COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 5121-14

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY
COMPLAINANT

v

AMAZON FULFILLMENT SERVICES, INC.
RESPONDENT

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Hon. John R. Rogers, Frankfort, for the Secretary. Hon. Kyle D. Johnson, Louisville, and Hon. Jeffrey B. Youmans, Seattle, for Amazon Fulfillment Services, Inc.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us from Amazon Fulfillment's timely petition for discretionary review of our hearing officer's recommended order. We granted review and asked for briefs. *See* 803 KAR 50:010, Section 48.

Standard of Review

KRS § 336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the commissioner of the department of workplace standards issues citations. KRS § 338.141 (1). If the cited employer notifies the commissioner of his intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission "shall afford an opportunity for a hearing." KRS § 338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS § 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the Review Commission; the Review Commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Secretary of Labor v O.S.H.R.C.,* 487 F.2d 438, 441 (8th Circ. 1973), the Eighth Circuit said when the Commission hears a case it does so "de novo." See also *Accu-Namics, Inc. v. O.S.H.R.C.*, 515 F.2d 828, 834 (5th Circ. 1975), where the Court said "the Commission is the fact-finder, and the judge is an arm of the Commission . . ."[1]

As stated by our Supreme Court in *Secretary of Labor v. Boston Gear, Inc.*, 25 S.W.3d 130, 133 (Ky. 2000), "[t]he review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another." *Terminix International, Inc. v. Secretary of Labor*, 92 S.W.3d 743, 750 (Ky. Ct. App. 2002).

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[1] See federal commission rule 92 (a), 29 CFR §2200.

Facts and Summary of Proceedings

Amazon Fulfillment Services, Inc. ("AF") is a subsidiary of Amazon, Inc., a nationwide electronic commerce company headquartered in Seattle, Washington. *See* Recommended Order Finding ("ROF") 1.[2] AF operates a large warehouse, known as a fulfillment center (FC), located in Campbellsville, Kentucky. *See id.* The Campbellsville FC has several pick modules, or "pick mods," where product is stored until it is ordered by customers. ROF 4 Employees in the Stow Department stow product on the pick mods when it arrives at the FC, and, later, employees in the Pick Department retrieve or "pick" the product when ordered. *Id.*

"E-mod" is a four-level pick mod within the FC typically used for product that arrives to the facility on wooden pallets. *Id.*; Transcript Day 2, p. 52 – 53. Each level has a central walkway with a conveyor belt and parallel row of pallet racking on either side. ROF 5. The pallet racking, which is divided in product storage bays, consists of large sections of metal grating. The grating is sloped and equipped with metal rollers on top of it. Wooden pallets loaded with product are set on top of the grating using "reach trucks" and slide down the rollers until they come to rest up against pallet stops near horizontal rack supports near the central walkway. *See id.*; Labor Exhibit 11. There are gaps approximately five inches wide between sections of grating behind vertical posts that support the pick mod structure. ROF 5. Employees are normally not exposed to the grating or gaps because the grating is

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[2] We hereby adopt our hearing officer's findings to the extent that they support our decision here.

covered with pallets and the vertical posts set between the designated walkway and the gaps. *See id.*

Lisa Orozco was a Camper Force Associate (a type of seasonal employee) who worked at the FC for about two months, from October to December of 2013. *See* ROF 7. She received safety school training from a trainer named Deborah Drye in October of 2013. *Id.* The two-day training is mandatory for all employees, and includes instruction on written rules stating: "Do not climb on, up, under or through pallet racking. Use a reach pole to reach product on back of pallets." ROF 29. Ms. Drye also testified that she verbally instructs all employees not to step on the grating at any time for any reason. *Id.* Ms. Orozco was assigned to the Stow Department and worked the night shift. *Id.* Darlene Netherland, the Stow Department Area Manager, was her supervisor. *Id.*

Around 1:00 a.m. on November 11, 2013, Ms. Orozco and another longer term employee, Bridgett Cash, were attempting to stow products on the empty pallets located on the fourth floor of E-Mod. ROF 8. There were already products of the same type in one of the pallet bays setting on a pallet, which were placed there earlier that night by Ms. Orozco and another stower. *See* Transcript Day 1, pp. 95 – 97. Since the pallet was fully loaded with these products, Ms. Cash decided to push the pallet upgrade to the back of the pallet bay so that she could place an empty pallet in front on which they could stow the remainder of the product. *See id.* There were empty pallets in other bays that could have been used to stow product. *See id.* Pushing a loaded pallet back into the pallet bay was both out of the ordinary

and cumbersome. *See* Transcript Day 2, pp. 55 – 57. In pushing the pallet to the rear of the bay, Ms. Cash exposed the grating underneath it. ROF 9.

As Ms. Cash pushed the full pallet back into the bay, some of the packages of product fell onto the exposed grating on both sides of the pallet. ROF 10. Instead of using a reach pole available to retrieve the product that had fallen off the pallet, Ms. Cash leaned over the grating to retrieve product on the right. *Id.* Ms. Cash knew about the gaps and testified that she did not step onto the grating. *Id.* At the same time, Ms. Orozco walked fully out onto the grating to pick up the product on the left. *Id.* After stacking the product back on the pallet, Ms. Orozco stepped back, and her left leg slipped into one of the five-inch gaps between the sections of the grating, which resulted in an abrasion and bruise to her thigh. *Id.* This was the first accident of its type in the fifteen-year history of the Campbellsville FC. ROF 32.

Anthony Morley, a certified compliance officer of the Secretary, opened an investigation and inspected the FC on November 20, 2013. ROF 15. During his inspection, CO Morley interviewed Misses Orozco and Cash, and five other AF employees. *See* ROF 16; Transcript Day 1, pp. 188. Based on those interviews, he maintained that it was common practice for employees to "step out onto the racks to gain access to product they were either stowing or picking." *Id.*, pp. 150, 190.

CO Morley testified at the hearing that only three of the five other employees that he had interviewed, in addition to Misses Cash and Orozco, told him that they had stepped onto the pallet rack grating. *See id.*, p. 190. CO Morley testified that

those employees stepped onto the grating itself and avoided stepping on the pallets because they would move. *Id.* at 151.[3] CO Morley neglected to document this finding in his investigation report. ROF 16.

Other witnesses at the hearing discredited CO Morley's conclusion that it was common practice for employees to step onto the grating. Ms. Orozco testified that she had not seen anyone step onto the grating prior to the incident.[4] Ms. Cash also testified that she never stepped onto the grating itself, nor did she recall seeing anybody else do it before the incident. *See* Transcript Day 1, pp. 89 – 90. Chris Lawless, a night shift safety coordinator, routinely walked the floors of the FC looking for unsafe practices, and never observed anyone stepping onto the pallet racking. *See* ROF 31. Ms. Netherland also stated that she had never seen this behavior. *See* ROF 32.

On January 28, 2014, the Secretary issued a Citation and Notification of Penalty citing AF with a violation of standard 29 CFR §1910.23(a)(8). ROF 21. The citation stated that AF failed to properly guard the five-inch gaps between sections of pallet rack grating, which it alleged to be floor holes, with either a cover or a standard railing with a standard toe-board on all exposed sides. *Id.* CO Morley based the citation on his conclusion that employees were stepping onto the grating on a regular basis. *Id.*

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3 We do not see how this would have been possible for the grating located in E-Mod. The record evidence shows that the grating there was covered by the pallets.

4 Ms. Orozco stated that she saw another employee step onto a pallet, which moved and caused the employee to do the splits. *See* Transcript Day 1, p. 52 – 53.

Our hearing officer subsequently allowed the Secretary to amend his complaint to charge AF with a violation of the general duty clause, KRS § 338.031(1)(a), based on the same work place hazard that is the subject of the standard-based citation. The Amended Complaint averred that AF's failure to properly guard or cover the gaps on its pallet racking constituted a violation of ANSI standard MH16.1 2008 (Specification for the Design, Testing and Utilization of Industrial Steel Storage Racks); that AF or the rack storage system industry recognized the hazardous condition; and that a barrier guard is one feasible means of abating the hazard. *See* Amended Complaint, ¶ 2.

Our hearing officer dismissed the standard-based citation and affirmed the general duty clause citation and its associated $7,000 proposed penalty. After careful consideration of the hearing testimony and the parties' briefs, we have decided to dismiss both the standard-based and general duty clause citations.

The Standard-Based Citation.

The Secretary cited AF for violating the following standard:

> 1910.23(a)(8): Every floor hole into which persons can accidently walk shall be guarded by either:
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> 1910.23 (a)(8)(i): A standard railing with standard toe board on all exposed sides, or
>
> 1910.23(a)(8)(ii): A floor hole cover of standard strength and construction. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing.

In order for this Commission to sustain this citation, the Secretary must prove four elements by a preponderance of evidence:

> (1) the applicability of the standard;
> (2) the employer's noncompliance with the terms of the standard,
> (3) employee access to the violative condition; and
> (4) the employer's actual or constructive knowledge of the violation.

Bowlin Group, LLC v. Secretary of Labor, 437 S.W.3d 738, 744 (Ky. Ct. App. 2014) (quoting *David Gaines Roofing, LLC v. KOSHRC*, 344 S.W.3d 145, 148 (Ky. Ct. App. 2011)).

In this case, the Secretary failed to show the applicability of the cited standard to the alleged hazardous condition (i.e. the gaps in the pallet rack grating). We agree with our hearing officer that the gaps in the grating are not floor holes under the following definition:

> 1910.21(a)(1) *Floor hole*. An opening measuring less than 12 inches but more than 1 inch in its least dimension, in any floor, platform, pavement, or yard, through which materials but not persons may fall: such as a belt hole, pipe opening, or slot opening.

Although the gaps have the dimensions to be a floor hole, the pallet racking where they are located is not a "floor, platform, pavement, or yard." It is obvious that the pallet racking cannot be considered pavement or a yard. At issue in this case is whether the grating is a floor or platform.

The standards define a platform as follows:

> 1910.21(a)(4) *Platform*. A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment."

This Commission has addressed when an elevated surface may be deemed a platform in *United Parcel Service, Inc.*, KOSHRC No. 4445-07, slip op. at 7 - 16 (Sept. 1, 2010). We relied on federal OSHA cases, *General Electric Company v. OSHRC*, 583 F.2d 61 (2nd Circ. 1978), *Globe Industries Inc.,* 10 O.S.H. Cas. (BNA) 1596, 1982 WL 22618 (O.S.H.R.C 1982), and *Unarco Commercial Products*, 16 O.S.H. Cas. (BNA) 1499, 1993 WL 522454 (O.S.H.R.C. 1993), and adopted *General Electric's* holding that "an elevated surface does not automatically become a 'working space' and a 'platform' merely because employees occasionally set foot on it while working." *Id.* at 10. Employing the guidance of these federal cases, we held that a motorized belt loader on which U.P.S. employees stood to perform their work was a platform because (1) employees "regularly used the top end of the belt loader to do their work" and spent considerable time there working; (2) that UPS required and assigned its employees to stand at the top of the loaders to open plane's cargo doors as part of their work; (3) and the work that the employees were required to do at the top of the belt loader was an "essential" and "central" part of UPS's processes. *Id.*, at 10 – 16.

As a preliminary note, we doubt that the pallet racking at issue is an "elevated" surface. The pallet racking was at the same level as the intended walk-way on the fourth level of E-Mod. On the other hand, the back side of the pallet racking is open so that forklifts on the bottom floor of the FC can lift pallets four stories and place them into the pallet bays. Regardless of whether the pallet

racking is "elevated," we find that it is not a working space for AF's employees and, therefore, cannot be a platform.

The record reveals that AF's employees do not regularly perform work central to AF's business on the pallet racking, nor does AF expect its employees to work on it. *See U.P.S., supra* at 10 – 16. The pallet racking is designed and used for the primary purpose of storing pallets of products. Pallets are typically loaded on the backside of the pallet racking and gravity fed down rollers to the front of the pallet bays. In order for Ms. Orozco to even access the grating of the pallet racking, and expose herself to the gap through which she slipped, her co-worker Bridgette Cash first had to push back a pallet on which product was already loaded. Ms. Orozco then walked onto the grating in clear violation of work rules stating that employees should not climb on, up, under or through the pallet racking. AF also trains its employees to use reach poles to retrieve product at the back of the pallet racks and call for assistance from a supervisor (process assistant) if they are unsuccessful. Based on these facts, we conclude that the pallet racking is not a platform.

We also considered the issue of whether the pallet racking is a floor, notwithstanding that it is not a platform. The Commission ordered the parties to submit supplemental briefs on this issue. The Secretary took the position in his supplemental brief that the pallet racking is not a floor, insisting that it is a platform. Although his position probably disposes of the issue, we nonetheless conclude that the pallet racking is also not a floor.

The subject standard does not define "floor." When attempting to define that term in the context of an analogous construction standard, the federal commission referred to a dictionary and stated that a floor is a "surface or the platform of a structure on which to walk, work, or travel." *See Pace Constr. Corp.*, 14 O.S.H. Cas. (BNA) 2216, 1991 WL 12007630, ** 7 - 8. (O.S.H.R.C. 1991). Much like a platform, a floor must be a surface on which employees are required to work or walk in order to perform their job duties, or, in other words, a "walking-working surface." *See e.g., Monitor Constr. Co.*, 16 O.S.H. Cas. (BNA) 1589, 1994 WL 39006 (O.S.H.R.C. 1994) (holding that plywood decking where contractors performed work was a "walking-working surface"); *Secretary of Labor* v. *Power Plant Div., Brown & Root, Inc.*, 10 O.S.H. Cas. (BNA) 1837, 1982 WL 22637, *1 (O.S.H.R.C. 1982) (two Commissioners holding that an air duct was a "working-walking surface," without agreeing on whether it was a platform or a floor, because it was necessary for employees to be inside the duct to perform their work); *Secretary of Labor v. Robert J. Lzicar*, 2 O.S.H. Cas. (BNA) 1053, 1974 WL 4216 (O.S.H.R.C. 1974) (holding that plywood decking was a floor because it was a working surface for employees to do their work).

We find these authorities persuasive and conclude that the pallet racking is not a working-walking surface and therefore cannot be a floor. We base this decision on the same facts that led us to hold that the racking is not a platform. Specifically, the pallets normally cover the pallet racking, preventing routine access by the employees. AF also has a work rule prohibiting its employees from climbing onto or

through the racking, and another rule requiring its employees to use reach poles to retrieve product at the back of the pallet racking.

Having found that the pallet racking is neither a floor nor a platform, the gap through which Ms. Orozco's leg slipped cannot be a "floor hole" that requires guarding or a cover pursuant to 29 CFR §1910.23(a)(8). Therefore, the citation based on that standard must be dismissed.

The General Duty Citation

Having found that the standard for floor holes does not apply to the gaps in the pallet racking through which Ms. Orozco's leg slipped, we must decide whether to affirm the general duty clause citation issued pursuant to KRS §338.031(1)(a).[5] To sustain a general duty clause citation, the Secretary must prove:

> (1) that the employer failed to render its workplace 'free' of a hazard which was;
> (2) 'recognized;'
> (3) and 'causing or likely to cause death or serious physical harm; and
> (4) the Secretary must . . . specify the particular steps a cited employer should have taken to avoid the citation, and to demonstrate the feasibility and likely utility of those measures.

See National Realty & Constr. Co. v. O.S.H.R.C, 489 F.2d 1257, 1265, 1268 (D.C. Circ. 1973)). Like standard-based citations, the Secretary must also show that the employer has "actual or constructive knowledge that the allegedly hazardous condition exists at its work place." Mark A. Rothstein, Occ. Safety & Health L., §

[5] The federal general duty clause is found at 29 U.S.C. §654(a)(1). The language of KRS § 338.031(1)(a) is identical.

6:10 (2016 ed.).[6] As more fully discussed below, we find that the Secretary failed to carry his evidentiary burden for the general duty citation.

The Secretary defined the hazardous condition or work activity at issue in his amended complaint by reference to the original citation. Thus, we find that the hazardous activity is AF's employees walking on the pallet racking and accidentally stepping through the approximate five-inch gap between the sections of grating.

The parties spent significant time addressing the "recognized" element of the general duty citation. To prove recognition, the Secretary had to show that (1) AF, in particular, had knowledge of the hazardous condition or work activity, or (2) that the order fulfillment industry, in general, recognized the hazardous condition or work activity. *St. Joe Minerals Corp. v. O.S.H.R.C.*, 647 F.2d 840, 845 (8th Circ. 1981). A particular employer's recognition of a potentially hazardous condition or activity encompasses both actual and constructive knowledge. *See id.*; Rothstein, *supra* at §6:5. (providing that the federal commission and courts have found constructive knowledge of a particular employer due to the obvious nature of the hazard or prior adjudications).

The Secretary maintained that ANSI standard MH16.1 2008 (Specification for the Design, Testing and Utilization of Industrial Steel Storage Racks) proved industry-wide recognition of the hazard. In particular, he focused on Section 8.4 of

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[6] As Professor Rothstein elaborates, this aspect of employer knowledge is distinguished from the actual or constructive knowledge required to show recognition of a potential hazardous work condition or activity. *See also, Secretary of Labor v. PSP Monotech Industries*, 22 O.S.H. Cas. (BNA) 1303, 2007 WL 5432286, *8 (O.S.H.R.C. 2008) (discussing this type of knowledge in addition to the knowledge required for recognition); *Secretary of Labor v. Otis Elevator Co.*, 21 O.S.H. Cas. (BNA) 2204, 2007 WL 3088263, *2 (O.S.H.R.C. 2007).

that standard and its commentary discussing guard rails and safety flooring for pick modules and rack supported platforms. The amended citation, post-hearing briefs and Recommended Order also address AF's recognition of the hazard apart from industry-wide recognition.[7]

Industry recognition is normally proved through the "common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question." *National Realty, supra* at 1265, fn. 32. The Secretary, however, only proffered the above voluntary ANSI standard as his evidence of the fulfillment industry's recognition of the hazard. In support of his argument, the Secretary cited to Rothstein's treatise, § 6:5, to claim that ANSI standards alone can prove industry recognition.[8] The cases cited by Professor Rothstein in support of his statement that ANSI standards are evidence of recognition, however, do not stand for the proposition that the Secretary need only proffer the standard to prove recognition. In each of those cases, the Secretary supported his position that an ANSI standard was evidence of industry-wide recognition with expert testimony.[9]

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7 The amended citation and complaint averred that "the cited condition constitutes a hazard which Amazon or the rack storage system industry recognizes as serious." Amended Complaint, ¶ 2 (emphasis added).

8 Professor Rothstein states, "Besides expert testimony, the Commission and Courts have held that other sources may be used to show that a hazard was recognized. State and local laws, ANSI and NFPA standards, industry publications, and manufacturer's warnings all have been used to demonstrate that a hazard was recognized by the employer's industry."

9 *St. Joe Minerals Corp., supra* at 845 n. 8, 9 (noting that the Secretary offered safety expert testimony that operating a freight elevator without interlocks was a recognized hazard in the elevator industry and contrary to ANSI); *Sec. of Labor v. Fluor Constructors International, Inc.,* 17 O.S.H. Cas. (BNA) 1947, 1993 WL 433593 (O.S.H.R.C 1993) (considering Secretary's expert testimony that employer should have followed a particular ANSI standard); *Sec. of Labor Kokosing Constr. Co. Inc.*, 17 O.S.H. Cas. (BNA) 1869, 1996 WL 749961 (O.S.H.R.C. 1996) (Secretary's unrebutted expert interpreted a particular ANSI standard and testified that the standard was generally known throughout the concrete industry); *Sec. of Labor v. Coleco Industries, Inc.*, 14

Thus, we hold that while ANSI standards may be used as supporting evidence of industry recognition, they cannot provide the sole basis for the same.

The Secretary should have offered the testimony of a safety professional familiar with AF's industry to testify that AF's industry accepted the subject ANSI standard. Moreover, as it relates to this case, it would have been helpful if the Secretary offered expert evidence stating how the ANSI standard constituted specific recognition of the hazard posed by the gaps in pallet rack grating at issue here, when the standard arguably addresses the hazard of personnel falling off the intended walkways on the upper levels of pic-mods. The testimony of CO Morley and Lonnie Crutcher was insufficient for these purposes. CO Morley was certainly not a safety professional familiar with the order fulfillment business, nor was he familiar with the subject ANSI standard. Mr. Crutcher's testimony also fell short of establishing that the ANSI standard was acknowledged by the fulfillment industry in general, or that it was evidence of recognition of the specific hazard at issue here.

Even though the Secretary failed to prove industry-wide recognition, we find that AF had knowledge of the potential hazard posed by the five-inch gaps in the pallet racking, and therefore "recognized" it.[10] AF established a work rule prohibiting its employees from climbing on the pallet racking and another that specifically mandated that employees use reach poles to retrieve product located at

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O.S.H. Cas. (BNA) 1961, 1991 WL 11784 (O.S.H.R.C. 1991) (specifically stating that the Commission did not rely on ANSI elevator standard as evidence of industry recognition).

[10] The Secretary and AF appear to focus more on whether AF should have known that its work rules were being violated by Ms. Orozco or other employees, and not as much about the danger to employees who decided to walk out onto pallet racking in violation of those rules. This issue is addressed below.

the back of the pallet racking. AF's establishment of these rules is evidence that it recognized that stepping onto the pallet racking is hazardous. *See Secretary of Labor v. Otis Elevator*, 21 O.S.H. Cas. (BNA) 2204, 2007 WL 3088263, at *4 (O.S.H.R.C 2007). Moreover, an employer may also have constructive knowledge of hazards that are readily apparent by the ordinary senses. *See Secretary of Labor v. Litton Systems, Inc.*, 10 O.S.H. Cas. (BNA) 1179, 1981 WL 18925, * 3 (O.S.H.R.C. 1981). Here, it is undisputed that AF knew about the gaps, which were readily observable. From an analytical perspective, it is simply too difficult to reconcile AF's work rules with the notion that it did not recognize the potential hazard to its employees posed by the obvious gaps in the pallet racking.

Even if the Secretary managed to prove recognition, he had to apprise AF of the steps that it should have taken to avoid the general duty citation and then prove that those steps were achievable (feasible) and would have materially reduced the hazard (have likely utility). *See U.P.S, Inc.,* KOSHRC 4869-11, at *18. Prior to and during the hearing, the Secretary took the position that the feasible abatement measure was to place barrier guarding in front of pallet bays in accordance with the ANSI standard governing guarding for rack storage systems, and that AF's failure to install guarding was a violation of the standard. *See* Amended Citation and Complaint, ¶ 2; Transcript Day 1, pp. 10 – 12 (opening statement at hearing by the Secretary).[11]

[11] AF inquired whether a sufficient abatement would be to place one cable across each pallet bay. *See* ROF 18. The Secretary found this measure to be inadequate because the cables "are not guardrails defined under OSHA regulations, [n]or do they comply with safety recommendations in ANSI MH 16.1:2008." Secretary's Post-Hearing Brief, pp. 20 – 21.

We find that the Secretary's proposed method of abatement, a guardrail system in front of the pallet bays, is not feasible, nor is it required by the ANSI standard. AF challenged the Secretary by elucidating the qualifying language of the ANSI standard, which was that guarding was not required when it would interfere with picking and stowing activities. AF offered evidence that guard rails located at the ANSI standard's recommended heights of 42 inches and 21 inches would have interfered with those activities.[12] *See* ROF 66. We agree with AF and find that such a guardrail system "is simply not practical and would present substantial interference with productivity of [AF's employees]." ROF 67.

After the hearing and the submission of AF's post-hearing brief, the Secretary suggested a different abatement measure, removable steel cables or chains similar to what the ANSI standard requires for pallet drops. Proposing an abatement after the hearing, such as the Secretary did here, was specifically admonished by the seminal case on general duty citations because it deprives an employer the opportunity to defend against it:

> Only by requiring the Secretary, <u>at the hearing</u>, to formulate and defend his own theory of what a cited defendant should have done can the Commission and the courts assure evenhanded enforcement of the general duty clause. Because employers have a general duty to do virtually everything possible to prevent and repress hazardous conduct by employees, violations exist almost everywhere, and the Secretary has an awesomely broad discretion in selecting defendants and in proposing penalties. To assure that citations issue only upon careful deliberation, the Secretary must be constrained to specify the

[12] Lonnie Crutcher, AF's safety manager, testified about the dimensions of the pallet bays and how the recommended guardrails imposed by the subject regulation and recommendations of the ANSI standard would make it difficult, if not impossible, to retrieve larger products off of the pallets. *See* Transcript Day 1, pp. 301 – 307.

> particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.

National Realty & Const. Co., supra at 1268 (emphasis added). We believe that *National Realty's* viewpoint on this issue is sound policy and adopt it as our own. Accordingly, the hearing officer erred in sustaining the general duty citation based on this alternative abatement measure proposed after the hearing.

Even if the tardiness of the Secretary's alternative proposal was overlooked, he neglected to provide substantial evidence concerning the feasibility and utility of that proposed measure. The Secretary should have offered the testimony of safety experts familiar with the pertinent industry on those issues. *See National Realty, supra* at 1266, n. 37 ("the question is whether a precaution is recognized by safety experts as feasible"); *see also*, Rothstein, *supra* at § 6:9. There was no such evidence in the record. Instead, the hearing officer relied on a section of the ANSI standard governing pallet drops and assumed that those cables were feasible for the pallet bays as well. Not only was AF deprived an opportunity to offer evidence as to why using two cables may have created an unreasonable burden on its picking and stowing activities, the ANSI standard does not even contemplate their use for the front of pallet bays.

Even if the Secretary had proven that the hearing officer's proposal for abatement is feasible, the Secretary offered insufficient evidence to demonstrate that AF failed to render the work place "free" of a recognized hazard. This duty does not impose strict liability for the "mere existence of recognized hazard" or for the "results of idiosyncratic, demented, or perhaps suicidal exposure of employees to

recognized hazards." *See Secretary of Labor v. O.S.H.R.C.*, 502 F.2d 946, 951 (3d Circ. 1974). Consistent with this concept, the Secretary must also show that the employer knew or with the exercise of reasonable diligence could have known of the presence of the condition that resulted in the alleged violation. *See id.*; *see also PSP Monotech*, 2007 WL 5432286 at *3. With these principles in mind, we find that the Secretary failed to establish this element.

AF had implemented a feasible abatement prior to Ms. Orozco's injury that would have eliminated the recognized hazard posed by employees walking onto the pallet racking. It had a work rule in place prohibiting such conduct and required its employees to use poles to reach product at the back of the pallet racks. If those rules had been followed by Ms. Orozco, the work place injury giving rise to this injury would not have occurred. By asserting that guard railing was required to protect AF's employees, the Secretary, at least implicitly, claimed that AF safety rules were inadequate.[13]

This Commission in *Secretary of Labor v. Armco Inc.,* KOSHRC 980 (K.O.S.H.R.C 1983), examined whether an employer who has taken feasible steps to abate a recognized hazard through a work rule nonetheless fails to render the workplace "free" of that hazard. We stated:

> We do not agree with the finding in *Magma Copper Company,* 24, 050 OSHD (1979), 608 F.2d 373, that the Complainant must now prove

[13] Our hearing officer also implied that AF's work rules, training and safety programs were an insufficient means of abating the potential hazard posed by the gaps in the grating simply because Ms. Orozco's accident occurred. *See* ROF 66. To the extent that is what the hearing officer found, we find his conclusion to be in error. *See National Realty,* 489 F.2d at 1267 ("actual occurrence of hazardous conduct is not, by itself, sufficient evidence of a violation, even when the conduct has led to injury").

> that the company's safety precautions are unacceptable in the industry or a relevant industry. Our position is based on the point that an objective industry standard is relevant to recognition of the hazard, not to the appropriate corrective measures. When the Complainant sets forth a feasible corrective measure, the Respondent may, as Armco has done, present their existing measure as part of its defense. If the Respondent's practice is in accord with widespread industry practice, that fact will give weight to their claim that they are effectively correcting the problem.

Id., slip opinion, at *6. We found that both the employer's method of abatement, a work rule, and the Secretary's method, an alternative work rule, were both feasible. We could not determine based on the evidence, however, whether the Secretary's method would have significantly or materially reduced the hazard more than the employer's work rule. *Id.* at *8. We nonetheless sustained the general duty clause violation because several incidents of employees failing to follow the work rule were more than "examples of idiosyncratic employee violation of a company rule or procedure; they [were] rather an indication of a failure to effectively communicate and train workers to operate under the rule." *Id.*

Like the employer in *Armco*, AF relied on its work rules to prevent its employees from being exposed to a hazard. Consistent with our analysis in *Armco*, the following rule should apply here:

> [W]hen elimination of a recognized hazard requires that employees follow safe procedures, an employer is not in violation of section 5(a)(1) if it has established work rules designed to prevent the hazards from occurring, has adequately communicated the work rules to the employees, has taken steps to discover noncompliance with the rules, and has effectively enforced the rules in the event of noncompliance. *Jones & Laughlin Steel Corp., supra*, 10 BNA OSHC at 1782, 1982 CCH OSHD at p. 32,887.

Inland Steel Co., 12 O.S.H. Cas. (BNA) 1968, 1986 WL 53521, * 10 (O.S.H.R.C. 1986). We believe this rule is particularly appropriate since the Secretary failed to prove that its proposed abatement, a guard rail system, was feasible.

AF offered substantial evidence that it adequately communicates its work rules to its employees. AF trains its employees during safety school on written rules stating that they were not to climb on or through pallet racking, and that they were to use reach poles to retrieve product at the back of the pallet rack. *See* ROF 29. AF also offered the testimony of Ms. Drye who stated that she covered the issue of not stepping onto pallet rack "grating" during safety school, even though the written rule only referred to "pallet racking." *See* Transcript, Day 2, pp. 142 – 143. This training was effective for the Secretary's own witness, Ms. Cash, who testified that she knew it was not safe to step onto the racking. *See id.*, Day 1, pp. 127. Even Ms. Orozco acknowledged during a post-accident interview that she was wrong to step onto the pallet racking. *See id.*, pp. 86 -87.

Moreover, AF offered substantial evidence concerning the adequacy of its safety compliance program. Lonnie Crutcher heads the safety department at the FC, which is comprised of four safety coordinators and a safety specialist. *See id.*, pp. 262, 266. His team observes the workplace for unsafe acts, behaviors or conditions, and takes appropriate corrective action. *See id.*, p. 262. Supervisors and employees are also trained to identify unsafe behaviors (*see* Transcript Day 2, pp. 35, 41 - 43)[14] and employees are trained to report "near miss" incidents at safety

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[14] Ms. Netherland, a stow supervisor, performed two formal weekly safety audits, discussed safety at every start-up meeting and weekly safety meeting, and was looking for unsafe behaviors

meetings. *See id.*, p. 25.[15] In fact, AF offers an incentive program ("Safety Saves") by giving Amazon gift cards to employees who correct and report unsafe issues. *See id.*, pp. 47 - 48. The safety specialist compiles noted safety issues in a formal system so that they may be communicated to the employees at the FC during weekly safety meetings and startup meetings that occur before each shift and after lunch breaks. *See* Transcript Day 1, p. 267, Day 2, p. 44 - 45. Last, employees were disciplined for unsafe behaviors, which included simple coaching (oral warnings), written reprimands and immediate dismissal if the severity of the violation warranted it. *See* Transcript Day 2, p. 77 -78, 81 – 82. We agree with our hearing officer's finding that the "[e]vidence universally points in the direction that [AF] had a high regard for worker safety, conducted rigorous training, has a strong safety culture and takes its training and compliance with its safety rules seriously, and was evidently blindsided by a freak accident, which occurred when an inexperienced worker impulsively stepped into an area that was not safe." *See* ROF 29, 54.

As further evidence of the effectiveness of AF's training and safety program, there were no previous instances of employees slipping through the gaps in the grating. Ms. Orozco's accident was the first of its kind since AF opened its Campbellsville facility over fifteen years ago. AF's witnesses, Chris Lawless, a safety coordinator, and Ms. Netherland, also testified that they did not see previous

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during day-to-day operations. *See* Transcript Day 2, p. 43 – 46, 80. There is an online reporting system used to document audits, noted deficiencies and the corrective action taken to address the deficiency. *See id.*, p. 81. Safety Coordinators on each shift also conduct informal observations and audits. *See* Transcript Day 2, p. 102 - 104.

[15] Select employees also serve on safety committees that meet weekly to discuss unsafe issues and ideas to make the FC safer. *See* Transcript Day 2, p. 78 – 79.

instances of employees moving pallets and then stepping onto the pallet racking in such a manner as to be exposed to the gaps between sections of grating. Even the Secretary's witnesses could not offer convincing testimony of another instance of an AF employee being exposed to the risks associated with the gaps in the grating like Ms. Orozco.

The Secretary, on the other hand, offered little to carry his evidentiary burden and show that AF's safety rules and programs were inadequate so as to support the general duty clause citation.[16] At most, the Secretary offered evidence that AF made changes to its written training materials to be more explicit about not stepping onto "grating." We find whatever additional clarity this change added to the extensive safety training program is immaterial, especially since the record shows that employees were verbally instructed not to step onto pallet rack grating. We also cannot overlook that the Secretary's primary theory against AF was that it somehow violated the ANSI standard. The commentary to the ANSI standard implies that training employees to stay off the pallet racking is a possible method to reduce the hazards associated therewith, but does not specify the substance of the training.

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[16] See *Sec. v. Conn. Light & Power Co.*, 13 O.S.H. Cas (BNA) 2214, 1989 WL 223325, *4 (O.S.H.R.C. 1989) ("If the Secretary alleges that the employer's work rules or safety program are not adequate to eliminate a recognized hazard, then the burden is on the Secretary to indicate the additional steps the employer should have taken to avoid the citation, and to demonstrate the feasibility and likely utility of these measures."); *see also* Rothstein, *supra* at § 6:12 ([Under 5(a)(10 the Secretary has the burden of proving the inadequacy of the employer's safety program and therefore the key elements of preventable employee misconduct defense are part of the Secretary's case.")

Last, the Secretary neglected to carry its burden of proof that Amazon knew or, with exercise of reasonable diligence could have known, of the hazardous condition or work activity that amounted to the violation (*i.e.*, its employees walking on pallet rack grating in the vicinity of the gaps). *See PSP Monotech Industries*, 2007 WL 5432286, at *3. The record does not support a finding that AF had actual knowledge of Ms. Orozco's actions because a supervisor or manager was not present when she stepped onto the pallet racking. Thus, the issue in this case is whether AF exercised reasonable diligence to discover its employees engaging in the same type of conduct that injured Ms. Orozco. Whether AF exercised reasonable diligence is a question of fact. *See* Rothstein, *supra* at § 5:15. "Factors relevant in the reasonable diligence inquiry include the duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules." *Bowlin Group*, 437 S.W.3d at 746.

We note that the design of the pallet racking and AF's ordinary work practices militate against finding that AF should have discovered the subject hazardous work activity. The pallet bays were designed to be loaded with products arriving to the FC on full pallets. Full pallets would be loaded from the back using a high lift fork truck (reach truck) and gravity fed down to the walkway of the pic-mod to be picked. *See* Transcript Day 1, p. 271. AF offered evidence that it was less common for stowers to stow individual products in pallet bays. If products are shipped into the FC on something other than pallets, the usual practice is to put

those products into bays equipped with library deep bins located somewhere other than Pic-Mod E. *See* Transcript Day 2, pp. 51 – 53. Even if pallet bays were used to stow individual products, the normal practice was to find an empty pallet in a bay on which to stow. *See id.*, pp. 55. It was also out of the ordinary, and exceedingly difficult for that matter, for only one person to push a pallet up the graded rack and place an empty pallet in its place, especially when there were empty pallets available for stowing in other bays. *See id.,* pp 55 - 56. If Ms. Cash had not pushed back a pallet to expose the grating and gap thereon in the first place, this accident would not have occurred.

Even if AF should have known that its employees were pushing back pallets, it had implemented simple work rules to address the possibility that employees would then decide to step out onto the exposed pallet racking. As stated above, we believe that AF offered substantial evidence that it adequately communicated those rules and had no reason to believe that they were being violated in such a manner that its employees were subjecting themselves to the potential hazard posed by the gaps in the pallet rack grating. Ms. Orozco could only testify about the event in question. She had not seen any other employees step onto pallet racking. Ms. Cash also could only testify as to some employees occasionally putting a foot on pallets or the crossbar that was in front of the bays, which in our view is substantially different than what Ms. Orozco did. AF's witnesses also stated that they had not seen employees stepping onto exposed pallet racking like Ms. Orozco did on the night she was injured.

Nor are we persuaded by the Secretary's implication that AF failed to adequately supervise its employees for compliance with its safety rules. AF offered evidence to the contrary. As stated above, its supervisors, process assistants and safety personnel were on the floor supervising employees for unsafe behaviors and work conditions. *See* Transcript Day 1, p. 262; Transcript Day 2, p. 35, 41 - 44. The Secretary nonetheless implied that AF's supervision was inadequate simply based on the ratio of supervisors to employees. He neglected, however, to present any evidence supporting that additional supervision was "either feasible or reasonable, or that the level of supervision provided by [AF] fell short of what conscientious persons familiar with the industry would employ." *Conn. Light & Power, Co.*, *supra* at * 6.

In sum, we find that the Secretary failed to show that AF failed to exercise reasonable diligence to discover the subject hazardous work activity that led to Ms. Orozco's injury. This provides yet another reason why we cannot sustain the general duty citation issued in this case.

Order

For the reasons discussed above, we hereby dismiss the standard-based and general duty clause citations issued by the Secretary to Amazon Fulfillment, Inc.

It is so ordered.

January 3, 2017.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

Certificate of Service

I certify that a copy of the foregoing brief has been served this 3rd day of January, 2017 on the following as indicated:

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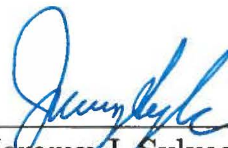

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