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. Q3 CONTRACTING, INC. Respondent.	OSHRC Docket No. 11-1788

FINAL ORDER

Administrative Law Judge James R. Rucker, Jr. issued a Decision and Order in this case affirming two citation items at issue, and that decision was directed for review on September 11, 2012. On October 31, 2012, the Secretary notified the Commission by letter of her decision to withdraw with prejudice the two citation items affirmed by the judge. This withdrawal resolves all issues in this case. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985) (holding that Secretary's discretion to withdraw citation is unreviewable). Because the Secretary has withdrawn all citation items in this case, the Commission vacates the Administrative Law Judge's Decision and Order.

SO ORDERED.

BY DIRECTION OF THE COMMISSION

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Dated: November 2, 2012

/s/
John X. Cerveny
Deputy Executive Secretary

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. Q3 CONTRACTING, INC., Respondent.	OSHRC DOCKET NO. 11-1788

Appearances:

Kim Prichard Flores, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Aaron A. Dean, Esq., Fabyanske Westra Hart & Thomson, Minneapolis, MN
For Respondent

Before: Administrative Law Judge James R. Rucker, Jr.

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to 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 Q3 Contracting, Inc. ("Respondent") worksite in Denver, CO on April 26, 2010. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging two serious violations of the Act and a proposed penalty of $3442.00. Respondent timely contested the citation, and the case was designated for Simplified Proceedings on August 9, 2011. A trial was held on June 5, 2012, in Denver, Colorado. Both parties have filed post-trial briefs.

Jurisdiction

The Court finds that the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). Further, the record establishes that, at all times relevant to this matter, Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v.*

OSHRC, 425 F.3d 861 (10th Cir. 2005).

Background

Respondent is a general contractor that provides, as is relevant to this case, underground utility services. (Tr. 17). Respondent's headquarters are located in Little Canada, Minnesota, with satellite offices in Milwaukee, Des Moines, and Denver. (Tr. 16). On the date of the OSHA inspection, Respondent was working on a gas pipeline as a part of the Excel Energy Accelerated Main Replacement Project. (Tr. 181). The portion of the project at issue ran along Jewell Avenue between Lafayette and Downing Streets in Denver, Colorado ("worksite"). (C-11).

On April 26, 2010, Compliance Safety and Health Officer ("CSHO") Robert Klosterman arrived at Respondent's worksite in response to a work zone safety complaint received by the Denver office that specifically named Q3 as the employer. (Tr. 112). The CSHO arrived at the worksite at 12:45 p.m. and, prior to beginning his inspection, drove around the perimeter of the site. (Tr. 112). As he drove around the site, the CSHO noticed that there were no advanced warning traffic signs in place. (Tr. 112). After he concluded his drive-around, the CSHO met with Respondent's site foreman, Troy Young ("Young"), presented his credentials, and conducted an opening conference. (Tr. 113). During the opening conference, Young asked that the CSHO hold off on the inspection until Doug Fleming ("Fleming"), Respondent's quality assurance ("QA") specialist, arrived on site. (Tr. 113). In light of the absence of advanced warning signs, the CSHO requested a copy of Respondent's traffic control plan ("TCP"), which illustrates the methods and signage used by a contractor to handle traffic in a given work area.[1] (Tr. 114). Fleming did not have a copy of the TCP, so he radioed traffic control supervisor ("TCS") Addam Belfiore ("Belfiore"), the individual responsible for drafting and implementing the TCP, who was at a different worksite. (Tr. 114).

The TCP illustrates a two-block section of Jewell, stretching from Downing Street to Lafayette Street. (C-11). According to the TCP, a series of fourteen advanced warning signs were to be placed at all possible entrances to the worksite. (Tr. 117–18, C-11). After reviewing the TCP, the CSHO discovered that eleven out of the fourteen advanced warning signs had not

[1]. The TCP is also submitted to the City of Denver in order to receive a permit to work in the designated area. (Tr. 18).

been set up at the worksite.[2] (Tr. 117–18, C-11). Belfiore admitted to the CSHO that he did not set up all of the traffic devices according to the TCP. (Tr. 115). Specifically, he told the CSHO that he was too busy with other worksites associated with the Excel Energy Accelerated Main Replacement Project, which he felt warranted more of his attention in light of the fact that the Jewell Avenue worksite was comprised of a series of low-volume streets and, therefore, was less dangerous. (Tr. 115). The CSHO agreed that the worksite was in a low-volume area and that the speed limit was 25 miles per hour. (Tr. 117). After the inspection, but before the issuance of the citation, Belfiore was suspended for three days without pay due to his failure to properly implement the TCP. (Tr. 96).

In addition to the missing advanced warning signs, the CSHO observed a small pothole, or "bell hole", that had been dug in the intersection of Jewell and Lafayette.[3] (C-8). This pothole was not accounted for in the TCP, and Belfiore stated that work was not being conducted in the intersection when he arrived at the worksite that morning. (Tr. 115). The pothole was marked by a series of cones that extended from the bumper of a utility truck parked on the southeast corner of the Lafayette-Jewell intersection to the opposite side of the excavation, which was abutted by a trailer. (Tr. 128–29, C-2). According to the CSHO, the cones surrounding the pothole extended outward from the pothole to create a buffer zone.

In light of the foregoing, Complainant argues that Respondent violated the above-referenced sections of the Act due to its failure to use signs, devices, and barricades in conformity with the Manual on Uniform Traffic Control Devices ("MUTCD"). Respondent contends that the citation items should be vacated because the violations were the result of unpreventable employee misconduct. Alternatively, Respondent argues that the violations listed above were "other-than-serious" and, according to its status as a White-level CHASE program participant, the citations should be vacated.[4]

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[2]. The Court would also note that a Type III, or "hard" barricade was to be installed at various entry points to the worksite. (Tr. 36, 137, 140, C-11, R-4). According to the CSHO, not all of the indicated Type III barricades were installed. Although this failure was not cited as a basis for the citation items at issue, such information is nonetheless important as it illustrates the extent of Respondent's failure to comply with its own TCP.

[3]. Multiple terms were used interchangeably to describe the excavation described above. The excavation measured approximately 47 inches long by 34 inches wide by 42 inches deep. To reduce confusion, the Court will simply refer to the excavation as a pothole.

[4]. The CHASE program is a partnership between OSHA and the Association of General Contractors ("AGC"), which accords certain benefits to contractors that institute specific safety policies and fulfill certain other safety-related obligations. In return, OSHA has agreed, for instance, that it will not issue citations for other-than-serious violations that are abated during the inspection. (R-21).

Discussion

To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991).

Because the Citation items at issue are so closely related, the Court shall address them together. The Citation items provide as follows:

Citation 1, Item 1(a)

Complainant alleges a serious violation of the Act in Citation 1, Item 1(a) as follows:

> 29 C.F.R. 1926.200(g)(2): The employer did not ensure that all traffic control signs or devices used for protection of construction workers conformed to Part VI of the Manual of Uniform Traffic Control Devices (MUTCD) Millennium Edition, December 2000:
>
> a) **Q3 Contracting, Inc. at Jewell Ave. and Lafayette St., Denver, CO 80210:** On or before April 26, 2011, the employer did not ensure that warning signs conformed to the MUTCD in that employees had dug a trench near the middle of the intersection of Jewell Avenue and Lafayette Street, and no advanced warning signs were in place on the north and south sides of Lafayette Street, nor on the east side on Jewell Avenue. In addition, access to Jewell Avenue was closed off at S. Marion Street, and there were no advanced warning signs on the north and south sides of S. Marion Street. Finally, the east-bound access to Jewell was closed off at Downing Street, and there were no advanced warning signs on the north and south sides of Downing Street. Employees were drilling a new natural gas pipeline, with this segment about 2 blocks long. Condition exposed employees to struck-by hazards.

The cited standard provides:

> All traffic control signs or devices used for protection of construction workers shall conform to Part VI of the Manual Devices.

Citation 1, Item 1(b)

Complainant alleges a serious violation of the Act in Citation 1, Item 1(a) as follows:

> 29 C.F.R. 1926.202: The employer did not ensure that all barricades for protection of construction workers conformed to part VI of the Manual of Uniform Traffic Control Devices (MUTCD) Millennium Edition, December 2000:

a) **Q3 Contracting, Inc. at Jewell Ave. and Lafayette St., Denver, CO 80210:** On or before April 26, 2011, the employer had dug a trench near the middle of the intersection of Jewell Ave. and Lafayette Street, and did not ensure that the barricades in use conformed to Part IV of the MUTCD. No tapers was [sic] in place for southbound traffic entering this intersection, and no tapers were in place in front of the vehicles for northbound traffic. Condition exposed employees to struck-by hazards.

The cited standard provides:

> Barricades for protection of employees shall conform to Part VI of the Manual on Uniform Traffic Control Devices, which are incorporated by reference in § 1926.200(g)(2).

There is no real dispute as to whether the above-referenced standards applied and were violated.[5] In both items, the operative question is whether the signs, devices, and barricades conformed to Part VI of the MUTCD. *See* 29 C.F.R. §§ 1926.200(g)(2), 1926.202. The testimony clearly established that: (1) there were numerous advance warning signs that were missing from the various entry points into the worksite; (2) there was no Type III, or "hard" barricade to prevent entry into the intersection of Lafayette and Jewell, where the pothole was located; and (3) there was no taper to direct traffic away from the lane of traffic where the pothole was located. The failure to provide such signs, devices, or barricades constitutes a violation of the MUTCD and, consequently, the cited portions of the Act. *See* Manual on Uniform Traffic Control Devices § 6B.01 ("Before any new detour or temporary route is opened to traffic, *all necessary signs shall be in place*.") (emphasis added); *id.* § 6G.03 ("When the work space is within the traveled way, except for short-duration and mobile operations, advance warning shall provide a general message that work is taking place and shall supply information about highway conditions. TTC devices shall indicate how vehicular traffic can move through the TTC zone.").

Based on the foregoing, the Court finds: (1) Respondent had failed to install all necessary signs, including advance warning signs; (2) Respondent's work space, in particular the pothole at the intersection of Lafayette and Jewell, was in the traveled way; and (3) Respondent's operation was neither of short-duration, nor was it mobile, as those terms are defined in the MUTCD. *See, e.g., id.* § 1A.13. Accordingly, the Court finds that the cited standards in Citation

[5]. Respondent's entire brief is targeted towards its defense of employee misconduct and its status as a CHASE program participant.

1, Item 1(a) and Citation 1, Item 1(b), apply and were violated.

The Court also finds that Respondent's employees were exposed to the condition. The photographs taken by the CSHO, the TCP, and the diagram authored by foreman Young clearly illustrate that the workspace and employees were located in a traveled way. (C-8, C-9, C-11, R-4). The CSHO testified that he observed employees working within the two-block worksite that did not have adequate signs, barriers, or tapers. (Tr. 141). Further, although the CSHO did not specifically see employees in the pothole, the testimony established that: (1) the pothole did not exist at the time Belfiore came out on the morning of April 26, 2010, but it did at the time of the inspection; and (2) neither Belfiore nor Young put out proper advanced warning signs or barricades near the pothole, which was not accounted for in the TCP. Thus, it is clear that employees had worked in the intersection of Jewell and Lafayette at some point after Belfiore set up the traffic control devices and before the inspection. Without proper warning signs, barricades, or tapers, the Court finds that all employees who had performed work at the worksite were exposed to the potential of being struck by a motor vehicle.

To establish knowledge, Complainant must prove that Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition. *See Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007). "The actual or constructive knowledge of the employer's foreman or supervisors can generally be imputed to the employer." *Kokosing Constr. Co., Inc.*, 21 BNA OSHC 1629 (04-1665, 2006); *see also Donovan v. Capital City Excavation Co, Inc.*, 712 F.2d 1008 (6th Cir. 1983). "Reasonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations." *Burford's Tree, Inc.*, 22 BNA OSHC 1948 (07-1899, 2010) (internal quotation omitted). The Commission has noted that the factors used to evaluate an employer's constructive knowledge are also the same as those that are used to evaluate a claim of unpreventable employee misconduct. *See id.* Accordingly, the Court shall address both issues in tandem.

In support of its defense of unpreventable employee misconduct, Respondent focuses solely on the actions of TCS Belfiore. Specifically, Respondent argues that Belfiore was the supervisor whose sole responsibility was implementing the TCP and that he failed to do so. Further, Respondent argues that it provided Belfiore with all necessary training, supervision, and

rules such that any deviation from the plan was not foreseeable. *See Capital Electric Line Builders, Inc. v. Marshall*, 678 F.2d 128, 130 (10th Cir. 1982). Complainant argues that, even if the defense applies as to Belfiore, Respondent should nevertheless be held liable because foreman Young was ultimately responsible for the safety and health of the employees at his worksite and that "the violation was foreseeable because of inadequacies in safety precautions, training of employees, or supervision." *Id.* In particular, Complainant points out that Respondent's Foreman Job Description specifically states that it is the foreman's responsibility to "[p]rovide a safe working environment for the crews by following and administering the company safety program." (R-14).

The Court finds that Complainant has the better argument. Although it was Belfiore's responsibility to set up the signage and barricades according to the TCP, the decision to expose employees to the hazard of being struck by a vehicle was Young's. Not only did Young expose the employees working within the boundaries of Lafayette and Downing streets by allowing them to work without proper signage, he also chose to begin work outside of those boundaries by drilling the pothole in the intersection of Lafayette and Jewell without a proper TCP to address the unique hazards associated with such work. In this regard, the Court echoes Complainant's concern that "[i]f employers can segregate responsibilities for particular types of hazards . . . to employees who merely check-in prior to work beginning, conceivably employers could argue they have no continued duty to assure employee safety throughout the work." (Compl't Brief at 8 n. 29). In other words, while it may be a TCS's responsibility to ensure the proper set-up of the TCP, it is the foreman who bears the ongoing responsibility to ensure employee safety.

Notwithstanding the above, the Court is mindful of the fact that Respondent has implemented a scheme of surprise QA inspections and has ensured that its traffic control employees are thoroughly trained. The Court also recognizes that Respondent clearly takes its commitment to safety seriously in that it disciplined Belfiore prior to the issuance of the citation. That being said, the problem in this case stems more from the safety program's implementation rather than its form. If, as Respondent's witnesses testified, this incident is one of the more egregious examples of a TCS deviating from an established plan, then such a failure should have been recognized by Young and by Fleming, who had visited the worksite earlier that day.[6]

[6]. Even though Fleming's duties at the worksite did not involve a QA inspection, the Court finds that Fleming had performed QA inspections of traffic control operations in the past and should have recognized the extent of the

Young, along with all of Respondent's employees, had received training with respect to traffic control that clearly focused on the importance of advanced warning. (Resp't Brief at 4, R-11). Fleming, prior to receiving more intensive traffic control training in August 2011, was charged with and conducted a number of traffic control QA inspections. (Tr. 189, R-19). The present failure, therefore, either speaks to the quality of the "awareness" training provided to Respondent's employees or addresses a problem with entrusting QA inspections of traffic control operations to individuals that have not been thoroughly trained in traffic control. In either case, the Court finds that Respondent knew or could have known about the above-listed violations. Accordingly, Respondent's defense of unpreventable employee misconduct is rejected.

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; she need only show that if an accident had occurred, serious physical harm or death could have resulted. *Whiting Turner Contracting Co*., 13 BNA OSHC 2155, 1989 CCH OSHD ¶ 28,501 (No. 87-1238, 1989); *see also California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975) ("Where a violation of a regulation renders an accident resulting in death or serious injury possible, however, even if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation."). If the possible injury addressed by the cited standard is death or serious physical harm, a violation is serious. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶ 29,942 (No. 88-0523, 1993).

The Court finds that the above-listed violations were serious. While the Court is mindful of the fact that the above-listed violations occurred on a low-volume, low-speed stretch of road, the determination of whether a violation is serious does not account for the probability that the prospective accident will occur. The testimony and evidence submitted establish that the particular hazard presented by the lack of proper traffic control devices is being struck by a motor vehicle. The CSHO testified, and Respondent conceded, that such an accident can lead to the possibility of serious injury or death. (Tr. 33–34, 142, R-16). Accordingly, the Court finds that the violations were properly characterized as serious.[7]

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failure in this case. (Tr. 189, R-19).

[7]. By so finding, the Court need not address Respondent's contention that its status as a White-Level CHASE

PENALTY

In assessing penalties, the Court must consider the factors set forth in Section 17(j) of the Act, which include the size of the business of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations. 29 U.S.C. § 666(j). As noted above, Respondent has a very thorough safety program and has been recognized as such due to its participation as a White-Level CHASE program participant. Further, although the facts elicited above compel the Court to find that the violations in this case were serious, the Court also finds that, in light of the worksite's location, traffic volume, existing preventative measures, and traffic control devices already in place, the probability of an accident resulting in serious injury or death is extremely low. Accordingly, the Court finds that a penalty of $750.00 is appropriate.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1(a) is AFFIRMED, and penalty of $750.00 is ASSESSED.
2. Citation 1, Item 1(b) is AFFIRMED.

Date: August 10, 2012
Denver, Colorado

/s/
James R. Rucker, Jr.
Judge, OSHRC

participant entitles it to have any citation vacated that is issued as other-than-serious. Furthermore, because the CHASE partnership is an agreement between the parties and operates as a de facto enforcement policy of OSHA, the Court is not bound by it. *See National Roofing Contractors Ass'n v. United States Dept. of Labor*, 639 F.3d 339, 341–42 (7th Cir. 2011) (indicating that Secretary's promulgation of an enforcement policy does not modify the rules but merely operates as an exercise of prosecutorial discretion).