UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant, v. PEPPER CONTRACTING SERVICES, INC., Respondent.	OSHRC DOCKET No. **14-0714**

DECISION AND ORDER

COUNSEL: M. Patricia Smith, Solicitor of Labor, Stanley Keen, Regional Solicitor, Rolesia Dancy, Acting Counsel, Brooke Werner McEckron, Senior Trial Attorney, for Complainant.
John M Hament, III, Esquire, and Anne Willis Chapman, Esquire, Kunkel, Miller & Hament, for Respondent.
JUDGE: John B. Gatto.

I. INTRODUCTION

Pepper Contracting Services, Inc. (Pepper) was the general contractor on a highway construction project in Tampa, Florida, when an employee was struck by a dump truck and died eighteen days later. The fatality was reported to the Department of Labor's Occupational Safety and Health Administration (OSHA), and after an investigation was conducted, OSHA issued[1] Pepper a citation for violating the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 651–678. The citation alleged a "serious" violation[2] of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), commonly known as the "general duty clause," and proposed a penalty of $5,670.00.

After Pepper timely contested the citation, the Secretary filed a formal complaint with the Commission charging Pepper with violating the Act and seeking an order affirming the citation

[1] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSAH. *See* 65 Fed.Reg. 50018 (2000). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). Here, the citation and proposed penalty were issued by the Tampa, Florida OSHA Area Director.

[2] *See* Part III, Subpart H for the definition of a "serious" violation classification.

and proposed penalty. The parties stipulated the Commission has jurisdiction of this action under section 10(c) of the Act, 29 U.S.C. § 659(c). (Compl. ¶ I; Answer ¶ I.) A two-day bench trial was held in Clearwater, Florida. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, 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.[3] For the reasons indicated *infra*, the Court concludes all the elements necessary to prove a serious violation of the general duty clause have been satisfactorily established. Accordingly, the citation is **AFFIRMED** and Pepper is assessed a civil penalty of $5,670.00.

II. BACKGROUND

Pepper is a general construction contractor located in Tampa with 230 employees, and on October 29, 2013, the day of the accident, Pepper was supervising a highway construction "milling" operation on Dale Mabry Highway. (Sec'y Post-Trial Br. p. 2; Pepper Post-Trial Br., p. 3.) In a highway milling operation, a milling machine is used to remove the existing asphalt layer to whatever depth is needed, referred to as "milling," before new road base and asphalt layers are added. (Tr. 277-278, 279, 298-99, 445.) As the milling machine moves forward removing the existing asphalt layer, a chute extending forward from the front of the machine deposits the milling debris via a conveyor into a dump truck in front of the machine. After the dump truck is filled, it leaves to dump the milled material and another dump truck backs into place in front of the milling machine. The dump trucks continuously cycle through filling and then dumping their loads, allowing the milling operation to proceed uninterrupted. (Tr. 55, 190, 193, 251, 332-33.)

The milling operation consisted of Pepper's crew, and two subcontractors hired by Pepper: Turtle Southeast Milling (Turtle), which performed the milling work, and Jason's Hauling, which provided dump trucks for the debris removal. (Tr. 41, 280-81.) Terry Infinger, Pepper's foreman on the project, had a crew consisting of the decedent, a laborer, and Robert Bacon, Jr., the finish load operator. (Tr. 280-81, 283.) Turtle operated the milling machine with a two-person crew, David Hollister, the foreman or crew chief, and Robert Karre, the milling machine operator. (Tr. 338, 343-44.) Jason's Hauling sent four dump truck drivers to the

[3] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

worksite, including Yonnesly Carmenate who is employed by Omar Mendoza, an independent contractor, and Alejandro Perez, an independent contractor driving the truck that struck the decedent. (Tr. 188-190, 191, 208-09, 213.) [4]

Since Infinger assessed the project sites they were planning to mill, he knew there were two separate worksites, one on each side of Tampa Bay Boulevard, and knew after they crossed Tampa Bay Boulevard, there would be a Verizon vertical pole marker in the direct path of the milling operation. (Tr. 288-89.) On the day of the accident, the project began working on the east side of Dale Mabry (on the south side Tampa Bay Boulevard). (Tr. 277-278, 279, 298-99, 444, 445.) The milling operation began around 7:30 a.m. and continued throughout the morning, milling "very slow, ten feet per minute." (Tr. 192, 375.) Later that morning, the milling convoy crossed Tampa Bay Boulevard to continue the operation. (Tr. 298, 320-21, 345.)

During the project sometime the week before the accident, the milling machine clipped a telecommunications box overgrown with grass. (Tr. 289, 360.) Although the box had a vertical pole marker, the marker indicated the cable was buried. (Tr. 289.) Therefore, immediately after crossing Tampa Bay Boulevard, Infinger and the decedent walked to the Verizon pole marker "to make sure there wasn't a box there" but found another partially covered telecommunications box. (Tr. 291, 360.) In order to better expose the box, Infinger used a shovel and began uncovering the front edge and then instructed the decedent to finish the job. (Tr. 288-90; R-11.) Bacon testified "the milling hadn't [restarted] -- we had just crossed over Tampa Bay Boulevard with the machines and everything." (Tr. 321.) "[Infinger] went up to the milling operator to show him exactly where to start, where the line would be. And while they were setting up, [Infinger] took [the decedent] up to locate a box. I walked in behind [Infinger] to show [the decedent] what to do. When I seen that -- what they were looking for right there, I turned around and went back to where my position is." (Tr. 321.)

Since Infinger anticipated the task would take no longer than a few minutes, he left the decedent at the box and walked back to the milling machine. (*Id.*) After Hollister finished setting up the milling machine, the milling operation began again, and a few minutes later the accident occurred. (Tr. 321, 326, 346.) Due to the injuries that he suffered when he was hit by Perez's

[4] Infinger has been in the road construction business for forty years. (Tr. 277.) Perez has been driving dump trucks for eighteen years and Carmenate has been driving dump trucks for three years. (Tr. 189, 209.) The decedent had eleven years of experience in road crew construction. (Tr. 448.)

dump truck, the decedent died at the hospital on November 16, 2013. There were no witnesses to the accident. However, there is no dispute the decedent was assigned to work near the Verizon pole that served as a marker for the telecommunications box, that he was wearing both a hard hat and a high-visibility vest, and that he was in this location at the time he was struck by Perez's dump truck. (Tr. 108, 289, 215-17, 301-02, 312; *see also* J-3). Immediately after the accident and again at the hospital before he passed away, the decedent stated Perez was speeding. (Tr. 145, Ex. J-l. p. 4.)

At that time of the accident, Carmenate's truck was directly in front of the milling machine receiving the milling debris deposit and Perez's truck was waiting its turn directly in front of Carmenate. (Tr. 126-27, 128; *see also* Ex. J-9; J-1l.) Since the milling operation had restarted and was slowly moving forward, at some point Carmenate's truck and Perez's truck were so close Carmenate honked his horn to move Perez forward. (Tr. 195, 353.) Hollister testified if Perez "was paying attention, then he would know that [Carmenate's] truck is right up on [his] backside and he should be moving forward. We shouldn't have to stop the milling machine, signal our driver to have him honk his air horn to make this truck move up." (Tr. 358-59.) "And these guys get in a rush, when they start honking their horns, they're like, oh, it's time to move, so we shoot up 20, 30 feet." (Tr. 359.)

Perez asserts after crossing Tampa Bay Boulevard he did not see the Verizon post where the decedent was working. "I see the post when it's still over there and I'm coming through Tampa Bay [Boulevard]. I see the post, it's far away and there's no person near it. Once I stop, the milling machine stops, the first truck stops, I stop, then at that point I am too close to the post to be able to see it." (Tr. 238.) Nonetheless, Perez also admitted "When you're doing your job, you're not looking at the Verizon post, you're not paying attention to that. There's many other things to look at. I have to watch the machine." (Tr. 239.)

The "at that point" reference by Perez is the point where the milling operation stopped to setup again after crossing Tampa Bay Boulevard. However, none of the other witnesses corroborate Perez's assertion that "at that point" he was too close to the post to be able to see the Verizon post (and the decedent). Significantly, Fred Sumner, Pepper's Safety Manager, arrived at the worksite a few minutes after the accident and personally measured the distance from the point the milling operation had stopped after crossing Tampa Bay Boulevard to the

telecommunications box, a distance of 210 feet.[5] (Tr. 418-19; *see also* R-1.) Hollister testified while he was setting up the milling machine again, he could see the decedent "down the road there unshoveling stuff." (Tr. 321, 360, 361, 363.) Bacon also testified "it was a ways to walk up there to where [Infinger] had showed [the decedent] where the box was" and there "was no truck close to [Infinger and the decedent] whatsoever." (Tr. 324, 331.) Likewise, Infinger testified when he and the decedent walked up to the telecommunications box, "I didn't see anyone that close to me." (Tr. 314.)

Hollister testified after they restarted the milling operation, they went "maybe ten, fifteen feet. So a couple minutes. We had just set in, so I mean we didn't go very far before we had to stop and idle down." (Tr. 346; *see also* Ex. J-11.) Bacon also testified "They probably couldn't have gone no more than ten or fifteen feet. I mean it was almost immediate." (Tr. 321.) Likewise, Karre also testified they went "about ten feet" before the accident occurred. (Tr. 373.) Therefore, Perez's assertion "at that point," the point where the milling operation stopped to setup again after crossing Tampa Bay Boulevard, he was "too close to the post to be able to see it," or the decedent, is not supported by the credible evidence in this case.

Perez also maintains after the milling operation started up again, Carmenate's truck "started to get filled up…they honked the horn for me to move. And as soon as I had moved maybe two or three feet I [felt] a weird movement. And that's when the accident happens." (Tr. 215.) Again, none of the other witnesses corroborate Perez's assertion he drove only two or three feet before striking the decedent. Infinger, who has been in the road construction business for forty years, testified he would never have placed himself or the decedent a few feet from the bumper of a running dump truck. (Tr. 277, 280, 290.) Likewise, Bacon testified "My boss wouldn't have never put anybody in front of anything like that. It wouldn't have happened, period. Wouldn't have happened." (Tr. 336.) When Bacon was asked if he walked in front of a truck that was close by when he followed Infinger and the decedent to the box, Bacon emphatically responded, "No. That would be insane. No . . . . you could either get hit – you'd get fired, too. Or you'd get reprimanded. You just don't do things like that. It's insane to do stuff like that." (Tr. 325.)

[5] Sumner has sixteen years of experience in safety management positions. (Tr. 382.)

The milling machine was thirty-two feet long and each dump truck was thirty feet long. There was approximately ten feet separating the receiving dump truck and the milling machine and approximately ten feet separating the two dump trucks. (Tr. 150, 151.) Therefore, the milling caravan was approximately 112 feet long. After the milling operation restarted it went only ten to fifteen feet before the accident occurred. The Court finds the preponderance of evidence therefore shows Perez drove between 83 and 88 feet before he struck the decedent (the 210 feet distance from the point where the milling operation stopped after crossing Tampa Bay Boulevard to where the telecommunications box was located, minus the caravan length of approximately 112 feet and the ten to fifteen feet the milling operation had milled after it restarted before the accident occurred). Thus, the Court finds Perez's assertion he moved only two or three feet is not supported by the credible evidence in this case.

The fatality was reported to OSHA on its hotline on November 16, 2013, and a fatality investigation was initiated on November 18, 2013, by Gerardo Ortiz, an OSHA Compliance Safety and Health Officer, which he completed on November 22, 2013. (Tr. 40; *see also* J-1.) By that time, twenty days had passed since the accident occurred and the scene had changed. Nonetheless, Ortiz visited the accident scene on November 19, 2013. (Tr. 39.) Ortiz interviewed Infinger, Bacon, Carmenate, Perez, Hollister, and Karre. (Tr. 55-57; *see also* J-9, J-10, J-11, J-12.) Ortiz also obtained a copy of the police report. (Tr. 57-58.) After completing the investigation, Ortiz determined that Pepper failed to keep employees who worked in the internal work zone free from the hazard of being struck by vehicles and equipment because it did not have sufficient internal traffic control procedures in place. (Tr. 68; see also J-1, J-2.) Therefore, Ortiz recommended the issuance of the citation. (*Id.*)

Ortiz admitted prior to the accident he had no experience investigating this type of milling operation. (Tr. 95.) Although Ortiz admitted the distance from where the milling operation restarted to the telecommunications box was important to help verify Perez's version of events, he admitted he did not know that distance. (Tr. 122, 123.) Nonetheless, relying at least in part on Perez's statement that he drove only two or three feet before striking the decedent, Ortiz concluded the decedent was in Perez's blind spot[6] when the accident occurred and that

[6] Although the citation refers to the "blind area," both parties also referred to it as the "blind spot" at trial and in post-trial briefs. For ease of reference, the Court refers to it as the "blind spot."

Perez was not speeding. (Tr. 147.) However, as indicated *supra*, Perez's assertion he drove only two or three feet before striking the decedent is not supported by the credible evidence and any reliance by Ortiz on Perez's statement was misplaced.

Further, in concluding the decedent was in Perez's blind spot, Ortiz also relied in part on a Tampa Police Department report, which stated the decedent was 5'2", even though Ortiz admitted the investigation of the Tampa Police Department "was essentially flawed," and even though the medical examiner's report concluded the decedent was 5'10". (Tr. 58, 117, 119.) Likewise, Ortiz admitted the truck used in his blind spot analysis was not the same model truck driven by Perez and admitted if he used the actual measurements from Perez's truck, he did not know if it would have made a significant difference in his calculations. (Tr. 183; *see also* Ex. J-5.) Ortiz also admitted his blind spot calculations were erroneously made in feet since the chart he relied on was a metric chart. (Tr. 174, 185.) Thus, Ortiz admitted he could have been mistaken in his reliance on this erroneous information in concluding the decedent was in Perez's blind spot and admitted his analysis was not accurate. (Tr. 119, 186.) Ortiz also admitted it was possible that Perez was not looking when he struck the decedent. (Tr. 165.)

The Court finds Ortiz's conclusions that the decedent was in Perez's blind spot and that Perez was not speeding are not supported by the credible evidence in this case. Rather, the preponderance of evidence shows since the decedent was wearing a high-visibility vest, was 83 and 88 feet from Perez, was in plain sight, and was not in Perez's blind spot. The preponderance of evidence also shows Perez was not paying attention, as evidenced by Carmenate's need to honk his horn to move him forward, and that Perez sped forward striking and fatally injuring the decedent.

Credibility

The Court closely observed the demeanor of each witness and assessed their credibility, considering their motivation, and whether the testimony was plausible, consistent and corroborated. The Court found Bacon, Carmenate, Hollister, Infinger, Karre, and Sumner to be candid and responsive to the questions posed to them and found them to be credible, straightforward and trustworthy witnesses. Their testimony was plausible, consistent with each other, and corroborated with the evidence in the record. Nothing in their demeanor suggested any bias or lack of veracity on their part. The Court credits their testimony and gives their

testimony considerable weight.

In contrast, the Court found Perez's demeanor to be cavalier, evasive and defensive and his testimony that he drove only two or three feet self-serving. Rather than having been motivated by a desire to be truthful, Perez's testimony appeared to be a deliberate and calculated attempt to shift the blame for his careless driving by alleging the decedent was in his blind spot. Perez's testimony that he drove only two or three feet and that the decedent was in his blind spot was not plausible and was not corroborated by any credible evidence. The Court does not credit Perez's testimony and accords it no weight, except the one admission he made, "When you're doing your job, you're not looking at the Verizon post, you're not paying attention to that. There's many other things to look at. I have to watch the machine." This statement, which was consistent with the corroborated evidence in the record, is given considerable weight.

The Court also found Ortiz's testimony related to the purported blind spot was not plausible or consistent or corroborated by the credible evidence in the record. Therefore, the Court does not credit Ortiz's testimony that the decedent was in Perez's blind spot or that Perez was not speeding and accords that portion of his testimony no weight. However, as to Ortiz's testimony, *infra*, regarding the existence of a struck-by hazard and the inadequacy of Pepper's internal traffic control plan, his testimony was plausible, consistent, and corroborated with the credible evidence in the record. Therefore, the Court credits that portion of Ortiz's testimony and gives it considerable weight.

III. ANALYSIS

Congress declared the Act was intended "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 654(b). To implement its statutory purpose, "Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards. 29 U.S.C. § 654(a)(1). They also have a 'special duty' to comply with all mandatory health and safety standards. *Id.* at § 654(a)(2)." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013).[7]

[7] The alleged violation occurred in Tampa, Florida, which is where Pepper also has its principal office. (Compl. ¶III 3; Answer ¶3.) Therefore, both parties may appeal the final order in this case to the Eleventh Circuit Court of Appeals, and in addition, Pepper may also appeal to the District of Columbia Circuit. *See* 29 U.S.C. § 660(a) & (b).

However, courts have consistently held that mandatory health and safety standards promulgated by the Secretary under the special duty clause are the preferred enforcement mechanism and the general duty clause serves only as an enforcement tool of last resort, as a "catchall provision" to cover dangerous conditions of employment not specifically covered by existing health and safety standards. *See e.g., Roberts Sand Co., LLLP v. Sec'y of Labor*, 568 F. App'x 758, 759 (11th Cir. 2014) (unpublished)[8] (the Secretary "can only issue general duty clause citations where [he] has not promulgated a regulation covering a particular situation at an employer's worksite"). In the present case, there is no applicable special duty clause standard governing the cited struck-by hazard. Therefore, the Secretary properly charged Pepper under the general duty clause.

Under the general duty clause, each employer must "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). In *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980), the Supreme Court held, "[a]s the legislative history of this provision reflects,[9] it 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*, 445 U.S. at 13.

"To establish a violation of the general duty clause, the Secretary must prove that (1) the employer failed to render its work place free of a hazard; (2) the hazard was "recognized"; and (3) the hazard caused or was likely to cause death or serious physical harm. [Citation omitted.] Moreover, (4) the hazard must be preventable." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 320-21 (5th Cir. 1979).[10] *Accord Roberts Sand*, 568 F. App'x 758 at 759 (*citing Waldon*

The Eleventh Circuit has held that the Commission and its judges "are bound to follow the law of the circuit to which the case would most likely be appealed." *ComTran*, 722 F.3d at 1307. *See also Quinlan Enterprises*, 24 BNA OSHC 1154, 1155 (No. 12-1698, 2013) (*citing Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000)) (stating that Commission generally applies precedent of circuit to which case will likely be appealed "even though it may differ from the Commission's precedent"). Therefore, in deciding this case, since it is likely to be appealed to the Eleventh Circuit, the Court applies the precedent of the Eleventh Circuit.

[8] *See* Eleventh Circuit Rule 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.").

[9] See S.Rep. 9–10, Leg.Hist. 149–150; H.R.Rep. 21–22, Leg.Hist. 851–852.

[10] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995. The Eleventh Circuit has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent. *Bonner v. City*

Healthcare Ctr., 16 BNA OSHC 1052, 1060 (No. 89–2804, 1993); N*ational Realty and Construction Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1265 (1973). The Court concludes the Secretary has satisfactorily established all four elements.

A. Existence of a Hazard

The Secretary's citation asserts Pepper committed a serious violation of the general duty clause "in that employees were exposed to the hazard of being struck by vehicular traffic inside a work zone." (Compl. Ex. A.) The Secretary unfortunately heightens the factual dispute with his choice of additional language in the citation's alleged violation description, which goes further and declares: "The box was in the blind area of the operator of a dump truck which proceeded to move forward, striking the employee." (*Id.*) Both parties spent much of their time at trial and in their post-trial briefs offering differing theories attempting to establish or dispute the existence of the blind spot. And Pepper argues in its post-trial brief the "recognized hazard" upon which the citation is based is the placement of the decedent in the "blind spot" of Perez's truck. (Pepper Post-Trial Br., p. 13.) The Court does not agree with Pepper.

The parties' blind spot theories miss the point and "unnecessarily complicate an issue that is readily resolved by the record." *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015). Because the Act "is designed to encourage abatement of hazardous conditions themselves [ ] rather than to fix blame after the fact for a particular injury, a citation is supported by evidence which shows the preventability of the Generic hazard, if not [the] particular instance." *Champlin Petroleum Co. v. Occupational Safety & Health Review Comm'n*, 593 F.2d 637, 642 (5th Cir. 1979); *accord National Realty*, 489 F.2d at 1266. Indeed, the purpose of the Act is to prevent the first injury, *Mineral Industries & Heavy Constr. Co. v. Occupational Safety & Health Review Comm'n*, 639 F.2d 1289, 1294 (5th Cir. 1981), and a finding of noncompliance is not predicated on the accuracy of a post-hoc accident analysis. *Concrete Constr. Corp.*, 4 BNA OSHC 1133, 1135 (No. 2490, 1976).

It is also well settled "that administrative pleadings are to be liberally construed," which is "particularly true for citations issued under the Act, which are drafted by non-legal personnel

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of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981). This body of precedent is binding unless and until overruled by the Eleventh Circuit en banc. *Id.* Further, the decisions of the continuing Fifth Circuit's Administrative Unit B are also binding on the Eleventh Circuit, while Unit A decisions are merely persuasive. *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377 (11th Cir. 2006).

who are required to act with dispatch. To inflexibly hold the Secretary to a narrow construction of the language of a citation would unduly cripple enforcement of the Act." *General Dynamics Land Systems Div. Inc.*, 15 BNA OSHC 1275, 1281 (No. 83-1293, 1991) (*citing Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170 (D.C. Cir. 1984) (enforcement of the Act would be crippled if the Secretary were inflexibly held to a narrow construction of citations issued by his inspectors). The purpose of the Federal Rules of Civil Procedure, which apply to Commission proceedings by virtue of section 12(g) of the Act, 29 U.S.C. § 661(f), "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *United States v. Hougham*, 364 U.S. 310, 317 (1960) (*quoting Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

Thus, the blind spot is a red herring. It does not matter whether a blind spot existed since Pepper was charged with violating the general duty clause for "exposing employees to the hazard of being struck by vehicular traffic inside a work zone." Significantly, in the parties' "Agreed Prehearing Statement" outlining their respective positions, neither party identified a blind spot as one of the stipulated "contested issues and facts" but rather, stipulated the dispute was whether "there was an activity or condition at [Pepper's] worksite that constituted a hazard to employees."[11] The stipulated dispute was fully litigated at trial. Although Pepper repeatedly attempted on cross-examination to extract an admission from Ortiz that there was no hazard if the purported blind spot did not exist, Ortiz steadfastly and repeatedly disagreed.

For example, when Ortiz was asked on cross examination if it was correct that without the blind spot, "there was no hazard and there wouldn't have been a case today," he replied, "The hazard is still there." (Tr. 131-32.) When Pepper asserted if the decedent was in plain view, there was no hazard, Ortiz again replied, "I disagree. I still think there would be a hazard." (Tr. 140.) "The hazard remains because [the decedent] was in the path of the machinery and the machine operator had not been notified of the presence and the milling would have been, should

[11] In the parties "Agreed Prehearing Statement," the Secretary enumerated seven contested issues and facts in this case, which included "Whether there was an activity or condition at Respondent's worksite that constituted a hazard to employees are as follows." (Agreed Prehearing Statement, § B, p. 5, ¶ 1.) In addition to the issues of fact and law identified by the Secretary, Pepper identified twelve additional issues and facts, none of which included a blind spot. (Agreed Prehearing Statement, § B, pp. 5-6, ¶¶ 1-12.)

have been, told to stop." (Tr. 141.) When Pepper asserted Ortiz had "no other evidence of any other hazards being created," other than "the blind spot scenario," Ortiz again disagreed, "There's a struck by hazard." (Tr. 169.)

In view of the unimportance of adhering to strict rules of pleading under the Federal Rules generally and especially in administrative proceedings, and having in mind the particular course of these proceedings, the Court finds that the citation described the alleged struck-by hazard with an accuracy sufficient to enable Pepper to fully litigate the stipulated dispute. Thus, the Court has no doubt that Pepper was put on notice as to the nature of the Secretary's complaint. As indicated *supra*, there is no dispute that the decedent was assigned to work near the Verizon pole that served as a marker for the telecommunications box, which was in the path of the milling operation. This in and of itself presented the potential for harm. *Georgia Electric*, 595 F.2d at 321. The struck-by hazard was a preventable consequence of a work operation over which Pepper can reasonably be expected to exercise control. Therefore, the Secretary has established the existence of a struck-by hazard.

B. Recognized Hazard

"[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). A "recognized hazard" is a condition that is "known to be hazardous." *Georgia Electric*, 595 F.2d at 321 (citation omitted). "This element can be established by proving that the employer had actual knowledge that a condition is hazardous." *Id.* (citation omitted). A "recognized hazard" may also "be shown by proving that the condition is generally known to be hazardous in the industry." *Ed Taylor*, 938 F.2d at 1272 (citation omitted).

Employer Knowledge

Pepper's Health and Safety Policy clearly recognizes a struck-by hazard since it states "[if] there are any questions as to visibility, or when working close to people on the ground, the operator should get a signal from someone standing on the ground with good visibility before proceeding to move." (Ex. J-13, § 8.12, p. 93.) Pepper's Safety Policy also mandates personnel "should never approach a piece of construction equipment without the operators' acknowledgment and until the operator stops work, and yields to the employee." (*Id.*) Further,

Pepper's Safety Policy indicates personnel should maintain "visual contact with the operator when in close proximity to the equipment." (*Id.*) In addition, each morning Infinger conducts a "Take 5" safety meeting with the Pepper crew where they "generally discuss who's working with us and what's happening." (Tr. 284.) "We deal with trucks on a daily basis pretty much and we deal with traffic on a daily basis and equipment. So basically those are my three points of focus." (*Id.*) Thus, the Secretary has established Pepper's recognition of a struck-by hazard.

Industry Recognition

The Commission has held industry standards and guidelines, such as those published by the American National Standards Institute (ANSI), are evidence of industry recognition. *Kokosing Constr. Co., Inc.,* 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996); *Cargill, Inc.*, 10 BNA OSHC 1398, 1402 (No. 78–5707, 1982). The citation references the relevant national consensus standard, ANSI A10.47 (2009), the standard on Work Zone Safety for Highway Construction, which "covers workers engaged in construction, utility work, maintenance, or repair activities on any area of a highway." (Ex. J-4, § 1.1.) Under this industry standard, "if workers are exposed to traffic or work vehicles/equipment, one or more methods to ensure that they are protected or have adequate warning of approaching traffic or equipment shall be used." (Ex. J-4, § 6.1.1) Thus, the Secretary has also established industry recognition of a struck-by hazard.

C. Causing or Likely to Cause Death or Serious Physical Harm

Although Pepper made much of the lack of struck-by injuries occurring from vehicles moving forward rather than from backing up, and that according to Pepper, the ANSI standard is "virtually 98% drafted in terms of backing up, not going forward (Tr. 164), that argument is immaterial to the finding of a hazard. The Commission does not require there be a significant risk of the hazard coming to fruition, "only that if the hazardous event occurs, it would create a 'significant risk' to employees." *Waldon*, 16 BNA OSHC at 1060. Thus, the Commission has made clear "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 harm." *Waldon*, 16 BNA OSHC at 1063.

There is no dispute that being struck by a dump truck is likely to cause death or serious bodily harm. Further, the death of the decedent constitutes at least *prima facie* evidence that the

struck-by 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). Thus, the Secretary has met his burden of proving the struck-by hazard was likely to cause death or serious injury.

D. Knowledge

In the Eleventh Circuit, "the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program[.]"*ComTran*, 722 F.3d at 1308.[12] As indicated *supra*, Pepper knew the telecommunications box was in the direct path of the milling operation *before* it recommenced the milling operation but failed to implement a safety plan that prevented the restart up of the milling operation while the decedent was in the path of that milling convoy. Pepper had ample opportunity to ensure the operation did not restart until *after* the telecommunication box was uncovered and the decedent was out of the direct path of the milling convoy. Further, even though Pepper's safety policy requires subcontractors to adhere to Pepper's safety policy and requires subcontractors to "coordinate their efforts with Pepper project Management" (Ex. J-13, § 5.9, p. 67), there is no evidence Pepper provided the dump truck drivers or the milling machine operator with a copy of its safety policy[13] and Pepper did not include them in its daily "Take 5" safety meetings. Therefore, the Secretary has established knowledge based upon Pepper's failure to implement an adequate safety program.[14]

E. Feasible Means to Eliminate or Materially Reduce the Hazard

"It has been long-established that OSHA does not impose absolute (or strict) liability on employers for harmful workplace conditions; instead, it focuses liability where harm can, in fact, be prevented." *ComTran*, 722 F.3d at 1306. While courts have emphasized the importance of proper instruction and adequate supervision in safety-related matters, "they have consistently

[12] The Secretary can also prove employer knowledge by showing "that a supervisor had either actual or constructive knowledge of the violation," which "is generally imputed to the employer." *ComTran*, 722 F.3d at 1307-08. "An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct." *Id.* at 1308. "An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have." *Id.*

[13] By way of example, Perez testified Pepper did not provide him with any documents when he arrived for work and was not provided with instructions on maximizing the separation of workers on foot from his dump truck. (Tr. 214.)

[14] While the Secretary asserts he also established actual and constructive knowledge, (Sec'y Post-Trial Br., p. 22), since the Court concludes he established knowledge based upon Pepper's failure to implement an adequate safety program, the Court declines to address these alternative bases for establishing knowledge.

refused to require measures beyond those which are reasonable and feasible." *Id. See* also *Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 564, 569 (5th Cir.1976) (discussing cases). Therefore, it is the Secretary's burden to show that "demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred." *Champlin*, 593 F.2d at 640 (citation omitted).

In the citation, the Secretary suggests an abatement method to correct the cited struck-by hazard was the development of "internal traffic control plans for inside the work zones to address conflicts between workers and work vehicles/equipment and to maximize the separation of vehicles and workers on foot." Pepper argues the Secretary's suggested abatement method was not feasible. (Pepper Post-Trial Br., p. 21.) The Court does not agree. The Supreme Court has defined "feasibility" as "'capable of being done, executed, or effected." *ATMI*, 452 U.S. 490, 508–09 (1981) (*quoting* Webster's Third New International Dictionary 831 (1976)). The Eleventh Circuit has indicated this means "both technologically and economically." *Am. Fed'n of Labor & Cong. of Indus. Organizations v. Occupational Safety & Health Admin.*, 965 F.2d 962, 980 (11th Cir. 1992). *See also National Cottonseed Prods. Ass'n v. Brock*, 825 F.2d 482, 487 (D.C.Cir.1987), *cert. denied*, 485 U.S. 1020 (1988).

Thus, under the general duty clause, the Commission has held "an employer is not required to adopt measures that would threaten its economic viability*." Waldon*, 16 BNA OSHC at 1052; *see also National Realty*, 489 F.2d at 1266 n. 37 (if adoption of the precaution would clearly threaten the economic viability of the employer, the Secretary should propose the precaution by way of promulgated regulations, subject to advance industry comment, rather than through adventurous enforcement of the general duty clause). Here, Pepper has not argued and there is no evidence to suggest the Secretary's first proposed abatement method was not technologically and economically feasible. The Court concludes Pepper could have easily adopted and absorbed the costs of the Secretary's first proposed abatement measure with "no threat to either its economic viability or the company's long-term profitability and industry competitiveness." *Waldon*, 16 BNA OSHC at 1063.

Pepper argues the Secretary "never proved that [it] did not have a proper traffic control plan, as required to support the citation." (*Id.*) The Court does not agree with Pepper. Ortiz

testified that during the course of his investigation he asked whether Pepper had an internal traffic control plan, and was given several answers but Pepper never indicated it had an internal traffic control plan. Instead, "they rely on this Take 5 meeting." (Tr. 67-68.) Thus, Ortiz testified an internal traffic control plan "was absent from the safety management process that Pepper Contracting had." (Tr. 78.) His testimony was corroborated by Sumner, who admitted that in lieu of having a written internal traffic control program, "we manage -- pre-manage the hazards in our work zones . . . traffic and others." (Tr. 397.)

Further, the relevant national consensus standard referenced in the citation, ANSI A10.47, requires employers to develop traffic control plans "for inside their work zones to minimize backups and other conflicts between workers and work vehicles/equipment and to maximize the separation of vehicles and workers on foot." (Ex. J-4, § 6.3). Under this industry standard, the traffic control plan is required to "be communicated to all workers on the site and all vehicles entering the site." (*Id.* § 6.3.1.) It also requires the onsite supervisor or safety person to "modify the plan as the work proceeds and as changes in the work site operations or environment dictate" and requires that all workers and drivers "be notified of changes to the plan as they are implemented." (*Id.* § 6.3.2.) Ortiz testified that the internal traffic control plan "should have provisions to communicate the hazards to the contractors and involve them in their safety discussions." (Tr. 89.) Although Pepper asserts it has written traffic control plans relevant to the entire project,[15] it admits it did not have a separate internal traffic control program *specific to the worksite*, even though Pepper's own safety policy mandates that site-specific safety plans are required for all field projects "to establish requirements for protecting the health and safety of personnel while conducting activities at a site." (Tr. 397, 411; Ex. J-13, § 8.30, p. 103.)

"To show that a proposed abatement measure will materially reduce a hazard, the Secretary must submit evidence proving, as a threshold matter, that the methods undertaken by the employer to address the alleged hazard were inadequate." *US Postal Service,* 21 BNA OSHC 1767 (No. 04-0316, 2006). Despite Pepper's own safety policy requirements, the Court finds the Secretary has established the methods actually undertaken by Pepper to address the cited struck-by hazard were inadequate. Even though Infinger assessed the sites they were planning to mill

[15] Pepper's purported written traffic control plans are also not in evidence since Pepper withdrew its proffer at trial. (Tr. 410, 411, 413.)

and knew there was a Verizon vertical pole marker directly in the path of the milling operation, Pepper failed to implement a safety plan to prevent the startup of the milling operation while workers were in the path of the convoy. Likewise, even though Pepper's safety policy requires subcontractors to adhere to its safety policy and requires subcontractors to "coordinate their efforts" with Pepper, there is no evidence Pepper provide subcontractors with a copy of its safety policy. Further, it is clear Pepper excludes them from its daily "Take 5" safety meetings.

According to Ortiz, the exclusion of the dump truck drivers and the milling machine operator from participating in the "Take 5" safety meeting is "a reflection of the absence of understanding of basic hazard control inside of a work zone. If a hazard [ ] is created by these vehicles in the work zone that Pepper controls, they should be an integral part of the discussion about safety– before the beginning of the job– and included along with safety efforts of the company … it's evidence [of] the flaw [in] the policies and procedures and it's an organizational weakness that this ANSI standard is trying to address and to incorporate into a safety program so that that situation does not remain any further." (Tr. 16-67.) The Court agrees with Ortiz.

The Court finds the decedent's exposure to the struck-by hazard would not have occurred if Pepper had simply implemented a safety plan that *prevented* the restart up of the milling operation while the decedent was in the path of the convoy. Since Infinger assessed the sites they were planning to mill, Pepper knew the telecommunications box was in the direct path of the milling operation *before* it recommenced the milling operation and had ample opportunity to ensure the operation did not restart until the decedent was out of the direct path of the milling convoy. Thus, with the exercise of "reasonable diligence," Pepper could have not only materially reduced the risk of the struck-by hazard, but could have avoided it completely. Therefore, the Court finds the Secretary's proposed abatement method was a feasible and acceptable abatement method to correct the struck-by hazard both technologically and economically.[16]

[16] The Secretary also proposed a second method of abatement, to "assign a spotter to communicate between workers on foot and equipment operators to clear paths before equipment is moved." However, since the Secretary is only required to set forth one feasible means of abatement, and the Court finds *supra*, he did so with his first proposed abatement method, it is not necessary for the Court to address the feasibility of the Secretary's second proposed abatement method.

F. Employee Misconduct Defense

The "law provides a complete defense[,] commonly referred to as an affirmative defense," *United States v. Mintmire*, 507 F.3d 1273, 1293 (11th Cir. 2007), if the violation was a result of unpreventable or unforeseeable employee misconduct. Thus, if "the Secretary makes out [his] prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *ComTran*, 722 F.3d at 1308. However, to reach safe harbor, an employer must demonstrate that it "(1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered." *Id.* Sustaining this burden requires more than pious platitudes, "the employer must establish that it took all feasible steps to prevent the [accident]." *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1602 (No. 95-0489, 2001) (citation omitted).

Although Pepper raised this affirmative defense in its answer, it never asserted that any of *its* employees violated an established work rule. Instead, Pepper asserts Perez, a subcontractor, engaged in misconduct and it "was his failure to pay attention . . . that caused the accident." (Pepper Post-Trial, Br. P. 22.) Since neither parties briefed the applicability of this defense to a subcontractor, assuming arguendo without deciding, that an employer may raise an affirmative defense of unpreventable or unforeseeable employee involving a subcontractor rather than its own employee, the Court nonetheless, concludes Pepper has not carried its burden of proof as to the first two elements.

Pepper did not prove it created a work rule to prevent the violation since, as indicated *supra*, it did not have a safety plan to prevent the startup of the milling operation while workers were in the path of the convoy. Even assuming arguendo it had such a work rule, Pepper did not prove it adequately communicated the work rule. Rather, the evidence shows Pepper did *not* communicate its safety policy to the dump truck drivers and the milling machine operator and did not include them in its "Take 5" safety meetings, even though they were required to follow Pepper's safety policy. Therefore, Pepper failed to establish the affirmative defense of unpreventable or unforeseeable employee misconduct.

G. Isolated Occurrence Defense

Although not expressly discussed by Pepper in its post-trial brief, Pepper identified as an issue in the parties' "Agreed Prehearing Statement" whether "the underlying incident giving rise to the instant citation was unpreventable, unanticipated and isolated." (Agreed Prehearing Statement, p. 6, § B, ¶ 3) Therefore, the Court also briefly addresses the "isolated occurrence" affirmative defense. In order to prevail in this defense, an employer must demonstrate that "all feasible steps were taken to avoid the occurrence of the hazard[.]" *H.B. Zachry Co. v. Occupational Safety & Health Review Comm'n*, 638 F.2d 812, 818. (5th Cir. Unit A Mar. 1981). "This includes the training of employees as to the dangers and the supervision of the work site." *Id.* The employer must also show "the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule of which departure the employer had neither actual nor constructive knowledge." *Id.*

As a condition precedent to establishing an isolated occurrence defense, Pepper must first prove it had a "uniformly and effectively communicated and enforced work rule" to address the cited struck-by hazard. As indicated *supra*, Pepper did not. Therefore, Pepper failed to demonstrate that "all feasible steps were taken to avoid the occurrence of the struck-by hazard. Further, Infinger also admitted he had "occasionally" observed unsafe driving habits with the dump truck drivers working on his projects. (Tr. 285.) Therefore, Pepper also failed to establish it did not have actual or constructive knowledge of the purported departure. Thus, Pepper has not established an isolated occurrence defense.

H. Classification

Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§ 666(a), (b), (c). Here, the Secretary classified the violation as "serious." A "serious" violation is defined in the statute; the other two degrees are not. A "serious" violation is one that carries a substantial probability that death or serious physical harm could result unless the employer did not, and could not with the exercise of "reasonable diligence," know of the presence of the violation. 29 U.S.C. § 666(k).

The Commission has concluded a hazard "is likely to cause serious physical harm if the likely consequences of employee exposure would be serious physical harm." *Morrison-Knudson*

Co./Yonkers Contracting Co., 16 BNA OSHC 1105, 1124 (No. 88-572, 1993). Here, there is no dispute death or serious physical harm would be the likely consequence of employee exposure to a struck-by hazard from a dump truck. The evidence supporting the finding that the hazard was likely to cause death or serious bodily harm also supports the similar requirement of the Act that there be a "substantial probability" that death or serious physical harm could result from the questioned condition. *Georgia Electric*, 595 F.2d at 322. Therefore, the Secretary has established the struck-by hazard was likely to cause death or serious bodily harm and there was a "substantial probability" that death or serious physical harm could result from the questioned condition.

Nonetheless, Pepper "cannot be found guilty of a 'serious' violation unless it did not, and could not 'with the exercise of reasonable diligence,' know of the presence of the violation." *Getty Oil Co. v. Occupational Safety & Health Review Comm'n*, 530 F.2d 1143, 1145 (5th Cir. 1976). However, "an employer's inability to establish the adequacy of the safety instructions to his employee shows a failure to exercise reasonable diligence." *H.B. Zachry*, 638 F.2d at 819. Here, since Pepper failed to establish the adequacy of its safety program, it shows a failure to exercise reasonable diligence." Therefore, the Court concludes the Secretary properly classified the violation as serious.

IV. PENALTY DETERMINATION

"Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission must give 'due consideration' to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations." *Revoli Constr.*, 19 BNA OSHC at 1682. "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (citations omitted).

Pepper is subject to a civil penalty of up to $7,000.00 for the serious violation. 29 U.S.C. §666(b). The Secretary proposed a $5,670.00 penalty based upon the gravity of the violation and after giving Pepper credit for its size, and lack of history of violations. The Court "consider[s] the amount of the Secretary's penalty de novo." *ComTran*, 722 F.3d at 1307. The Court agrees

with the Secretary's proposed reduction in the penalty amount for Pepper's lack of history of violations and for its size.

"The *gravity* of a particular violation can range from *de minimis,* where there is very low potential for injury or occupational illness, to severe, where death or serious physical injury would be likely." *Nacirema*, 1 BNA OSHC at 1002. "In evaluating the gravity of the violation, the Commission considers the number of employees exposed, the duration of exposure, the precautions taken against injury, and the degree of probability that an injury would occur." *Gunite Corp.*, 20 BNA OSHC 1983, 1990 (Nos. 98-1986, 98-1987, 2004). *See also J.A. Jones*, 15 BNA OSHC at 2214; *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 (No. 76-2644, 1981). Applying the gravity factors, given the fatality, the gravity of the violation was high.

There is no evidence the Secretary gave a credit for good faith. "[T]he Commission focuses on a number of factors relating to the employer's actions, 'including the employer's safety and health program and its commitment to assuring safe and healthful working conditions[,]' in determining whether an employer's overall efforts to comply with the OSH Act and minimize any harm from the violations merit a penalty reduction." *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209 (No. 12-0379, 2013) (*citing Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001)). *Accord Nacirema*, 1 BNA OSHC at 1002; *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2119 (No. 07-1578, 2012). Here, the Court concludes Pepper's approach to safety does not show good faith.

Pepper failed to implement a safety plan to prevent the startup of the milling operation while workers were in the path of the milling operation, which led to the death of Pepper's employee. Pepper also did not communicate its safety plan to all workers onsite, including the subcontracting dump truck drivers and milling machine operator. Pepper failed to include its dump truck drivers and the milling machine operator, in its "Take 5" safety meetings, even though the subcontractors were required to adhere Pepper's safety policy. Moreover, Pepper admitted that it did not provide safety instructions or training to the truck drivers and milling machine operator at the worksite. *See Capform*, 19 BNA OSHC at 1378 (finding a reduction for good faith inappropriate when instructions were insufficient). These failures demonstrate a lack of good faith. Therefore, a penalty reduction for good faith is not warranted. *See Elliot*, 23 BNA

OSHC at 2119 (concluding that "significant failings" with respect to employee safety negated a penalty reduction for good faith).

As indicated *supra*, had Pepper not failed to exercise "reasonable diligence," it could have not only materially reduced the risk of the struck-by hazard, but could have avoided it completely, simply by implementing a safety plan to prevent the startup of the milling operation while workers were in the path of the milling convoy. Thus, the struck-by hazard was a preventable consequence of a work operation over which Pepper can reasonably be expected to exercise control. Therefore, having considered Pepper's size, history of violations, good faith, and the gravity of the violation, the Court finds the Secretary's proposed penalty of $5,670.00 is appropriate. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT the citation is **AFFIRMED** and Pepper is assessed and directed to pay to the Secretary a civil penalty of $5,670.00.[17]

SO ORDERED THIS 2nd day of **November, 2015**.

/s/
JOHN B. GATTO, Judge

[17] *See* section 17(l) of the Act, which mandates that civil penalties owed under this Act "shall be paid to the Secretary for deposit into the Treasury of the United States[.]" 29 U.S.C. §666(l).