United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MASTER CONSTRUCTION CO., INC., and its successors, Respondent.	OSHRC Docket No. 18-0170

Appearances:

Kristi Henes, Esq., Department of Labor, Office of Solicitor, Denver, Colorado
For Complainant

Aaron Dean, Esq. & Jeffrey Wieland, Esq., Moss & Barnett, Minneapolis, Minnesota
For Respondent

Before: Judge Patrick B. Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

I. PROCEDURAL HISTORY

In 2017, Respondent was in charge of a project to expand and repave 19th Avenue, which runs through Fargo, North Dakota. On October 4, 2017, a cement mixer ran over one of Respondent's employees, who suffered two broken legs. (Tr. 68). Respondent notified Complainant the next day. (Tr. 44). Approximately one week later, Complainant dispatched Compliance Safety and Health Officer (CSHO) Shawn Damberger to conduct an inspection.[1] As a result of his inspection of the worksite and interviews of relevant parties, CSHO Damberger

1. The parties dispute when the inspection took place. The Court does not find this discrepancy is material to the ultimate resolution of this case, nor does it find such a discrepancy to impact the credibility of CSHO Damberger, who was likely mistaken or mis-documented when it took place.

recommended, and Complainant issued, a Citation and Notification of Penalty, which alleges one serious violation of the general duty clause, 29 U.S.C. § 654(a)(1), and one other-than-serious violation of 29 C.F.R. § 1926.21(b)(2). Complainant proposed a $11,641.00 penalty for the general duty clause violation and a $933.00 penalty for the other-than-serious violation. Respondent timely contested the Citation.

A trial was held on February 6–7, 2019 in Fargo, North Dakota. The following witnesses testified: (1) CSHO Shawn Damberger; (2) Keith Nelson, driver for Aggregate Industries; (3) Lance Savageau, driver for Aggregate Industries; (4) Rachel Hardy, Respondent's Human Resources Manager; (5) Kenneth Shorter, Complainant's designated expert; (6) Arthur Cofell, Respondent's Concrete Superintendent; (7) Frank Lopez III, Respondent laborer; and (8) Mark Grothe, Respondent's designated expert. At the close of its case, Respondent moved for judgment as a matter of law, which was denied by the Court. (Tr. 621, 623). The parties timely filed post-trial briefs, and, upon motion of the parties, the Court also permitted them to file reply briefs.

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. As discussed further below, the Court finds Complainant established Respondent violated the general duty clause by failing to adequately protect its employees from being struck by heavy equipment traffic within the boundaries of the repaving project. The Court also finds, however, Complainant failed to establish a violation of the training standard found at 29 C.F.R. § 1926.21(b)(2), because he failed to produce evidence the injured employee was not provided adequate training in a language the employee could understand. Accordingly, the Citation and Notification of Penalty is AFFIRMED in part and VACATED in part.

II. STIPULATIONS & JURISDICTION

The Court has jurisdiction over the parties and subject matter in this case. The Court obtained jurisdiction over this matter under section 10(c) of the Act upon Respondent's timely filing of a notice of contest. 29 U.S.C. § 659(c). Based on Respondent's Answer to the Complaint, the Court also finds Respondent is an employer engaged in interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 8). *See Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005). In addition to those jurisdictional matters, Respondent withdrew its affirmative defense of employee misconduct. (Tr. 347).

III. FACTUAL BACKGROUND

A. The Worksite and Nature of the Work Performed

Respondent was hired to expand 19th Avenue from a two-lane road to a four-lane road.[2] (Tr. 50, 265). The unfinished roadbed was 60 feet across and covered with gravel. (Tr. 163, 173). The roadbed was bounded on both sides by dirt fields. (Tr. 61, 386–87). On the day of the incident, Respondent's crew was pouring concrete for the lanes on the north side of the road, which measured approximately 1,200 feet long and 22 feet across. (Tr. 50, 154–55). This portion of the project required 970 cubic yards of mixed concrete, which was delivered by Aggregate Industries, the subcontractor hired by Respondent to provide trucks, drivers, and concrete. (Tr. 51).

The construction site was closed to the general public and was marked with traffic control devices. (Tr. 368). The work inside the construction site was dynamic—the machines used to pour and smooth the concrete constantly moved forward as the road was being poured, and 15 different Aggregate cement trucks delivered 100 loads of concrete approximately once every six minutes. (Tr. 154–55, 250). In order to pour the road, Respondent employed a series of machines working

2. The end result was a four-lane road with a middle turn lane, which also accommodated two-and-a-half feet wide curb and gutter on both sides of the road. (Tr. 163–64).

in tandem with the concrete trucks that delivered the pre-mixed concrete. The first machine, called the placer, collected the concrete delivered by the trucks into a hopper. (Tr. 271; Ex. R-26). A conveyor delivered the concrete from the hopper to a movable chute that spreads the concrete over the roadbed. (Tr. 271; Ex. R-27). The placer was controlled by one of Respondent's employees, who sat in an elevated platform on top of the machine, which allowed him to control and monitor the pour. (Tr. 481). The paver traveled behind the placer and was responsible for smoothing and forming the concrete into the lanes of the road. (Tr. 484; Ex. R-28). Finally, traveling behind each of those machines was the cure cart, which applied a compound to the concrete to ensure it dried properly to achieve the specified strength and durability. (Tr. 54–55, 485). On the day of the incident, the operation was moving eastward along 19th Avenue, between 43rd and 45th Streets. (Tr. 485).

Aggregate's trucks entered the worksite from the east end of the worksite. (Tr. 473). They would drive up 19th Avenue until they reached the intersection at 43rd Street, at which point they would turn around and back up to the hopper on the placer machine. (Tr. 474). One of Respondent's employees, known as the chute man, guided the driver back to the placer, where the driver would lower the chute on his truck and unload the concrete into the hopper. (Tr. 66). Once the load had been delivered, the chute man notified the driver he could pull forward. (Tr. 110). The driver would pull away, driving to the right to avoid the next truck in line, and pull off to the side to flip the remaining portion of the chute up against the truck. (Tr. 255). Depending on how many trucks had been dispatched[3] to Respondent's worksite, there could be a line of trucks sitting in position to back up to the hopper. The hopper was wide enough so that two trucks could be

3. Truck drivers were not designated to work at a particular site all day; instead, they were issued work tickets upon receiving a load of concrete at the Aggregate facility. Those tickets indicated where the load was to be delivered. (Tr. 264).

unloaded at a time; however, at the time of the incident in this case, only one truck was permitted to unload at a time. (Tr. 477–78).

Aside from the chute man, most of Respondent's employees worked behind the placer and paver, which served as a *de facto* barrier between them and the incoming truck traffic.[4] (Tr. 269, 483). That said, Cofell testified the employees' vehicles, extra tools, equipment, and supplies were in a staging area on the eastern end of the worksite where trucks entered and exited the worksite. (Tr. 484–85). According to Cofell, this layout made sense, because the equipment and cars were located where the work would eventually end for the day. (Tr. 485). However, as will be discussed in more detail below, this layout also required Respondent's employees to occasionally travel on foot through an area where trucks were entering and exiting the worksite.

B. Training and Communication of Hazards

According to Respondent, it trained employees on how to deal with the potential of being struck by a moving vehicle on the worksite, which included annual seminars and weekly tool-box talks at the worksite. (Tr. 301, 471). Respondent had multiple policies governing the possibility of collisions between heavy mobile equipment and pedestrians, including Work Zone Safety, Mobile Equipment Hazards, Preventing Backovers, and Blindspot Analysis. (Ex. R-6, R-7, R-8, R-9). Each of these policies included warnings and directives, such as:

- "Be aware of vehicle and equipment travel paths and avoid standing or walking in these areas."
- "[O]perators may not always see a worker approaching them . . . ."
- "[A]pproach equipment only after making eye contact and signaling the operator; wait for their approval . . . ."

4. Although not physically behind the machine, the placer operator was in an elevated platform atop the placer, putting him out of harm's way. (Tr. 481).

(*Id.*). Aside from these general admonitions, however, there were no specific, documented rules governing pedestrian and truck traffic within the construction zone.

Based on the testimony of Nelson and Savageau, it appears Respondent gave only basic instructions to the truck drivers entering the worksite. Neither Nelson nor Savageau received site-specific training for the road construction project. (Tr. 262, 288). Instead, Nelson testified, "The first driver usually tells them—it gets to relayed to everybody else how to do it. And they're basically the same all the time." (Tr. 258–59). Savageau testified he did not recall receiving any notice Respondent's employees would be walking in the area of truck traffic and stated it was "not likely at all" for workers or contractor employees to be traveling in that area on any worksite. (Tr. 288–89). Respondent's concrete superintendent, Cofell, testified he spoke with Aggregate's representative, Lynn Alm, and discussed "how the trucks were coming in and where they needed to turn around." (Tr. 477). Otherwise, according to Cofell, he and Alm had only discussed safe operating speed within the worksite. (Tr. 517). Aside from the issue of speed and identifying where drivers needed to enter and turn around, Cofell, who testified as to his general knowledge of Internal Traffic Control Plans ("ITCP), admitted he had never implemented one on a construction site before. (Tr. 514).

C. The Accident

On the day of the accident, work was progressing as described above. The series of events leading to A.A.'s injury started with Aggregate driver Nelson positioning his truck to back up to the hopper. (Tr. 273). According to Frank Lopez III, Nelson appeared agitated because the chute man would not allow him to park alongside the other truck that was unloading concrete into the hopper, because Respondent was only permitting one load to be dumped at a time. (Tr. 545–46). Nelson, on the other hand, testified he was able to pull right up to the hopper when he arrived. (Tr.

253). Once he was positioned to pour, Nelson said it took four or five minutes to unload the concrete. (Tr. 254). After unloading, the chute man motioned to Nelson, indicating he could raise up the chute and pull out to make room for the next driver in line. (Tr. 255). Nelson raised his chute, checked his mirrors, and pulled forward to the right (south) side of the gravel roadbed to avoid the next driver, Savageau, who was backing up to the hopper. (Tr. 256–57). After pulling forward approximately 50 feet, Nelson stopped his truck to pin up the chute. At that point, he discovered he had hit one of Respondent's employees. (Tr. 277).

While Nelson was positioning his truck and pouring concrete, Art Cofell directed A.A. to get the backhoe and collect an additional barrel of cure, which was starting to run low.[5] (Tr. 488). As stated above, both the backhoe and cure were located on the east side of the operation, which required A.A. to travel outside the area otherwise protected by the placer machine. According to CSHO Damberger, who interviewed him, A.A. walked along the passenger side of Nelson's truck, giving himself roughly 4–7 feet of lateral space between them. (Tr. 68). At some point after A.A. walked past the truck and Nelson had delivered his load into the hopper, Nelson pulled forward and turned to the right side of the road. While this practice, at least nominally, was designed to avoid a collision between the incoming and outgoing trucks, it also placed A.A. in the path of Nelson's truck.

All of the testifying witnesses had varying accounts as to how far away from the placer the accident occurred, ranging from 20 to 200 feet. (Tr. 278, 287, 498, 546). The problem, however, is that no one took measurements after the accident occurred, which left CSHO Damberger, as well as this Court, to reconstruct what happened based on the various estimates given by Nelson, Savageau, A.A., and Rachel Hardy. (Tr. 240). This was complicated by the fact the work

5. The backhoe was necessary because the cure is stored in 55-gallon drums. (Tr. 485–86).

continued after A.A. had been taken to the hospital and the worksite was no longer in the same place at the time of CSHO Damberger's inspection. Based on the scant evidence of distance, the Court finds A.A. was somewhere between 50 and 100 feet east of the placer at the time of the accident.[6] While his distance from the placer was more difficult to ascertain, most of the witnesses agree that A.A. was found roughly 30 feet to the south of the string line[7] and 5–7 feet north of the southern edge of the roadbed. (Tr. 279, 497, 535). According to Cofell, Respondent's employees typically walked in the dirt field to the south of the gravel roadbed in order to access their vehicles and spare tools on the east end of the worksite. (Tr. 484–85). In this instance, however, Cofell noted some of the employees walked along the gravel because the dirt field was muddy at the time. (Tr. 488). Neither Nelson or Savageau had a reason to believe Respondent's employees would be traveling through the roadbed area on foot.

The police arrived at the worksite shortly after the accident occurred and conducted interviews of Nelson and other people at the worksite. None of the testifying witnesses saw the collision take place. Notwithstanding Lopez's testimony regarding Nelson's agitated behavior and unsafe driving, the police did not issue Nelson a citation for his role in the accident, and the Court sees no evidence to suggest he engaged in such behavior. (Tr. 260). Whether Nelson traveled 20 feet, 50 feet, or even 200 feet before hitting A.A., the Court finds this discrepancy is irrelevant to the resolution of this case, because the Court is not charged with determining the cause of the accident, but whether A.A. and his fellow employees were exposed to a recognized hazard. While

6. As discussed more below, A.A.'s distance from the placer at the time of the accident has little to no bearing on the outcome of this case. Whether Nelson should have seen A.A. at the time of the accident is related to the cause of the accident, which does not impact the analysis of whether a Section 5(a)(1) violation occurred. *See Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, 874 (3d Cir. 1979) ("Our task on review is not to look for a proximate cause relationship between the accident which preceded the inspection and the specific violation charged, but to determine whether there is substantial evidence in the record supporting the charge that the employer maintained, at the time and place alleged, a recognized hazard to the safety of its employees.").
7. The string line guided the placer, which was pouring the inner of the two eastbound lanes. (Tr. 271–72).

Respondent takes issue with the possibility Nelson was focused on his rearview mirrors and the incoming truck as he was taking off from the hopper, Cofell made it clear such behavior was typical given the layout of the worksite. (Tr. 524). When coupled with the fact the drivers did not anticipate foot traffic in the area of the roadbed, Nelson's focus on the immediate and anticipated hazards make more sense. Further, like the distance issue, such evidence is related to the issue of causation, not whether a recognized hazard existed.

D. Complainant's Inspection

CSHO Damberger initiated an inspection with HR Manager Rachel Hardy at Respondent's facility and conducted an onsite investigation of the road construction project the following day. (Tr. 44–45). As noted above, by the time CSHO Damberger arrived, the project had advanced forward a substantial distance. Based on his interviews, CSHO Damberger found Respondent had not taken any measurements at the time of the accident, nor had it conducted an interview of A.A.. While Hardy had taken photographs with her phone, they did not clarify what had occurred on the day of the incident. (Ex. R-16, R-17).

CSHO Damberger conducted multiple interviews, including A.A., took photographs of the equipment involved and the nature of the operation, reviewed the accident report, and collected information on Respondent's safety policies and training. Based on the information he collected, CSHO Damberger determined Respondent violated the general duty clause because it failed to properly address the struck-by hazard presented by employees traveling on foot through an area where concrete trucks were driving. CSHO Damberger also recommended a citation for Respondent's failure to properly communicate its safety policies and training to its Spanish-speaking employees. Those recommendations were adopted by Complainant, and the citation items discussed below were issued.

IV. THE ACT, REGULATIONS AND JUDICIAL PRECEDENT

The Occupational Safety and Health Act of 1970, ("Act"), 29 U.S.C. §§ 651-678, is meant "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). The Act imposes a general duty on employers to furnish employees a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." *Id.* § 654(a)(1). In order to prove such a violation, the Secretary must show "that a condition or activity in the workplace presented a hazard, that the employer or its industry recognized a hazard, that the hazard was likely to cause death or serious physical harm, and that a feasible and effective means existed to eliminate or materially reduce the hazard." *Arcadian Corp.*, 20 BNA OSHC 2001 (No. 93-0628, 2004). The evidence must also show the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. *See Regina Constr. Co.*, 15 BNA OSHC 1044 (No. 87-1309, 1991).

The Secretary must establish his *prima facie* case by preponderance of the evidence. *See Hartford Roofing Co*., 17 BNA OSHC 1361 (No. 92-3855, 1995).

> "Preponderance of the evidence" has been defined as:
>
> > The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014).

While Respondent characterizes Complainant's use of the general duty clause as an end-run around the Administrative Procedures Act ("APA"), the Supreme Court recognized section 5(a)(1) "was intended itself to deter the occurrence of occupational deaths and serious injuries by

placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980). This independent obligation was designed to emphasize the general and common duty of all employers to protect the life and health of their employees:

> The committee has concluded that such a provision is based on sound and reasonable policy. Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a), in providing that employers must furnish employment 'which is free from recognized hazards so as to provide safe and healthful working conditions,' merely restates that each employer shall furnish this degree of care.

S. Rep. No. 91-1282, 91st Cong., 2nd Sess. (1970), U.S.C.C.A.N., 91st Cong., 2d Sess. (1970) at 5186.

Contrary to Respondent's assertion Complainant is attempting to use Section 5(a)(1) to require the implementation of ITCPs as a *de facto* safety standard, the Court finds its application is specific to the set of facts presented. *See Pepper Contracting Svcs.*, 657 Fed. Appx. 844, 849 (11th Cir. 2016) (finding specific facts of case illustrated hazard of positioning an employee in front of and in the path of milling convoy, including failure to inform drivers of employee's location). Complainant is still required, as in every general duty clause case, to (1) establish the existence of a serious hazard that is either recognized by Respondent specifically, or by its industry generally; and (2) prove not only the existence of feasible and effective means of abatement, but, to the extent Respondent has implemented measures to address the hazard, also show those measures were ineffective. *See Arcadian Corp.*, 20 BNA OSHC 2001. This exacting burden of proof, which has been reviewed and approved of by the Commission, Circuit Courts of Appeal, and the Supreme Court, ensures Respondent is not being held to some *ad hoc* standard of conduct

the Secretary plucks out of thin air. Instead, Complainant's proposed standard of conduct must be premised on hazards either Respondent or its industry squarely recognize and abatement measures industry experts have determined are effective at minimizing those hazards. *See, e.g., id.* ("Feasible means of abatement are established if 'conscientious experts familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard." (citing *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2032 (No. 89-0264, 1997))). As will be discussed further below, Complainant has met that burden.

V. ANALYSIS, FINDINGS OF FACT AND LEGAL APPLICATION

1. Citation 1, Item 1

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

> Section 5(a)(1): The employer did not furnish to each of his employees employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that employees were exposed to struck-by hazards:
>
> a) On October 4, 2017, for the employee working on a road construction site who was seriously injured after being struck by a concrete truck in the vicinity of 19th Avenue & 45th Street in Fargo, North Dakota.
>
> Abatement Note:
>
> Among other methods, one feasible and acceptable abatement method to correct the hazard would be for the employer to develop and implement a comprehensive work site traffic control plan that addresses struck-by hazards for personnel on the ground for vehicles entering and exiting construction sites, but not limited to a dedicated pathway[] for individuals on foot.

See Citation and Notification of Penalty at 6.

a. Respondent's Work Practices Presented a Hazard

"[A] safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur." *Baroid Div. of NL Indus., Inc. v. Occupational Safety and Health Review Comm'n,* 660 F.2d 439 (10th Cir. 1981).

2019). Though Respondent did not stipulate to the existence of a hazard at trial, it appears to have conceded as much in its post-trial brief. According to Respondent:

> The first and second elements *are not in contention*. Cement trucks were moving on the work site, so there was a potential for a struck-by accident. Master Construction obviously recognized this potential hazard because it extensively trained its employees how to deal with that hazard. The other two elements, however, are very much in dispute.

Resp't Post-trial Br. at 22 (emphasis added). Notwithstanding Respondent's concession, there is ample evidence a hazard existed at the worksite. Respondent's employees walked in the area where trucks were operating in order to access spare equipment, tools, chemicals, and employee vehicles, which were all located on the eastern end of the worksite. Any time those items needed to be retrieved, Respondent's employees had to travel beyond the protective barrier provided by the placer and into an area where trucks were operating. Although Respondent contends this happened infrequently, it nonetheless admits its "employees did cross into the truck's area of operations . . . ."[8] *Resp't Br.* at 23. The Court finds Complainant has established the existence of a stuck-by hazard existing at the time of the incident and before.

b. The Hazard was Recognized.

It is "[t]he hazard, not the specific incident resulting in injury, [that] is the relevant consideration in determining the existence of a recognized hazard." *Kansas City Power & Light Co*., 10 BNA OSHC 1417, 1422 (No. 76-5255, 1982*)*. "[W]hether or not a hazard is 'recognized' is a matter of objective determination." *Ed Taylor Const. Co. v. Occupational Safety & Health Review Comm'n*, 938 F.2d 1265, 1272 (11th Cir. 1991). Whether a work condition poses a recognized hazard is a question of fact. *See Baroid Div. of NL Indus., Inc. v. OSHRC,* 660 F.2d at 446.

8. The Court will address this argument in more detail with respect to the issue of exposure and likelihood of death or serious physical harm in Section IV.A.1.c, *infra*.

This element is established by proving the employer had actual knowledge the condition was hazardous. *Id.* A "recognized hazard" may also be shown by proving the condition is generally known to be hazardous in the industry. *Ed Taylor*, 938 F.2d at 1271 (citation omitted). Finally, if the hazard is likely the type of hazard that is "so obvious and glaring" it may be deemed recognized for the purpose of the general duty clause apart from evidence of industry practice or expert testimony. *See Tri-State Roofing & Sheet Metal, Inc. v. OSHRC*, 685 F.2d 878, 880 (4th Cir. 1982).

Respondent has conceded the hazard was recognized in its post-trial brief. *Resp't Post-trial Br.* at 22 This hazard was recognized by Respondent and the highway construction industry. Respondent has rules addressing the potential for collisions between mobile equipment and employees on foot and provides training and toolbox talks addressing the same. (Ex. R-6, R-7, R-8, R-9). Likewise, both Respondent's and Complainant's respective experts testified the highway construction industry recognizes struck-by hazards involving mobile equipment and workers on foot. (Tr. 415, 617). This is further supported by the existence of ANSI standards addressing such hazards. (Tr. 430–31; Ex. C-15). Accordingly, based on Respondent's concession and the weight of the evidence presented by Complainant, the Court finds there was a recognized hazard at Respondent's worksite during the applicable time period.

c. Respondent Was Aware of the Hazard

In addition to the four primary elements of a general duty clause violation, Complainant must also establish Respondent "knew or, with the exercise of reasonable diligence, should have known of the hazardous conditions constituting the violation." *S.J. Louis Constr. of Texas*, 25 BNA OSHC 1892 (No. 12-1045, 2016). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix*

Roofing, Inc., 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of the noncomplying conduct of a subordinate, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 632 F.2d 155, 158 (10th Cir. 1980).

As noted above, Respondent admitted its employees walked through the area where concrete trucks were driven. In fact, Cofell explicitly told A.A. to travel through that area in order to collect a barrel of cure, and he knew employees walked through the area to gather additional tools and collect food and water from their personal vehicles. Because Cofell was the concrete superintendent, and thus designated as an on-site supervisor for Respondent, his knowledge of the struck-by hazard is imputable to Respondent. *See Dover Elevator*, 16 BNA OSHC 1281 (No. 91-862, 1993) ("[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program."). The Court finds Respondent had actual knowledge of the conditions constituting a hazard.

d. The Hazard Was Likely to Cause Death or Serious Physical Harm

The determination as to what is considered serious physical harm is made on a case-by-case basis. In making such determination the Court needs to look to the nature of the hazard against which the standard was intended to protect. *Anaconda Aluminum Co.,* 9 BNA OSHC 1460, 1981 (No. 13,102, 1981). Complainant need not show there was a substantial probability an accident *would* occur; he need only show that if an accident occurred, serious physical harm *could* result. *See Sec'y of Labor v. Phelps Dodge Corp. v. Occupational Safety & Health Review Comm'n*,

725 F.2d 1237, 1240 (9th Cir. 1984) (emphasis added). Injuries to employees constitute at least *prima facie* evidence the hazard was likely to cause death or serious injury. *See e.g., Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977) ("The fact that the activity in question actually caused one death constitutes at least *prima facie* evidence of likelihood: 'the potential for injury is indicated on the record by [the] death and, of course, by common sense.' *National Realty*, 489 F.2d at 1265 n. 33.")

Respondent's argument with respect to this element is misguided. Instead of analyzing whether a serious physical injury or death was the likely outcome of an accident resulting from the hazard, Respondent argues "[t]he evidence produced at trial show [sic] that an injury was not likely to happen." *Resp't Br.* at 23. The Commission has made clear, however, "the criteria for determining whether a hazard is 'causing or likely to cause death or serious physical harm' is not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious physical harm." *Waldon Health Care Center*, 16 BNA OSHC 1052 (No. 89-2804, 1993) (citation omitted). Notwithstanding the accident at issue in this case, Respondent argues it was unlikely any injury whatsoever would occur, because it had effectively addressed the hazard through its safety program and training. This argument is more appropriately targeted at whether Complainant established the existence of a hazard in the first instance. *See id.* ("There is no mathematical test to determine whether employees are exposed to a hazard under the general duty clause. Rather the existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances." (citing *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973))). Although Respondent previously conceded the existence of a struck-by hazard, the Court will give Respondent the benefit of the doubt and address the question of probability of exposure—and,

hence, whether a hazard existed—from the standpoint of whether its policies, procedures, and training were sufficient to abate that hazard. Those arguments, however, will be addressed in the next section. *See* Section V.1.e.i, *infra*.

As regards this specific element, however, the Court has no trouble concluding the struck-by hazard posed by cement trucks and pedestrian employees working in the same space was likely to cause death or serious physical harm. Indeed, the Court need look no further than the injuries suffered by A.A. when he was struck by Nelson's truck: both legs were broken below the knee, which required hospitalization and extensive rehabilitation. Contrary to Respondent's assertion, relying on the injury that occurred in this case is not akin to strict liability. Instead, it is concrete evidence that serious physical injury is a likely result of being hit by a concrete truck.[9] Accordingly, the Court finds Complainant established this element.

e. There Were Feasible and Effective Means to Abate the Hazard

i. Respondent Failed to Effectively Abate the Hazard

As stated in the language of the Act, Respondent's general duty is to "furnish to each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious injury to the employees." 29 U.S.C. § 654(a)(1). Or, as stated by the D.C. Circuit, "The question is whether [the employer] rendered its construction site 'free' of the hazard." *National Realty*, 489 F.2d at 1265. Insofar as Respondent has implemented measures to address the hazard, Complainant must show those measures are inadequate in order to prevail. *See Alabama Power Co.*, 13 BNA OSHC 1240 (No. 84-357, 1987). The Court finds Complainant has made such a showing.

9. In a case where an injury did not occur, it is incumbent on Complainant to prove that exposure to the hazard *would* cause such an injury. That is not at issue here, where an injury actually occurred; though, it is not a stretch to conclude that being hit by a truck would cause serious injuries or death.

In determining whether an employer has adequately protected its employees from a hazard, the Commission considers "whether [the employer] has established work rules designed to prevent exposure, has properly communicated those rules to its employees, has taken steps to discover noncompliance with the rules, and has effectively enforced its rules in the event of noncompliance." *Id.* (citing *Inland Steel Co.*, 12 BNA OSHC 1968, 1976 (No. 79-3286, 1986)). General admonitions to avoid a hazard or act safely are not adequate for compliance; however, a rule is not inadequate just because it requires employees to exercise judgment. *Id.* "In determining whether a work rule is sufficiently specific to protect employees, the nature of the hazard and overall circumstances of the work operation must be considered." *Id.*

Respondent did not have a site-specific plan for combined vehicular and foot traffic inside of the construction zone. According to Cofell, he coordinated with Lynn Alm from Aggregate to discuss the speed limit within the worksite and "how the trucks were coming in and where they needed to turn around."[10] (Tr. 477). As illustrated by the testimony of Nelson and Savageau, however, they relied primarily upon experience from previous jobs and radio communications with other drivers, who relayed the layout of the worksite. (Tr. 268, 284). Other than that information, however, Nelson and Savageau testified they had not received any site-specific training from Aggregate or Respondent, nor were they informed Respondent's employees would be traveling through the traffic area on foot. (Tr. 261–62, 288–89). In fact, both testified it would be unusual for them to do so. (Tr. 262, 288–89).

As for concrete workers, like A.A., Respondent had a couple of difference policies governing foot traffic through worksites with heavy equipment and trucks, though they were fairly

10. Respondent argues this general discussion of traffic flow was, itself, sufficient to qualify as an ITCP and, therefore, qualified as sufficient abatement of the hazard. As discussed below, Shorter's description of an ITCP illustrates Respondent's program was deficient.

general in nature. Other than a specific requirement to wear high-visibility clothing, Respondent's policies, as relayed through Safety Topic training sessions, admonished its employees to:

- Work where drivers can see you, but as far as possible from traffic.
- Get in and out of traffic spaces and heavy equipment areas quickly and safely.
- Be aware of vehicle and equipment blind areas and avoid being in or near these areas.
- Be aware of vehicle and equipment travel paths and avoid standing or walking in these areas.

(Ex. R-6, R-7, R-8, R-9). Respondent did not give its concrete workers specific directions as to how they were supposed to travel the worksite on foot. Although Cofell testified he told his employees to stay 15 feet away from moving trucks, he also admitted there was no specified lane of travel employees on foot were required to use; instead, he said there was "pretty much" an understanding of where employees should walk. (Tr. 488). Specifically, he testified, "Well, they sometimes walked on the berm outside where the gravel was, but it was muddy so I'm sure he walked on the edge [of the gravel road]." (Tr. 488). Respondent argues the foregoing rules, coupled with its worksite segregation via the placer, were sufficient to address the hazard presented by trucks and employees on foot traveling through the same area. The problem, however, is Respondent's worksite segregation was undermined by where its materials, and employees' personal vehicles, were staged. Periodically, employees had to travel beyond the protective confines of the placer to gather additional tools, lunches, water, and cure compound, which were located on the east end of the operation.

Respondent failed to properly account for the hazards accompanying employees traveling on foot to get those materials. The rules discussed above place the obligation on the employee on foot to avoid collisions by requiring them to "be aware", to move "quickly and safely", and to work "as far as possible" from traffic. Given the equally general instructions provided to the Aggregate drivers, who were not made aware workers would be traveling through the area on foot,

the Court has no trouble concluding Respondent's work rules governing vehicle and foot traffic through the construction zone were inadequate to address the hazard and, insofar as the drivers were concerned, were poorly communicated.

In *Pepper Contracting Services*, the Eleventh Circuit affirmed ALJ Gatto's finding that a hazard existed under circumstances similar to those found in this case. *See* 657 Fed. Appx. at 849. In *Pepper*, an employee and his supervisor traveled ahead of a road milling convoy to clear brush from around a telecommunications box. *Id.* at 846. The supervisor left the employee behind to complete the job, but he did not tell any of the dump truck drivers an employee was located ahead of the convoy. *Id.* Shortly after the employee was left behind to clear brush, a truck driver sped forward from the milling convoy and fatally struck the employee near the telecommunications box, which was roughly 83 feet away from the convoy. *Id.*

The employer in *Pepper* made arguments similar to those made by Respondent in this case. Both employers argued that their respective employees were not exposed to a hazard because: (1) the employees were located far from the moving vehicles before they were struck, (2) they should have been visible to the driver because of distance and high-visibility clothing, and (3) the drivers involved were driving carelessly. *Id.* at 849. In the underlying case, Judge Gatto found the arguments regarding distance, blind spots, and whether the driver was careless to be unavailing. *Pepper Contracting*, 25 BNA OSHC 2052 (No. 14-0714, 2015) (ALJ Gatto). Indeed, he specifically referred to the blind spot theory as a "red-herring", because the employer was charged with violating the general duty clause for "exposing employees to the hazard of being struck by vehicular traffic inside a work zone." *Id.* Whether the employee was in the blind spot of the truck was irrelevant because the employer assigned him to work near the telecommunications box, which was in the path of the milling operation. *Id.* The Eleventh Circuit agreed, stating:

> [I]t may not always be true that where a contractor positions an employee 83 feet in front of and in the path of a milling convoy, a hazard necessarily exists. But, as discussed above, here such additional facts were shown as (1) Pepper's lack of supervisory protocol to account for Diaz's whereabouts at the time the milling operation resumed, (2) Pepper's authorizing the milling operations to resume, and (3) Pepper's failure to inform the truck drivers of Diaz's location.
>
> The ALJ could reasonably determine that the facts of this case showed that Pepper's placement of Diaz in the path of a milling convoy led by dump trucks capable of moving at a high rate of speed actually exposed Diaz to a hazard in a zone of danger or, at the least, made it reasonably predictable that he would imminently be exposed to such a hazard in a zone of danger.

Pepper Contracting Svcs., 657 Fed. Appx. at 849 (emphasis in original).

Judge Gatto also addressed the sufficiency of Respondent's existing abatements measures and found them wanting. In particular, Judge Gatto noted Respondent: (1) failed to have a specific ITCP for that particular worksite;[11] (2) failed to implement plans to prevent start-up of the milling operation while workers were in the path of the convoy; and (3) failed to coordinate its efforts with the independent trucking contractor by either providing it with a copy of its safety policy or including its drivers in its daily safety briefings. *See Pepper Contracting*, 25 BNA OSHC 2052 at *13.

The Court agrees with the analysis of Judge Gatto and the Eleventh Circuit. Respondent's arguments regarding distance, visibility, and carelessness may be appropriate considerations for what caused this accident; however, they are mostly irrelevant to the question of whether Respondent's employees were exposed to a hazard and whether Respondent's work rules and practices were adequate to address that hazard. *See Bethlehem Steel*, 607 F.2d at 874. Just as the employer in *Pepper* sent its employee ahead of the convoy to clear brush, Respondent segregated and staged its worksite in such a way that employees were periodically required to travel ahead of

11. Interestingly, the employer in *Pepper* had a general traffic control plan for the entire project, but Judge Gatto still found the lack of site-specific plans rendered such a general plan insufficient.

the paving equipment and into construction traffic in order to gather supplies or retrieve personal items. *See Fabricated Metal Prods, Inc.*, 18 BNA OSHC 1072 (No. 93-1853, 1997) (holding, under precedent of *Gilles & Cotting* and *Rockwell*, Complainant must show "that it is reasonably predictable either by operational necessity or otherwise (*including inadvertence*), that employees have been, are, or will be in the zone of danger") (emphasis added). Cofell, who sent A.A. to gather the cure compound, admitted he was aware the employees used the gravel roadway instead of the undeveloped dirt field due to the muddy conditions. Nevertheless, no specific rules were in place to address employees walking through the trafficked area, no notification was given to the drivers that employees walked in the area, and there was no coordination of training or policy with the drivers save for the perfunctory discussion of traffic between Cofell and Alm.

In light of these facts, the Court finds Complainant proved Respondent did not properly address the struck-by hazard, either through its own rules or through the communication of such rules to all affected parties.

ii. Complainant Established Feasible Means of Abatement

"The Secretary must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enters.*, 19 BNA OSHC 1161, 1190 (No. 91-3144, 2000). Complainant is not required to show that its proposed methods of abatement would eliminate the hazard or that the absence of those methods was the "sole likely cause of the serious physical harm." *Arcadian Corp.*, 20 BNA OSHC 2001 at *13. Complainant can establish its proposed means of abatement are feasible if "'conscientious experts familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Id.* (citing *Pepperidge Farm, Inc.*, 17 BNA OSHC at 2032).

According to the citation, Complainant alleged that one means of abatement would be for Respondent to develop an ITCP that incorporated dedicated pathways, which is consistent with the requirements of ANSI A10.47-2015, Section 6.4. (Tr. 431). In addition, Complainant's expert, Ken Shorter, identified a four-step process Respondent could have implemented to effectively identify and abate the hazard. Respondent contends dedicated pathways would not have been feasible given the evolving nature of the worksite nor would they have been effective at preventing the type of accident that occurred in this case. Respondent also contends it had a *de facto* traffic control plan, but that it did not have it documented. Finally, Respondent argues the alternative abatement elements proposed by Complainant would not be effective at preventing the hazard in this case. Below, the Court shall address the various methods of abatement, as well as Respondent's contention that it implemented a traffic control plan, to determine their effectiveness. Ultimately, the Court finds Complainant established a feasible and effective means of abatement.

Shorter identified four steps for addressing hazards associated with multi-employer worksites, including: performing a task hazard analysis; communicating the identified hazards to both employees and contractors; developing work plans separating people on foot from vehicle and heavy equipment traffic; and performing inspections to ensure compliance. In the specific arena of highway construction, Shorter proposed three additional methods to abate the ever-present struck-by hazard: (1) close supervision of high-risk work, (2) a written ITCP, and (3) truck-specific safety rules.[12]

Respondent's traffic control plan did not address some of the key issues identified by Mr. Shorter. First, there is no evidence Respondent performed a task hazard analysis. Second, the conversation between Alm and Cofell, which covered the basics of where trucks would drive and

12. Shorter also included task hazard analysis as part of these proposals; however, this particular element is mentioned twice in his report, perhaps highlighting the importance of such an analysis.

how fast they should be going, did not adequately communicate the relevant worksite hazards to the drivers. According to Nelson and Savageau, drivers were not notified Respondent's employees would be in the area of truck traffic. Third, there was no established plan separating people on foot from vehicular traffic. While Respondent's employees typically worked from behind the placer, they periodically traveled beyond that area to retrieve tools and additional materials. When retrieving those tools, Respondent expected, but did not direct, its employees to walk in the dirt field adjacent to the gravel roadbed. Even Cofell admitted the area was muddy and his employees used the gravel roadbed to walk. Whether Respondent's plan was written or not,[13] the Court finds it was deficient.

According to Shorter's testimony, the key to an effective ITCP is the separation of workers on foot from vehicular traffic. One method of accomplishing such separation would be to store necessary materials behind the barrier created by the placer so that employees would not have to travel into the trafficked area. (Tr. 422). To the extent that was not possible, Shorter advocated dedicated walking lanes. (Tr. 423–25). Given the nature of the worksite, neither expert advocated the use of concrete Jersey barriers. (Tr. 425, 594). Though they would certainly be effective, the concrete barriers would not be feasible to implement over the distances associated with the project. Alternatively, Shorter proposed stakes and caution tape, spray painted lines, or cones to identify where employees should walk. (Tr. 423, 425). While Respondent contends such "barriers" would not prevent someone from being run over, Shorter's point was the designated walking areas would need to be part of a comprehensive scheme. (Tr. 424). This would include training all worksite occupants, so that employees and drivers alike would be aware of the dedicated walking lanes; implementing and enforcing truck safety rules, such as speed limits and prohibitions against cell

13. The Court agrees with Shorter that a written plan would be required under such circumstances to ensure its particulars could be properly communicated to employees and contractors.

phone use; and close supervision of high-risk work, such as when an employee is directed to retrieve tools/chemicals located on the other side of the placer's protective barrier. *See, e.g., Pepper Contracting*, 25 BNA OSHC 2052 at *13 (discussing appropriate abatement of a similar hazard).

The general duty clause does not require elimination of the hazard, only a material reduction of it. When viewed as a whole, Shorter's comprehensive approach to the struck-by hazard accomplishes that. By comparison, Grothe's analysis of Complainant's proposed abatement sought to justify Respondent's existing program and failed to show Complainant's proposed abatement was infeasible or ineffective. For example, as previously mentioned, Grothe pointed out that "barriers" or dedicated walking paths that were lined by spray paint, tape, or cones would not protect an employee from being run over. (Tr. 590). While that is true, the point of the lanes is to be a visible indicator of where walking traffic could be expected. Grothe opined that using paint lines would also be ineffective, as they would have to be consistently reapplied due to the changing nature of the worksite and the potential for them to be washed or blown away. He also noted the individual applying the lines would be exposed to the same hazard the lines were designed to prevent. The Court also rejects these arguments. Not only were painted lines only one suggestion, along with caution tape and cones, but the application of these types of barriers could reasonably be accomplished with adequate notice to drivers and through what Shorter referred to as "close supervision of high-risk work". Further, although the paving equipment was in constant motion, it moved toward a defined endpoint for each day of work. Respondent expected its employees would walk along the same path to get to the additional tools and materials located on the east end of the operation. Although the location of the path might be different from day to day, it would be more or less constant for each individual day of work. As illustrated above, Grothe

pointed out minor deficiencies in specific rules, such as honking a horn when pulling away from the placer and the use of paint, but his testimony did not undermine the feasibility of implementing a comprehensive scheme of segregated foot and vehicular traffic, which would be reinforced through a program of hazard analysis and employee- and contractor-involved training.

Respondent relies on two cases issued by OSHRC ALJs in the last couple of years. *See Central Site Development, LLC*, 26 BNA OSHC 1985 (No. 16-0642, 2017) (ALJ) and *The Lane Construction Corporation*, 26 BNA OSHC 2139 (No. 16-0534, 2017) (ALJ). In support of its argument that pathways are difficult to define, Respondent cited *Central Site Development*, wherein Judge Gatto vacated a general duty clause citation requiring the use of an ITCP on a construction project because it was impractical. *Central Site Dev.*, 26 BNA OSHC 1985. Citing the employer's expert, the judge found the use of such a plan, and the attendant pedestrian lanes, impractical because a development site is progressing in different areas at different times, whereas highway construction moves in a constant progression. *Id.* at *11. Given the differences between the worksite in *Central Site* and the present case, the Court finds the holding in *Central Site* inapposite.

Though the facts of *Lane Construction* are more on point, the Court finds its holding is also inapposite. First, the court did not hold that the ITCP would not change behavior or fail to make employees materially safer. The key holdings in *Lane* were: (1) the Secretary did not establish Lane failed to comply with the specific subsections of the ANSI standard governing back-up hazards; (2) the Secretary failed to establish Lane's existing safety program was inadequate; and (3) the Secretary failed to prove an ITCP would be an effective means of materially reducing the hazard. *The Lane Construction Corporation*, 26 BNA OSHC 2139. As previously discussed, Respondent did not have an ITCP at all, and Complainant showed Respondent's existing program

was inadequate to address the hazard. The more interesting ruling from *Lane* is (3), wherein the Court relied upon a Request For Information issued by OSHA in 2012. In the RFI, OSHA discusses ITCPs under the ANSI Standard A10.47, but ultimately states it "has no information on the effectiveness of this consensus standard." *See* Reinforced Concrete in Construction, and Preventing Backover Injuries and Fatalities (RFI), 77 Fed. Reg. 18973, 18982 (March 29, 2012). Based on this statement, the Judge Calhoun concluded Complainant failed to establish the effectiveness of an ITCP.

This Court finds there is one notable difference between the facts presented in this case and those presented in *Lane*: expert testimony. In her analysis of Respondent's safety program, Judge Calhoun noted the Secretary failed to introduce expert testimony. Although this discussion was not directly related to the question of effectiveness, the Court finds it implicates Judge Calhoun's finding that Complainant failed to prove ITCPs are an effective abatement measure. The RFI was issued in 2012, which was more than seven years ago. Thus, its usefulness as an assessment only holds water if Complainant fails to provide any additional evidence that ITCPs are effective at abating struck-by hazards. Unlike *Lane*, counsel for Complainant in this case introduced an experienced professional, who testified that the foregoing measures—task hazard analyses, ITCPs, close supervision of high-risk work, and truck-specific rules—are "well-recognized in the construction industry, and are typically used to protect employees from being injured, including being struck-by and run over by large trucks." (Tr. 427). His conclusions carry weight not only because he is a member of the ANSI committee responsible for promulgating such standards, but also based on his work for large contractors that perform this kind of work. These contractors, and those similarly situated, make recommendations to ANSI about what they deem effective at reducing worksite hazards, such as the one involved in this case. (Tr. 404–406, 444). Based on

his extensive experience, Shorter concluded an ITCP, coupled with adequate task hazard analyses, training and communication, and truck-specific rules, would be effective at materially reducing the hazard by designating areas for foot and vehicle traffic and minimizing the necessity for interaction between the two. *See Arcadian Corp.*, 20 BNA OSHC 2001 ("Feasible means of abatement are established if 'conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard."). The Court finds this testimony establishes the effectiveness of Complainant's proposed abatement.

Consistent with the foregoing, the Court credits Shorter's opinion over Grothe's as it relates to the questions of the sufficiency of Respondent's safety program and the feasibility of an ITCP as an abatement method. Shorter is a member of the ANSI committee responsible for promulgating standards governing the work of highway construction companies and has worked for multiple large-scale contractors that perform this type of work. Given this background, Shorter testified ITCPs are commonly used in the industry and are effective at preventing the type of incident that occurred in this case. (Tr. 426–27, 444–45). The Court was particularly persuaded by the thoroughness of Shorter's analysis, which included a discussion of pre-planning hazard analyses, communication, training, and follow-up inspections as key parts of a comprehensive safety program and how Respondent's safety program was deficient in those areas. (Ex. C-15). Although Respondent's expert, Grothe, also had an impressive background in safety and health, the Court finds his testimony was less persuasive and, thus, accords it less weight. There were points during Grothe's testimony where he agreed with many of Shorter's suggestions about the importance of communication, documenting hazard analyses, and providing training. (Tr. 598, 599–601, 608). He appeared to hedge against those conclusions, however, when he suggested it was not necessary to physically document ITCPs and hazard analyses insofar as "everyone is on the same page." (Tr.

582). The Court finds this curious because, in his experience, those types of safety documents were typically reduced to writing because it aids memory, assists in training, and provides a reference for proper communication. (Tr. 600–602). In concluding Respondent did not violate the general duty clause, Grothe placed significant emphasis on Respondent's undocumented "traffic pattern", for which there is no evidence of training supplied to Master or Aggregate employees, was only discussed between Cofell and Alm, and failed to account for the presence of pedestrian employees in areas where trucks were driven. (Tr. 613–616; Ex. R-19). For these reasons, and based on the analysis above, the Court credits Shorter's conclusion over Grothe's.

At bottom, neither Grothe nor Respondent undermined the feasibility of Complainant's proposed abatement methods. Instead, they sought to show how Respondent's existing scheme was sufficient and to point out minor imperfections in Complaint's proposed abatement. Complainant clearly illustrated the failures of Respondent's safety program, including the overly general nature of its rules and its failure to properly communicate those rules and hazards to *all* worksite occupants. Further, though some aspects of Complainant's abatement proposals are not perfect, such is not required to achieve compliance with the Act; rather, all that is required is a material reduction in recognized hazards. The Court finds Complainant's proposal achieves that end.

Accordingly, Citation 1, Item 1 shall be AFFIRMED as a violation of the Act.

f. The Citation is Properly Classified as Serious.

The Court finds the violation was serious within the meaning of section 17(k) of the Act. If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA 1044, 1047 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA 2072, 2077 (No. 88-523, 1993). As noted above in Section V.1.d, which is

incorporated by reference, the Court finds the hazard presented by Respondent's violation was likely to cause death or serious physical harm; indeed, such an injury did occur when A.A. was run over by the concrete truck. Therefore, Citation 1, Item 1 will be AFFIRMED as a serious violation of the Act.

2. Citation 2, Item 1

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Act, the Secretary 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 employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

> Complainant alleged a serious violation of the Act in Citation 2, Item 1 as follows:
>
> 29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his/her environment to control or eliminate any hazards or other exposure to illness or injury:
>
> a) On October 4th, 2017, and for time[s] prior for the employees exposed to struck by hazards from construction vehicles where non-English speaking employees have not been provided safety information in a manner that they can understand at a construction site in the vicinity of 19th Avenue & 45th Street in Fargo, North Dakota.

See Citation and Notification of Penalty at 7.

> The cited standard provides:
>
> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

29 C.F.R. § 1926.21(b)(2).

a. The Cited Standard Applies

The Commission has held that section 1926.21(b)(2) "requires instructions to employees on (1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." *Superior Custom Cabinet Co*., 18 BNA OSHC 1019, 1020 (No. 94-200, 1997), *aff'd without published opinion*, 158 F.3d 583 (5th Cir. 1998). However, section 1926.21(b)(2) does not require the safety instructions "be written as long as the safety rule is clearly and effectively communicated to employees." *Gem Indus., Inc*., 17 BNA 1861, n. 5 (No. 93-1122, 1996). There is no dispute the standard applies, as every employer is required to provide training in how to recognize and avoid hazards applicable to the work being undertaken.

b. Complainant Failed to Establish a Violation of the Standard

In *Secretary of Labor v. Bardav, Inc. dba Martha's Vineyard Mobile Home Park*, 24 BNA OSHC 2015 (No. 10-1055, 2014), the Commission stated it had not abandoned the usual four-part test for determining whether the Secretary had established a violation of 29 CFR 1926.21(b)(2). Under Commission precedent, the reasonable prudent employer test is, and has consistently been, used to determine whether an employer has failed to comply with the standard—that is, to access the adequacy of the content of the instructions at issue.

To prove a violation of a training standard, the Secretary "must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2122 (No. 96-0606, 2000). Respondent can rebut the allegation "by showing it has provided the type of training at issue . . . ." *Id.* at 2126 (*quoting AMSCO*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997), *aff'd*, 255 F.3d 133 (4th Cir. 2001)). When rebutted, "the burden shifts to the Secretary to show some deficiency in the training provided." *Id.*

The Court finds Complainant failed to establish Respondent violated the standard in the manner alleged. The basis for the citation was CSHO Damberger's determination that non-English speaking employees, such as A.A., were not provided adequate training because neither the formal training sessions nor the associated materials were provided in Spanish. (Tr. 137, 204). The evidence produced at trial, however, showed this was not correct. According to CSHO Damberger's testimony, as well as that of Hardy and Cofell, there were a couple of individuals who provided translations of the training seminars and materials to A.A. to ensure he understood. (Tr. 209, 303, 513). In fact, the evidence showed A.A. signed training sheets indicating he had received and understood the training provided. (Tr. 205). In support of this, A.A., through a translator, told CSHO Damberger, "Actually, I do not sign anything if I do not know what it is about. Also, I am not very, very stupid." (Tr. 206–207; Ex. C-22). Aside from the fact that an accident occurred, Complainant failed to provide any evidence Respondent failed to adequately communicate its policies to A.A. or any other non-English speaking employee.

At trial, and in its brief, Complainant attempted to expand the scope of the original citation to allege Respondent failed to adequately instruct all its employees in the recognition and avoidance of hazards present at the worksite. (Tr. 102). This modification is at odds with CSHO Damberger's original basis for the citation, the language of the citation itself, as well as subsequent disclosures made by Complainant in discovery. In response to Respondent's interrogatory requesting the basis for issuing Citation 2, Item 1, Complainant generally discussed Respondent's failure to provide instruction "in a manner and language that [all of their employees] could understand." (Ex. R-3 at 5). In fact, the entire response to the interrogatory, which spans two pages, reiterates Complainant's position that the basis for the violation was Respondent's failure to ensure its training and policies were provided in Spanish. This included: (1) pointing out that

only one signature document indicated the signing employee understood the information provided; (2) discussing that Frank Lopez, Respondent's concrete foreman, provided translation, but, as far as the safety manual is concerned, only translated "what is relevant for the crew's specific work tasks"; and (3) pointing out Respondent's failure to provide credentials or qualifications of Lopez or other individuals providing translations. (Ex. R-3 at 5–6). At the end of the response, Complainant included an additional paragraph stating Respondent's "failure to establish and enforce safe procedures" and "its failure to ensure that its employees received training and instructions in a language they could understand" indicate it violated the general duty clause. (Ex. R-3 at 6). At first glance, this statement seems to indicate the expansive scope Complainant now advocates; however, on further review, this particular portion of the response does two things: (1) reiterates that Citation 2, Item 1 is about a language barrier, and (2) attempts to connect the failure in Citation 2, Item 1 to the violation of the general duty clause in Citation 1, Item 1.

Although administrative pleadings are supposed to be liberally construed, there is a limit to how much leeway should be given. This is particularly the case when Complainant attempts to alter the "essential factual allegations" contained in the citation. *Compare A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995 (No. 92-1022, 1994) (holding amendment to complaint permissible where it *merely* added an alternative legal theory but did not alter the essential factual allegations contained in the citation) *with Roanoke Iron & Bridge Works, Inc.*, 5 BNA OSHC 1391 (denying amendment where Secretary alleged new facts required to prove a new legal theory). The language of Citation 2, Item 1 is explicit in terms of its coverage: "where *non-English speaking employees* have not been provided safety information in a manner that *they can understand*". *Citation and Notification of Penalty* at 7 (emphasis added). There is no plausible reading of this allegation that implicates all of Respondent's employees or the adequacy of Respondent's training

program. The Court's conclusion is bolstered by Complainant's responses to interrogatories, which Respondent utilized at trial to illustrate Complainant's attempt to expand the scope of its original allegation. (Ex. R-3). By doing so, Respondent showed it did not consent to trying the unpleaded issue of its failure to properly train all its employees. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128 (No. 80-5868, 1984) (finding parties did not consent to try unpleaded allegations) (citing Fed. R. Civ. P. 15(b)(2)). Amendments during and after trial are governed by FRCP 15(b). If a pleading is not amended by consent, the Court may permit an amendment even over an objection by the party against whom the evidence is offered "when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." Fed. R. Civ. P. 15(b)(1). Under the circumstances presented here, the Court finds the amendment proposed by Complainant will not aid in presenting the merits of its case, which are adequately addressed in Citation 1, Item 1. Further, the Court also finds Respondent would be prejudiced in its defense, which was premised entirely on the plain language of the Citation narrative.

Because Complainant failed to establish a violation of the standard as alleged, the Court VACATES Citation 2, Item 1.

V. Penalty

Under the Act, the Secretary has the authority to propose a penalty according to Section 17 of the Act. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441–42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). Ultimately, it is the province of the Commission to "assess all civil penalties provided in [Section

17]", which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995).

"Regarding penalty, the Act requires that "due consideration" be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). Rather, the Commission assigns the weight that is reasonable under the circumstances. *Eric K. Ho,* 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (Consol.), *aff'd sub nom.*, *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005). It is the Secretary's burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed. *Valdak Corp*., 17 BNA OSHC at 1138. "The gravity of the violation is the 'principal factor in a penalty determination. Assessing gravity involves considering: (1) the number of employees exposed to the hazard; (2) the duration of exposure; (3) whether any precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury. *See, e.g.*, *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished).

Complainant proposed a penalty of $11,641 for Respondent's violation of Citation 1, Item 1, because it determined the severity of the violation to be "high" and its probability of occurrence to be "greater". (Tr. 96). These conclusions were premised on the seriousness of the injury suffered by A.A. and by the fact that 100 loads of concrete were delivered to the site roughly once every six minutes, respectively. When coupled with the fact that extra tools, materials, and personal items were stored on the east end of the operation, which required employees to walk through the zone of danger, the Court finds each of the 15–16 employees laying concrete were exposed to the

hazard at least once a day. (Tr. 503). While Respondent had some policies governing the hazard, the Court finds they were overly general, only provided to employees, and failed to account for the actions of otherwise untrained external contractors. Ultimately, the Court generally agrees with Complainant's assessments related to gravity.

Regarding size, history, and good faith, which Complainant uses to apply reductions to its original proposed penalty, the Court finds such elements were adequately accounted for. Complainant provided a ten-percent discount for size, as Respondent has 163 employees. (Tr. 46). Complainant did not provide a discount for good faith due to the deficient nature of Respondent's safety program, including its failure to adequately identify and address known hazards or to facilitate communication between its own employees and the multiple drivers that entered onto the worksite. As to history, neither Complainant nor Respondent introduced evidence that would convince the Court to adjust the penalty upward or downward. The Court agrees with Complainant's assessments. Accordingly, a penalty of $11,641 shall be assessed.

ORDER

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

1. Citation 1, Item 1 is AFFIRMED as Serious, and a penalty of $11,641 is ASSESSED.
2. Citation 2, Item 1 is VACATED.

SO ORDERED

/s/_____
Patrick B. Augustine
Judge, OSHRC

Date: January 27, 2020
Denver, Colorado