Nos. 16-1713, 16-1813, 16-1872, 17-0023, 17-0279

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

BRIEF FOR THE SECRETARY OF LABOR

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ISSUES FOR REVIEW

1. Whether the Secretary established that the seven Postal Service employees at issue in these five cases were exposed to the hazard of excessive heat in the summer of 2016, where highly-qualified expert witnesses concurred that the temperatures in the 90s, heat indexes up to 109 degrees, and physical activity level of the letter carriers resulted in their being exposed to a heat stress hazard.
2. Whether the Secretary established the economic feasibility of his proposed means of abatement, where economic feasibility requires only a showing that the abatement would not imperil an employer's continued economic viability, and the evidence shows that the Postal Service is an economically functional entity that has discretionary funds available and is at no real risk of going out of business.
3. Whether the ALJ incorrectly found that training alone is sufficient to abate the cited hazard, where the Secretary maintains that a multi-element heat stress program is necessary to materially reduce the hazard and, contrary to the ALJ's finding, did not propose alternative abatement options, and where the expert testimony was clear that training is only one element of such a program and that the Postal Service's existing training, standing alone, does not materially reduce the hazard.

4. Whether enterprise-wide abatement measures are authorized and warranted in these cases, where the Commission has authority under section 10(c) of the OSH Act to order any “appropriate relief,” a broad grant of authority that is properly construed to include abatement measures to be taken at the corporate level, and the Postal Service has, for years, refused to take the hazard of excessive heat exposure seriously, resulting in preventable employee injuries and illnesses every summer.

PROCEEDINGS BELOW

These are five cases brought by the Secretary against the United States Postal Service (USPS or Postal Service) alleging violations of the general duty clause of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 654(a)(1), for exposing seven employees in five cities to the hazard of excessive heat, also referred to as heat stress. ALJ Sharon D. Calhoun dismissed all five citations in separate opinions issued July 15, 2020.

The Secretary filed a petition for discretionary review of two of the ALJ’s findings that are common to all five cases: first, that the Secretary failed to prove the employees were exposed to a hazard; and second, that the Secretary failed to establish that his proposed means of abatement were economically feasible. In addition, the Secretary sought review of the ALJ’s finding in three of the cases that merely providing minimal training about heat stress hazards is sufficient to

abate the hazard. The Postal Service filed a conditional cross-petition for discretionary review, contending that the ALJ erred in not issuing a declaratory order prohibiting any future requirement of enterprise-wide abatement measures by the Postal Service in heat stress cases. On August 31, 2020, the Commission directed review of the ALJ's decisions, and by notice dated September 25, 2020, the Commission requested that the parties brief the issues raised in both petitions.

STATEMENT OF FACTS

A. The Postal Service's History with Excessive Heat

In 2012, John Watzlawick, a letter carrier from USPS's Truman Station in Independence, Missouri, died of heat stroke while delivering mail. DM Ex. C-2; DC Tr. 51-52.[1] OSHA issued a citation and, after a 2014 trial on the merits, ALJ Peggy S. Ball found that the Postal Service had committed a willful violation of the general duty clause, specifically criticizing the agency for putting productivity before employee safety. *United States Postal Service*, 25 BNA OSHC 1116, 1133-35 (No. 13-0217, 2014) (ALJ Decision). Judge Ball found:

> [USPS] had an abundance of information at its disposal in order to address the hazards of excessive heat, and yet, it failed to do

[1] Citations refer to the transcripts and exhibits from the five cases as follows: DC for the national hearing in Washington, D.C.; SA for the San Antonio case (No. 16-1713); DM for the Des Moines case (No. 16-1813); AR for the Benton, Arkansas case (No. 16-1872); HO for the Houston case (No. 17-0023); and WV for the Martinsburg, West Virginia case (No. 17-0279). The ALJ's five decisions are cited as San Antonio Decision, Des Moines Decision, Benton Decision, Houston Decision, and Martinsburg Decision.

> 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.

Id. at 1135.

The Postal Service did not develop and implement a written heat stress policy after the 2012 fatality, or after the 2014 ALJ decision. DC Tr. 60-61, 1253, 1870. The agency's current heat response plan has not changed in any significant way for many years because, as the agency's own top management officials have acknowledged, they do not see exposure to excessive heat as a serious health concern.[2] The plan is limited to three elements: training, water, and calling 911. DC Tr. 1947-50. The program does not include any work/rest cycle provisions; any acclimatization provisions; any provisions for taking extra breaks due to the heat; any provisions to ensure there are air-conditioned or shaded areas to take

[2] Linda DeCarlo, the Postal Service's highest-ranking safety officer, testified the number of reported heat-related injuries "is not a major concern" because the quantity of heat-related injuries is less than injuries from vehicle accidents, slips/trips/falls, and dog bites. DC Tr. 1260-61. One of USPS's expert witnesses, Dr. Joshua Gotkin, stated that, in order to be "statistically significant," there would need to be at least 17,000 heat-related injuries per year. DC Tr. 1662. Postal Service Chief Operating Officer David Williams stated that if the agency were to spend money to address health hazards, "it's not going to be in the heat." DC Tr. 1931.

breaks; or any provisions about how much water carriers should be consuming. Training provisions are not always mandatory and are inconsistently implemented, resulting in both managers and carriers failing to receive training. DC Tr. 946-47; DM Tr. 54-55; 332-33, 359, 523-24, 528. The provisions about when to call 911 are also inconsistent; for example, in some places calling 911 is mandatory as soon as heat stress symptoms are present, while in others certain steps are supposed to be taken to see if the individual improves, and 911 is to be called only if there is no improvement after 60 minutes. DC Tr. 1959-64, 1968-70.

Although Postal Service letter carriers have been told they may take extra breaks in the summer, in practice, employees feel intense pressure not to use such breaks. Echoing Judge Ball's finding from six years earlier, Judge Calhoun found that "the records in the five Postal Service cases, across five cities, demonstrate rural and city carriers experience near-constant pressure to complete their routes faster and to discourage them from taking breaks, reporting injuries or illnesses, or calling in sick." Houston Decision at 30. The five records are full of examples of this pressure. One carrier recalled in September 2017 being told by her supervisor to "get back to carrying" when he saw her standing in the shade underneath a tree, drinking water and trying to cool off. DM Tr. 497-98. When carriers tried to use a Form 3996 – which notified management when a carrier needed more time than allotted to complete his or her route – because the heat

required additional breaks, they were routinely rejected; one carrier's supervisor "laughed at [her] and said, 'Oh, come on, it's not that hot,'" and another was told by management that "heat is no excuse" to go slower. DM Tr. 489, 499, 681-82. Carriers were sometimes disciplined for reporting heat-related illnesses. DC Tr. 88-89.

Between 2015 and 2018, nearly two thousand USPS carriers reported heat-related medical incidents. DC Ex. C-127; DC Tr. 268-70. In the summer of 2018, another letter carrier, Peggy Frank, died because of working in the heat. DC Tr. 103. Since 2015, letter carriers have reported approximately 500 to 600 heat-related injuries per year, about half of which are considered "recordable" under the OSH Act. DC Tr. 1245, 1257-59.

B. Seven Letter Carriers in Five Cities Are Exposed to Heat Stress in the Summer of 2016

Des Moines, Iowa. On the morning of June 9, 2016, letter carrier Jami Yoder began her route delivering mail. DM Tr. 234. Her route, Route 1213, was a mostly residential route that involved about ten miles of walking that took six to six and a half hours to complete. DM Tr. 236, 240. Route 1213 was hilly and mostly in direct sunlight. DM Tr. 236-39.

By 1:15pm the temperature had reached 93 degrees and Ms. Yoder felt nauseated, "drugged out," and "very dry and hot," like her skin was burning. DM Tr. 262. An hour later, she was unable to complete her route and drove back to

the postal station, vomiting along the way. DM Tr. 277-79. Co-workers who saw her upon her return described her as "clammy-looking," "dazed," "extremely red," "shaking," and not quite "tracking right." DM Tr. 407-08, 439, 459. Her supervisors ordered her to go back out and complete her route, but with the intervention of a union steward she refused and went to an urgent care clinic, where she was diagnosed with heat exhaustion and instructed to remain off work for three days. DM Tr. 281, 283-84, 286, 351, 408-09, 459; DM Ex. C-47 at 3-4.

On the morning of July 21, 2016, Des Moines letter carrier Debra Wickliff began work on Route 1205, a residential route requiring eight to ten miles of walking, much of it in direct sunlight. DM Tr. 579-80. Ms. Wickliff began to feel ill with a headache, nausea, and short-term memory loss about two hours into her route, when the temperature was 93 degrees and the heat index was 106 degrees. DM Tr. 585-86; DM Exs. C-44 at 8, C-45. As the day went on and her symptoms worsened, the temperature rose to 96 degrees and the heat index to 111. DC Tr. 476-77; DM Tr. 590; DM Ex. C-44 at 8. She was taken by ambulance to the hospital, where she was diagnosed with heat exhaustion and instructed to remain off work for three days. DM Tr. 591:4-14; DC Ex. C-184 at 13, 26.

San Antonio, Texas. On the morning of June 13, 2016, letter carrier Roberto Saenz began his route, Route 13. This route requires twelve to fourteen miles of outdoor walking a day, and Mr. Saenz carried a satchel that weighed at

least thirty pounds. SA Tr. 85, 337-38. On June 13, 2016, the high temperature in San Antonio was 93 degrees and the heat index was 105 degrees. DC Ex. C-144; DC Tr. 418. Several hours into his route, Mr. Saenz began experiencing a headache, profuse sweating, and feeling faint. SA Tr. 88. Around 4:00pm, Mr. Saenz called his supervisor because he could not stop throwing up. SA Tr. 83-84, 518. Mr. Saenz went to an urgent care center and was diagnosed with rapid heart rate, heat exhaustion, and dehydration; he was given medication and IV fluids. SA Tr. 90; DC Ex. C-175 at 1740-42.

Two days later, on June 15, 2016, San Antonio letter carrier Christy Solis began her route, Route 30. SA Tr. 145. This route involved twelve to fifteen miles of walking, 90-95% of which was in direct sunlight. SA Tr. 146-47. Her mail satchel weighed at least twenty pounds. SA Tr. 147. At midday, Ms. Solis began feeling sick and dizzy. SA Tr. 177, 179. She purchased a Gatorade and tried to drink it but gagged and vomited. SA Tr. 183. The heat index on that day rose from 99 degrees to 105 degrees throughout the afternoon. DC Tr. 426. At the hospital, Ms. Solis received treatment and IV fluids for severe dehydration; she missed three days of work as a result. SA Tr. 187; SA Ex. R-8.

<u>Houston, Texas</u>. On the morning of June 17, 2016, letter carrier Torres Francis began his route, Route 2536, which was a sunny route that required eleven to thirteen miles of walking, taking about six hours. HO Tr. 52, 57, 59. The high temperature in Houston that day, around 2:30pm, was 99 degrees with a

heat index of 109 degrees. HO Tr. 858; DC Tr. 549. At 2:40pm, after completing his lunch break, Mr. Francis began experiencing painful muscle cramps. His "vision was blurry," he "was seeing spots," and his "ears felt like [they] had water in them." HO Tr. 71, 198; HO Ex. C-12. Mr. Francis spent two days in the hospital, where doctors diagnosed him with heat exhaustion, acute renal failure, and rhabdomyolysis. HO Tr. 73, 176-77, 180, 478; DC Tr. 422, 442; HO Exs. C-26, C-32).

Martinsburg, West Virginia. On the morning of August 13, 2016, in Martinsburg, West Virginia, letter carrier Karen Teter began her route delivering mail. She had been working this particular route, Rural Route 13, for more than twenty years. WV Tr. 70. Route 13 was a "mounted" route; Ms. Teter was inside her official vehicle for 80% of her route, which took five to six hours to complete. WV Tr. 71, 76. Ms. Teter's assigned vehicle was a "long-life vehicle," or LLV, the "familiar boxy mail truck." WV Tr. 72; Houston Decision (only) 12. LLVs are not air-conditioned and have metal floors that can get extremely hot; they have a small dashboard-mounted fan that serves only to "blow hot air around."[3]

[3] Several employees of the Martinsburg post office testified about conditions inside the LLVs. The motor in the LLV is right beside the driver under the floor, about 18 inches from the driver's body. WV Tr. 174-76. Carriers described the heat in the following ways: it gets so hot you can heat up your cold steak lunch (WV Tr. 176-77); letter carriers nicknamed LLVs "easy bake ovens" because they get so hot (WV Tr. 77); it was "well over a hundred degrees in there" (*id.*); "You could fry an egg on the floor . . . No human being should have to drive an LLV in the summer" (WV Tr. 331); "way hotter" than outdoor temperatures (WV Tr.

WV Tr. 75. On Ms. Teter's route, the LLV was in direct sun 95% of the time. WV Tr. 76.

The high temperature for August 13 in Martinsburg was 95 degrees, and the temperature remained above 90 degrees from 10:53am until at least 2:53pm. WV Ex. C-24 at 2-3. About an hour and a half into the route, Ms. Teter began to feel nauseated and started sweating profusely; as time went on she stopped sweating and became unable to stay awake. WV Tr. 78-79, 81. At approximately 2:10pm, she knocked on the door of customers she knew, and they looked at her and told her she needed to get inside immediately. WV Tr. 82, 86, 127. Ms. Teter was not coherent, she was nodding, and she "wasn't altogether there." WV Tr. 86. When she arrived at the hospital she reported symptoms of nausea, lethargy, cessation of sweating, dizziness, and muscle spasms. WV Tr. 135. The diagnosis was that her kidney had stopped functioning and she needed to be admitted. WV Tr. 90. She stayed in the hospital for three days and home from work for an additional four days. *Id.*

Benton, Arkansas. On the morning of June 10, 2016, letter carrier Colby Fontinel began his route, Route 6, which required five full hours of walking, a distance of nine to ten miles, half of which was in direct sunlight. AR Tr. 310,

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332); it feels "like a sauna" during the summer with "radiant heat coming off the floorboards that just overwhelms you, and you feel like you can't escape" (WV Tr. 226).

334, 347-38. During the afternoon portion of his route, which was residential, Mr. Fontinel walked up 100 flights of stairs. AR Tr. 346. On average, Mr. Fontinel also spent at least 45-60 minutes a day inside his assigned LLV. AR Tr. 348-49. In the heat, the LLV became so hot the floorboard could burn a carrier's hand or melt the bottom of their cooler. AR Tr. 336-37, 491.

The high temperature that day was 95.9 degrees and the high heat index was 99 degrees. DC Ex. C-143; DC Tr. 403. By approximately 11:00am the temperature had risen above 90 degrees, and the heat index ranged from 93 to 97 degrees throughout the afternoon. DC Ex. C-143. Mr. Fontinel completed approximately half of his route before becoming too ill to continue. AR Tr. 351-53.

C. The Citations and Assignment to ALJ Calhoun

Between September 2016 and January 2017, OSHA issued USPS five citations – one for each of the cities listed above – each alleging a violation of the OSH Act's general duty clause for exposing employees to the hazard of excessive heat.[4] As feasible means of abatement the citations proposed a multi-element heat stress program that would include elements such as work/rest cycles, an

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[4] The terms heat stress and excessive heat are interchangeable. DC Tr. 1339. The Review Commission has referred to this hazard interchangeably as both "heat stress" and "excessive heat." *See, e.g.*, *Indus. Glass*, 15 BNA OSHC 1594 (No. 88-348, 1992); *Duriron Co., Inc. v. OSHRC*, 11 BNA OSHC 1405 (No. 77-2847, 1983).

adequate emergency response program, analyzing existing data on employees' heat-related illnesses, employee monitoring, training, and reducing outdoor exposure time. Secretary's First Amended Complaint at 12. The Postal Service contested the citations and the cases were assigned to ALJ Calhoun. Houston Decision 2.[5] In his subsequently filed complaint, the Secretary requested that, if appropriate, the ALJ enter an order requiring "enterprise-wide abatement" that would apply to all Postal Service facilities. Secretary's First Amended Complaint at 4. Judge Calhoun held a consolidated hearing in Washington, D.C., to receive evidence common to all five cases. *Id.* at 2-3. She also held separate hearings for evidence specific to each city's case. *Id.*

D. Key Evidence Related to the Excessive Heat Hazard

To establish that the seven employees were exposed to a hazard, the Secretary presented two expert witnesses on the subject of heat stress, Dr. Aaron Tustin and Dr. Thomas Bernard.[6] Dr. Tustin explained that heat stress is a combination of environmental heat, which is heat that comes from sources outside

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[5] For simplicity and readability, this brief will cite only the Houston decision rather than all five decisions, but unless otherwise stated, all references to the Houston decision refer equally to all five cases.

[6] The ALJ accepted Dr. Tustin as an expert in occupational medicine, including the specific areas of heat stress exposure assessment and the epidemiology of occupational heat-related illnesses. DC Tr. 253-54. She accepted Dr. Bernard as an expert in the area of industrial hygiene and specifically regarding industrial heat stress. DC Tr. 807-08.

of a worker's body, and a worker's metabolic heat, which is the heat that the human body generates. DC Tr. 255-56. For each of the seven letter carriers described above, Dr. Tustin evaluated not only the environmental heat conditions (which include temperature and heat index) but the metabolic heat of the individual worker, including factors such as how far they walked and how heavy their satchels were. DC Tr. 301-02. He used this data to render an expert opinion on whether the carrier was exposed to a heat stress hazard on the day in question, and he readily concluded that all seven carriers were exposed to the hazard of excessive heat. DC Tr. 408, 419-20, 426, 439-40, 447-51, 466-67, 478. For example, as to Mr. Saenz in San Antonio, Dr. Tustin combined the temperature of 93 degrees and heat index of 105 degrees with the facts that Mr. Saenz was carrying a 30-pound satchel and had walked approximately four miles of his route by the time he began to feel sick to conclude that Mr. Saenz was exposed to a heat stress hazard. DC Tr. 419-20. Dr. Bernard confirmed that he, too, concluded that all seven carriers faced a heat hazard. DC Tr. 970-71, 973, 974, 975, 978, 979, 981.

In contrast to the testimony by Dr. Tustin and Dr. Bernard, neither of USPS's experts offered opinions on whether the conditions and activities constituted a hazard to each carrier. Rodman Harvey made clear in his expert report and deposition that he was not opining on this issue, expressly stating that he did not have an opinion on whether the environment to which each employee

was exposed was a hazardous environment. DC Tr. 2932-35. And Dr. Shirley Conibear provided only non-answers that the ALJ described as "not persuasive." Houston Decision 38.

E. The Quasi-Governmental Nature of the Postal Service

The Postal Service is an "independent establishment of the executive branch of the Government of the United States," 39 U.S.C. § 201, which holds a "monopoly over the carriage of letters." *United States Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 741 (2004). It was formed in 1971 and succeeded the cabinet-level Postal Office Department established in 1792. DC Ex. C-131 at 2. Nine of the eleven members of its Board of Governors must be nominated by the President and confirmed by the Senate. *See* 39 U.S.C. § 202. The Postal Service has "significant government powers," including the power of eminent domain and the power to "make postal regulations." *Flamingo Indus.*, 540 U.S. at 741. Its employees are part of the civil service system. *See* 39 U.S.C. § 1001(b). The Postal Service operates 34,700 post offices across the United States and employs approximately 280,000 letter carriers to deliver 493 million pieces of mail to 159 million delivery points every day. DC Ex. C-132 at 3, 13.

Despite its governmental character, the Postal Service was designed to operate in a "business-like fashion," *Beneficial Finance Co. of New York, Inc. v. Dallas*, 571 F.2d 125, 128 (2d Cir. 1978) (internal quotation marks and citation omitted), and thus has some attributes of a private-sector company. *See*

Franchise Tax Bd. of Ca. v. United States Postal Serv., 467 U.S. 512, 519-20 (1984) (through Postal Reorganization Act of 1970, Congress intended Postal Service to "be run more like a business than its predecessor, the Post Office Department"). The Postal Service does not look to congressional appropriations to fund its operations; rather, it obtains revenue from the sale of postage and other products. *See* 39 U.S.C. §§ 3622, 3633; *National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 462 U.S. 810, 813 (1983).

Until 1998, the Postal Service, like other federal agencies, was not an "employer" subject to the OSH Act's general enforcement scheme. In 1998, however, Congress passed and the President signed the Postal Employees Safety Enhancement Act, PL 105-241, 112 Stat. 1572, which amended the OSH Act to place the Postal Service within OSHA's enforcement jurisdiction. *See* 29 U.S.C. § 652(5) (defining "employer" to include the Postal Service). Thus, the Postal Service is subject to the OSH Act's requirements in the same way that private employers are, and is subject to OSHA citations and penalties as well.

Unlike private employers, however, the Postal Service is restricted in various ways from using OSHA compliance costs as a basis for reducing its provision of services. Thus, for example, section 3 of the Postal Employees Safety Enhancement Act prohibits the use of OSHA compliance as a basis for closing branch offices, PL 105-241, § 3 (amending 39 U.S.C. § 404)), and section 4 prohibits the Postal Service from "restrict[ing], eliminat[ing], or adversely

affect[ing] any service . . . as a result of the payment of any penalty imposed under the [OSH Act]" PL 105-241, § 4 (amending 39 U.S.C. § 415)).

F. Key Evidence Related to Economic Feasibility

The Postal Service's annual operating budget is north of $70 billion. DC Ex. J-1. At the national hearing, USPS financial economist Dr. Do Yeun Sammi Park presented a model showing that it would cost as little as $100 million to provide a five-minute daily break and to acclimate all carriers who are off work for seven or more consecutive days, which were among the methods of hazard abatement proposed by the Secretary.[7] DC Tr. 1560-62. This amount is equal to one-fourth of one percent of the $50 billion the Postal Service spent on employee compensation in 2018. DC Ex. C-131 at 53; DC Tr. 2400-01.

In the 2016, 2017, and 2018 fiscal years, the Postal Service recorded net losses of $5.5, $2.7, and $3.9 billion, respectively. DC Exs. J-1, ¶ 3; C-131 at 53. The annual operating expenses creating those balance-sheet losses are attributable to the Postal Accountability and Enhancement Act ("PAEA"). The PAEA, enacted by Congress in 2006, required the Postal Service to prefund its future retirees' health benefits by paying a total of $54 billion into a Retiree Health Benefits Fund ("RHBF") through 2016. DC Exs. C-135 at 19, C-131 at 53, 76;

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[7] Dr. Park's cost estimates ranged from $67 million to $487 million depending on whether the time was paid as regular or overtime; whether the acclimatization was for carriers who had been off work for three days or for seven; and how many months of the year the program would cover. Houston Decision 70-71.

DC Tr. 1750-52. The RHBF is the primary factor behind the Postal Service's contention that it is losing money. DC Tr. 900-01. However, the Postal Service has not actually paid any money into the RHBF during the last nine years; after the 2010 economic recession, it stopped making RHBF payments and has not suffered any negative consequences. DC Tr. 897-98. It is unclear when, if ever, the Postal Service intends to begin payment, in part because the PAEA contains no default or enforcement provisions.[8] DC Ex. C-131 at 76; DC Tr. 2394.

Postal Service executives used language such as "death spiral" and "hemorrhaging money" to describe the agency's financial condition. DC Tr. 922, 1912, 1920-21, 2148. A Presidential Task Force evaluation of the Postal Service's finances, excluding the RHBF, demonstrates the agency has operated profitably since 2013, resulting in a $3.8 billion profit. DC Ex. C-135 at 19; DC Tr. 919. In 2018, the Postal Service had a $700 million profit, which is six times more than enough to pay for additional paid breaks and acclimatization, according to its own calculations. DC Tr. 901-02. Over the next ten years, the Postal Service plans to spend $2.4 billion on capital projects such as facilities,

[8] The RHBF is more akin to a pension fund than a third-party debt. DC Tr. 903. According to Jim Sauber of the National Association of Letter Carriers (NALC), USPS's (in)action with respect to the RHBF is similar to parents in tough times who decide to stop putting money into their child's college fund. *Id.* Despite the Postal Service's non-payment, RHBF funds are more than sufficient to provide for all retirees until 2030, and benefits are not being denied. DC Tr. 916, 2361.

technology, customer support, mail-processing equipment and replacement of its fleet of LLVs. DC Ex. C-133 at 9, 14-16; DC Tr. 319, 2423-24, 2386.

The Postal Service also has tools to increase its revenue. The PAEA classified USPS services into two types: Market-Dominant-Products ("MDPs"), such as postage, which are subject to a price cap; and Competitive Products ("CPs"), such as packages, which do not have such a cap, thereby allowing the Postal Service to increase prices as it sees fit. DC Ex. C-131 at 2; DC Tr. 878. Additionally, there are ways that the Postal Service can exceed the MDP price cap, such as in 2013, when it successfully generated $4.6 billion of additional revenue to offset the 2008 recession. DC Ex. C-131 at 2-3. In 2018, the Postal Service announced price increases on MDPs and CPs, creating additional expected revenue of $1.7 billion in 2019. DC Ex. C-131 at 42; DC Tr. 880-81. The Postal Service has "borrowing authority" for $15 billion and, at the time of the national hearing, was authorized to borrow $4 billion from the U.S. Treasury. DC Ex. C-131 at 69; DC Tr. 1919.

When asked about the prospect that the Postal Service's ostensibly dire finances would cause it to become unable to operate, Chief Operating Officer David Williams stated that, in all likelihood, USPS would "get some kind of legislative relief before that happens," and when asked if the Postal Service would close its doors, he acknowledged, "I find that unlikely." DC Tr. 1923, 2387-88.

G. The ALJ's Decisions

On July 15, 2020, the ALJ issued five separate decisions vacating the citations. In each, she held that the Secretary had failed to prove the existence of a heat hazard. *See* Houston Decision 59. In reaching this conclusion, the ALJ progressed through the following series of findings:

1. First, the ALJ found that the Secretary had not proven that any of the seven employees' illnesses described above were caused by heat. Houston Decision 39. She observed that the Secretary's expert witness, Dr. Tustin, testified confidently that the illnesses were caused by heat stress, whereas the Postal Service's expert witness, Dr. Conibear, testified confidently that the illnesses were not caused by heat stress.[9] *Id.* at 37-38. Because of this, the ALJ concluded that the evidence was in equipoise and the Secretary had therefore not met his burden of proof.[10] *Id.* at 38-39. She correctly noted, however, that a showing of employee illnesses caused by heat is not necessary for the Secretary to establish the existence of a hazard. *Id.* at 39.

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[9] The one exception was with regard to Mr. Fontinel in Benton, Arkansas; both experts agreed that the vomiting and pouring sweat he experienced were caused by vertigo, not heat. Benton Decision 45. The Secretary maintains that, except in Mr. Fontinel's case, the evidence clearly shows the illnesses were caused by heat, but did not seek Commission review of the ALJ's decision on this point.

[10] The ALJ described both experts as "unyielding." Houston Decision 38. Dr. Tustin, however, readily acknowledged that Mr. Fontinel's illness was not heat-related, demonstrating his objectivity as an expert witness. DC Tr. 408.

2. The ALJ then incorrectly stated Dr. Tustin had relied on a National Weather Service chart to support his opinion about the existence of a hazard, and she proceeded to evaluate the scientific integrity of the chart. Houston Decision 43-46. She concluded that the chart lacked scientific support, and that the Secretary had failed to demonstrate that two of the terms used on the chart, "prolonged exposure" and "strenuous activity," applied to the specific letter carriers in these cases. *Id.* at 46-48.

3. Next, the ALJ turned to the question of whether "excessive heat exposure presents a significant risk of harm to letter carriers generally." Houston Decision 49. Largely because the Secretary's experts did not quantify the risk posed by heat, and noting that the Secretary did not define a threshold at which heat becomes "excessive," the ALJ concluded that the Secretary had not proven that heat stress is a hazard faced by letter carriers as a general matter. *Id.* at 58-59. Yet she did not address the most fundamental legal question of all, namely whether the Secretary established that any of the seven employees faced an excessive heat hazard while delivering mail in the summer of 2016 on the cited days, when the heat index went as high as 109 degrees.

4. Having concluded the Secretary did not establish the existence of a hazard, the ALJ nonetheless proceeded to evaluate a number of the Secretary's proposed means of abating the hazard. Houston Decision 59. Relevant to this petition for discretionary review, the ALJ found that several proposed abatements

related to carriers' schedules – such as implementing work/rest cycles, providing additional breaks, and acclimatizing carriers who return to work after time away – were not economically feasible. *Id.* at 65. She based this conclusion on two primary factors: (1) the model prepared by Dr. Park estimating that a program of breaks and acclimatization would cost between $67 million and $487 million and (2) testimony from USPS managers that they "just don't have sufficient cash" and "can't afford it." *Id.* at 69, 70-73. She found that the Secretary failed to "demonstrate a reasonable likelihood compliance costs would not threaten the existence or competitive structure of the Postal Service." *Id.* at 73. In each case, the ALJ found that it was unnecessary to reach the issue of enterprise-wide abatement of excessive heat exposure because she found the Secretary had not proven the underlying violation. *Id.* at 75.

In the San Antonio, Martinsburg, and Benton cases, the ALJ also found that the Secretary had proposed as feasible abatements not a comprehensive heat stress program but a list of alternative stand-alone options, any of which would suffice to abate the hazard. San Antonio Decision 62-64, Martinsburg Decision 71-73, Benton Decision 60-62. She found that because training was listed as an abatement measure and the Postal Service in these three cities had provided some minimal training on heat issues, it had satisfied the training "alternative" and had

no further obligations under the general duty clause.[11] San Antonio Decision 64, Martinsburg Decision 73-74, Benton Decision 62-63. The ALJ therefore dismissed the citations in all five cases.

SUMMARY OF THE ARGUMENT

The ALJ erred in vacating the citations. The Secretary established that the Postal Service exposed the seven employees in these five cases to a heat hazard on the specific days alleged in the citation, presenting evidence from highly-qualified expert witnesses who concurred that the temperatures in the 90s, heat indexes up to 109 degrees, and physical activity level of the letter carriers resulted in their being exposed to a heat stress hazard on those days in the summer of 2016. The Postal Service's expert witnesses, in contrast, did not even opine on whether they believed those conditions constituted a hazard.

The Secretary also established the economic feasibility of his proposed means of abatement, which requires only a showing that the abatement would not imperil an employer's continued economic viability. The evidence in this case demonstrates that the Postal Service, in spite of its dramatic protestations to the contrary, continues to be an economically functional entity that has discretionary

[11] In the Des Moines case, however, the ALJ found that the Postal Service's emergency response and training were inadequate, and that the Secretary established both emergency response and training as feasible means of abating a heat stress hazard. Des Moines Decision 67 n.40.

funds available and is at no real risk of going out of business. The ALJ gave undue credit to USPS's claim of "not being able to afford" the Secretary's proposed abatements and unreasonably concluded that a $100 million abatement measure would be the tipping point even though that sum would account for just 0.2% of the $50 billion the agency spends annually on employee compensation alone.

The ALJ also incorrectly found in three of the cases that because the citations listed training as one element of a comprehensive heat stress program that would materially reduce the hazard, training was an independent, "alternative" means of abatement. Proposing a program of abatement is permissible in a general duty clause case, and the Secretary's position throughout the litigation has been that a multi-element heat stress program would materially reduce the hazard; the abatement measures proposed in the citation are elements of such a program, not equally viable alternatives to one another. Additionally, the expert testimony was clear that training is only one element of such a program and that the Postal Service's minimal existing training, standing alone, does not materially reduce the hazard.

Finally, although the ALJ acted properly in not reaching the issue of enterprise-wide abatement because she had found no underlying violation, this issue will become ripe should the Commission find the Secretary established a general duty clause violation. Enterprise-wide abatement measures are both

authorized and warranted in these cases. The Commission has authority under section 10(c) of the OSH Act to order any "appropriate relief," a broad grant of authority that is properly construed to include abatement measures to be taken at the corporate level. This type of relief is "appropriate" here because the Postal Service has, for years and across the nation, refused to take the hazard of excessive heat exposure seriously, resulting in employee injuries and illnesses every summer that can and should be prevented.

The Commission should therefore affirm the citations and remand the cases to the ALJ for further proceedings related to the imposition of enterprise-wide abatement.

ARGUMENT

I. The Secretary Established the Existence of a Hazard by Proving That the Seven Employees Were Exposed to a Heat Stress Hazard in the Summer of 2016.

To establish a violation of the general duty clause, the Secretary must prove that: (1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the cited employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Industrial Glass*, 15 BNA OSHC 1594, 1597 (No. 88-348, 1992). Only the first and fourth elements are at issue before the Commission.

"To prove that a condition presents a hazard under the general duty clause, the Secretary is required to show that it exposed employees to a 'significant risk' of harm." *A.H. Sturgill Roofing, Inc.*, 2019 WL 1099857, at *2 (No. 13-0224, 2019). As long as the Secretary can show that a workplace condition presents a "nontrivial" risk of harm, or that harm can result "upon other than a freakish or utterly implausible concurrence of circumstances," the significant risk standard is met. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1172(Nos. 91-3144, *et al.*, 2000) (internal quotation marks and citation omitted); *see also Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1060 (No. 89-3097, 1993). To make this showing, the Secretary may rely on expert testimony and evidence regarding the physical conditions to which the employees were exposed. *See, e.g.*, *Duriron Co.*, 11 BNA OSHC at 1407, *aff'd*, 750 F.2d 28 (6th Cir. 1984). In these five cases, the Secretary used expert testimony and evidence about the physical conditions in the summer of 2016 to demonstrate that seven USPS employees were exposed to the hazard of excessive heat while working their delivery routes that summer.

Dr. Tustin explained that heat stress is a combination of environmental heat, which is heat that comes from sources outside of a worker's body, and a worker's metabolic heat, which is the heat that the human body generates. DC Tr. 255-56. For each of the seven letter carriers described above, Dr. Tustin evaluated not only the environmental heat conditions (which include temperature

and heat index) but also the factors contributing to the metabolic heat of the individual worker, including how far they walked and how heavy their satchels were. DC Tr. 301-02. He used this data to render an expert opinion on whether the carrier was exposed to a heat stress hazard on the day in question, and he concluded that all seven carriers were exposed to the hazard of excessive heat. DC Tr. 408, 419-20, 426, 439-40, 447-51, 466-67, 478. For example, as to Mr. Saenz in San Antonio, Dr. Tustin combined the temperature of 93 degrees and heat index of 105 degrees with the facts that Mr. Saenz was carrying a 30-pound satchel and had walked approximately four miles of his route by the time he began to feel sick to conclude that Mr. Saenz was exposed to a heat stress hazard. DC Tr. 419-20. Dr. Bernard confirmed that he, too, concluded that all seven carriers faced a heat hazard. DC Tr. 970-71, 973, 974, 975, 978, 979, 981.

The Secretary's evidence of a heat hazard specific to the seven employees takes on even more persuasive value because it is ultimately undisputed. The Postal Service's experts declined to answer questions about the conditions on the seven days in question. Mr. Harvey stated outright he was not answering that question, DC Tr. 2934, while Dr. Conibear provided a non-answer that the ALJ described as "not persuasive."[12] Houston Decision 35. Indeed, Dr. Conibear

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[12] "Q: Is it your opinion that no matter how hot it had been on that day, that the environmental heat did not play a role in his illness?
A: I don't know what 'play a role' means." DC Tr. 3201-02.

went so far as to deny that carrying thirty pounds while walking several miles on a very hot day could make a person sweat.[13] DC Tr. 3207.

In concluding that the Secretary had not proven a hazard, the ALJ erroneously focused on whether the Secretary showed that heat stress is a hazard to letter carriers generally, rather than whether the seven employees were specifically exposed to a heat stress hazard in the summer of 2016. Largely because the Secretary's experts did not quantify the risk posed by heat, and noting that the Secretary did not define a threshold at which heat becomes "excessive," the ALJ concluded that the Secretary had not proven that heat stress is a hazard faced by letter carriers as a general matter. But she never answered the question of whether the very hot conditions on the seven days described in the citations – with temperatures in the 90s and heat indexes in the 90s and 100s – constituted a heat hazard for the seven employees working their mail routes those days.

To prove a violation of the general duty clause, the Secretary is not obligated to establish governing rules for when a similar hazard might exist in other cases, just that the conditions and activities described in the present citation constituted a hazard. *See Waldon Health Care Ctr.*, 16 BNA OSHC at 1059-60 (analyzing hazard to nursing home workers of hepatitis transmission by looking at

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[13] "Q: Is it your testimony that Mr. Saenz's profuse sweating starting in the afternoon was not related in any way to his walking five miles, carrying a satchel that weighed up to 30 pounds on day [sic] when the heat index was above 100? A. Yes." DC Tr. 3207.

"the circumstances existing at the cited nursing homes"). On that question, the Secretary presented testimony from two of the most highly qualified experts in the country that all seven employees were exposed to hazardous heat conditions, and the Postal Service offered no evidence to dispute it.

The ALJ also spent considerable time discussing a National Weather Service chart and whether the Secretary had established that two phrases on the chart, "prolonged exposure" and "strenuous activity," applied to the seven letter carriers, Houston Decision 46-48, but the Secretary has never even contended that the chart was relevant to the existence of a hazard, much less relied on it to prove his case.[14] The NWS chart *was* at issue in the Commission's most recent heat stress decision, *Sturgill*. But in these cases, the Secretary chose not to use it and relied instead on the opinions of experienced and knowledgeable experts.

Dr. Tustin explained that his conclusions were based on his own extensive epidemiological research on how heat index levels correlate to levels of risk for workers.[15] DC Tr. 275-293. In total, Dr. Tustin personally reviewed an

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[14] To the extent the chart was included as one of the Secretary's exhibits (as it was in the Des Moines case), it was solely for the purpose of translating the NWS record of temperature and relative humidity into a heat index number, as heat index itself is not listed in the NWS records.

[15] That research includes four individual projects, three of which resulted in peer-reviewed, published articles. Dr. Tustin also reviewed and analyzed research by other scientists that confirmed a correlation between a heat index over 90 and the incidence of heat-related illnesses. DC Tr. 293-95 (research by Gubernot); 296-98 (research by Roelofs); 964-65 (research by Specter).

extraordinarily large body of data: approximately 750 cases of heat-related deaths and hospitalizations. DC Tr. 293. That body of research clearly establishes a significant risk of death or serious illness when employees are exposed to a heat index of between 80 and 90 degrees, and an even greater risk when the heat index is over 90 degrees. DC Tr. 275-93. Dr. Tustin also evaluated the Postal Service's own heat-related illness data, which showed a sharp increase in heat-related illnesses when the temperature rose above 90 degrees. DC Exs. C-162, C-163; DC Tr. 488. He provided data-based testimony that a worker is 686 times more likely to suffer a heat-related incident when the temperature is between 90 and 94 degrees as compared to days when the temperature is below 80. DC Tr. 491-94.

The ALJ found all of this testimony by Dr. Tustin irrelevant because, according to her, the testimony established only that a worker's risk of heat illness rises as it gets hotter, not that workers faced any quantifiable magnitude of harm. Houston Decision 55. But the frequency and sheer number of heat-related illnesses among Postal Service workers shows that the risk is not merely theoretical. Between 2015 and 2018, nearly two thousand USPS carriers reported heat-related medical incidents, and at least two have died. DC Ex. C-127; DC Tr. 51-52, 103, 268-70.

The Commission should therefore find that the Secretary established that the seven letter carriers were exposed to a heat stress hazard on the days in question.

II. The Secretary Established The Existence of Economically Feasible Means of Abating the Heat Stress Hazard.

In a general duty clause case, the Secretary must establish the existence of a feasible means of abatement that would have eliminated or materially reduced the hazard. *Science Applications Int'l Corp.* (No. 14-1668, Apr. 16, 2020), slip op. at 10 (citing *Arcadian Corp.*, 20 BNA OSHC 2001, 2011 (No. 93-0628, 2004)). "The Commission has generally held that an abatement method is not economically feasible if it would clearly threaten the economic viability of the employer." *Beverly Enters.*, 19 BNA OSHC at 1192 (citation and internal quotation omitted); *Waldon Health Care Ctr.*, 16 BNA OSHC at 1063 ("an employer is not required to adopt measures that would threaten its economic viability").

The evidence in this case shows that the Postal Service, in spite of its dramatic protestations to the contrary, continues to be an economically functional entity, and that paying for measures to abate the hazard of excessive heat would be no threat to the Postal Service's economic viability. The Postal Service's argument on economic feasibility might have some surface-level appeal – they claim billions in losses each year and assert they have no available funds to pay financial obligations – but the Secretary's evidence shows this argument to be disingenuous.

At the outset, it is important to note that this case is unique because the Postal Service's economic viability is not subject to the same market constraints as ordinary businesses. The Postal Service is, instead, a quasi-governmental agency subject to Congressional control and oversight and is at no realistic risk of going out of business. It need not make a profit to survive. USPS's own Chief Operating Officer, when asked about the prospect that the Postal Service's ostensibly dire finances would cause it to become unable to operate, stated he anticipated USPS would "get some kind of legislative relief before that happens," and that the Postal Service was "unlikely" to close its doors. DC Tr. 1923, 2387-88.

Additionally, it was not reasonable for the ALJ to find that the Postal Service's economic viability would be placed at risk from implementing safety measures that, even by their own calculations, would cost as little as one quarter of one percent of the agency's annual employee compensation expenditures. DC Ex. C-131 at 53; DC Tr. 1560-62, 2400-01. A $100 million abatement measure will not be the financial tipping point for an agency that spends $50 billion annually on employee compensation alone. This is true *even if* one accepts the Postal Service's claimed annual losses as legitimate. In the 2016, 2017, and 2018 fiscal years, the Postal Service recorded net losses of $5.5, $2.7, and $3.9 billion, respectively. DC Exs. J-1, ¶ 3; C-131 at 53. Yet it continues to pay its employees and deliver mail and packages. Moreover, the Postal Service is planning to spend

$2.4 billion on various projects over the next ten years, including a capital spending project for video conferencing systems "to increase productivity" and the purchase of package sorters to increase package processing efficiency. DC Ex. C-133 at 15; DC Tr. 1924. If the Postal Service has money to spend on video conferencing, it has money to spend on employee safety. Certainly reassigning a mere portion of those funds to pay for employee safety would not threaten the economic viability of the agency.

Moreover, the Postal Service's claim that it is "hemorrhaging" money is disingenuous. The Secretary showed that the claimed losses of billions are entirely attributable to USPS's statutory obligations to make payments into its employees' retirement fund, but the Postal Service is not actually making the payments. Without consideration of the retirement fund factor, the Postal Service turns a profit every year. DC Ex. C-135 at 19; DC Tr. 919. In 2018, Respondent had a $700 million profit, which is two to six times the amount necessary to pay for additional paid breaks and acclimatization, according to its own calculations. DC Tr. 901-02. The Postal Service invokes its obligation to make the payments when trying to avoid OSH Act liability, but chooses to ignore that obligation when it comes to providing for its employees' retirement as the law requires. Notably, the Postal Service's retirement fund obligations appear to pose no

barriers to other investments the agency plans to make, such as videoconferencing upgrades.[16]

Accordingly, the Commission should reject the testimony from Postal Service executives that the agency "couldn't afford" abatement measures and find that the Secretary established the existence of feasible means of abating the heat stress hazard in this case.

III. The Secretary Proposed as Abatement a Comprehensive Heat Stress Program, Not a List of "Alternative" Abatement Options, and the Postal Service's Minimal Existing Training Does Not Suffice to Abate the Hazard.

In a general duty clause case, the Secretary may propose that abatement consist of a program designed to address the hazard. *See Pepperidge Farm Inc.*, 17 BNA OSHC 1993, 2033-344 (No. 89-0265, 1997) (finding that a feasible method of abatement can include a process approach to identify suitable measures); *BHC Nw. Psychiatric Hosp., LLC v. Secretary of Labor*, 951 F.3d 558,

[16] The Postal Service suggests that some or all of the Secretary's proposed means of abatement are infeasible because they would interfere with the agency's "24-hour clock" approach to scheduling mail handling and delivery, which sets certain postal tasks to be completed at specific times of the day. *See* Houston Decision 69. For example, Postal Service COO David Williams testified that providing breaks to letter carriers would be infeasible because it would "impact[] our ability to deliver mail on time to make the 24 hour clock." DC Tr. 1912. This argument puts the cart before the horse, assuming that the 24-hour clock is an immoveable feature of postal operations that can never be adjusted. Implementing abatement measures is always going to require some change on the part of the employer. The Postal Service has provided no reason why its 24-hour clock should be treated as sacrosanct at the expense of employee safety.

562 (D.C. Cir. 2020) (affirming Secretary's proposed abatement of having employer complete a self-evaluation and institute a comprehensive workplace violence prevention and response program). That is what the Secretary has done here: the citations proposed a multi-element heat stress program that would include elements such as work/rest cycles, an adequate emergency response program, analyzing existing data on employees' heat-related illnesses, employee monitoring, training, and reducing outdoor exposure time. *See* Secretary's First Amended Complaint at 12. The Secretary plainly did not intend that any of the elements, standing alone, would be a sufficient means of abatement.

Notwithstanding the clarity of the Secretary's aim, in three of the five cases the ALJ erroneously interpreted the Secretary's proposed comprehensive, multi-element heat stress program as a list of alternative abatement options, any one of which would suffice to abate the hazard. San Antonio Decision 62-64, Martinsburg Decision 71-73, Benton Decision 60-62. She then found that because training was listed as an abatement measure and the Postal Service in these three cities had provided some minimal training on heat issues, it had satisfied the training "alternative" and had no further obligations under the general duty clause. San Antonio Decision 64, Martinsburg Decision 73-74, Benton Decision 62-63. Both aspects of this holding were in error.

First, as explained above, the Secretary plainly proposed a comprehensive program of abatement, not a list of alternatives. Second, although training is

recognized by health and safety professionals as a necessary component of an effective heat stress program, Dr. Bernard explained that the Postal Service's heat stress training was inadequate because there seemed to be a disconnect between what was included in the materials and what was actually being absorbed by Postal Service managers and letter carriers. DC Tr. 852, 946-47. Accordingly, even if appropriate training alone were enough to abate the hazard, the Postal Service failed to provide such training. The Commission should therefore reject the ALJ's findings that in three of the cases, the Postal Service's existing training sufficed to abate the hazard.

IV. The Postal Service Can and Should Be Required to Implement Enterprise-Wide Abatement Measures.

Finally, in its cross-petition for discretionary review, the Postal Service contends that the ALJ should have issued a declaratory order stating that enterprise-wide relief to abate heat stress hazards across the entire Postal Service would not be appropriate. USPS Cross-PDR at 1-2. The ALJ acted properly in not reaching this issue given that she did not find the Secretary proved an underlying violation of the general duty clause, but should the Commission agree that the Secretary did establish a violation, the imposition of enterprise-wide abatement measures in this case is both permissible under the OSH Act and warranted under the circumstances of the case.

A. The ALJ Properly Declined to Reach the Issue of Enterprise-Wide Abatement Because it Was Not Necessary to Resolve the Case, But If the Commission Finds the Secretary Established the Underlying General Duty Clause Violation, the Issue Would Become Ripe.

As an initial matter, the ALJ acted properly in declining to reach the question of whether enterprise-wide abatement is warranted in this case because she found that the Secretary did not establish the underlying violation. Houston Decision 75. "This Commission, of course, can only adjudicate issues in dispute. It cannot give advisory opinions." *B.F. Goodrich Co.*, 3 BNA OSHC 1295, 1296 (No. 3651, 1975) (Moran, Chairman, concurring) (citing *Madden v. Hodgson*, 502 F. 2d 278 (9th Cir. 1974)). However, should the Commission find, as the Secretary urges, that the Secretary established that the Postal Service violated the general duty clause with respect to the hazard of heat stress and demonstrated the existence of a feasible means of abatement, the question of whether enterprise-wide abatement is authorized and warranted would then properly be before the Commission.

B. The Commission Has Authority Under the OSH Act to Order Enterprise-Wide Abatement In an Appropriate Case.

Section 10(c) of the OSH Act authorizes the Commission to grant enterprise-wide relief in an appropriate case. That section provides the Commission with the authority to "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing *other appropriate relief*." 29 U.S.C. § 659(c) (emphasis added).

Because the phrase "other appropriate relief" should be construed as endowing the Commission with the authority to order any normally available remedy to correct a proven wrong, section 10(c) authorizes the Commission to issue enterprise-wide abatement orders in those cases where such relief is necessary to address a systemic pattern of similar violations at multiple worksites that are controlled by a single employer.

The "general rule" is that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (the "existence of a statutory right implies the existence of all necessary and appropriate remedies"). As a purely adjudicatory body that, "[l]ike a district court, has no duty or interest in defending its decision on appeal and … no stake in the outcome of the litigation," *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991), the Commission was intended by Congress to function like a quasi-district court.[17] *See Oil, Chem. &*

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[17] The legislative history of the OSH Act also demonstrates that Congress intended to create a tribunal akin to a district court, further supporting a broad

Atomic Workers Intl. Union v. OSHRC, 671 F.2d 643, 652 (D.C. Cir. 1991) (unlike other administrative bodies, the Commission "was envisioned by its creators to be similar to a district court"); *see also In re Perry*, 882 F.2d 534, 537 (1st Cir. 1989); *A. Amorello & Sons Inc.*, 761 F.2d 61, 65 (1st Cir. 1985) (discussing the Commission's role). Because Congress intended that the Commission be treated like a federal district court, the statutory language should be read as granting the same broad remedial powers.

Interpreting the phrase "other appropriate relief" to authorize the Commission to order any normally available remedy is supported by *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187 (1st Cir. 1994), in which the First Circuit held that the phrase "all appropriate relief" in § 11(c) of the OSH Act, 29 U.S.C. § 660(c), includes all forms of relief that are "normally available," including punitive damages. After comparing the case before it to the Supreme Court's decision in *Gwinnett County* – in which the Supreme Court held that the phrase "all appropriate relief" in Title IX of the of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688, included "any of the procedures or actions

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reading of the Commission's authority under section 10(c) to direct "other appropriate relief." The early Senate bills providing for an independent tribunal to adjudicate contested matters (*e.g.*, the Commission) authorized the tribunal to issue such orders "as are deemed necessary to enforce" the Act. S. 2788 § 7(a)(1) (Aug. 6, 1969), Leg. Hist. 47; S. 4404 § 11(b)(11) (Sept. 29, 1970), Leg. Hist. 105. The bill that passed the House similarly authorized the Commission to issue such orders "as are deemed necessary to enforce the Act." H.R. 16785 § 11(b)(11), Leg. Hist. 1101.

normally available . . . according to the exigencies of the particular case," *Gwinnett County*, 503 U.S. at 68 – and noting the lack of any "clear direction" by Congress to limit courts' normal ability to order all available remedies, the First Circuit concluded that section 11(c) authorized the district court to order exemplary damages. *Cambridgeport*, 26 F.3d at 1191. Because section 10(c) contains a grant of authority almost identical to that contained in section 11(c) – "other appropriate relief" in the former, and "all appropriate relief" in the latter – the reasoning in *Gwinnett County* and *Cambridgeport* supports a broad reading of the Commission's remedial authority. Further, rather than a "clear direction" by Congress limiting the authority of the Commission to issue all normally available remedies, *Cambridgeport*, 26 F.3d at 1194, the legislative history of the Act demonstrates the establishment of an independent tribunal like a district court, with broad remedial powers to direct "other appropriate relief." *See supra* n.17.

A liberal reading of the phrase "other appropriate relief" is also warranted given that the fundamental objective of the OSH Act is to prevent occupational deaths and injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980); *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1275 (6th Cir. 1987) (the OSH Act's "purpose is neither punitive nor compensatory, but rather forward-looking, *i.e.*, to prevent the first accident"). That objective cannot be fully achieved if the Commission, even when faced with evidence that a cited hazardous practice exists throughout an employer's facilities nationwide, is limited to ordering abatement of the unsafe

conditions at the specifically-cited worksite. Ordering enterprise-wide remedies where appropriate would further the preventative purposes of the OSH Act by eliminating corporate-wide policies or practices that create systemic violations. And, by addressing unsafe practices on a corporate-wide scale, rather than repeatedly reviewing contested citations that concern virtually identical factual scenarios involving the same employer at multiple worksites, ordering enterprise-wide remedies when appropriate promotes the preservation and efficient use of administrative and judicial resources.

C. Enterprise-Wide Abatement is Appropriate in These Cases Because the Postal Service, Year After Year, Refuses to Address Heat Stress, Resulting in Injuries and Illnesses Every Summer that Can and Should Be Prevented.

An order requiring enterprise-wide abatement would be "appropriate relief" in these five cases because they reveal a nationwide, systemic failure by the Postal Service to adequately address a recognized hazard that predictably causes employee deaths and serious injuries every summer, year after year. The Postal Service has known about the hazard of heat stress on both the local and national levels for many years, but has refused to take adequate steps to protect its employees. The testimony at the hearings, from the highest level executives all the way down to individual post office supervisors, demonstrates a corporate-wide culture in which heat stress is simply not taken seriously. *See, e.g.*, DC Tr. 1260-61, 1662; DM Tr. 489, 499, 681-82.

At the executive level, the Postal Service appears to have deemed the number of carriers who have suffered heat-related deaths and illnesses each year acceptable, not warranting investment in any abatement measures beyond its insufficient and poorly implemented program of training and awareness, providing water, and guidance as to when carriers should call 911. *See* DC Ex. C-183. The Postal Service refuses to modify its nationwide approach to heat stress even after being found liable for a willful violation of the general duty clause. *United States Postal Serv.*, 25 BNA OSHC at 1133-35. The Postal Service has demonstrated that it will not change its deficient approach to the hazard of heat stress on an enterprise-wide level unless it is forced to do so. As the agency's COO, David Williams, admitted, if the Postal Service were to spend money to address health hazards, "it's not going to be in the heat." DC Tr. 1931.

These five cases—arising from different facilities spread across the country—show there is a systemic problem that requires a nationwide solution. They present precisely the kinds of facts that should compel the Commission to require the Postal Service to do more than just abate individual general duty clause violations one by one as they occur year after year. According to the agency's own records, there have been 1,972 heat-related incidents since 2015, and, according to employer reporting of work-related hospitalizations, approximately six percent of all heat-related hospitalizations from 2015 to 2017 in states under the jurisdiction of federal OSHA were hospitalizations of Postal

Service employees. DC Ex. C-127; DC Tr. 268-70. An order of enterprise-wide abatement from the Commission could prevent hundreds of serious injuries and illnesses every summer.

The Postal Service mischaracterizes the nature of the "other appropriate relief" the Secretary seeks in this case, claiming that the Secretary is trying to obtain "a finding of enterprise-wide *liability*" (emphasis added) that would "treat over 31,000 facilities as having been found in violation of the Act without any allegation, evidence, or finding to that effect." USPS Cross-PDR 3. This dramatic assertion is incorrect.[18] The Secretary seeks enterprise-wide relief to address corporate practices, not individual heat stress conditions at specific locations, and the Secretary is *not* attempting to show that every individual post office branch has violated the OSH Act. As the Secretary explained before the ALJ, the request for "enterprise-wide abatement" seeks "an order, injunctive in nature, compelling [the Postal Service] to take reasonable action at the corporate-level to protect employees from unsafe heat stress conditions before any future violations occur." Secretary's Response to Respondent's Motion to Strike or

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[18] The Postal Service also mischaracterizes the purpose of the national hearing Judge Calhoun held in these five cases, stating that the twelve-day hearing was "devoted to the enterprise-wide abatement issue." USPS Cross-PDR 3. In fact, the purpose of the hearing was to receive evidence common to all five cases, including expert testimony from both sides about the nature and existence of a heat hazard as well as evidence about the Postal Service's operational structure, how mail delivery works, and the agency's past efforts regarding heat injuries. *See* Houston Decision 2, 16-30, 49-58.

Dismiss 6-7. The Secretary's request for enterprise-wide relief is contingent upon proof of actual section 5(a)(1) violations and seeks to remedy corporate practices, not conditions specific to worksites that OSHA has never inspected. *Id.*

Accordingly, should the Commission find that the Secretary proved that the Postal Service violated the general duty clause by exposing seven employees to the hazard of excessive heat in the summer of 2016, and that there is a feasible means of abating the hazard, the Secretary requests that the Commission remand the cases to Judge Calhoun, who is most familiar with the facts of each case, to consider what type of enterprise-wide abatement would constitute "appropriate relief." 29 U.S.C. § 659(c).

CONCLUSION

For the reasons stated above, the Commission should affirm the citations in these five cases and remand to the ALJ for penalty assessment and further consideration of an appropriate order of enterprise-wide abatement.

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CERTIFICATE OF SERVICE

I certify that on December 14, 2020, I served a copy of the foregoing Brief on counsel for Respondent via the Commission's e-filing system.

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