United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. UNITED STATES POSTAL SERVICE, Respondent.	OSHRC Docket No. 08-1547

ON BRIEFS:

Lisa A. Wilson and Kristen M. Lindberg, Attorneys; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Teresa A. Gonsalves and Kimberly Richardson, Attorneys; Stephan J. Boardman, Chief Counsel for Labor Relations; United States Postal Service, Washington, DC
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

At issue on review is a citation issued by the Occupational Safety and Health Administration to the United States Postal Service regarding two OSHA recordkeeping regulations, 29 C.F.R. § 1904.29(b)(2) and (b)(3), alleging a failure to record a work-related illness on the forms required by 29 C.F.R. Part 1904. We conclude that the Secretary has failed to prove a violation of the cited regulations; thus, we vacate the portion of the citation that relates to the alleged failure to record at issue.[1]

[1] USPS assumes for purposes of argument that the illness was work-related. Because we decide this case on other grounds, we need not address this issue.

BACKGROUND

Employee-A, an employee of USPS at its Seattle, Washington, mail processing center, submitted an application to USPS requesting protected leave under the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654. With the application, Employee-A submitted a completed copy of the Department of Labor's Form WH-380, a health care provider certification for employees seeking FMLA-protected leave. In Employee-A's WH-380, her physician described her illness and symptoms, and stated that she had a "serious health condition . . . caused by her work environment exclusively." It is undisputed that USPS did not record this illness on either OSHA's Form 300, Log of Work-Related Injuries and Illnesses, or OSHA's Form 301, Injury and Illness Report.

OSHA issued USPS a citation alleging two violations of the recordkeeping regulations—one violation of 29 C.F.R. § 1904.29(b)(2) (Item 1a), and one violation of 29 C.F.R. § 1904.29(b)(3) (Item 1b)—for failing to record the illness.[2] Following a hearing, the late Chief Administrative Law Judge Irving Sommer affirmed the citation and assessed the $5,000 proposed penalty.[3] At issue on review are the implications of the confidentiality requirements of the FMLA's implementing regulations, in light of an employer's obligations under OSHA's recordkeeping regulations. For the reasons that follow, we reverse the judge with respect to Employee-A. For the remaining portion of the affirmed violation, we assess a penalty of $2,500.

DISCUSSION

USPS contends that the citation should be vacated because: (1) the confidentiality provision of the FMLA regulations, 29 C.F.R. § 825.500(g), requires USPS to maintain Employee-A's FMLA documentation in a separate system of confidential records and precludes USPS from recording the information about Employee-A's illness on its OSHA log and report;

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[2] Section 1904.29(b)(2) states: "*What do I need to do to complete the OSHA 301 Incident Report?* You must complete an OSHA 301 Incident Report form, or an equivalent form, for each recordable injury or illness entered on the OSHA 300 Log." Section 1904.29(b)(3) states, "*How quickly must each injury or illness be recorded?* You must enter each recordable injury or illness on the OSHA 300 Log and 301 Incident Report within seven (7) calendar days of receiving information that a recordable injury or illness has occurred."

[3] Each citation item included two instances, one based on Employee-A's illness, and one based on the illness of another USPS employee. The judge affirmed both items with respect to both employees. Only the instances involving Employee-A's illness are at issue on review.

(2) the knowledge of USPS's FMLA Coordinator, who knew of Employee-A's illness from the Form WH-380, is not imputable to USPS; and (3) there is no basis to infer that Employee A's supervisor knew Employee-A had a work-related illness independent of the FMLA documents. Before we address the merits of USPS's arguments, we first consider the Secretary's claim on review that USPS waived its FMLA argument.

I. Waiver

The Secretary contends USPS waived its argument that FMLA confidentiality requirements prohibited it from recording Employee-A's illness, because this argument was not included as an affirmative defense in USPS's answer and was not asserted until USPS filed its post-hearing brief with the judge. Commission Rule 34(b), 29 C.F.R. § 2200.34(b)(3)-(4) (requiring answer to "include all affirmative defenses being asserted," and stating that failure to do so may "result in the party being prohibited from raising the defense at a later stage in the proceeding"). In the Secretary's view, USPS's FMLA argument should be considered an affirmative defense because it is "analogous" to a preemption claim under section 4(b)(1) of the OSH Act, 29 U.S.C. § 653(b)(1), which the Commission has long recognized as an affirmative defense. *Rockwell Int'l Corp.*, 17 BNA OSHC 1801, 1803, 1995-97 CCH OSHD ¶ 31,150, p. 43,529 (No. 93-45, 1996). We disagree.

Commission Rule 34(b)(3)'s reference to affirmative defenses is to those recognized as such at common law—i.e., assertions raising arguments or new facts that, if proven, defeat a plaintiff's claim even if the allegations in the complaint are true. *See Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986) ("An affirmative defense raises matters extraneous to the plaintiff's *prima facie* case."); *see generally* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1270-1271 (3d ed. 2004); 61A Am. Jur. 2d Pleading § 279. Therefore, "if the defense involved is one that merely negates an element of the plaintiff's prima facie case [ ] it is not truly an affirmative defense and need not be pleaded [in the answer]." *Sanden v. Mayo Clinic*, 495 F.2d 221, 224 (8th Cir. 1974) (internal quotation marks and citation omitted).

Here, the Secretary asserts that USPS had a legal obligation to review the FMLA documents for OSHA recordkeeping purposes. USPS disagrees that it had such an obligation, asserting that the FMLA confidentiality requirements precluded it from reviewing the FMLA documents for OSHA recordkeeping purposes. In this respect, the parties' arguments directly

implicate the knowledge element of the Secretary's prima facie case. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (Secretary's prima facie burden includes establishing that "the cited employer either knew or could have known of the condition with the exercise of reasonable diligence"), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Accordingly, we find that USPS's FMLA argument is not an an affirmative defense, and is not subject to waiver as the Secretary contends.

Even if the FMLA argument were considered an affirmative defense, we find that the issue was "tried by the . . . implied consent of the parties and [may therefore be] treated as if actually raised by the pleadings." *Bill C. Carroll Co.*, 7 BNA OSHC 1806, 1810, 1979 CCH OSHD ¶ 23,940, p. 29,032 (No. 76-2748, 1979). A finding of such consent is appropriate where "the party who should have pled the [affirmative] defense introduces evidence in support thereof without objection by the adverse party . . . ." *Jones v. Miles*, 656 F.2d 103, 107 n.7 (5th Cir. 1981). At the hearing, USPS's counsel asked USPS manager Kenn Messenger if FMLA documentation must be kept confidential by USPS's FMLA Coordinator. The Secretary failed to object, even though this question sought evidence that, from the Secretary's standpoint, was unrelated to any other issue in the case. *Compare In re Acequia*, 34 F.3d 800, 814 (9th Cir. 1994) ("Where evidence . . . allege[d] to have shown implied consent was also relevant to the other issues at trial[,] [it] cannot be used to imply consent to try the [unpleaded] issue.") (internal quotation marks and citation omitted). Also, after USPS included the FMLA argument in its post-hearing brief before the judge, the Secretary did not object in any way, such as by moving to strike the argument or requesting the opportunity to file a post-hearing reply brief. *See Elliot Constr. Co.*, 23 BNA OSHC 2110, 2114, 2012 CCH OSHD ¶ 33,231, p. 56,065 (No. 07-1578, 2012) (considering arguments that relied on information not objected to until brief on review).

Finally, the Secretary has failed to show that he suffered any prejudice resulting from our consideration of USPS's FMLA argument. While he asserts that, had he known USPS would raise this argument, he "might have" questioned Employee-A's work supervisor about whether the supervisor knew of Employee-A's illness *apart* from the FMLA documents, the Secretary has never requested a further opportunity to present evidence of the supervisor's independent knowledge of Employee-A's illness. *Bill C. Carroll*, 7 BNA OSHC at 1810, 1979 CCH OSHD at p. 29,032. *Compare Nuprecon, LP*, 22 BNA OSHC 1937, 1939, 2009-12 CCH OSHD ¶ 33,034, p. 54,384 (No. 08-1037, 2009) (prejudice where Secretary identified document he would

have proffered had he been apprised applicability was in dispute). As such, we find no bar to our consideration of the FMLA argument.

II. Knowledge

"To meet [his] burden of establishing employer knowledge, the Secretary must show that the cited employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2122, 2000 CCH OSHD ¶ 32,101, p. 48,239 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001). As discussed below, we reject the Secretary's claim that USPS had constructive or actual knowledge of Employee-A's illness because the FMLA confidentiality requirements precluded USPS from reviewing FMLA leave-request documentation for purposes of OSHA recordkeeping, and the Secretary's attempts to establish the element of knowledge by other means also fail.

The Secretary argues that USPS was obligated to review such information to determine if it is required to be recorded on OSHA's recordkeeping forms pursuant to OSHA's recordkeeping regulations. USPS claims, however, that pursuant to the confidentiality provision of the FMLA regulations, the documentation at issue here must be kept confidential:

> Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, *shall be maintained as confidential medical records in separate files/records* from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 C.F.R. § 1630.14(c)(1)), except that:
>
> (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
>
> (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
>
> (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g) (emphasis added). In response, the Secretary contends that the opening part of this provision implicitly permits review and disclosure of FMLA information for OSHA recordkeeping purposes because, he argues, the phrase "maintained as confidential . . . records" is not an absolute requirement, but rather allows disclosure for certain governmental purposes. We disagree.

By its terms, the confidentiality provision set forth in § 825.500(g) prohibits disclosure of FMLA medical information to supervisors and managers unless the information involves "necessary restrictions on the work or duties of an employee and necessary accommodations"; or the information is necessary for "emergency treatment." 29 C.F.R. § 825.500(g)(3). *See Superior Masonry Builders, Inc*., 20 BNA OSHC 1182, 1184, 2002-04 CCH OSHD ¶ 32,667, p. 51,417 (No. 96-1043, 2003) (when determining the meaning of a standard, the Commission first looks to its text and structure); *Blount Int'l, Ltd*., 15 BNA OSHC 1897, 1902, 1991-93 CCH OSHD ¶ 29,854, p. 40,752 (No. 89-1394, 1992) (if provision's wording is unambiguous, the plain language of the standard will govern, even if the Secretary posits a different interpretation). *See also Christensen v. Harris County*, 529 U.S. 576, 583 (2000) ("[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode") (quoting *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. 269, 270 (1871)). Because the provision plainly prohibits the use of FMLA documentation for non-excepted purposes, we conclude that such documentation may not be reviewed by an employer for OSHA recordkeeping purposes. *See Worcester Steel Erectors, Inc*., 16 BNA OSHC 1409, 1418-19, 1993-95 CCH OSHD ¶ 30,232, p. 41,635 (No. 89-1206, 1993) (rejecting Secretary's interpretation of a standard when it strains the plain meaning of the regulatory text).

The Secretary also contends that the express exception in subsection (g)(3) applies here, because the OSH Act and OSHA recordkeeping regulations constitute "other pertinent law." 29 C.F.R. § 825.500(g)(3). This ignores, however, that the exception's plain language permits disclosure only to "government officials." The parenthetical reference to "other pertinent law" simply addresses the reason government officials are seeking the documents, not to whom the documents may be disclosed. Here, if the FMLA-protected information were to be disclosed, it would go beyond government officials—it would be seen by USPS personnel examining the FMLA documents for non-FMLA purposes; further, as required by the OSHA recordkeeping regulations, USPS employees and their representatives have access to the OSHA injury and illness records. 29 C.F.R. § 1904.35(b)(2). Therefore, this exception, like the rest of the provision, is unambiguous—it does not permit the disclosure of FMLA medical information for

purposes of OSHA recordkeeping.[4] *See Superior Masonry*, 20 BNA OSHC at 1184, 2002-04 CCH OSHD at p. 32,667; *Blount Int'l*, 15 BNA OSHC at 1902, 1991-93 CCH OSHD at p. 40,752; *Worcester Steel Erectors*, 16 BNA OSHC at 1418-19, 1993-95 CCH OSHD at p. 41,635. In light of the foregoing, USPS could not review the FMLA documentation to identify OSHA recordable illnesses because USPS was prohibited from doing so under the FMLA regulations. Therefore, we conclude that the Secretary has failed to establish constructive knowledge as an element of its case here.

Contrary to the judge's finding, the record also fails to establish that USPS had actual knowledge of Employee-A's illness. The Secretary claims that the FMLA Coordinator who received Employee-A's WH-380 (which contained a medical diagnosis of her illness and attributed the illness to her work) was a supervisor whose knowledge can be imputed to USPS. *See Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726, 1999 CCH OSHD ¶ 31,821, p. 48,782 (No. 95-1449, 1999) ("[K]nowledge can be imputed to the cited employer through its supervisory employee."). The judge agreed with the Secretary that the FMLA Coordinator was a supervisor. He also made inferences regarding the knowledge of Employee-A's work supervisor. We decline to find knowledge on either of these bases.

To determine whether an employee is a supervisor, the inquiry focuses on whether the employee directed other employees' work activities. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095-96, 2012 CCH OSHD ¶ 33,235, p. 56,116-17 (No. 10-0359, 2012) (imputing knowledge of backhoe operator who lacked authority to hire or fire but was charged with giving work instructions and orders to other employees); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993) ("[A]n employee . . . empowered to direct that corrective measures be taken is a supervisor[]."). Here, while the FMLA Coordinator had authority to decide FMLA claims, this authority did not relate to control of employee work, and the record does not show that the FMLA Coordinator otherwise had the

[4] Because we find the regulation at issue unambiguous, deference to the Secretary's interpretation is unwarranted. *See Auer v. Robbins*, 519 U.S. 452, 457-58 (1997) (deference to an agency's interpretation is warranted only when the language of the regulation is ambiguous).

Commissioner MacDougall further notes that to defer to the Secretary's position under circumstances such as this, involving an unambiguous regulation, would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

requisite control indicative of supervisory status. Indeed, Kenn Messenger, a USPS manager, testified that FMLA Coordinators have no "direct employees" and make no decisions about other employees' work. Thus, the Secretary has failed to establish USPS's actual knowledge of Employee-A's illness through the FMLA Coordinator. Moreover, as indicated above, even if the FMLA Coordinator had been a supervisor or USPS had otherwise known of the illness from Employee-A's WH-380, the FMLA confidentiality requirements would have precluded recordation of the illness on the OSHA recordkeeping forms required by 29 C.F.R. Part 1904.[5]

Finally, there is no support in the record for the conclusion that Employee-A's work supervisor knew of her illness from sources other than the FMLA documentation. First, despite the Secretary's contention that Employee-A "likely informed her supervisor of her work-related illness," there is no direct evidence that she or anyone else informed her supervisor of her illness or the reason for her leave request, or that the supervisor knew of it. The judge inferred such knowledge based on two factors: (1) a letter from the FMLA Coordinator to Employee-A about her leave request which, based on a notation on the letter, Employee-A's supervisor evidently saw, and (2) USPS's FMLA claims procedure, under which supervisors are to be informed of FMLA claims and approvals related to their subordinates. However, the letter neither identified Employee-A's condition nor indicated whether it was work-related. Further, consistent with the FMLA confidentiality provision, USPS's FMLA claims procedure does not require supervisors to be informed of the nature or work-relatedness of an employee's health condition. While the Secretary claims for the first time on review that, as a routine matter, USPS employees reported work-related illnesses to their supervisors, and it is thus "likely" that Employee-A did so here, the Secretary failed to prove such a consistent pattern of conduct that would permit this to be

[5] Commissioner MacDougall writes separately on this point to clarify with respect to a situation that will frequently arise—where the individual responsible for administering an employer's FMLA leave is a supervisor, such as for the many small employers that do not have multiple employees in various human resources positions. Irrespective of whether USPS's FMLA Coordinator was a supervisor, the result here would be the same—any knowledge obtained from USPS maintaining Employee-A's FMLA confidential documentation cannot be imputed to it for purposes of OSHA's recordkeeping regulations and the forms required by 29 C.F.R. Part 1904. The FMLA's implementing regulations, and their unambiguous confidentiality provisions, 29 C.F.R. § 825.500(g), compel this conclusion.

deemed a "routine practice" pursuant to Federal Rule of Evidence 406.[6] *See Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 511 (4th Cir. 1977) (stating that examples "numerous enough to base an inference of systematic conduct" are required to establish routine practice) (internal citations omitted). Moreover, there is no evidence that Employee-A's supervisor ever observed Employee-A's symptoms, which, in any event, would not alone indicate that they were work-related. For these reasons, we find the judge erred in concluding that the Secretary established actual knowledge through Employee-A's supervisor. Accordingly, the Secretary has failed to establish USPS's knowledge of Employee-A's illness.

ORDER

We vacate the portion of Citation 1, Items 1a and 1b, that pertains to Employee-A's illness. We also agree with USPS that it is appropriate to reduce the penalty because the citation is affirmed with respect to only one of the two employees upon whom it was based. We therefore assess a penalty of $2,500.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Heather L. MacDougall
Commissioner

Dated: September 29, 2014

[6] This rule provides: "Evidence of . . . the routine practice of an organization . . . is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice." Fed. R. Evid. 406 (2009). On behalf of USPS, Messenger testified only to the existence of the procedure—he did not address the extent to which it was followed by USPS. This is insufficient evidence to meet the requirements of Rule 406.

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR,	:	
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Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 08-1547
	:	
U.S. POSTAL SERVICE (Seattle, WA),	:	
	:	
Respondent.	:	

Appearances:	Evan H. Nordby, Esquire U.S. Department of Labor Office of the Solicitor Seattle, Washington For the Complainant.	Stephen C. Yohay, Esquire Ogletree Deakins Leigh Bonds, Equire U.S. Postal Service For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a facility of the U.S. Postal Service ("USPS") in Seattle, Washington, from March 19, 2008 to May 23, 2008. As a result, on September 10, 2008, OSHA issued a citation alleging "repeat" violations of 29 C.F.R. 1904.29(b)(2) and (b)(3) for failing to record two work-related illnesses as required. Respondent USPS contested the citation. The hearing in this matter was held in Seattle, Washington, on November 18 and19, 2009. Both parties have filed post-hearing briefs.

Background

The cited facility is USPS's Processing and Distribution Center ("P&DC") in Seattle, Washington. The P&DC is the main USPS facility in the Seattle area for processing mail. It is a large facility with highly automated processing equipment. The facility operates 24 hours a day, with three

shifts, and has about 1,200 employees. The non-supervisory workers consist of "regular" and "casual" employees. Regular employees are represented by postal unions, and their assignments are subject to collective bargaining agreements. Casual employees are not represented by unions, and their work assignments vary according to factors such as mail volume, unscheduled absences, and limits imposed by the union agreements. Union agreements also limit the percentage of casual workers at the P&DC. (Tr. 174-77,192-95, 202, 205-06).

"N.B." began working at the P&DC as a "Christmas casual" on November 7, 2007.[1] She worked on the night shift, which started between 10 and 11 p.m. and ended between 6:30 and 7:30 a.m., and she generally worked about 35 hours per week. At first she worked on the bar code machine, where several supervisors told her she was doing a good job. In late December 2007, N.B. went to see Dr. Zachariah at the Community Health Center in Federal Way, Washington, for what she thought was the flu. Dr. Zachariah, however, said she did not have the flu but a dust allergy and gave her a prescription for an allergy medication and an inhaler. N.B. filled the prescription at a pharmacy in Federal Way. Her only previous allergy diagnosis had been to shrimp. (Tr. 89-94).

After the Christmas season, the P&DC cut back the number of casuals in N.B.'s work area but kept N.B. on. She started working at other mail sorting machines in January 2008, such as the DIOS and DBCS machines.[2] N.B. requested a mask to work on the DBCS machine, due to the dust that resulted from the mail sliding down the feeder. Cliff Wind, the casuals' supervisor, provided N.B. the mask, which covered her mouth and nose. (Tr. 94-96, 120).

On January 17, at 11 p.m., N.B. was assigned to be trained on the Flat Sorting Machine ("FSM"). She stood by the machine as a co-worker showed her how to load and feed the FSM. As the feeding process took place, N.B.'s eyes began burning, itching and watering. Her face felt hot, like it was burning, and she also smelled a burning "rubbery" smell. These symptoms began within 10 minutes of beginning the feeding of the FSM. N.B. finished her training between 3 and 3:30 a.m.

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[1]This decision refers to the two affected employees in this matter by their initials to protect their privacy rights, in light of the medical information contained in the record.

[2]All dates hereafter will refer to the year 2008, unless otherwise indicated.

During her training, she took three or four quick restroom breaks to wash her face, which helped the symptoms. She told her co-worker about the symptoms. (Tr. 96-101, 105).

On January 20, when N.B. reported for work, Rosanna Cortez, a supervisor, assigned her to work on the FSM. While she was feeling fine when she got to work, N.B. began to have the same symptoms as before within 10 minutes of beginning to feed the FSM. As she continued to work on the machine, she also began experiencing trouble breathing, as if pressure were being put on her chest. She told her co-workers on the FSM of her symptoms, and one suggested she tell Richard Hitt, the FSM supervisor. Since she could not leave the machine in the middle of processing a "zone," she continued to work but took short restroom breaks to wash her face in between zones. After finishing the last zone, N.B. encountered Mr. Hitt as she was leaving the restroom. Mr. Hitt told her she did not "look good," and she told him about her symptoms from working on the FSM. Mr. Hitt took her to see Ms. Cortez. After discussing the matter, the two supervisors at first told her to take her lunch break. Ms. Cortez then told her that she had no more work for her that shift and that she should go home. N.B. waited until she felt well enough to drive and then went home and used the medications Dr. Zachariah had prescribed for her in December. The medications alleviated her symptoms, and since she did not want to worry her husband, who had recently had a heart attack, she decided not to call the doctor. (Tr. 102-09).

N.B. returned to work as scheduled on January 24. She asked Ms. Cortez if she needed to get a doctor's note for having left early on January 21. Ms. Cortez told her that since she was feeling fine upon her return, she did not need to get a doctor's note or other documentation. N.B. discussed with supervisors on several more occasions the symptoms she had had while working on the FSM on January 20 and 21. On February 7, she told Mr. Wind about the symptoms and asked to be reassigned from the FSM for her February 10 shift. She was nonetheless assigned to the FSM on February 10, and she asked Ms. Cortez to reassign her, citing her illness. Ms. Cortez told her they had no one else to work there and that N.B. had to work on the FSM. Another casual traded places with N.B. on February 10 before the feeding of the FSM began. On February 15, another supervisor assigned N.B. to the FSM. After N.B. convinced him that she should not work there, again citing her illness, Christine Batara, a different supervisor, questioned her about giving the supervisors a "hard time" about working on the FSM. N.B. explained that, although she thought that the FSM was an

easy place to work, it made her ill. Ms. Batara indicated to N.B. that she could be terminated and referred her to Mr. Wind, who told her that she had to either work on the FSM on February 17 and 18 or call in sick. Mr. Wind ultimately allowed N.B. to exchange assignments with another employee on February 17. During her shift on February 17, N.B. asked a technician to get her a dust sample from the FSM area so that she could try to find out what was making her sick. (Tr. 109-19).

N.B. did not work on February 18. On February 19, at the end of her shift, Mr. Wind told N.B. that she had to go to her doctor and get documentation stating she could work everywhere in the P&DC or she would be fired. That same day, N.B. went to her regular doctor, Joy Ziemann, in Federal Way.[3] N.B. described her symptoms to Dr. Ziemann, including her breathing difficulty, when she worked on feeding the FSM. She also told her doctor she had taken the allergy medications Dr. Zachariah had prescribed. At the end of the visit, Dr. Ziemann gave N.B. a note that gave a diagnosis of "Allergic Reaction." The note also stated that N.B. "should not work the FSM (flat sort machine) due to allergic reaction." Dr. Ziemann's records from the visit state the symptoms N.B. described, the doctor's medical conclusions, and the fact that Dr. Ziemann refilled the prescription for loratadine, the allergy medication that Dr. Zachariah had prescribed. Dr. Ziemann also referred N.B. to Franciscan Occupational Medicine for further evaluation. (Tr. 119-29; C-4A, C-4B).

N.B. visited Dr. Paul Darby of Franciscan Occupational Medicine on February 22, to begin allergy testing. Dr. Darby took N.B.'s medical history, including the symptoms she had had while working at the FSM. At the conclusion of the visit, he gave N.B. a note setting out a diagnosis of "Allergic Reaction" and a "Key Objective Finding" of "Allergic reaction, bronchospasm to machine dust from [FSM]." Under "Other Restrictions,"the note stated: "No work with or in the area of [FSM]." The note also stated that N.B. was not otherwise restricted and that allergy testing was pending. N.B. took the notes from Drs. Darby and Ziemann to the P&DC on the evening of February 22. She presented the notes to Ms. Batara and Mr. Wind, and Ms. Batara initialed the notes as being received. N.B. was not permitted to return to work, however, since the doctors' notes did not say that she could work on the FSM. N.B. then filled out the paperwork for, and filed, a Federal Worker

[3]N.B. had gone to Dr. Zacharia in December 2007 as she did not have health insurance at that time. By February 19, she once more had health insurance and went to see her regular doctor, who was Dr. Ziemann. (Tr. 121).

Compensation claim. She submitted two forms, as the first form she filed was not the proper form. N.B. went back to Dr. Darby three times for follow-up allergy testing, but she was never diagnosed with an allergy to a specific substance. This was because Dr. Darby's testing was basic in-office testing, and while he was going to refer her to another doctor for further allergy testing, those tests would have cost from $1,000.00 to $5,000.00. N.B. was not able to pursue that testing because she could not afford to pay for it out of her own pocket. (Tr. 128-45, 155-57; C-5A, C-5B, C-7, C-8).

OSHA initiated the inspection in this case after receiving complaints from N.B. and another employee, "A.R.," about the air quality in the areas where they worked in the P&DC. The OSHA industrial hygienist ("IH") who conducted the inspection received medical information from the two employees indicating their doctors believed the employees were allergic to the dust in their work areas.[4] N.B. had been diagnosed as having had an allergic reaction from working with the FSM, and, on February 22, she provided the P&DC with doctors' notes containing this information and stating she should not work with or in the area of the FSM. A.R., the second employee, had been diagnosed as having allergic rhinitis caused by the dust in her work environment. On March 6, A.R. had submitted a Form WH-380 (completed by her doctor, Lawrence Klassen) with this information to the P&DC to obtain leave protected under the Family and Medical Leave Act ("FMLA"). The form also indicated that the condition had caused A.R. to miss work and required leave as needed and treatment with prescription medications. (Tr. 20, 24-30, 36-41; C-4B, C-5B, C-6B, C-11).

Based on her conversations with the employees and the medical information she received, the IH concluded that the incidents relating to N.B. and A.R. were required to be recorded on the P&DC's illness/injury logs and incident reports. When she requested the P&DC's Form 300 illness/injury logs and Form 301 incident reports, however, she discovered that neither of the incidents had been recorded. During her inspection, the IH found no other discrepancies in the P&DC's illness and injury record-keeping. (Tr. 20-23, 44-45, 66-67).

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[4]The IH was also the Area Director ("AD") of the OSHA office, and she conducted the inspection because her office was short-handed at that time. She performed indoor air quality testing of the areas where the two employees worked, and she found no problems in that regard. The P&DC also did testing, by having a consulting firm measure dust levels in various areas, including the FSM area. R-1, the results, indicated all measured levels were well below the permissible exposure limit. OSHA was provided a copy of R-1. (Tr. 15-16, 45-47, 54-55).

Admissibility of Exhibits C-11 and C-12

At the hearing, the Secretary moved to have Exhibits C-11 and C-12 admitted. USPS objected, and I denied the motion. (Tr. 285-96). After the hearing, and upon further review of the record in this matter, I concluded C-11 and C-12 should have been admitted. On February 2, 2010, I issued an order admitting the documents and giving the parties an opportunity to respond. Neither has done so, but, for completeness of record, the reasons for admitting the documents follow.

First, C-11 and C-12 clearly relate to A.R., the second employee involved in this case. C-11 and C-12 are both letters to A.R., on USPS letterhead, that address A.R.'s request for FMLA-protected leave. C-11, dated March 6, states that USPS's Attendance Support Office had received the Form WH-380 her doctor had completed. It also states that the form is incomplete and explains what additional information is needed. C-11 is signed by "Fred Santiaguel, FMLA Coordinator Tour 3." Below that signature is a "Note to Supervisor" that states: "Please have the employee sign and date below verifying that s/he received his/her copy of this letter and return the signed copy to me." A.R.'s signature appears below that note, as does the date March 8. C-12, dated April 8, is from USPS's Human Resources, Seattle District Headquarters. About halfway down the page, C-12 provides A.R.'s "Case ID" number, describes her condition as a "Serious Health" condition, and categorizes it as a "Chronic Condition – Allergy." It also states: "Approved Date: 04/04/08." C-12 additionally describes the facility's forthcoming transition to an interactive voice response ("IVR") telephone system for employees to call when reporting unscheduled absences. C-12 is also signed by "Fred Santiaguel, FMLA Coordinator – T-3."[5]

Second, USPS concedes A.R. was an employee of the Postal Service and that she submitted an FMLA leave form to USPS. (Tr. 297). Further, Kenn Messenger, the former senior manager for distribution operations at the P&DC, testified that he had not seen C-11 and C-12 before but had seen similar letters, that he knew the process by which application for leave under the FMLA was made, and that he had received FMLA training as a manager with USPS. He was also familiar with USPS's transition to the IVR system, as described in C-12. (Tr. 278-88). Finally, AD Flack, the OSHA IH who conducted the inspection, testified that C-11 was one of the documents that A.R. had

[5]The Secretary's counsel noted at the hearing that page 2 of C-12 was not part of the exhibit and was a mistake made when the document was being copied. (Tr. 289).

provided her during the inspection. (Tr. 40-41). I agree with the Secretary that USPS cannot seriously object based on foundation to admitting C-11 and C-12 into evidence. As the Secretary has pointed out, the documents are from USPS's own records and are self-authenticating.[6] (Tr. 295-96). For all of these reasons, C-11 and C-12 were properly admitted into the record.

Admissibility of Exhibits C-4, C-5 and C-6

Exhibits C-4, C-5 and C-6 are the medical records relating to the two employees involved in this matter, N.B. and A.R.[7] As USPS notes, I denied the Secretary's Motion in Limine to admit the documents prior to the hearing. As USPS also notes, I expressed skepticism at the hearing about the reliability of the information in C-5B, and the Secretary's motion to admit that document was at first denied. (Tr. 24-36). Later, upon further consideration, C-4A-B, C-5A-B and C-6A-B were all admitted conditionally, subject to my determining their admissibility, relevance and reliability.[8] (Tr. 72-86, 302-03). After reviewing the entire record and the parties' arguments in regard to these documents, I find that the documents are admissible, relevant and reliable.

Federal Rule of Evidence ("FRE") 803 sets out exceptions to the hearsay rule, even though the declarant is available as a witness. FRE 803(4) provides the following exception:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past, or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonable pertinent to diagnosis or treatment.

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[6]This conclusion is supported by the fact that, when the Secretary first moved for the admission of C-11, USPS had no objection and C-11 was admitted. (Tr. 84). Later, when the Secretary moved to have C-12 admitted, USPS objected and also asserted C-11 had not been admitted. The Court agreed, incorrectly. USPS then objected to admitting either document, and the Secretary's motion to admit C-11 and C-12 was denied. (Tr. 287-96). Regardless, as USPS initially had no objection to C-11, and since it has not responded to my order of February 2, 2010, I am persuaded of the authenticity of both C-11 and C-12.

[7]C-4 and C-5 relate to N.B., while C-6 relates to A.R. As the Secretary stated at the hearing, C-4A, C-5A and C-6A are copies of the medical records from the doctors' offices that are certified as business records of those offices. C-4B, C-5B and C-6B are copies of the medical records that USPS had for the employees and provided the Secretary during discovery. (Tr. 24).

[8]Exhibits C-7 and C-8, the Federal Worker Compensation claim forms N.B. submitted, were also received on this basis. (Tr. 157-58).

As the Secretary asserts, the statements N.B. and A.R. made to their doctors in regard to the symptoms they had experienced while working at the P&DC facility were in furtherance of their respective diagnoses and treatments and are thus admissible for the truth of the matters asserted therein under FRE 803(4). *See U.S. v. Yazzie*, 59 F.3d 807, 812 (9th Cir. 1995).[9] Patient-declarants do not have to be describing a current condition, as long as the court is satisfied the statements were made to the doctor to be relied upon by the doctor in furtherance of medical diagnosis and treatment.[10] *Id*. at 813. *See also U.S. v. Nick*, 604 F.2d 1199, 1201-02 (9th Cir. 1979); *O'Gee v. Dobbs Houses, Inc.*, 570 F.2d 1084, 1087-89 (2d Cir. 1978). The out-of-court statements can also relate to causation of the injury. *Yazzie*, 59 F.3d at 813; *Nick*, 604 F.2d at 1201-02. I agree with the Secretary that the statements N.B. and A.R. made to their doctors as to the symptoms they had had while working at the P&DC, as reflected in the documents in issue, are admissible under FRE 803(4).

I also agree with the Secretary that the statements in the documents that reflect the doctors' medical findings as to N.B. and A.R. are admissible. FRE 803(6), another exception to the hearsay rule, even though the declarant is available as a witness, provides for the admission of "Records of Regularly Conducted Activity" as long as the records are properly certified by the custodian of the records. C-4A, C-5A and C-6A are copies of the doctors' records in this matter, and they have been properly certified. As the Secretary notes, the Ninth Circuit has held that medical records are "classic" business records admissible under FRE 803(6). *U.S. v. Hall*, 419 F.3d 980, 987 (9th Cir. 2005).

Having found the documents admissible, I turn now to their relevance and reliability. The documents are clearly relevant, as they support the Secretary's assertion that N.B. and A.R. were

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[9]As the Secretary notes, the Commission must follow the law of the Circuit Court to which an appeal may be taken. In this case, an appeal could be taken to the Ninth Circuit.

[10]USPS asserts that FRE 803(4) does not apply to N.B. as her doctor visits were due solely to the P&DC's telling her she had to get a doctor's note. (Tr. 148-49). R. Brief, p. 16. I disagree. While it is clear N.B. went to the doctor in part for this reason, it is equally clear she also wanted to "get to the bottom" of what was causing her illness. (Tr. 119, 148). And, while February 19 was the first doctor visit N.B. had to discuss her symptoms from working with the FSM, patient-declarants do not need to be describing a current condition to their doctor. Finally, N.B. testified she had not gone to the doctor after working with the FSM on January 20 as she had used the allergy medications Dr. Zachariah had prescribed and they relieved her symptoms; she also had not wanted to worry her husband, who had had a recent heart attack. (Tr. 103-09).

made ill by exposure to dust in their respective work areas and that USPS was required to record their illnesses under the cited standards. I also find that the documents are reliable. In this regard, I note that N.B.'s testimony, which is summarized above in the background section of this decision, was consistent with what she told Drs. Ziemann and Darby, as reflected in C-4A and C-5A. And, her testimony was not refuted by other witnesses who testified, as discussed below. I observed the demeanor of N.B. as she testified, including her facial expressions and body language, and I found her to be a credible and convincing witness. Her testimony is credited, and it supports a conclusion that the statements in C-4A and C-5A are reliable. A.R. did not testify. C-11 and C-12, however, show A.R. requested FMLA-protected leave by submitting a Form WH-380 her doctor completed. They also show that while A.R.'s request was initially found to be incomplete due to a lack of certain information, it was approved on April 8. C-12 describes A.R.'s illness as a "Serious Health" condition and categorizes it as a "Chronic Condition – Allergy." C-11 and C-12, USPS's own records, support a conclusion that what A.R. told her doctor, as in C-6A, was reliable. Finally, there is no reason to question the medical findings of the doctors in this case, as set out in their records.

I have considered USPS's arguments that the statements in C-4A-B, C-5A-B and C-6A-B are inadmissible and its further arguments indicating that the claims of N.B. and A.R. are suspect and unreliable. *See, e.g.*, R. Brief, pp. 16-18, 21-29. These arguments are rejected, and, as noted above, C-4A-B, C-5A-B and C-6A are admitted and found to be relevant and reliable.

Whether USPS Violated the Cited Standards

The citation alleges that USPS violated 29 C.F.R. 1904.29(b)(2) and (b)(3) when it did not record the incidents described above relating to N.B. and A.R. The cited standards require that OSHA 300 Log entries and 301 Incident Reports be completed "within seven (7) calendar days of receiving information that a recordable injury or illness has occurred." A "recordable injury or illness" is a work-related injury or illness that results in "restricted work" and/or "medical treatment beyond first aid," among other possibilities. *See* 29 C.F.R. 1904.7(b)(1).

To prove a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies; (2) the terms of the standard were not met; (3) employees had access to or were exposed to the cited conditions; and (4) the employer knew or could have known of the cited conditions with the exercise of reasonable diligence. *See, e.g., Kulka Constr. Mgmt. Corp.*, 15 BNA OSHC 1870, 1873

(No. 88-1167, 1992). There is no dispute that USPS did not record the incidents relating to N.B. and A.R. There is also no dispute that USPS received the notes described above from N.B.'s doctors, that is, C-4B and C-5B, pp. 11-12, on February 22. Further, based on my findings *supra*, USPS received the Form WH-380, completed by A.R.'s doctor, on March 6, and USPS approved A.R.'s request for FMLA leave on April 8. *See* C-11, C-12. USPS contends, however, that the Secretary has not proved the incidents were work-related illnesses required to be recorded. It also asserts that the Secretary has not proved the knowledge element.

As to whether the incidents were work-related illnesses, as the Secretary notes, an injury or illness is "work-related" if "events or exposures at work either caused or contributed to the problem." *Home Depot #6512*, 22 BNA OSHC 1863, 1865 (No. 07-0359, 2009) (citing Occupational Injury and Illness Recording and Reporting Requirements: Final Rule, 66 Fed. Reg. 5916, 5917 (Jan. 19, 2001)) ("Final Rule"). "[P]ure speculation that 'some' event in the workplace may have caused or contributed to an injury or illness" is not enough. *Home Depot* at 1865. But, if the work itself is "a tangible, discernible causal factor," an injury or illness is work-related. Final Rule at 5929.

As the Secretary also notes, the standard does not require a final diagnosis of a particular illness or exposure to a specific substance, because the record-keeping system is designed to gather information about what may be latent trends in illnesses and injuries within the workforce. As OSHA stated in the preamble to the Final Rule:

> It is evident from the statute that Congress wanted employers to keep accurate records of non-minor injuries and illnesses, in part, to serve as a basis for research on the causes and prevention of industrial accidents and diseases. This research is needed, among other reasons, to further examine and understand those occupational factors implicated as contributory causes in injuries and diseases. To serve this purpose, the records should include cases in which there is a tangible connection between work and an injury or illness, even if the causal effect cannot be precisely quantified, or weighed against non-occupational factors. (Emphasis added).

Final Rule at 5930. The Secretary points out that the preamble to the Final Rule cites approvingly to the Commission's approach in *General Motors Corp.*, 8 BNA OSHC 2036, 2039-40 (No. 76-5033, 1980). "The issue in General Motors was whether the employer was required to record respiratory ailments of three employees, based on notations from the employees' treating physicians that their

ailments were probably related to exposure to a chemical substance at work." Final Rule at 5930. The Commission held the illnesses recordable. *General Motors* at 2040.[11] S. Brief, pp. 15-16.

USPS agrees with the Secretary that the "tangible, discernable causal factor" is the test to show that an injury or illness is work-related. It urges, however, that a settlement between OSHA and NAM, the National Association of Manufacturers, reached after NAM filed a challenge to the Final Rule, puts the burden on the Secretary to show an injury or illness is work-related, as follows:

> Section 1904.5(b)(3) states that if it is not obvious whether the precipitating event or exposure occurred in the work environment or elsewhere, the employer "must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment caused or contributed to the resulting condition or significantly aggravated a pre-existing condition." This means that the employer must make a determination whether it is more likely than not that work events or exposures were a cause of the injury or illness, or a significant aggravation to a pre-existing condition. If the employer decides the case is not work-related, and OSHA subsequently issues a citation for failure to record, the Government would have the burden of proving that the injury or illness was work-related. (Emphasis added).[12]

R. Brief, pp. 12-14.

Based on the foregoing, A.R.'s illness was work-related and recordable. The Form WH-380 that her doctor completed describes A.R.'s medical condition as "allergic rhinitis and conjunctivitis with severe eye & nose irritation/nosebleed headaches caused by her work environment exclusively. Primarily dust as well as environmental toxins."[13] It states that the condition began "12/07 (concurrent with assignment to present work station)." It also states A.R.'s "episodes of debilitating symptoms

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[11]USPS asserts that the "tangible, discernable causal factor" distinguishes this case from *General Motors*. I disagree. A reading of *General Motors* shows the Commission there rejected General Motors' argument that an incident was recordable only if it was "directly caused" by the work environment. The Commission held employers must record illnesses in which the work environment either was "a contributing factor to the illness or aggravated a preexisting condition." It also held that employers must record illnesses when "there is medical evidence from personal physicians linking the illness and the occupational environment and no other medical evidence contradicts this demonstrated relationship." *General Motors* at 2040.

[12]USPS notes that OSHA's website has a link to the settlement. R. Brief, p. 13, n.6.

[13]There are two copies of the WH-380 in the record. One is C-6A, pp. 4-6, and the other is C-6B, pp. 1-3. Although they are the same form, portions of the form in C-6B were evidently "cut off" when the copies were made. The above notations are thus from the C-6A copy.

occur several times a week requiring to miss days to recover or leave early from work." Finally, the form states that A.R. will require ongoing treatment and absence from work for treatment "as needed several times a yr." The form describes the required regimen of continued treatment as "Rx meds." C-12 establishes that USPS ultimately accepted the information submitted by A.R.'s doctor, in that it approved her request for FMLA leave on April 8. C-12 also establishes that USPS itself classified A.R.'s illness as a serious and chronic health condition. I find that the Form WH-380 and C-12 demonstrate that A.R.'s condition was work-related and recordable.

I also find that N.B.'s illness was work-related and recordable. C-4B, the note from Dr. Ziemann, gives N.B.'s diagnosis as "Allergic Reaction." It also states that "she should not work the FSM (flat sort machine) due to allergic reaction." C-5B, pp. 11-12, the note from Dr. Darby, gives N.B.'s diagnosis as "Allergic Reaction." It states, under "Key Objective Finding(s)," "Allergic reaction, bronchospasm to machine dust from Flat Sorting Machine." It also states, under "Other Restrictions/Instructions," "No work with or in the area of Flat Sorting Machine." These two documents, in my view, show that N.B.'s illness was work-related. They also show that the illness was recordable because N.B. was restricted in her work duties.

USPS points to certain testimony in support of its claim that N.B.'s illness was not work-related and recordable. For example, Mr. Hitt, the FSM supervisor, testified that as he recalled, N.B. had told him only that she was unable to continue working on the FSM. He did not recall her describing any symptoms or being in any distress or short of breath. (Tr. 164-66). On cross-examination, however, Mr. Hitt agreed that in a phone interview with an OSHA official, he stated that N.B. had told him the dust was excessive. He further agreed that he had written and signed C-10, a "Memorandum to Record" dated April 11. (Tr. 169-72). C-10 states, in pertinent part, as follows:

> On 21 January 2008, I had employee [N.B.], from Automation, on my AFSM 100s for training. At that time, she approached me and informed me she was having difficulty working on the AFSMs. She told me her eyes were affecting her.

Rosanna Cortez, a distribution operations supervisor at the P&DC, testified she recalled Mr. Hitt bringing N.B. to her and stating that N.B. could not work at the FSM. When Ms. Cortez asked why, N.B. said that "she was tired, it's heavy there, and it's dusty." As Ms. Cortez recalled, N.B. said nothing about having had an allergic reaction to the FSM. Also, N.B.'s eyes did not appear to be red, and she did not seem to be short of breath or to have any problems with her face. (Tr. 267-70). On

cross-examination, Ms. Cortez agreed she had written an e-mail on February 8 to other supervisors at the P&DC that stated: "[N.B.] asked NOT TO WORK on the AFSM due to dust problems; can we trade somebody to work for her Sunday night?" Ms. Cortez also agreed she had told an OSHA official that N.B. had had a "pretty good job performance." (Tr. 272-77).

Pam Cook, currently a senior manager at the P&DC, was a manager of distribution operations at the P&DC in February 2008. She testified about the automated equipment at the P&DC and the fact that extensive maintenance, including vacuuming, is done of the equipment to ensure proper operation and that the electric eyes are not obscured by dust. She said that, in her opinion, an FSM does not give off enough dust to collect in a bag; to do so, one would need to get the dust out of the vacuum bag a maintenance employee had filled upon vacuuming the inside of an FSM. (Tr. 173-78, 187-92).

Ms. Cook further testified that she first became aware of an employee not being able to work on the FSM equipment in a staff meeting in which Mr. Wind reported it. She told Mr. Wind that, per standard procedure, if the employee could not perform the full functions of her job, she would need to provide medical documentation stating what she could or could not do. Ms. Cook next heard about the situation when Ms. Batara called her on February 22 about the medical documentation that N.B. had provided. After Ms. Batara read her the doctors' notes, Ms. Cook spoke to N.B. on the phone and told her the notes did not give her a medical rationale that allowed her to make a decision about whether work was available for her. She also told N.B. that she would need further documentation that would explain in detail the medical rationale for N.B. not being able to work on the FSM. Ms. Cook noted that it was not her job to decide whether N.B. had reported a condition that was recordable on OSHA forms; that was up to the safety office. (Tr. 196-203).

On cross-examination, Ms. Cook stated that the only documents she had seen relating to N.B. were the doctors' notes. She agreed the note from Dr. Darby stated, under "Other Restrictions," "No work with or in the area of flat sorting machine." She also agreed that it stated: "Allergic reaction, bronchospasm to machine dust from flat sorting machine." *See* C-5B, p. 12. Despite these statements, she wrote in a memo concerning N.B.: "Management is unaware of any exposure to take precautions for." In another memo, she wrote that: "It is a fact that [N.B.] had some allergic reaction (January 21st)

from 'something.'"[14] Ms. Cook repeated that Dr. Darby's note did not provide a medical rationale as to why N.B. could not work on the FSM. She stated that N.B. was not allowed to return to work because she (N.B.) did not clarify her medical restrictions. She further stated that it was not her role to question anything in the doctors' notes; rather, she had to determine if there was anywhere in the building she could place this particular employee. Ms. Cook agreed she had not referred N.B. to another doctor for another medical opinion. (Tr. 222-23, 235-62). When asked if she was aware of any non-work-related exposure that could have caused N.B.'s condition, she stated:

> I don't have any knowledge that it even occurred personally. It's all – this is all after the fact hearsay to me. So, no I don't have any facts that any of it happened. I don't have any knowledge that anything occurred, or whether any of it's true or untrue.

(Tr. 262).

I disagree the foregoing supports USPS's position. While Mr. Hitt and Ms. Cortez indicated on direct that they did not recall N.B. being in any distress or reporting any symptoms to them, their testimony on cross-examination in essence contradicts their testimony on direct and supports the testimony of N.B. And, Ms. Cook's testimony about the extensive maintenance the P&DC equipment undergoes, including the FSM, is no basis for concluding that the FSM does not emit dust that may trigger an allergic reaction in some individuals, in light of contrary evidence in the record.[15] Further, while Ms. Cook testified as to her belief that N.B.'s doctors' notes did not provide the "medical rationale" she needed, that testimony does not establish that N.B.'s condition was not work-related and recordable. In my view, the doctors' notes, and especially the one from Dr. Darby, provided USPS with a clear medical reason for the likely cause of N.B.'s illness, that is, dust from the FSM.

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[14]The two memos, prepared in regard to N.B.'s Federal Worker Compensation Claim, were not offered in evidence. (Tr. 235-36, 250-53).

[15]USPS asserts that N.B.'s asking a technician to get her some dust from the FSM was improper, likening it to stealing. (Tr. 147). *See also* R. Brief, pp. 17-18. That assertion is rejected. USPS also asserts, based on Ms. Cook's testimony, that to obtain enough dust one would have to get it from a vacuum bag inside the FSM. R. Brief, p. 18. That assertion is also rejected. Ms. Cook testified that to get enough dust, it would probably need to be taken from the vacuum bag the technician had used to vacuum inside of the FSM. (Tr. 192). N.B. testified she asked for the dust so she could "get to the bottom" of what was causing her illness. Dr. Darby put some of that dust on her back to see if it would cause a reaction. It did not. (Tr. 118-19, 145-46).

It also provided a clear restriction to prevent a recurrence of her symptoms: "No work with or in the area of Flat Sorting Machine." The testimony of Ms. Cook shows that she performed no actual "evaluation" of the cause of N.B.'s illness, as set out in the OSHA/NAM settlement, which USPS has cited. *See* page 11, *supra*. Her testimony also shows that she did not direct N.B. to get another medical opinion. I find, therefore, that the Secretary has established that N.B.'s illness was work-related and recordable and that USPS has not rebutted that finding.

A final argument of USPS is that N.B.'s illness was not recordable because it did not meet the definition of "restricted work." R. Brief, pp. 15, 22. Restricted work includes situations where, as a result of work-related illness or injury, a physician or other licensed health care professional recommends that the employee not perform one or more of the routine functions of his or her job. *See* 29 C.F.R. 1904.7(b)(4)(i). An employee's "routine functions" are those work activities the employee regularly performs at least once a week. *See* 29 C.F.R. 1904.7(b)(4)(ii).

USPS asserts that N.B.'s work on the FSM did not meet the above test because it was not "routine." It points out she was a casual employee with no routine assignments and that she worked only intermittently on the FSM. R. Brief, p. 22. The Secretary notes, however, that USPS's own witnesses confirmed that working at the FSM was a routine duty of casual employees. Ms. Cook testified casual employees are hired and must be available to work throughout the P&DC as needed. (Tr. 194-96, 205-06). Mr. Hitt testified that, as the FSM supervisor, he had casuals working for him at least weekly. (Tr. 168). And, N.B. testified that USPS tried to assign her to the FSM on multiple occasions over two weeks in February 2008 and that she was terminated as she could not work on the FSM. (Tr. 107-20, 135-37). S. Brief, p. 20. In view of the record, I find that N.B.'s work on the FSM met the definition of "routine functions" and resulted in "restricted work" as set out in the standard.

Based on the foregoing, the Secretary has met the first three elements of her burden of proof. As to the fourth element, that is, knowledge, the Secretary must show that USPS either knew, or could have known with the exercise of reasonable diligence, that it was required to record the incidents relating to N.B. and A.R. As to N.B., C-4B and C-5B, pp. 11-12, are the doctors' notes N.B. presented to Ms. Batara and Mr. Wind on February 22. As found above, those notes were sufficient to inform USPS that N.B.'s illness was recordable. In particular, the notes stated that she had had an allergic reaction to the dust from her work on the FSM and that she should not work on the FSM. Ms. Batara

and Mr. Wind were both supervisors of N.B. (Tr. 91, 131-35, 197-98, 200). Further, Kenn Messenger testified that employees report work-related illnesses and injuries to their supervisors. (Tr. 282). And, Pam Cook testified that it is up to the P&DC's safety office to decide if an incident is recordable. (Tr. 203). It is reasonable to infer from this testimony that an employee's supervisor, upon receiving information like the notes N.B. presented, is responsible for providing the information to the safety office. The safety office then determines if the incident is recordable. N.B.'s supervisors received her doctors' notes on February 22. The supervisors thus should have provided the notes to the safety office for proper recording.[16] Because two of N.B.'s supervisors were aware of her illness due to the doctors' notes, their knowledge is imputable to USPS. USPS has admitted that it did not record N.B.'s illness. It was, therefore, in violation of the cited standards as to N.B.'s illness.

As to A.R., I find that the Form WH-380 that A.R.'s doctor completed, so that she could apply for FMLA leave, provided the P&DC with clear notice that A.R. had a work-related illness that was required to be recorded. Further, C-11 and C-12, the letters from Mr. Santiaguel about her application, establish that while her FMLA claim was initially found to be incomplete, it was approved on April 8. C-12 refers to N.B.'s condition as a "Serious Health" condition and categorizes it as a "Chronic Condition – Allergy."[17] C-11 indicates A.R.'s supervisor saw C-11. At the bottom of C-11, there is a "Note to Supervisor" that asks the supervisor to have the employee sign and date the letter. A.R.'s signature appears below the "Note" along with the date of March 8. It is thus reasonable to infer that A.R.'s supervisor was aware of A.R.'s FMLA claim. This inference is supported by Mr. Messenger's testimony indicating that the employee lets her supervisor know she will be requesting FMLA leave, after which the employee submits the Form WH-380. His testimony also indicates the form may be

[16]Ms. Cook, who was a supervisor over N.B., could also have passed N.B.'s information along to the safety office, even though, as she testified, it was not her job to decide if an incident was recordable. (Tr. 203).

[17]USPS suggests that only the Form WH-380 can be considered to determine if it violated the cited standards, due to the AD's testimony that the only document OSHA relied upon to issue the citation as to A.R. was the WH-380. (Tr. 50-53). This suggestion is rejected. As the Secretary points out, the Commission has held that the Secretary may introduce evidence at the hearing that OSHA may not have actually "relied upon" when it issued the citation. *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2129-30 (No. 96-0606, 2000). This is particularly true here, where USPS itself issued C-12, which shows that the P&DC approved A.R.'s FMLA application on April 8.

given to the supervisor, who routes it to the FMLA coordinator. The FMLA coordinator decides whether to approve the application and, if it is approved, informs the supervisor who administers the employee's leave of that fact.[18] It is also reasonable to infer that A.R.'s supervisor knew of her illness, in that A.R., according to the WH-380, had missed work due to her illness. The evidence, therefore, supports a conclusion that A.R.'s supervisor knew of her condition and should have reported it to the safety office. The supervisor's knowledge is imputable to USPS.

I also agree with the Secretary that Mr. Santiaguel, the FMLA coordinator who approved A.R.'s application, was a supervisor for knowledge purposes in this case. Mr. Messenger testified that FMLA coordinators review and decide FMLA claims. He also testified that while FMLA coordinators do not actually supervise anyone's work, they are not union members and "their pay scale is executive and administrative pay scale." (Tr. 282-84, 293). As the Secretary notes, an employee who has been delegated authority over other employees, even temporarily, may be considered a supervisor for purposes of imputing knowledge. *See Propellex Corp.*, 18 BNA OSHC 1677, 1680 (No. 96-265, 1999) (citation omitted). I conclude, consequently, that Mr. Santiaguel was a supervisor for purposes of knowledge in this matter and that, because he reviewed and approved A.R.'s FMLA application, his knowledge of her condition may be imputed to USPS.[19]

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[18]Mr. Messenger said that upon receiving a WH-380, the supervisor does not keep a copy of it due to HIPAA and other laws; rather, the form is kept by the FMLA coordinator. (Tr. 280).

[19]USPS argues that the Secretary's construing an FMLA leave application as a potential report of a recordable condition pursuant to OSHA's regulations is an "ill-advised and serious misapplication of the FMLA statute and regulations." It notes that under the FMLA regulations, medical certifications are to be maintained as confidential medical records and kept in files that are separate from employee personnel files. It also notes Mr. Messenger's testimony that, while a supervisor may receive the FMLA application, the supervisor routes it to the FMLA coordinator and does not keep a copy of it. R. Brief, pp. 29-32. USPS misses the point that it is responsible for having reliable procedures in place for recording incidents as required under the Act. I have found that the supervisor in this case had sufficient notice to report A.R.'s illness. I have further found that Mr. Santiaguel also had sufficient notice. That A.R.'s illness was not reported, in my view, indicates a possible problem with the P&DC's reporting and recording procedures and is a totally separate issue from ensuring that FMLA records are kept separate and confidential.

Based on the foregoing, the Secretary has shown that USPS had knowledge of the illnesses of the two employees, A.R. and N.B. She has also shown that USPS had knowledge their illnesses were required to be reported and recorded. The alleged violations are accordingly affirmed.

Whether the Violations were Repeated

To demonstrate a "repeat" violation, the Secretary must establish the employer was previously cited for a violation of the same regulation or condition, or one that is substantially similar, and that the prior citation had become final before the alleged repeat violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary's Exhibit C-3 contains copies of a number of final orders and informal settlement agreements, and related documents, issued within the past three years for violations of 29 C.F.R. 1904.29(b). C-3 includes final orders for violations of 29 C.F.R. 1904.29(b)(3) that were issued by OSHA's Bellevue Area Office to other Seattle-area USPS facilities.

USPS does not dispute that the documents contained in C-3 show a prima facie case of repeat violations. It urges, however, that that is not the end of the inquiry and that the Secretary must also show the actual violations in this case were substantially similar to those in C-3. R. Brief, pp. 32-34. Upon reviewing C-3, I find that the Secretary has shown that the previous violations are substantially similar to those in this case. In particular, several of the previous citations alleged violations of 29 C.F.R. 1904.29(b)(3) in circumstances similar to those in this case, that is, a recordable incident was not recorded as required. The violations here were properly classified as repeat. Items 1a and 1b of Repeat Citation,1 alleging violations of 29 C.F.R. 1904.29(b)(2) and 29 C.F.R. 1904.29(b)(3), are affirmed as repeat violations.

Penalty Discussion

The Secretary has proposed a total penalty of $5,000.00 for Items 1a and 1b. In assessing penalties, the Commission is to give due consideration to the gravity of the violations and to the size, history and good faith of the employer. *See* Section 17(j) of the Act. The Secretary asserts that the proposed penalty is appropriate in view of USPS's large size and the fact that USPS has had multiple previous violations of OSHA's record-keeping standards. The OSHA AD who conducted the inspection testified in this regard (Tr. 42-43). I find the proposed penalty of $5,000.00 to be appropriate. That penalty is accordingly assessed.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Repeat Citation 1, Items 1a and 1b, alleging violations of 29 C.F.R. 1904.29(b)(2) and 29 C.F.R. 1904.29(b)(3), is AFFIRMED, and a total penalty of $5,000.00 is assessed.

/s/

Irving Sommer
Chief Judge

Date: April 2, 2010
Washington, D.C.