, it places the onus on the employee to make the determination as to when they should take a break, which, in some cases, will be problematic if the individual is already suffering from the effects of heat illness, rendering it difficult for them to determine if they actually need a break. (Tr. 229–30, 463); *see also Post Buckley*, 24 BNA OSHC 1155 at *13. Based on the testimony of Dr. Bernard and Dr.

Parmet, as well as the documents in Respondent's possession, the Court finds that this is a feasible means of abatement. (Tr. 453–57).

Items (5) and (6) deal with providing adequate break areas. If available, Respondent should provide a climate-controlled area for heat-affected employees to take breaks; however, in the absence of such an area, shade should be made available. Given the challenges inherent in Respondent's ability to control the environment in which its employees work, providing climate-controlled areas is somewhat difficult—the vehicles driven by letter carriers are, for the most part, not air conditioned and must remain locked and closed up when a carrier is doing a walking relay. (Tr. 67, 81). According to Respondent, there are many locations for its letter carriers to take breaks along their route, and drivers are encouraged to provide input as to where they prefer to take their breaks. While this may be true, it does not appear that any coordinated effort had been made by management to contact local businesses about the use of their facilities instead of passing the responsibility for identifying break locations largely to individual letter carriers without adequate training, support, and safety monitoring. As with many of the previous items and methods of abatement, this sort of *ad hoc* system is not sufficient for the purposes of a heat stress management program—it is the employer's responsibility to ensure that the workplace, wherever it may be, is free of a recognized hazard. *See Armstrong Cork Co.*, 8 BNA OSHC 1070 at *5 (No. 76-2777, 1980) ("The duty to comply with section 5(a)(1), however, rests with the employer. An employer cannot shift this responsibility to its employees by relying on them to, in effect, determine whether the conditions under which they are working are unsafe."). The Court finds it is feasible for Respondent's management team to make arrangements—or at least implement a process for identifying appropriate rest locations—to enable its employees to have adequate facilities for climate-controlled air or shade.

Finally, item (8) requires monitoring the National Weather Service heat advisories and alerts and checking on carriers in the field during heat advisories or alerts, which warn of dangerous conditions. Respondent already receives and distributes the NWS heat advisories and alerts; however, according to Ms. Goza, Respondent did not have a procedure in place regarding how to respond to such alerts and advisories. (Ex. C-68 at 63–64). Further, neither Mr. Harvey nor Mr. Dyer monitored those reports or weather conditions. (Tr. 252, 258). This is a relatively simple procedure to implement, as Respondent already has the information at its disposal. Despite its simplicity, this particular item is of the utmost importance because it serves as the determining factor as to when the heat stress management protocol should be implemented.

Ultimately, the Court finds that all of the foregoing proposed abatement measures are feasible in the technical and economic sense. First, the heat stress management program and its attendant requirements only require implementation during periods of excessive heat, as indicated by the National Weather Service warnings and alerts. Second, Respondent has already paid lip-service to many of the foregoing measures through the documents sent out by Ms. Goza. (Ex. C-25, C-28 to C-35). In other words, Complainant is not recommending abatement measures that Respondent has not already addressed through its own literature or through the distribution of NIOSH-authored documents to its management team. The obstacle in this case is not feasibility; rather, it is the apparent unwillingness of management to accept that heat impacts performance, notwithstanding the information and literature available to them. Further, case law suggests when safety precautions are widely recognized and accepted, that is evidence of their economic feasibility. *See National Realty and Constr. Co.*, 489 F.3d at 1266 n.37; *Continental Co. v. OSHRC*, 630 F.2d 446, 449 (6th Cir. 1980).

v. Respondent Knew or Could have Known of the Hazardous Condition

As noted above, the evidence must show that the employer knew or with the exercise of reasonable diligence, should have known of the hazardous condition. *Otis Elevator Company*, 21 BNA OSHC 2204. The Court finds that Complainant proffered ample evidence to show that Respondent knew or could have known of the hazardous condition.

First, Respondent was in possession of, and even authored, materials that explained the hazards associated with excessive heat and the conditions under which precautions should be taken. (Ex. C-28 to C-35). Second, not only was an excessive heat warning issued by the National Weather Service, but Respondent's own safety manager received those alerts, and, in many cases, distributed such alerts to members of management. Third, there were multiple incidents involving heat-related illnesses in the days and weeks leading up to July 23 and 24, 2012. In fact, in response to those very incidents, Ms. Goza specifically emailed the management group and inquired as to whether the safety talks regarding heat-related illnesses were being presented to Respondent's employees.

The Court finds that Respondent knew, or could have known, of the hazardous condition. Accordingly, based on the foregoing, the Court finds that Respondent violated Section 5(a)(1) of the Act.

C. The Violation was Willful

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.'" *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted); *see also Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993) ("A willful violation is differentiated by heightened awareness of the

illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference . . . ."). According to the Commission:

> A willful violation is differentiated by a heightened awareness—of the illegality of the conduct or conditions—and by a state of mind—conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete.

Williams Enters. Inc., 13 BNA OSHC 1249 at *9 (No. 85-355, 1987).

i. "Heat is No Excuse"

From the very top of the management chain down to the floor supervisor, the message was clear: heat is not an excuse for performance issues. Mr. Behrends, the acting Officer-In-Charge at the time of the incident involving J.W. and other letter carriers, gave sworn testimony that Gail Hendrix and Steve Erbland told him and other managers that heat does not matter and that employees should be able to perform within their expected delivery parameters regardless of the weather. (Tr. 245–47). This is further supported by the series of emails[14] that were sent between the various managers in the Mid-America District. That message was relayed to lower-level supervisors, such as Mr. Harvey and Mr. Dyer, who, in turn, conveyed the same message to the letter carriers.

14. These emails are discussed more fully in Section IV.F, *supra*.

The problem, of course, is that this message flies in the face of long-established industry knowledge regarding the effects of heat and also runs contrary to virtually all of the safety information Respondent had in its possession and distributed to members of its management team. Dr. Bernard and Dr. Parmet testified that it was a well-known and long-established fact that heat impacts performance. (Tr. 194, 458). Ms. Goza, notwithstanding her limited knowledge regarding heat safety, stated that she was aware of heat's impact upon delivery times. Nevertheless, Respondent's own District Manager characterized this statement as a mere assumption.

The fallout from this is that undue emphasis was placed on delivery cut-off time and avoiding the payment of penalty overtime. (Tr. 252, 264). Letter carriers were placed under significant pressure to perform within their expected delivery parameters, and, as a result, were subjected to unnecessary exposure to extreme heat without adequate preventative measures. (Tr. 104, 156). Further, to the extent that these employees became overworked or needed reprieve, their requests for assistance or sick leave were viewed with suspicion. (Tr. 98; Exs. C-9, C-12, C-14). Instead of making a factual determination about why sick leave was being used in uncharacteristic amounts, or why delivery times were longer than usual, management operated under the assumption that employees were abusing the system and lamented the impact it would have on the bottom line.

ii. Respondent Failed to Implement or Properly Utilize Available Safety Information

Just as concerning to the Court is the fact that, although Respondent did not have a formal heat stress management program, it nevertheless had an overwhelming amount of information at its disposal—in some cases even generated by Respondent itself—indicating how to develop and implement an appropriate heat stress management program. (Ex. C-25, C-28 to

C-35). To be sure, these documents and safety tips are not standards contained within the Act; however, they do comprise a part of Respondent's institutional knowledge regarding the hazards of exposure to excessive heat. This information was not merely limited to what to do, but also when to do it. Ms. Goza stated that she received and forwarded National Weather Service warnings and advisories to the management team; however, according to Mr. Dyer and Mr. Harvey, such warnings and advisories went unheeded. With a few modest exceptions, Respondent completely ignored readily available information that, if properly implemented, would have had the effect of eliminating, or at least materially reducing, the hazards associated with working in extreme heat.

iii. Respondent Failed to Respond to Known Instances of Heat-Related Illness

In addition to the foregoing, and perhaps as a result thereof, Respondent repeatedly failed to properly respond to instances of heat-related illness. Even if we do not consider the events of July 23 and 24, 2012, it is clear that Respondent was aware that its employees were being impacted by heat-related medical issues. As noted above, on July 20, 2012, Ms. Goza asked the managers of the Mid-America District about six reported heat-related incidents and whether safety talks were being given. (Ex. C-68 at 27). Notwithstanding Ms. Goza's inquiry, no additional action was taken; in fact, it is not clear that Ms. Goza's email was even read.

This case is similar to a recent Commission case, wherein the respondent was in possession of information that it either chose to ignore or to which it failed to respond. In *Elliot Construction*, a foreman who was well-versed in the effects of carbon monoxide exposure failed to take proper precautions to prevent exposure before the project began and, subsequently, failed to respond in a timely manner when his employees began to get sick. *Elliot Constr. Corp.*, 23 BNA OSHC 2110 (No. 07-1578, 2012). Even after some of his employees began to get sick, he

allowed the project to proceed with those employees who were not falling ill. *Id.* In those circumstances, the Commission found that:

> [D]espite Dynowski's heightened awareness of the potential for CO exposure at this particular site, and following employee health complaints that he knew were consistent with such exposure, he took no steps to monitor for CO and kept employees working inside the CO-contaminated room. Under these circumstances, we find that Dynowski was plainly indifferent to the safety of his crew and, given that he was a supervisor, his willful state of mind can be imputed to Elliot.

Id. at *7. *See also Morrison-Knudsen, Inc.*, 16 BNA OSHC 1105 (No. 88-572, 1993) ("After all, persons had reminded the employer's officials of the duties embodied in the standards, but the employer did not implement the suggested abatement methods, such as engineering controls and a proper respiratory protection program. This evidence indicates that this employer either intentionally violated the standards or showed plain indifference to them.").

Respondent's attempts to mitigate the importance of its knowledge of prior incidents are unpersuasive. With respect to many of the incidents recounted at trial, Respondent continually argued that the affected employees did not specifically mention it was the heat that was affecting their performance. That, however, was part of the problem—managers were either unaware of, or completely ignored, information that would have assisted them in identifying and responding to heat-related illnesses, especially when, as Dr. Bernard testified characteristically can occur, affected employees may have had difficulty understanding or articulating what was affecting their performance because of heat-induced confusion . (Tr. 229–30).

The bottom line is that Respondent had an abundance of information at its disposal in order to address the hazards of excessive heat, and yet, it failed to do anything with it, with the exception of giving out water and instructing its employees to seek out shade. This was wholly insufficient—not only did Respondent have ample information regarding the implementation of a heat stress management program, but it was also presented with a number of incidents that

should have prompted a more searching review of its safety program. Instead, Respondent's management continued to see its problems from the standpoint of production, viewing the use of sick leave and complaints about heat as indicators of a labor force gone astray as opposed to a serious safety issue.

The Court finds that Respondent, through its management, exhibited a conscious disregard of, and plain indifference to, employee safety. Accordingly, the Court finds that Citation 1, Item 1 was properly characterized as willful.

D. Good Faith

In response to Complainant's characterization of the violation as willful, Respondent contends it had a good faith belief it was in compliance with the Act. Specifically, Respondent contends that it was in compliance with no fewer than five of the proposed abatement measures, and, as such, it did not commit a willful violation. The Court disagrees.

According to the Commission, "An employer's conduct will not be found willful if it 'made a good faith effort to comply with a standard or eliminate a hazard, even though [its] . . . efforts were not entirely effective or complete.'" *Elliot Constr.*, 23 BNA OSHC 2110 (citing *A.E. Staley Mfg. Co.*, 19 BNA OSHC 1199, 1202 (No. 91-0637, 2000) (consolidated), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002)). Respondent lists the following amongst its good faith efforts to eliminate the hazard of excessive heat: (1) providing ice and water; (2) providing a work/rest regimen; (3) providing training and informational materials to management and employees; and (4) providing cool, climate-controlled locations and shaded areas.

First, the Court accepts that Respondent provided ice and water to its employees; however, as the court in *Post Buckley* noted, merely providing water is only one part of a comprehensive heat management program. *Post Buckley*, 24 BNA OSHC 1155.

Second, contrary to Respondent's arguments, it did not provide a work/rest regimen. A work/rest cycle takes current weather conditions into consideration and allows for periodic rest to allow the body to cool down. The breaks that were authorized for Respondent's employees were contractually bargained for, were applicable year-round, and did not take into consideration the increased need for periodic rest in high heat conditions. Rather, employees were expected to work within the same parameters in the month of July as they were in the month of April.

Third, as was previously discussed above, while Respondent may have given safety talks and provided information in the form of posters, its training program was woefully deficient. All but one of the letter carriers who testified stated that they received very little in the way of substantive training regarding the hazards of heat. Specifically, they recalled being told to drink lots of water and to seek out shade. Some recall being told to take rest breaks; however, most of them felt that such breaks had to fit within the existing allowance for breaks. Further, due to the threat of discipline for failure to complete routes in a timely manner, many of the employees felt they could not take extra breaks because it could potentially prevent them from being able to complete their respective routes within the projected time frame. Even members of management testified as to the cursory nature of their training—Mr. Dyer stated that he did not recall receiving training for excessive heat; Mr. Harvey stated that he relied a lot on common sense; and Ms. Goza stated that, prior to the incident involving J.W., she had not received formal training on heat hazards. (Ex. C-68 at 27). The level of training was not commensurate with the amount of knowledge and information available to Respondent, and putting up posters and making information available for reading at a later time was a poor substitute for instruction.

Finally, while it sounds as if many of the local businesses provided climate-controlled areas and that letter carriers were able to find shade along their routes, the availability of such

rest areas was not the product of management efforts to procure them. Instead, letter carriers needed to find their own rest stops, which were recorded in a book so that management would be able to find them. (Tr. 740). Ultimately, the location of break spots was "entirely up to the carrier." (Tr. 740). While this process makes sense in light of the individual nature of the job, the Court finds that Respondent should not be credited with good faith for playing a minor, passive role in agreeing with a letter carrier on his selected break areas (and only for the purpose of knowing where the carrier was stopping), particularly when rigid production standards were not adjusted to accommodate.

For the foregoing reasons, the Court finds that Respondent has not established the defense of good faith.

VI. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1995).

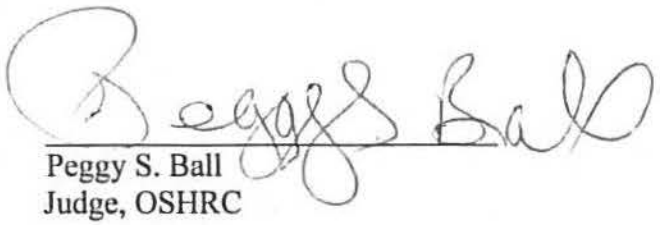
Complainant proposed the maximum penalty of $70,000.00 for Citation 1, Item 1. This assessment was based on the fact that: (1) Respondent is a very large employer, with approximately 8,000 employees in the Mid-America District alone; (2) the gravity of the violation was high due to the significant risk of injury, the lack of meaningful protections, the fact that all employees at the Truman Station were exposed to the hazard, and the fact that multiple employees became sick, or, in J.W.'s case, died; (3) Respondent did not exhibit good faith; and (4) Respondent had a history of violations in the recent past. (Tr. 551–55). The Court agrees with the assessment of Complainant. As noted by the Commission, gravity is given primary consideration. In this case, numerous employees were exposed to the hazard of excessive heat without being properly equipped with adequate training and resources to prevent, recognize, and treat heat-related illnesses. Considering the amount of information available to Respondent regarding heat hazards, the Court also finds that Respondent should not be entitled to any credit for good faith. Accordingly, the Court shall assess a penalty of $70,000.00.

ORDER

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is hereby AFFIRMED, and penalty of $70,000.00 is ASSESSED.

SO ORDERED



Peggy S. Ball
Judge, OSHRC

Date:
Denver, Colorado