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. KS ENERGY SERVICES, INC., Respondent.	OSHRC Docket No. 06-1416

APPEARANCES:

Elizabeth S. Goldberg, Attorney; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Jonathan Snare, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Charles B. Palmer, Esq. and Jason A. Kunschke, Esq.; Michael Best & Friedrich LLP, Waukesha, WI
For the Respondent

DECISION

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

In order to install an underground natural gas pipeline along a county road near Langes Corners, Wisconsin, KS Energy Services, Inc. ("KS Energy") created a temporary traffic control zone ("traffic control zone" or "zone") around its installation worksite and shared the zone with Dorner Stahl ("Dorner"), a construction company working along the same section of road. On May 25, 2006, in response to a complaint, Occupational Safety and Health Administration ("OSHA") Compliance Officer ("CO") Kelly Bubolz conducted an inspection of the worksite and the surrounding traffic control zone. As a result of the inspection, OSHA issued KS Energy a citation under the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-78, alleging a serious violation of 29 C.F.R. § 1926.200(g)(2), a "Signs, Signals, and Barricades"

standard which incorporates by reference a portion of the Federal Highway Administration Manual on Uniform Traffic Control Devices ("MUTCD" or "manual").[1] The citation, as amended, alleges that KS Energy failed to protect its employees exposed to vehicular traffic by not providing the "advance warning" to motorists required by section 6G.03 of the MUTCD.[2]

KS Energy contested the citation, and the case was heard by Administrative Law Judge Benjamin R. Loye pursuant to the Commission's procedures for Simplified Proceedings. 29 C.F.R. pt. 2200, subpt. M. At the close of the hearing, the judge granted the Secretary's request to amend the citation to conform to the facts in evidence, which changed the cited MUTCD provision from section 6G.02 to section 6G.03. The judge affirmed the amended citation, and assessed the proposed penalty of $875. For the following reasons, we affirm the judge.

ISSUES

At issue on review is a due process challenge by KS Energy based on its contention that the MUTCD, and therefore the cited OSHA standard, are unconstitutionally vague, and its contention that the Secretary's end-of-hearing amendment to the citation deprived it of fair notice. Also at issue is whether the judge erred in affirming a violation of § 1926.200(g)(2) based on his finding that KS Energy failed to comply with applicable requirements set forth in the MUTCD.

FINDINGS OF FACT

KS Energy and Dorner shared a single traffic control zone approximately a quarter-mile long that blocked the eastbound lane and shoulder of a county road subject to a fifty-five mile per hour speed limit. KS Energy placed signs and set up cones to direct traffic at the western end of the traffic control zone, and Dorner placed signs and set up pylons at the eastern end of the zone. Both companies used the entire length of the blocked-off eastbound lane and shoulder for

[1] The cited OSHA standard requires that "[a]ll traffic control signs or devices used for protection of construction workers shall conform to" Part VI of the December 2000 "Millennium Edition" of the MUTCD, which the standard "incorporate[s] by reference." 29 C.F.R. § 1926.200(g)(2).

[2] Section 6G.03 of the MUTCD provides:

> 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, shall supply information about highway conditions, and shall indicate how motor vehicle traffic can move through the temporary traffic control zone.

staging equipment, vehicles, and materials, which their employees routinely operated and accessed during the course of their work.

At the commencement of her inspection, CO Bubolz approached the traffic control zone by car from the western end, where she observed a "Utility Work Ahead" sign placed to the right of the eastbound lane, approximately 150 feet before reaching an arrow sign and cones routing eastbound traffic into the westbound lane. This re-routing moved westbound traffic onto the shoulder to the north, entirely closing off both the existing eastbound lane and its shoulder to traffic.

I. DUE PROCESS CHALLENGE

PRINCIPLES OF LAW

"A statute or regulation is considered unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments if it 'forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Ga.-Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005 (11th Cir. 1994) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). An employer is entitled to "fair notice" and "fair warning" of prohibited or required conduct and a "reasonably clear standard of culpability . . . ." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). Vagueness is determined on an "as-applied" basis "in the light of [the standard's] application to the facts of the case." *Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982).

With respect to the sufficiency of pleadings, due process requires that a cited employer "be given notice and an opportunity to respond." *Sierra Res. Inc. v. Herman*, 213 F.3d 989, 993 (7th Cir. 2000). If issues not raised by the pleadings are tried by the express or implied consent of the parties, those issues are treated as raised in the pleadings. Fed. R. Civ. P. 15(b); *see also* 29 U.S.C. § 661(g) (Federal Rules of Civil Procedure applicable to Commission proceedings unless Commission adopts different rule). "Such amendment of the pleadings as may be necessary to cause them to conform to the evidence . . . may be made upon motion by any party at any time, even after judgment . . . ." Fed. R. Civ. P. 15(b). "In assessing whether the pleadings should conform to the proof, the pivotal question is whether prejudice would result" because the failure to originally plead the issue disadvantaged the opposing party in presenting its case. *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 104-05 (2d Cir. 1996)

(citation omitted). In cases assigned to Simplified Proceedings, where pleadings are not required, the Commission applies the Federal Rules of Civil Procedure when considering whether a judge's ruling on a motion to amend a citation was an abuse of discretion. *Kokosing Constr. Co.*, 21 BNA OSHC 1629, 1631, 2005-06 CCH OSHD ¶ 32,838, p. 52,781 (No. 04-1665, 2006) (finding "nothing in the Commission's procedural rules or past precedent" suggests that federal rules concerning amendments change for cases using Simplified Proceedings), *enforced*, 232 F. App'x 510 (6th Cir. 2007) (unpublished).

ANALYSIS

A. VAGUENESS

KS Energy contends the MUTCD is vague with respect to "which warnings are required under the circumstances," and, therefore, the OSHA standard is deficient. In support of this contention, KS Energy notes that the MUTCD is "full of words such as 'should' and 'may,'" and its "language [is] peppered throughout" with non-mandatory provisions.[3] The judge rejected this argument as "completely without merit," finding that KS Energy's foreman, Chad Dallman, understood the requirements of the relevant MUTCD provision, having admitted it was the company's usual practice to "deploy three signs on either side of its traffic control zones."

KS Energy does not dispute that the cited OSHA standard clearly incorporates the mandatory provisions contained in Part VI of the MUTCD. *Ruhlin Co.*, 21 BNA OSHC 1779, 1784, 2005-06 CCH OSHD ¶ 32,876, p. 53,189 (No. 04-2049, 2006) (indicating that mandatory provisions of the MUTCD are incorporated as standards by § 1926.200(g)(2)). The MUTCD provision at issue here, section 6G.03, is specifically designated a "standard" and is, therefore, one of the mandatory provisions contained in Part VI. MUTCD, Introduction. Although KS Energy relies on other non-mandatory provisions of the MUTCD that are merely "advisory" to support its vagueness claim,[4] advisory provisions are not incorporated into the OSHA standard

[3] KS Energy also refers to the manual's length to support its vagueness claim. We note, however, that only a portion of the MUTCD is incorporated into the OSHA standard. In any event, we reject KS Energy's argument linking vagueness to regulation length as unpersuasive, given that the company cites no supporting legal authority for its claim.

[4] We reject KS Energy's claim that the Secretary should have cited it under MUTCD section 6G.05 or 6G.07, as these non-mandatory provisions are not incorporated into the OSHA standard and do not appear to address the particular working conditions at issue here.

and, therefore, provide no support for KS Energy's position.[5] *Id.*; *Ruhlin Co.*, 21 BNA OSHC at 1784, 2005-06 CCH OSHD at p. 53,189.

We also reject KS Energy's contention that it "cannot be expected to know how it should set up its traffic signs in a way that complies with the standard" because the term "advance warning" is not defined in the MUTCD. As discussed below, the evidence here establishes that at the western end of the traffic control zone, KS Energy provided one sign which conveyed only one of the three categories of warning information required by section 6G.03.

In these circumstances, we conclude that the wording of section 6G.03 provided KS Energy with sufficient notice of the types of information it must convey, and that this information must be positioned at least some distance prior to the work space. *Faultless*, 674 F.2d at 1185 (explaining that purported vagueness of a standard adjudged "in the light of [the standard's] application to the facts of the case"). Moreover, testimony from foreman Dallman establishes that KS Energy understood the cited provision's requirements as applied to its zone. Indeed, Dallman had received MUTCD training and he testified it was KS Energy's "standard practice" to place three signs on each end of a "coned area" and the crew otherwise complied with this practice during the course of the project. For these reasons, we reject KS Energy's vagueness challenge to § 1926.200(g)(2) and the incorporated MUTCD provision.

B. AMENDMENT OF THE CITATION

KS Energy contends it lacked notice that section 6G.03 "was the standard at issue until after the close of [the] evidence" and, therefore, it was denied due process when the judge granted the Secretary's end-of-hearing motion to amend the citation to conform to the evidence. Prior to this amendment, the citation referenced section 6G.02, a section that merely defines various work duration terms. According to the Secretary's counsel, the amendment to section 6G.03 was necessary to establish the cited condition was "intermediate-term stationary" or,

[5] Likewise, we reject KS Energy's reliance on the CO's testimony that the MUTCD prescribes no "one way" to provide "advance warning" as proof of the manual's vagueness. Contrary to KS Energy's contention that the CO's testimony demonstrates "the MUTCD does not offer clear guidance to an employer as to how it should set up and utilize traffic signs," this testimony simply explains the flexibility accorded employers to utilize devices best suited to the particular traffic control zone, as long as the three required categories of information set forth in section 6G.03 are properly conveyed.

alternatively, "short-term stationary."[6] During the colloquy with the judge regarding the amendment, KS Energy's counsel requested clarification as to which MUTCD section provided the basis for the citation, noting that the CO had relied on section 6G.03 in testifying about the violation. The Secretary's counsel explained that section 6G.03 was, in fact, the basis of the citation because it was "the implementation" of the requirement. In response, KS Energy's counsel stated that "[i]f we're just focused on [6]G.03, I'm fine with that." The judge then granted the Secretary's request to amend the citation.[7]

In these circumstances, we conclude the judge did not abuse his discretion in permitting the Secretary to amend the citation to conform to the evidence at the close of the hearing. KS Energy's consent to the amendment, both at the hearing and in a follow-up letter to the judge, obviates any due process infringement, and KS Energy has made no other specific claim of prejudice on review. *See, e.g.*, *Sw. Bell Tel. Co.*, 6 BNA OSHC 2130, 2131-32, 1978 CCH OSHD ¶ 23,187, p. 28,031 (No. 14761, 1978) (finding amendment proper when implied or express consent is established).[8] Accordingly, we reject KS Energy's due process challenge to the Secretary's end-of-hearing citation amendment.

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[6] Section 6G.02, the provision of the MUTCD replaced by the Secretary's amendment, defines "[i]ntermediate-term stationary" as "work that occupies a location more than one daylight period up to 3 days, or nighttime work lasting more than 1 hour" and "[s]hort-term stationary" as "daytime work that occupies a location for more than 1 hour, but less than 12 hours." MUTCD § 6G.02.

[7] Apparently in error, the Secretary's subsequent publication of this amendment in her post-hearing brief failed to change the applicable section of the MUTCD from section 6G.02 to section 6G.03. As neither party raised this oversight on review, we consider the citation as amended by the judge in granting the Secretary's amendment request at the hearing.

[8] Although KS Energy objects to the Secretary's reference in her brief on review to sections of the MUTCD other than 6G.02 and 6G.03, we find nothing impermissible in her reference to other provisions as guidance in interpreting the disputed terms in the cited provision, an approach that is consistent with Commission precedent. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1077, 1993-95 CCH OSHD ¶ 30,699, p. 42,603 (No. 90-2148, 1995) (stating that when interpreting disputed terms, Commission looks to "the provisions of the whole law, and to its object and policy"), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished); *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1108, 1993-95 CCH OSHD ¶ 30,048, p. 41,264 (No. 88-572, 1993) (explaining Commission construes "each part or section . . . in connection with every other part or section so as to produce a harmonious whole").

II. ALLEGED VIOLATION

PRINCIPLES OF LAW

To prove a violation of an OSHA standard, the Secretary "must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions." *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097, 1098, 2000 CCH OSHD ¶ 32,198, p. 48,746 (No. 98-1748, 2000), *aff'd*, 277 F.3d 1374 (5th Cir. 2001) (unpublished).

To prove employee exposure, the Secretary 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." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195, 2000 CCH OSHD ¶ 32,134, p. 48,417 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). Employees may be in the zone of danger "when they engage in activities in the course of their assigned working duties, their personal comfort while on the job, or their normal means of ingress and egress to their assigned workplaces." *Id.* The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶ 30,754, p. 42,729 (No. 91-2107, 1995).

The Secretary establishes the knowledge element of her case by showing "the cited employer knew, or with the exercise of reasonable diligence could have known, of the violative condition." *Kokosing Constr. Co.*, 21 BNA OSHC at 1631, 2005-06 CCH OSHD at p. 52,781. The Commission has held that "the conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge." *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871, 1993-95 CCH OSHD ¶ 31,207, p. 43,723 (No. 92-2596, 1996). Additionally, constructive knowledge may be found where a supervisory employee was in close proximity to a readily apparent violation. *Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1993-95 CCH OSHD ¶ 30,034, p. 41,184 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished).

ANALYSIS

The Secretary alleges KS Energy violated the cited OSHA standard because it failed to provide adequate "advance warning" of the work space. 29 C.F.R. § 1926.200(g)(2)

(incorporating MUTCD section 6G.03). The judge affirmed the violation, finding the evidence established the Secretary's allegation. On review, KS Energy argues the cited MUTCD provision was not applicable to the traffic control zone and, in any event, the Secretary did not prove noncompliance with its terms, employee exposure to the cited condition, or employer knowledge thereof.

A. APPLICABILITY

The advance warning prescribed by section 6G.03 of the MUTCD applies to a "work space" located "within the traveled way." The manual defines "work space" as "that portion of the highway closed to road users and set aside for workers, equipment, and material," and defines "traveled way" as "the portion of the roadway for the movement of vehicles, exclusive of the shoulders, berms, sidewalks and parking lanes." MUTCD §§ 1A.13(87), 6C.06.

KS Energy argues that its work space was limited to the off-road pipeline installation area and, therefore, its work space was not within the traveled way. We disagree. The CO's unrebutted testimony establishes that in addition to the off-road pipeline installation area, KS Energy employees worked inside the blocked-off eastbound traffic lane, as well as the shoulder, where they operated machinery, moved pipes, and where the company stored its equipment. Under these circumstances, we find KS Energy's "work space" included the blocked-off portion of the roadway and, therefore, the work space was located within the "traveled way."

By its terms, the cited MUTCD provision does not apply to work classified as "short-duration" or a "mobile operation[]." MUTCD § 6G.03. Although KS Energy contends its work on this project satisfies the criteria of these two exceptions, the evidence fails to substantiate its claim. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522, 1993-95 CCH OSHD ¶ 30,303, p. 41,761 (No. 90-2866, 1993) ("party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim"). The MUTCD defines "short duration" as "work that occupies a location up to 1 hour." MUTCD § 6G.02. Foreman Dallman testified that KS Energy could have completed its work in one day, which would clearly exceed the one-hour limit of "short duration" work. In fact, as Dallman explained, the crew spent at least three hours working at the installation location before the CO began her inspection and returned to work "[f]or the duration" of the next day. Moreover, there is no evidence that KS Energy's crew changed location or moved the traffic control zone during this time. Based on this testimony, we conclude KS Energy failed to establish that its work was of "short duration."

With respect to whether work is "mobile" under the MUTCD, the manual provides that such work "moves intermittently or continuously" and might "often involve frequent short stops." MUTCD § 6G.02. Again, the evidence shows that KS Energy's work remained stationary for two days—the day of the inspection and the next day. Although the CO testified that KS Energy's work space was "moving continuously down a road," she was describing the workers' movement within the stationary quarter-mile traffic control zone. Thus, we find KS Energy failed to establish that its work was "mobile." Accordingly, we conclude the cited MUTCD provision was applicable to the conditions in KS Energy's traffic control zone.

B. NONCOMPLIANCE

The cited MUTCD provision requires an employer to provide advance warning that conveys three categories of information: (1) "a general message that work is taking place," (2) "information about highway conditions," and (3) "how motor vehicle traffic can move through the temporary traffic control zone." MUTCD § 6G.03. The judge, in part, found KS Energy failed to comply with this provision because there was only one sign providing advance warning to eastbound motorists. On review, KS Energy argues it provided advance warning that complied with all requirements of section 6G.03 at the western end of the traffic control zone,

At the western end of the traffic control zone, KS Energy erected one sign warning of "Utility Work Ahead" approximately 150 feet in front of the traffic cones that directed eastbound traffic into the westbound lane. The CO acknowledged this sign conveyed "a general message that work is taking place," the first category of information required by section 6G.03.

Immediately after the beginning of the coned area in the blocked-off eastbound lane, KS Energy placed a straight-arrow sign pointing traffic to follow the cones to the left. Regardless of whether this sign satisfied the MUTCD's second requirement to supply information on highway conditions, it was not located in "advance" of the transition area as required by section 6G.03. *See, e.g.*, MUTCD § 6C.04 & fig. 6C-1 ("advance warning area" provides information about "upcoming work zone"); MUTCD § 6C.05 (advance warning area separate from the ensuing "transition area" where "road users are redirected out of their normal path"); MUTCD § 6F.15 (advance warning should be *well in advance of* roadway obstructions or closures); s*ee supra* note 8 and cases cited therein. In these circumstances, we find the arrow sign failed to satisfy the requirement to provide "advance warning" of the work space by supplying information about the highway conditions.

Finally, KS Energy contends the two sets of cones creating the lane shift properly conveyed the third category of required information, "how motor vehicle traffic can move through the temporary traffic control zone." Assuming *arguendo* that channelizing devices, such as cones, are permissible to convey the information required for advance warning, an issue we need not reach, we note the CO testified that the cones used here created an "immediate" transition into the oncoming traffic lane and motorists "went straight from one lane to another." KS Energy's work space began immediately at that point of transition and was contiguous to the lane shift created by the cones. Based on these facts, we find the cones failed to provide the required information in "advance" of the work space.[9] MUTCD § 6G.03. Accordingly, we find KS Energy failed to comply with the cited standard on the western end of the zone.[10]

C. EXPOSURE

The judge found KS Energy's employees "moved within the zone of danger to access their vehicles," demonstrating exposure. KS Energy argues the Secretary failed to offer any evidence showing its employees were in the danger zone. We disagree. The evidence shows that KS Energy's employees operated machinery and moved equipment throughout the blocked-off eastbound traffic lane. Although the CO testified that "the majority of [the employees'] time is spent by the shoulder where the excavations were," she observed KS Energy employees in the blocked-off traffic lane "mov[ing] pipe back and forth." With respect to the potential for injury, the CO testified that "[w]ithout having that [fifty-five mile per hour speed limit] reduced and proper signage to let the drivers know what they're doing, they could very well drive straight through that site before they realized they were on top of it." Indeed, Dallman admitted to the CO that he wished law enforcement had been present to force approaching traffic to slow down. Based on this evidence, we find the record establishes KS Energy's employees were exposed to the violative condition.

[9] We need not address KS Energy's contention that the cones also provided information about highway conditions, the second category of required information, as any message conveyed was not provided in "advance."

[10] Because we find that KS Energy failed to comply with the cited provision on the western end of the traffic control zone, we need not reach the parties' arguments as to the company's compliance on the eastern end of the zone.

D. KNOWLEDGE

The judge found KS Energy "knew[] or could have known of the cited violation" because foreman Dallman "knew there should have been additional signs." Dallman was continuously present at the quarter-mile-long traffic control zone while his crew worked for approximately three hours in the zone of danger. Dallman contended that he did not inspect or observe the signage at either end of the traffic control zone, but he knew about the tapering of the cones at the transition. In addition, the signage was in plain view and remained unchanged throughout this time. In these circumstances, we find that with the exercise of reasonable diligence, Dallman could have known of the violative condition. Accordingly, we find that constructive knowledge is established. *Kokosing Constr. Co.*, 21 BNA OSHC at 1631, 2005-06 CCH OSHD at p. 52,781 (imputing foreman's constructive knowledge to employer).

CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude the cited OSHA standard and MUTCD provision provided constitutionally sufficient notice to KS Energy of its compliance obligations, and the judge properly granted the Secretary's end-of-hearing request to amend the citation. We also conclude the cited standard was applicable to the alleged conditions of the traffic control zone and the Secretary established a serious violation of § 1926.200(g)(2).[11]

ORDER

We affirm Citation 1, Item 1, and assess a penalty of $875.

SO ORDERED.

/s/_____
Horace A. Thompson III
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

Dated: July 14, 2008

[11] On review, the parties do not dispute the serious characterization of the violation or the penalty amount assessed by the judge.

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SECRETARY OF LABOR, Complainant, v. KS ENERGY SERVICES, INC. Respondent.	OSHRC DOCKET NO. 06-1416

APPEARANCES:

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For the Respondent:
Charles B. Palmer, Esq, Michael Best & Friedrich LLP, Attorneys at Law, Waukesha, Wisconsin

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, KS Energy Services, Inc. (KS), was installing gas pipeline along County Road R in Lang's Corner, Wisconsin. Because construction is in a class of activity which as a whole affects interstate commerce it is established that KS is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983).

On May 25, 2006, in response to a complaint, the Occupational Safety and Health Administration (OSHA) initiated an inspection of the KS worksite (Tr. 12). As a result of its inspection, OSHA issued a citation alleging violation of §1926.200(g)(2) of the construction standards. By filing a timely notice of contest KS brought this proceeding before the Occupational Safety and Health Review Commission (Commission). Pursuant to a telephone conference, the citation was amended prior to the hearing. The hearing was held in Milwaukee, Wisconsin on February 9, 2007. The complaint was amended again at hearing to conform to the evidence (Tr. 139, 142, 154). The amended complaint appears in Complainant's

post-trial brief. Briefs have been submitted on the issues, as amended, and this matter is ready for disposition.

Alleged Violation of §1926.200(g)(2)

Serious Citation 1, item 1 alleges:

29 CFR 1926.200(g)(2): All traffic control signs or devices used for the protection of construction workers did not conform to Part VI of the Manual for Uniform Traffic Control Devices, Millennium Edition, December 2000 edition.

a) At the site, 13 employees working on Cty. Rd. R, exposed to vehicular traffic, where signs (i.e., Road Work Ahead, Shoulder Work, Lane Closed Ahead, Road Narrows) were not used for the duration of work (long term stationary: i.e., work that occupies a location more than three days, *or in the alternative, intermediate-term stationary; i.e., work that occupies a location more than one daylight period up to three days or nighttime work lasting more than one hour; or short-term stationary; i.e., daytime work that occupies a location for more than one hour, but less than twelve hours)* and for the speed limit 55 mph. (sign spacing: initial warning 500 ft. shifting taper 330 ft., and buffer zone 335 ft.).

Among other feasible and acceptable abatement to correct this hazard include the proper placement of advance warning signage and channelizing devices. These abatement methods are discussed in detail in Part VI, Chapter G, Section 6G-02 of the MUTCD 2000 Millennium Edition.

Section 1926.200(g)(2) provides:

> All traffic control signs or devices used for protection of construction workers shall conform to Part VI of the Manual of Uniform Traffic Control Devices (AMUTCD). . . or Part VI of the Manual on Uniform Traffic Control Devices, Millennium Edition, December 2000....

FACTS

On May 25, 2006, Compliance Officer Kelly Bubolz responded to a written complaint about an alleged traffic hazard on County Road R (Tr. 12). After leaving the interstate and traveling approximately fourteen miles east on County Road R, Bubolz reached a construction site (Tr. 13-14). Two employers, KS and Dorner Stahl were working in the area (Tr. 38). A single sign "Utility Work Ahead" was placed on the right hand side of the road approximately 150 feet before the site (Tr. 14; Exh. C-i). A north/south road intersected County Road R between the sign and worksite. Immediately west of the intersection a cone zone had been established, routing eastbound traffic into the westbound lane and westbound traffic onto the shoulder to the north (Tr. 18; Exh. C-2). Half way through the worksite, eastbound, directional arrows and a "35 MPH" sign had been placed (Tr. 21, 25; Exh. C-6, C-7, C-8, C-b). Bubolz drove through the site and continued east on County Road R for approximately two miles before turning around and approaching the site in the westbound lane (Tr. 15). There was no signage in advance of the

construction site alerting west bound traffic of the upcoming lane reconfiguration (Tr. 15). At the east entrance to the worksite, a number of signs, including "Road Narrows", "Road Construction", "35 MPH" and two directional arrows competed for motorists' attention (Tr. 19; Exh. C-4, C-l1). Bubholz photographed excavators and a dump truck working close to, and coming out into the reconfigured eastbound lane midway through the worksite (Tr. 20, 34; Exh. *C-5,* C-9; C-12, C-13). There was no flagger to stop oncoming traffic (Tr. 26). The speed limit on County Road R is *55* MPH (Tr. 13).

Discussion. In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative condition, and (d) the employer's actual or constructive knowledge of the violation *(i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.,* 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994).

The relevant portion of the Manual on Uniform Traffic Control Devices (MUTCD), is Section 6G.03, which states:

> The choice of temporary control needed for a temporary traffic control zone depends on where the work is located. As a general rule, the closer the work is to road users, the greater the number of temporary traffic control devices that are needed. Procedures are described later in this Chapter for establishing temporary traffic control zones...
>
> * * *
>
> **Standard:**
>
> **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, shall supply information about highway conditions, and shall indicate how motor vehicle traffic can move through the temporary traffic control zone**.

Applicability/Exposure. The standard is applicable. CO Bubolz testified that employees in the closed traffic lane (Tr. 35-36, 38) were exposed to oncoming traffic (Tr. 39, 72). According to Bubolz, drivers traveling *55* mph could drive straight into the closed lane before they realized they were upon it (Tr. 39). In its brief Respondent argues KS was not actually laying pipe within the "traveled way," and had blocked off the street merely to make room to park its vehicles.

In order to show employee exposure, the Secretary must prove that employees have been, are, or will be in zones of danger during either their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Kaspar Electroplating Corp.,* 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶30,303, p. 38,886, (No. 86-0274, 1993). Clearly, accessing its trucks and excavators is crucial to the completion of

KS' pipe-laying operation. Because KS employees necessarily moved within the zone of danger to access their vehicles, KS had a work space within the traveled way (Tr. 72; Exh. C-3), making the cited standard applicable.

Noncompliance. It is clear on this record that there were was only a single sign "Utility Work Ahead" on east bound County Road R providing advance warning. There were *no* signs providing motorists with information about the condition of the highway or indicating how motor vehicle traffic can move through the temporary traffic control zone. The signage on west bound County Road R provided information, but was not placed so as to give advance warning of conditions to motorists.

Tables 6H- 1, 6H-3 and diagram TA-li of the MUTCD suggest that, at a minimum, three signs with 500 feet between each sign be placed in advance of a construction zone on a two-lane rural road with a speed limit of *55* mph (Tr. *55-56,* 62-68). Respondent argues that 6H-i, 6H-3 and TA-il are optional, rather than mandatory guidelines, and that KS was improperly cited for failing to comply with their requirements. KS was *not* cited for violating 6H-1, 6H-3 and TA-il, however. The citation alleges a violation of 29 CFR §1926.200(g)(2), which incorporates the *mandatory* requirements contained in 6G.03. The record clearly shows that KS failed to comply with 6G.03, in that there were no signs providing *advance* warning of road conditions on west bound County Road R. Only one sign providing advance warning was in place on east bound County Road R, and it was inadequate to meet 6G.03's requirements because it did not provide information about highway conditions or instruct motorists how to move through the temporary traffic control. KS failed to comply with the terms of the cited standard.

Knowledge. Chad Dallman, the project foreman for KS, knew there should have been additional signs, and testified that it was the company's standard practice to put up three signs on each end of their coned area (Tr. 123, 132). Dallman did not set the signs up personally, however, and could not refute the testimony or photographic evidence establishing that the east bound signage was missing (Tr. 123, 133). Dallman further testified that he believed the other contractor on the site, Dorner Stahl, was handling the signage on west bound County Road R (Tr. 134). However, he knew that KS was responsible for both ends of the traffic control zone and stated he would have placed the appropriate signage on the west bound approach if he had realized it was not in place (Tr. 134). Dallman admitted that he did not inspect that side of the traffic control zone (Tr. 134). KS knew, or could have known of the cited violation.

Vagueness. KS argues that the cited standard is unconstitutionally vague in that it fails to provide employers with fair warning of what conduct is required to avoid citation, citing *Diamond Roofing v. OSHRC,* 528 F.2d 645 (5th Cir. 1976). KS maintains that the mere size of the MUTCD, which contains

over 1000 pages, including numerous optional suggestions for complying with its mandatory provisions, makes it impossible for employers to identify whether warning signage has been properly deployed.

Respondent's argument is completely without merit. KS' project foreman knew what signage was required, and claimed it was the usual practice of KS to deploy three signs on either end of its traffic control zones, just as is required by the MUTCD. Dallman could not explain why the east bound signs were not in place on the date of the OSHA inspection, however, it is clear from his testimony that he knew the signage should have been there. The west bound violative conditions resulted directly from Dallman's failure to adequately inspect the worksite and ensure Dorner Stahl's signage conformed with KS's normal practice. In light of Dallman's testimony, KS may not argue that it could not have known what the MUTCD required.

Due Process. Respondent's due process argument must also fail. The amendments to the citation (in italics above) pertain only to the length of work being performed, and do not affect the requirements of §6G.03. That section applies whenever the employer's work space is within the traveled way, except for short-duration and mobile operations. KS does not claim to have been engaged in short-duration or mobile operations. The same required advance warning signs are mandated for long, intermediate and short term work. That the Secretary originally overstated the amount of time the traffic control zone was in place did not prejudice Respondent in the preparation of its defense.[1]

The Secretary has proved the cited violation.

Penalty. A penalty of $875.00 was proposed for this item. KS has approximately 100 employees, thirteen of whom were present at the Lang's Corner worksite (Tr. 71). The gravity of this violation is high, because the employees were working within an inadequately signed traffic control area on a heavily traveled road with a speed limit of 55 mph (Tr. 70, 72-73). Though employees were in the roadway only intermittently, had one been struck by a vehicle moving 55 mph, death or serious injury could have resulted. The proposed penalty takes into account KS' good history and safety program (Tr. 71). The proposed penalty will be assessed.

Findings of Fact

All findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

[1] This matter was assigned to simplified proceedings. No discovery took place prior to hearing; the amendment of the citation was allowed merely to conform to the evidence.

Conclusions of Law

1. KS Energy Services, Inc. is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. KS Energy Services, Inc., at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.
3. At the time and place alleged, KS Energy Services, Inc. was in violation of 29 CFR §1926.200(g)(2), and said violation was serious within the meaning of the Act.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.200(g)(2) is AFFIRMED, and the proposed penalty of $875.00 is ASSESSED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: May 3, 2007