United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. Williams Brothers Construction Co., Inc., Respondent.	OSHRC Docket No.: **22-0503**

Appearances:

Remy B. Smith, Esq. (At Trial & On Brief), Feliz Marquez, Esq. (At Trial), Lindsay A. Wofford, Esq. (Post-Trial)
Office of the Solicitor, U.S. Department of Labor, Dallas, TX
For Complainant

Emily Linn, Esq. & Steven R. McCown, Esq.
Littler Mendelson, P.C., Austin & Dallas, TX
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

On the evening of October 29, 2021, Respondent, Williams Brothers Construction Co., Inc. ("Williams Brothers") was preparing to open new traffic lanes as part of a massive, multi-year construction project involving the intersection of Interstate 69 ("I-69")[1] and Interstate 610 ("I-610") in southwest Houston. (Exhs. C-2, at DOL000026 to 27; C-14; Tr. 39, 49-50, 307, 359-60, 391). To accomplish this, Williams Brothers needed to close off an approximately two-to-three-mile stretch of I-69 for its crews to remove several temporary concrete barriers, which had been placed to block off public traffic during construction. (Exh. C-2, at DOL 000026 & 27; C-12, C-

[1] The stretch of I-69 implicated by the events in this case is apparently coextensive with U.S. Highway 59, and so attorneys and witnesses sometimes referred to it as "59" at the hearing. (*E.g.*, Tr. 80, 212, 248, 358; *see also* Exh. R-17 (map of jobsite with highways labeled as "69" and "59")). For the sake of clarity, the Court will refer to this stretch of highway only as "I-69" throughout the remainder of this decision.

21; Tr. 86, 126-27, 247, 268, 359-60). After the concrete barriers were removed, a subcontractor, Professional Traffic Control ("PTC"), needed to remove existing road stripes and reflector buttons and "re-stripe" the lanes with painted road signals to guide traffic when the lanes were eventually opened to the public. (Exh. C-2, at DOL000028; Tr. 49-50, 214-15, 247, 307, 358, 361, 385, 390).

Williams Brothers began closing off a portion of the highway in the early evening, approximately 9 p.m., and had largely completed this task by around 10:30 p.m. (Exh. C-2, at DOL000026 & 27; Tr. 422). Once the stretch of highway was closed off, the concrete barriers were removed, and PTC began re-striping a portion of the highway. (Exh. C-2, at DOL000028; Tr. 49-50, 214-15, 307, 358, 361, 385, 390). On that same stretch of highway, near the "gore" point of I-610 North and South, a Williams Brothers employee was cleaning up garbage and debris, which had been left behind when the concrete barriers were removed. (Exhs. C-2, at DOL000028; C-8, at 1, 4, 5, 6; C-8A, R-21, at 05:37; Tr. 44-46, 248-52, 358-59, 366, 387-88; *see also* Tr. 322 (explaining a "gore" point is the triangle-shaped portion of a highway where it splits into connectors, exit ramps, etc.)). At some point after midnight on October 30, 2021, a vehicle entered the enclosure and struck three employees, two PTC employees and the Williams Brothers employee who had been cleaning up debris. (Exhs. C-2, at DOL000029; C-7; R-21, at 05:19; Tr. 56-57, 366-67, 386-88). The Williams Brothers employee suffered hip and rib fractures, among other injuries. (Exhs. C-1, at 1; C-2, at DOL000026 & 29; C-7, at 2; Tr. 57, 148-49, 286).

The incident was reported to the United States Occupational Safety and Health Administration ("OSHA"), which, on the following Tuesday, sent a Compliance Safety and Health Officer ("CSHO") to investigate. (Exh. C-2, at DOL000025; Tr. 134-36). Because the lane closure had ended Sunday evening, the "worksite" created by the enclosure no longer existed. So, in lieu of a physical inspection of the worksite, the CSHO met with supervisors and safety personnel at Williams Brothers' home office. (Exh. C-2, at DOL000033; Tr. 137-38).

Following his interviews of Williams Brothers employees, supervisors, and safety personnel, as well as a review of Williams Brothers' safety programs and materials, the CSHO concluded Williams Brothers had violated Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.* ("the Act"), commonly referred to as the "General Duty Clause," by failing to protect its employees from struck-by hazards while engaged in highway construction work. (Tr. 138-39).

On the CSHO's recommendation, OSHA issued a one-item serious Citation to Williams

Brothers, alleging a violation of the General Duty Clause and proposing a penalty of $14,502.

Williams Brothers filed a timely Notice of Contest thereby bringing this matter before the Occupational Safety and Health Review Commission ("Commission") and this Court. The Court held a two-day hearing on this matter on May 31 to June 1, 2023, in Houston, Texas. The parties have filed post-hearing briefs.

For the reasons laid out in detail below, Citation 1, Item 1 is **VACATED**.

JURISDICTION AND COVERAGE

The parties agree Williams Brothers timely contested the Citation. (Jt. Prehr'g Statement ¶ D(4)). The parties further agree the Commission has jurisdiction over this action and Williams Brothers is a covered employer under the Act. (*Id.* at ¶¶ D(1) & (3)). Based on these stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and Williams Brothers is a covered employer under § 3(5) of the Act.

BACKGROUND

Williams Brothers Construction & the I-610 Project

Williams Brothers is a large employer in the highway construction industry, employing approximately 2,000 people. (Tr. 139). "At least 95%" of Williams Brothers' construction work consists of contracts with the Texas State Department of Transportation ("TxDOT") to construct and maintain highways in the State. (Tr. 337).

At some point prior to the events in this case, Williams Brothers contracted with TxDOT to be the general contractor on a massive, multi-year construction project involving the "I-610 W. Loop/I-69 SW Freeway Interchange" (the "I-610 Project") in southwest Houston. (Exh. C-14; Tr. 39). The approximately $259 million project focused on "improv[ing] safety and mobility while reducing congestion by widening the connector ramps to two lanes, increasing sight distances and vertical clearances, and providing remedies to eliminate weaving." (Exh. C-14). "The project also call[ed] for adding shoulders on the I-610 West Loop mainlane bridge over I-69 and adding detention ponds." (*Id.*). The five-year project was to be "phased" and required "night and weekend road closures." (*Id.*).

Williams Brothers' Traffic Control Plans, Policies, & Training

Traffic Control Plans

As a standard part of its standard contract with TxDOT, Williams Brothers agrees to follow certain policies and procedures regarding traffic control. (Exh. R-19, at 3 & 4; Tr. 38, 337, 371,

470-71). Foremost among these is the "Texas Manual on Uniform Traffic Control Devices" ("TxMUTCD" or "Texas Manual"), an over-900 page document developed and published by TxDOT which sets forth the "Texas standard for all traffic control devices installed on any street, highway, bikeway, or private road open to public travel," with "traffic control devices" defined as "all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, bikeway, or private road open to public travel …." *Tex. Manual on Uniform Traffic Control Devices* at I-1, TEX. DEP'T OF TRANSP. (rev. 2, eff. Oct. 2014) (available at https://ftp.txdot.gov/pub/txdot-info/trf/tmutcd/2011-rev-2/revision-2.pdf); *see also* (Tr. 446-48, 455-57; Exhs. R-12, at 2; R-19, at 3 & 4). Williams Brothers also agrees to follow Traffic Control Plan Standard Sheets, which are issued by TxDOT's Traffic Safety Division to modify and clarify the use of traffic control devices in various scenarios more generally described in the TxMUTCD. (Exhs. C-5, C-6, R-15, R-16; Tr. 274, 329-30, 337, 371, 446-48, 470-71).

The Court examines the legal nature of both the TxMUTCD and the TxDOT Standard Sheets more fully below in addressing Williams Brothers' preemption argument. As a practical matter, Chapter 6 of the TxMUTCD is devoted to "Temporary Traffic Control Zones," which include "an area of a highway where road user conditions are changed because of a work zone" and "an area of a highway with construction … activities." TxMUTCD § 6C.02 ¶¶ (1) & (2). Chapter 6 contains a multitude of "Standards," "Support," "Options," and "Guidance" on the use of various traffic control devices in temporary work zones, including, for example, flaggers, barricades, signage, and lighting. *See, e.g.*, TxMUTCD §§ 6E.01 (flaggers), GF.02 (other "traffic control devices" defined to include "all signs, signals, markings, and other devices used to regulate, warn, or guide road users …"); *see also id.* at §§ 1A.13 ¶¶ (A) to (D) (defining "standard," "guidance," "option," and "support"). The TxMUTCD also contains multiple "figures," essentially diagrams, which offer general guidance on what traffic control devices should be utilized to create a temporary work zone on a roadway. *See, e.g.*, *id.* at p. 679 ("Lane Closure on a Two-Lane Road Using Flaggers"). Meanwhile, TxDOT issues its "Standard Sheets" to make "minor changes" to the general guidance provided by the TxMUTCD and make it "more specific." (Tr. 448, 461-62). As can be seen in the two Standard Sheets submitted at the hearing, the Standard Sheets are tailored to specific scenarios, including, as is relevant here, "Freeway Lane Closures" and "Work Area[s] Near [a] Ramp." (Exhs. C-5, C-6, R-15, R-16; *see also* Exh. R-19, at 3 & 4; Tr. 448, 461-62).

There is a hierarchy as to which traffic-control plan a highway construction contractor, like Williams Brothers, should follow in a given situation. If there is a site-specific traffic-control plan for the project, i.e., one designed specifically for the project in question and certified by an engineer, it takes precedence over the guidelines set forth in both the Standard Sheets and the TxMUTCD. (Exh. R-19, at 3-4; Tr. 329, 461, 470). If there is no site-specific traffic-control plan, the Standard Sheets, which are more specific than the TxMUTCD, should be followed to the extent they differ from the TxMUTCD. (Exh. R-19, at 3-4; Tr. 329-30, 461, 470-71). If there is no Standard Sheet for a scenario presented by a given construction project, only then should the TxMUTCD alone govern traffic control for the project. (Exh. R-19, at 4; Tr. 461-62). However, the TxMUTCD and Standard Sheets are meant to be "read together" to determine what traffic control devices to utilize for a given construction project. (Tr. 233-34, 452-53).

Traffic Control Devices

Williams Brothers utilized several types of traffic controls devices for the I-610 Project generally and for the specific temporary work zone involved in this case. Of foremost focus to the parties was Williams Brothers' use of "Truck Mounted Attenuators" ("TMAs"). A TMA is a type of "cushion" designed to absorb energy when struck by a vehicle and thereby prevent serious injury or death to the driver as well as prevent serious damage to the striking vehicle. (Exh. R-21, at 04:45; Tr. 41, 54, 97, 383). A TMA is attached to a "shadow vehicle," typically a flat-bed truck with a flashing arrow board mounted on top of it. (Exh. R-21, at 04:45; Tr. 42-43, 54). Together, the combination of the TMA and the shadow vehicle creates what the parties have referred to as a "crash truck."[2] (*E.g.*, Tr. 54-55, 97, 144, 215, 254). When a crash truck is parked in a highway construction zone, it provides additional protection to workers in the "work space" or "work zone" immediately to the right of the truck by shielding them from the impact of any stray vehicles that might enter the enclosure. (Exhs. C-5 ("work space" indicated by asterisk to the right of crash trucks); C-6 (same); Tr. 41-43, 54-55, 68, 155-56, 305-06, 333-34, 396-97).

Both Standard Sheets submitted at the hearing contained similar language on the use of crash trucks, language which has drawn a great deal of attention from both parties. First, under

[2] The nomenclature used at the hearing for these elements and their combination varied, with the terms "TMA," "shadow vehicle," and "crash truck" sometimes being used interchangeably. As the Court understands it, a TMA must be attached to a shadow vehicle to be fully functional. In other words, it offers no protection on its own accord. The Court will therefore use the term "crash truck" to refer to the combination of a TMA mounted on a shadow vehicle, mindful that sometimes attorneys and witnesses used the term "TMA" or "shadow vehicle" alone to refer to this same combination.

"General Notes," the Standard Sheets state: "All traffic control devices illustrated are REQUIRED. Devices denoted with the triangle symbol may be omitted when stated elsewhere in the plans." (Exhs. C-5, C-6, R-15, R-16). The Court notes the figures of the crash trucks depicted in the Standard Sheets do not have a triangle symbol on or near them. The Standard Sheets also both have a box on the right side of the sheet with the following language: "*A shadow vehicle equipped with a Truck Mounted Attenuator is typically required. A shadow vehicle equipped with a TMA shall be used if it can be positioned 30' to 100' in advance of the area of crew exposure without adversely affecting the work performance." (Exhs. C-5, C-6, R-15, R-16).

Williams Brothers utilized crash trucks as a means of traffic control for the I-610 Project, including, as the Court details later, at least one crash truck on the night the accident. The crash trucks could be moved by any Williams Brothers employee with a valid driver's license. (Tr. 215-16). However, the leader of the traffic control team would decide where to place the crash trucks, guided by the requirements of the traffic control plan in place for the worksite. (Tr. 206-07, 217, 317-18, 387, 400). And generally, once a crash truck was placed in a work zone, an employee would need permission to move the truck if it became necessary to do so. (Tr. 308). The keys were left in the crash trucks in case such a need arose. (Tr. 217, 275, 308-09).

Williams Brothers utilized several other types of traffic-control devices for the I-610 Project, including signs, signals, barrels, temporary concrete barriers, "flashing arrow boards" with "oscillating strobing lights," and reflective vests for its employees. (Exhs. R-1; R-18, at DOL000057, 60 & 61; R-21; Tr. 98, 206, 338-39, 369-90, 405). Williams Brothers also contracted with another company, "T-Mack Motorcycle and Escort Services," to provide off-duty police officers during lane closures. (Exh. R-21, at 01:57, 02:57, 04:00, 04:45, 05:25; Tr. 80-82, 95-97, 117-18, 127, 377-78, 380-82, 384, 387). These police officers would sit in their personal police vehicles with red and blue flashing lights to draw the traveling public's attention to the lane closures. (Exh. R-21, at 01:57, 02:57, 04:00, 04:45, 05:25; Tr. 95-97, 377-78, 380-82, 384, 387).

Traffic Control Training

Orientation & Other Training

Williams Brothers' Safety Coordinator, Jairo Cortes, is responsible for training new and returning employees. (Tr. 350-51). His training responsibilities include training traffic control employees on traffic control rules and procedures. (Tr. 351). This training includes a "work zone class and orientation" and an eight-and-a-half-minute long video called "Work Zone Fundamental

Training," which is created by TxDOT. (Tr. 335-36, 351). Williams Brothers has a "Safety Program Manual," the 2019 version of which was in effect at the time of the accident. (Tr. 353). It is not clear whether employees are trained directly on the contents of the Manual; however, Cortes testified the "Life Giving Commitments" set forth in the Manual were "a big focus on safety that we have … during the orientation" and proceeded to discuss the first commitment regarding the hazards associated with the "Traveling Public" at some length with Williams Brothers' attorney at the hearing. (Exh. R-23, at WBC-Hwy-59-000420; Tr. 353-55). As evidenced by the two "Safety Orientation Training" checklists submitted at the hearing, a copy of this Manual is given to each employee during orientation training.[3] (Exhs. R-6 & R-8).

Williams Brothers also provides certain traffic control employees flagger training and other employees OSHA-10 training to become competent persons. (Exh. R-3; Tr. 295-96, 351). In addition to the training provided directly by Williams Brothers, traffic control employees are encouraged to take a 16-hour "Work Zone Traffic Control" course provided by the "Texas A&M Engineering Extension Service" ("TEEX"). (Tr. 230, 352). Among other subjects, this course covers the use of temporary traffic controls for temporary highway construction sites and the application of the TxDOT Standard Sheets. (Tr. 230-31, 298-99; Exh. R-13).

Francisco Cisneros, a "Dirt Supervisor" at Williams Brothers who was overseeing all operations occurring at the worksite on the night of the accident, had received OSHA-10 training as well as attended the TEEX course at least twice, once on November 12 and 13, 2019, and again on October 15 and 16, 2020. (Exhs. R-4 & R-5; Tr. 296-98). Jonathan Gomez, a "Head Traffic Controller" at Williams Brothers who was responsible for placing the traffic control devices to close off the necessary portion of I-69 North the night of the accident, had received orientation training in July of 2019 and attended the TEEX course in November 17 and 18, 2020. (Exhs. R-6 & R-7; Tr. 229-30). Finally, Gomez's "helper" the night of the accident had received orientation training in July of 2019 and attended the TEEX Course on October 6 and 7, 2021. (Exhs. R-8 & R-9; Tr. 207-08, 213).

[3] Williams Brothers submitted into evidence what may represent an additional aspect of its traffic control training, a PowerPoint presentation entitled "Roadway Work Zones: 'The Danger Zone.'" (Exhs. R-12). However, this exhibit was never discussed at the hearing, and no other evidence was adduced describing how, if at all, this PowerPoint presentation related to the training conducted by Cortes. *But see* Tr. 432 (Cortes generally describing the use of PowerPoint presentations when he conducts training). Without any testimony or other evidence to connect this presentation to its use in Williams Brothers' training, the Court places no evidentiary weight on it or its contents.

Other Safety Policies

Williams Brothers' supervisors hold daily safety meetings prior to working in a temporary work zone, during which traffic control and hazards posed by the traveling public may be discussed. (Exhs. C-16 & R-10; Tr. 231-32, 280-82, 299-300, 352). Supervisors and "leadmen" are stationed at the work zone to oversee employees. (Tr. 288-89, 356-57). Williams Brothers submitted into evidence a copy of its discipline policy, which reads in relevant part as follows: "As a condition of employment, compliance with all company safety rules is expected. Failure to comply with certain rules will result in disciplinary action at the discretion of the supervisor. The discipline may range from a counseling statement, time off without pay, or termination." (Exh. R-11). No witness at the hearing discussed this policy directly, although Cisneros and Cortes testified generally to the discipline of employees who failed to follow Williams Brothers' work rules. (Tr. 288-89, 358, 432-33). And, as the Court details below, two employees, Cisneros and Gomez, were eventually disciplined in connection with the accident giving rise to the Citation. (Exhs. C-9, R-2).

Creating the Worksite on the Evening of October 29, 2021

On October 29, 2021, Williams Brothers was preparing to open a portion of the finished I-610 Project to the public. (Exh. C-2, at DOL000026; Tr. 49-50, 307, 360). This portion included two connector lanes, "Connector C" and "Connector F," which, once opened, would connect I-69 North to I-610 North and I-610 South, respectively. (Exhs. C-2, at DOL000026; C-8, at 1-6; R-17; Tr. 44-46, 51, 63-68, 247-49, 251-52, 303-04, 363). To open these lanes to the public, Williams Brothers needed to remove several temporary concrete barriers, which had been placed to block off the connector lanes during construction. (Exhs. C-2, at DOL000027 & 28; R-1; Tr. 247, 270, 358-60). To remove the concrete barriers, Williams Brothers first needed to close several lanes of traffic on an approximately two-to-three mile stretch of I-69 in both directions. (Exhs. C-2, at DOL000026 & 27; R-17; Tr. 86, 126-27, 268, 317). On I-69 North, Williams Brothers planned to start the lane closure around the exit ramp to Chimney Rock Road and proceed eastward, past South Rice Avenue to the gore point of I-69 North and the connector lanes of I-610 North and South. (Exhs. C-2, at DOL000027 & 28; R-17, R-21, at 01:18 to 05:25; Tr. 212, 254, 376-90). Starting just past this gore point, there is a permanent concrete wall running between I-69 North and the I-610 connector lanes. (Exhs. C-8, at 8; R-21, at 05:20 to 05:40; Tr. 387). Thus, just past the closure planned for I-69 North on the night of the accident, traffic traveling on I-69 North was

physically separated from the soon-to-be-open connector lanes leading to I-610 North and South. (Exhs. C-8, at 8; R-21, at 05:20 to 05:40; Tr. 387).

On the evening of October 29, Cisneros held a safety meeting offsite during which he discussed the lane closures occurring later that night. (Exhs. C-16, at 1; R-10, at 1; Tr. 280-83). After this safety meeting, at approximately 7:30 p.m., Williams Brothers' "traffic control team" met separately at a site adjacent to the soon-to-be closed portion of I-69 called the "Old Katy Yard" to discuss their plan for closing off the necessary portions of the highway. (Tr. 207-10). One crew was responsible for the I-69 South side of the highway, the closing off of which is not otherwise implicated by the events in this case except to note Cisneros, who was overseeing all operations occurring on the I-610 Project the night of October 29 (including those for traffic control), was physically on the I-69 South side of the highway the entire time leading up to the accident. (Tr. 207-10, 241-42, 255-56). The crew responsible for closing off the lanes on the I-69 North side of the highway was led by Gomez, who oversaw the work of a single "helper." (Tr. 84, 206-07, 255, 269, 271). These two employees arrived at the soon-to-be worksite around approximately 9 p.m. and began to place the necessary signs, barrels, and barriers to close off the aforementioned stretch of I-69 North from Chimney Rock Road to the gore point of I-69 North and I-610. (Exh. C-2, at DOL000026; Tr. 212).

Ultimately, three lanes of I-69 North needed to be closed off for Williams Brothers and its subcontractors to perform their work in opening the I-610 connector lanes. (Exhs. C-2, at DOL000026; R-21, at 01:18, 02:36, 03:45; Tr. 255, 376, 380, 382). As documented by Cortes in a video taken the day following the accident, signage for the closure started as far west as Hillcroft Avenue, with intermittent signage (familiar signs such as "Road Work Ahead," "Right Lane Closed Ahead," and flashing arrow boards with arrows pointing left) warning of the closure as traffic approached Chimney Rock Road. (Exh. R-21, at 00:00 to 01:18; Tr. 369-75). At the gore point of I-69 and the exit ramp for Chimney Rock Road, Gomez placed the first set of orange barrels to start to close off the far-right lane of traffic. (Exh. R-21, at 01:18; Tr. 376). Gomez and his helper used "tapered" lane closures, wherein a flashing arrow board is proceeded by a string of orange barrels at regular intervals to allow drivers "time to be able to merge safely into the other lane that's still open." (*E.g.*, Exh. R-21, at 01:18 to 01:40; Tr. 377). This tapering continued until three lanes of I-69 North were closed off and ended at the point where I-69 North became physically separated from the I-610 connector lanes by a permanent concrete wall. (Exhs. C-8, at 8; R-21, at

05:22 to 05:40; Tr. 254, 387). In addition to the barrels and signage used in the tapered lane closure, a number off-duty police officers in vehicles with flashing blue and red lights were interspersed throughout the closure to warn the traveling public.[4] (Exhs. C-2, at DOL000026; R-21, at 01:57, 02:57, 04:00, 04:45; Tr. 85-86, 96-99, 208, 214-15, 377-78, 380-82, 384-85).

Around 9:30 p.m., two crash trucks arrived onsite near a "grassy area" of the entrance ramp to I-69 North from Chimney Rock Road. (Tr. 57-58, 273-74 317). Placing the crash trucks is the last part of the process of lane closure. (Tr. 318). According to Gomez, the TMA on one of the two crash trucks "wouldn't crank," i.e., would not turn on.[5] (Tr. 320). Gomez notified Cisneros who told him "somebody else was probably going to move it since we were done with our shift." (Tr. 321). From the time Gomez left it there until the time of the accident, no one moved this non-functioning crash truck from the entrance ramp of Chimney Rock Road. (Tr. 273, 320-22). As to the other crash truck, Gomez placed it "a little bit in front of" the gore point of I-69 and the connector lanes to I-610 North and South, i.e., in front of the start of the permanent concrete wall which separated I-69 and the I-610 connector lanes. (Exhs. C-2, at DOL000028; C-8, at 8; R-17, R-21, at 05:20 to 05:22; Tr. 217-18, 254, 319-20, 387).

Gomez and his helper finished closing off the necessary lanes of I-69 North at approximately 10:30 p.m., at which time their shifts ended and another traffic control team took over. (Exh. C-2, at DOL000027; Tr. 321). Williams Brothers and several of its subcontractors then commenced multiple jobs at multiple locations throughout the enclosed worksite. (Exh. C-2, at DOL000027 & 28; Tr. 49-50, 247, 358-62). Of particular relevance to the events occurring later that night, one crew of PTC workers was re-striping near the gore point of I-69 North and the I-

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[4] According to Thomas Mack, the owner of the subcontractor who supplied these officers, "a total of 13 officers" were at the worksite the night of the accident. (Tr. 86). It is not clear whether these thirteen officers were all stationed on the I-69 North side of the highway, or if they were split between I-69 North and South. Gomez could account for the exact whereabouts of six officers along various points in the enclosure on I-69 North and stated "the remaining officers were at the end of the closure." (Tr. 214-15). Mr. Mack marked two of the Secretary's photos to indicate where two additional officers were stationed near the gore point of I-610 North and South. (Exh. C-8A; Tr. 92-94).

[5] As detailed earlier, a TMA merely acts as a cushion and needs to be mounted to a shadow vehicle to provide any sort of protection to workers. (Exh. R-21, at 04:45; Tr. 41-43, 54, 97, 383). The Court is unsure from the evidence presented if a TMA also needs to be activated in some other way to be effectively utilized. It is thus not clear if Gomez was referring to the actual TMA when he testified "[i]t wouldn't crank" or if he was referring to other elements of the crash truck, such as the flashing arrow board or the shadow vehicle. (Tr. 320; *see also* Exh. R-21, at 04:45). As the Court has previously noted, at the hearing the term "TMA" was sometimes used interchangeably to describe the entire crash truck combination of a TMA mounted on a shadow vehicle with a flashing arrow board attached. *See* note 2. Gomez later testified he tried giving the TMA a "jumper cable jump," which suggests it was the shadow vehicle part of the crash truck malfunctioning. (Tr. 322). Whatever the specific element of the crash truck Gomez was referencing, it suffices to say he found one of the two crash trucks inoperable in some way and thus did not utilize that crash truck the night of the accident.

610 connector lanes, while another crew was re-striping further east on the connector lane for I-610 South. (Exhs. C-2, at DOL000027 & 28; C-7, at 3; C-8, at 8; R-21, at 05:19 to 05:25; Tr. 254-55, 358). Meanwhile, the temporary concrete barriers near the gore point of the I-610 North and South connector lanes were removed, leaving behind trash, "dust," and other debris. (Exh. C-2, at DOL000027; Tr. 247, 358-60, 366). A Williams Brothers employee was assigned to clear up the trash and debris at this location. (Exh. C-2, at DOL000027; Tr. 359, 366, 387-89).

The location Gomez left the crash truck, in front of the permanent concrete wall separating I-69 North and the I-610 connector lanes, was in the immediate vicinity of the first crew of PTC workers re-striping that stretch of the highway and approximately 700 feet from the Williams Brothers employee who was cleaning up the trash and debris at the gore point of the I-610 connector lanes.[6] (Exhs. C-2, at DOL000028; R-17; Tr. 218-19). At some point prior to the accident, this crash truck was moved westward because it was impeding the first PTC crew's re-striping work. (Tr. 385, 400-03). The new location of the crash truck, on the "hill" of the overpass of I-69 and South Rice Avenue, was approximately 400 feet from the first PTC crew and approximately 1,300 feet from the Williams Brothers employee. (Exhs. C-2, at DOL000028; R-17; Tr. 145, 254, 274, 277, 400). Nothing in the record affirmatively established who moved the crash truck to this location; however, Cortes believed it was someone from PTC rather than a Williams Brothers employee. (Tr. 400-01).

Two Vehicles Enter the Work Zone

Sometime after midnight on October 30, two unauthorized, private vehicles entered the enclosure on I-69 North.[7] The first vehicle entered and passed through seemingly without incident.

[6] Several witnesses estimated the distance between the various employees working on I-69 North and the sole functional crash truck as its location changed throughout the night. (Exh. C-2, at DOL000028 & 31; Tr. 145, 217-19, 277-78, 279-80). In the CSHO's Safety Narrative, he included a diagram created from Google Maps approximating the relative locations of the crash truck, the PTC crews, and the William Brothers employee, along with a distance measuring tool spanning, in 50-foot intervals, from South Rice Avenue to the gore point of I-610 North and South where the Williams Brothers employee was cleaning up trash and debris. (Exh. C-2, at DOL000028; Tr. 145). Neither party has questioned the accuracy of the measurement in this diagram; indeed, Williams Brothers submitted the same diagram as part of its stipulated exhibits. (Exh. R-17). The Court finds this diagram reasonably reliable in calculating the approximate distances between various points of the work zone and has used it in conjunction with witness testimony in setting forth its findings of fact on this issue. *Cf., e.g.*, *Pahls v. Thomas,* 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of a Google Map to show the general location of events relevant to the litigation); *Global Control Sys., Inc. v. Luebbert,* No. 4:14–CV–657–DGK, 2015 WL 753124, *1 n.1 (W.D. Mo. Feb. 23, 2015) (taking judicial notice of a Google Maps search to establish the approximate distance between two locations); *Petrongolo Contractors, Inc.*, No. 20-0786, 2021 WL 5230473, at *5 n.2 (O.S.H.R.C.A.L.J., Sept. 28, 2021) (using Google Maps to estimate the distance between two points).

[7] The reason for these multiple entries was the subject of some speculation at the hearing. By all accounts, traffic was abnormally heavy the night of October 29, 2021, in part due to it being the weekend of Halloween and also in part to

(Exh. C-2, at DOL000029; Tr. 145, 283-84, 305). The second vehicle, however, entered the enclosure at approximately 12:50 a.m. and struck a PTC employee near the I-69/I-610 gore point where the first crew was re-striping. The driver then proceeded along the connector lane for I-610, struck the Williams Brothers employee who was cleaning near the gore point of the I-610 connector lanes, proceeded further along I-610 South, and struck another PTC employee from the second crew. (Exhs. C-2, at DOL000029; C-7, at 3 & 4; R-21, at 05:19; Tr. 56-57, 366-67, 386-88). The driver of this second vehicle did not stop after striking the three workers, and, although Mr. Mack, one of the off-duty police officers onsite, followed the vehicle for a brief while, the driver was never apprehended. (Exh. C-7, at 2; Tr. 103-06). The PTC employees who were struck suffered only minor injuries, while the Williams Brothers employee suffered head injuries and a hip fracture, resulting in surgery and a brief hospitalization. (Exh. C-2, at DOL000029; Tr. 57, 148-49, 286).

After medical and other emergency personnel had tended to the scene of the accident, Cisneros moved the crash truck from its location over South Rice Avenue closer to its original location at the gore point of I-69 and the I-610 connector lanes "[b]ecause everybody was nervous and … [he] want[ed] to make them feel better." (Tr. 305-306; *see also* Tr. 385, 401). However, after the PTC crew resumed working near the gore point, the crash truck needed to be moved back to South Rice Avenue to accommodate PTC's re-striping work. (Tr. 306-07, 403).

Post-Accident Discipline

Nearly five months after the accident, on March 21, 2022, Cisneros, at the direction of his supervisor, disciplined Gomez in the form of an "Environmental & Safety Counseling Notice." (Exhs. C-9, R-2, at 1; Tr. 225-26, 289-92). Cisneros issued this Notice because "[t]raffic control device(s) on the [I-610] project were not set up properly per TxDOT standard sheets." (Exhs. C-9, R-1, at 1). Particularly, Gomez was alleged to have missed a "Right Lane Closed Ahead" sign when closing off the portion of I-69 North. (Tr. 225-26, 291). Gomez received a "written & verbal warning." (Exh. C-9, R-2, at 1). On the same date, Cisneros, again at the direction of his supervisor, also did a "self-write up" by issuing an "Environmental & Safety Counseling Notice" to discipline himself in connection with the accident. (Exh. R-2, at 2; Tr. 293-94). Like Gomez, Cisneros

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it being the night of the Houston Astros' final game in the World Series, losing to the Atlanta Braves. (Tr. 148, 302-03). This same combination of factors led the CSHO to surmise more drivers were intoxicated that night. (Tr. 148). Although some witnesses hinted one or both of the drivers who entered the worksite was intoxicated, there was no affirmative evidence this was the case for either driver.

received a "written & verbal warning" because "[t]raffic control device(s) on the [I-610] project were not set up properly per TxDOT standard sheets," particularly the same missing "Right Lane Closed Ahead" sign. (Exh. R-2, at 2; Tr. 293).

OSHA's Investigation & Citation

Williams Brothers reported its employee's injuries to OSHA the Sunday following the accident, November 1, 2021. (Exh. C-2, at DOL000025; Tr. 135). The following day, CSHO Peter Vo was assigned to investigate the accident. (Exh. C-2, at DOL000025; Tr. 134-35). Because the lane closures had already been taken down and the new traffic lanes opened to the traveling public, the CSHO had no physical worksite to inspect. (Tr. 137). So, on Tuesday, November 3, he held an opening conference at Williams Brothers' home office with Williams Brothers' Safety Director, John Fleck, and Safety Coordinator Cortes. (Exh. C-2, at DOL000033; Tr. 136-37).

After conducting interviews, reviewing documentation, and speaking with employees at TxDOT, the CSHO concluded Williams Brothers had violated the General Duty Clause by failing to protect its employee from the recognized struck-by hazards posed when working in a highway construction zone. (Tr. 137-39). Having received conflicting information on whether crash trucks were ever onsite, he further concluded a feasible means of abatement of the struck-by hazard was to place a crash truck 30' to 100' feet from the active work crews, per TxDOT's TCP (6-1)-12 and (6-2)-12 Standard Sheets. (Exhs. C-5, C-6, R-15, R-16; Tr. 144-45, 153-55, 187-88).

Based on the CSHO's investigation, OSHA issued the one-item serious Citation to Williams Brothers.

PREEMPTION

As an initial matter, Williams Brothers argues the General Duty Clause violation alleged in the Citation is preempted by 29 U.S.C. § 653(b)(1). Resp't's Br. 12-15. The Supreme Court has referred to 29 U.S.C. § 653(b)(1) as implicating "OSHA's jurisdiction," and so the Court addresses this argument before addressing the elements of the Secretary's case. *See Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241 (2002); *cf. Cook v. Reno*, 74 F.3d 97, 99 (5th Cir. 1996) ("Before ruling on the merits of the case, it is imperative that the court first determine whether it has jurisdiction to hear the suit; if jurisdiction is lacking, then the court has no authority to consider the merits.").

Williams Brothers relies on the TxMUTCD and the Traffic Control Plan Standard Sheets issued by TxDOT as the bases for its preemption argument. Resp't's Br. 14. Before addressing the

substance of Williams Brothers' argument, these materials, as well as the federal "Manual on Uniform Traffic Control Devices" ("MUTCD" or "Federal Manual"), must be put in their proper legal context. The Court therefore will first examine the background and legal significance of the Federal Manual, before addressing the same issues regarding the Texas Manual. The Court will then examine the legal significance, if any, of the Standard Sheets submitted at the hearing. (Exhs. C-5, C-6, R-15, R-16).

The FHWA & the Federal Manual

The Federal Highway Administration ("FHWA") is an agency housed within the United States Department of Transportation. *See* 49 C.F.R. § 1.84; 5 West's Fed. Admin. Prac. § 5325. The FHWA's main function is to administer the Federal-Aid Highway Program, which assists state highway departments by providing federal funding for the "planning, design and construction" of highways. *Lathan v. Brinegar*, 506 F.2d 677, 682 (9th Cir. 1974); *see also* 23 U.S.C. § 101 et seq. (Federal-Aid Highway Act); 23 C.F.R. § 1.1 ("The purpose of the regulations in this part [governing the FHWA] is to implement and carry out the provisions of Federal law relating to the administration of Federal aid for highways."); 5 West's Fed. Admin. Prac. § 5326. To this end, the FHWA "ascertains that the state highway departments have adhered to federal law and regulations before authorizing reimbursement to the states for a portion of the federal-aid highways' cost." *Lathan*, 506 F.2d at 682. "This adherence to federal standards is assured by requiring the state highway departments to obtain federal approval at various stages during the conception and building of a highway project." *Id.*

One of the FHWA's goals in approving federally funded highway projects is "to obtain basic uniformity of traffic control devices on all streets and highways …." 23 C.F.R. § 655.601. In furtherance of that goal, the FHWA is tasked with periodically revising and publishing the MUTCD. *See* 23 C.F.R. §§ 655.601(a), 655.603(a); *see also Oliver v. Ralph's Grocery Co.*, 654 F.3d 903, 909 (9th Cir. 2011). The MUTCD itself echoes its goal of "obtain[ing] basic uniformity of traffic control devices," defined as "all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, bikeway, or private road open to public travel …." *Manual on Uniform Traffic Control Devices for Streets & Highways* at I-1, FED. HIGHWAY ADMIN. (2009 ed., eff. June 2012) (available at

https://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd2009r1r2edition.pdf).[8] The MUTCD is expansive, nearly one thousand pages long, and covers a variety of topics including, as is most relevant for purposes of this case, temporary traffic control in work zones. *See* MUTCD, Ch. 6G.

Although it is often couched in mandatory language, the Federal Manual, by its own terms, only "describes the application of traffic control devices, but shall not be a legal requirement for their installation," and accounts for changes "made on the basis of either engineering study or the application of engineering judgment." MUTCD, at § 1A.09, ¶¶ 2 & 3; *but see id.* at § 1A.13, ¶ 1(A) (defining a "standard" as "a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device."); *see also, e.g.*, *id.* at § 6G.02, ¶ 4 (stating "retroreflective and/or illuminated devices shall be used in long-term stationary [temporary traffic control] zones." (emphasis added)). Federal courts have rejected many kinds of claims premised on the MUTCD being binding or mandatory, rather than precatory. *See, e.g.*, *Cope v. Scott*, 45 F.3d 445, 451 (D.C. Cir. 1995) (finding the MUTCD "is more of a guidebook" than a "specific prescription"); *Wasserman v. City of New York,* 802 F. Supp. 849, 855 (E.D.N.Y.1992) (finding no liability for city for placement of signs allegedly in violation of MUTCD because its suggested posting distances were "guides"), *aff'd,* 60 F.3d 811 (2d Cir.1995) (table); *Peruta v. City of Hartford*, No. 3:09-CV-1946 VLB, 2012 WL 3656366, at *14 (D. Conn. Aug. 24, 2012) ("[The] MUTCD should therefore be viewed more as an aspirational guide, like uniform building codes. Since [the] MUTCD is not controlling or binding, it cannot support a plausible Supremacy Clause claim."); *Holland v. Gay*, No. CIV.A. 7:05CV85 HL, 2006 WL 2374788, at *4-5 (M.D. Ga. Aug. 16, 2006) ("Because § 655.603(b) [regarding the adoption of the MUTCD] is couched in precatory, rather than mandatory terms, it is insufficient to impose a binding obligation on the State. Therefore, it is insufficient to create an individual right."); *Buchwald v. Metro. Transp. Comm'n*, No. 04-01833

[8] The accident giving rise to the Citation in this case occurred on October 30, 2021. The effective MUTCD on that date was the 2009 Edition, which had two revisions effective as of June 13, 2012. *See Previous Editions of the MUTCD*, FED. HIGHWAY ADMIN., https://mutcd.fhwa.dot.gov/previous_editions.htm (last visited Feb. 21, 2024). Subsequent to the date of the accident, a third revision was added to the 2009 edition of the MUTCD, with an effective date of September 6, 2022. *Id.* Subsequent to the third revision of the 2009 Manual, the FHWA published an entirely new edition, described as the "11th Edition," with an effective date of January 18, 2024. *See* "National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision," 88 Fed. Reg. 87,672-696 (Dec. 19, 2023). Details of these changes are set forth at *Revision 3 Pages to the 2009 MUTCD*, FED. HIGHWAY ADMIN., https://mutcd.fhwa.dot.gov/pdfs/2009r1r2r3/mutcd2009r2r3pages.pdf (last visited Feb. 21, 2024) and at 88 Fed. Reg. 87,672-696. Neither revision substantially changed the scope or purpose of the MUTCD, which is set by regulation. *See* 23 C.F.R. § 655.601; *compare*, 2009 MUTCD, at I-1, *with* 11th Ed. MUTCD, at § 1A.01. The Court's citations to the MUTCD in this decision are to the version effective on the date of the accident, i.e., the 2009 Edition with its first two revisions.

SC, 2005 WL 2000931, at *4 (N.D. Cal. Aug. 16, 2005) ("This Court is persuaded that the MUTCD does not provide the kind of mandatory regulations contemplated by the" Federal Tort Claims Act); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 669 (1993) (finding it "implausibl[e] … state negligence law has been implicitly displaced by means of an elliptical reference in [the MUTCD, which is] otherwise devoted to describing for the benefit of state employees the proper size, color, and shape of traffic signs and signals" and noting the Federal Manual's own disclaimer it is "not a legal requirement for installation.").

The Texas Manual

States wanting to receive federal funds to aid in highway construction have three options regarding the prescriptions set forth in the MUTCD. The state must either: 1) "adopt the federal MUTCD as a state regulation," 2) "adopt a state MUTCD that is approved by the Secretary of Transportation as being in 'substantial conformance' with the federal MUTCD," or 3) "adopt the federal MUTCD in conjunction with a state supplement." *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 909-10 (9th Cir. 2011), citing 23 U.S.C. §§ 109(d), 402(c); 23 C.F.R. § 655.603(b)(3). Texas opted for the second option, i.e., "adopt[ing] a state MUTCD that is approved by the Secretary of Transportation as being in 'substantial conformance' with the federal MUTCD…." *Id.*

The "Texas Manual on Uniform Traffic Control Devices" ("TxMUTCD" or "Texas Manual") is published by the Texas Transportation Commission, a division of TxDOT. *See* Tex. Transp. Code Ann. § 544.001 (West 2024); *see also id.* at §§ 201.001(a)(1); 201.051; *Tex. Manual on Uniform Traffic Control Devices*, TEX. DEP'T OF TRANSP. (rev. 2, eff. Oct. 2014) (available at https://ftp.txdot.gov/pub/txdot-info/trf/tmutcd/2011-rev-2/revision-2.pdf). The FHWA has, by all accounts, approved the TxMUTCD as being in "substantial conformance" with the Federal Manual.[9] *See Texas Dep't of Transportation v. Galloway-Powe*, No. 10-19-00130-CV, 2021 WL 3413137, at *5 (Tex. App. Aug. 4, 2021) ("Further, the FHWA determined that the 2011 Texas Manual is in substantial conformance with the National Manual."); *see also* TxMUTCD, at i, iv, v, I-1. As such, the TxMUTCD "appl[ies] to all traffic control devices installed on or after the adoption of this manual upon the highway, roads, and streets" in Texas, and, like the Federal Manual, defines "traffic control devices" as "all signs, signals, markings, and other devices used

[9] According to California's state highway agency, FHWA sends a "letter of substantial conformance" when it approves a state MUTCD. *See CA Manual on Uniform Traffic Control Devices*, CALTRANS, https://dot.ca.gov/programs/safety-programs/camutcd (last visited Feb. 21, 2024). The Court was not able to find a copy of the letter approving the TxMUTCD and thus the form and substance of the FHWA's approval of the TxMUTCD is unknown.

to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, bikeway, or private road open to public travel…." TxMUTCD, at v, I-1.

As with its Federal counterpart, the TxMUTCD "does not establish a mandatory legal duty to install particular traffic control devices," but "is a standard for design and application of traffic control devices," and "is not a substitute for engineering judgment." TxMUTCD, at I-2; *see also id.* ("The provisions of [the TxMUTCD] do not create mandatory duties, as opposed to discretionary duties, in the legal sense under the Texas Tort Claims Act and elsewhere.").

As construed by Texas courts, the Texas Manual has been held to be entirely discretionary, bestowing no legal rights and creating no legal obligations. *See State Dep't of Highways & Pub. Transp. v. King*, 808 S.W.2d 465, 466 (Tex. 1991); *Tex. Dep't of Transp. v. Perches*, 339 S.W.3d 241, 252 (Tex. App. 2011) ("We first note that compliance with the MUTCD's provisions is generally not mandatory."), *aff'd in part, rev'd in part*, 388 S.W.3d 652 (Tex. 2012); *Brazoria Cnty. v. Van Gelder*, 304 S.W.3d 447, 454 (Tex. App. 2009) ("We note, parenthetically, that compliance with the Manual's provisions is not mandatory."); *Tex. Dep't of Transp. v. Andrews*, 155 S.W.3d 351, 359 (Tex. App. 2004) ("TxDOT's duty to comply with the Texas Manual is discretionary…."); *see also Bellnoa v. City of Austin*, 894 S.W.2d 821, 824 (Tex. App. 1995); *Dunn v. City of Tyler,* 848 S.W.2d 305, 307-08 (Tex. App. 1993); *Villarreal v. State*, 810 S.W.2d 419, 420-21 (Tex. App. 1991).

TxDOT Standard Sheets

In addition to the TxMUTCD, TxDOT, through its Traffic Safety Division, also issues traffic control-related "Standard Sheets."[10] *Traffic Standards*, TEX. DEP'T OF TRANSP., https://www.dot.state.tx.us/insdtdot/orgchart/cmd/cserve/standard/toc.htm (last visited Feb. 21, 2024). Some of these Standard Sheets touch upon traffic control in work zones, and the Citation pointed to two of these in particular: TCP (6-1)-12, a "Traffic Control Plan [for] Freeway Lane Closures," and TCP (6-2)-12, a "Traffic Control Plan [for a] Work Area Near [a] Ramp." (Exhs. C-5, C-6, R-15, R-16). The Texas Administrative Code contemplates the existence of the Standard Sheets as part of a "design manual" referenced in various parts of the Code, *see, e.g.*, Tex. Transp.

[10] The Court was unable to ascertain the exact process by which the Standard Sheets are developed or issued and could find no evidence the Standard Sheets go through any sort of process similar to notice-and-comment rulemaking. As best as the Court can tell, the Standard Sheets are issued from the Director of the TxDOT Traffic Safety Division by way of a simple memorandum to TxDOT's "District Engineers." *See, e.g.*, Memorandum, Re: "Revisions to TCP(2-3)-23, TCP(2-7)-23, & TCP(2-8)-23 Standard Sheets," (April 11, 2023) (available at https://ftp.dot.state.tx.us/pub/txdot-info/cmd/cserve/standard/traffic/memo4-11-23.pdf).

Code Ann. §§ 6.2(5)(J); 27.31(4)(E); 27.51(4)(J), but does not make clear how they otherwise relate to legal requirements for contractors like Williams Brothers performing highway construction work in Texas.

Thus, the exact legal status of the Standard Sheets is not clear to the Court, and the parties have not briefed the issue other than to discuss the meaning and requirements of the two sheets introduced into evidence in this case. However, at the hearing, an Area Engineer for TxDOT, Hamoon Bahrami, explained TxDOT issues the Standard Sheets as "minor changes" to the TxMUTCD or to make its provisions "more specific" to particular scenarios. (Tr. 448, 461-62). Bahrami further explained the TxMUTCD and Standard Sheets both apply to highway construction worksites, like the one at issue here, and have to be "look[ed] at both together" to understand their respective requirements. (Tr. 452-53; *see also* Tr. 233-34). Where the TxMUTCD and a given Standard Sheet conflict on a matter, the Standard Sheet should be followed. (Tr. 461).

Bahrami's assistant laid out this hierarchy of traffic control plans in detail to the CSHO in an email exchange between the two:

> The TxDOT TCP standard plan sheets (such as TCP (6-1)-12) are based on the MUTCD but in some cases may add additional requirements that may either be optional on the MUTCD or not required at all on the MUTCD. If the contractor is performing a temporary closure that does not have a site-specific TCP plan that was specifically created for that closure then the contractor must use the appropriate TCP standard plan sheet included in the plans that applies to the situation. In this case where the TCP plan conflicts with the MUTCD, the contractor is supposed to go by the TCP plan. I believe the only case where the contractor should go strictly off the MUTCD is when there is no site-specific TCP plan in the contract and there is no TCP standard plan in the contract that can be applied to the situation.
>
> In short, when it comes to any discrepancy or conflicts between the site-specific TCP plans that are sealed by an engineer, TCP standard plans, and the MUTCD: site-specific TCP plan that are sealed by engineer take precedence over TCP standard plans and TCP standard plans take precedence over the MUTCD on a contract.
>
> That all being said, if there is ever any confusion in the field when it comes to setting up traffic control or what TCP applies, the bottom line is at the very least they need to follow the MUTCD requirements.

(Exh. R-19, at 3-4; Tr. 460-62; *see also* Tr. 329-30 (Williams Brothers' Safety Director describing a similar hierarchy in traffic-control plans)).

The Court concludes, based on the available evidence, the TxDOT Standard Sheets, which are issued as modifications and clarifications of the TxMUTCD, simply provide guidance for the

placement of traffic control devices in various scenarios. Despite containing some mandatory language, the Court finds the Standard Sheets do not create legal rights or obligations, just like the TxMUTCD which itself contains a great deal of mandatory language but has been held to be discretionary in nature. *See* note 13, *infra* (citing cases); *see also, e.g.*, Tex. Transp. Code Ann. § 27.74(d) (requiring compliance with both the TxMUTCD and various "design manuals," of which the standard sheets are a part).

Merits of Williams Brothers' Preemption Argument

Analytical Framework

Having contextualized the relevant legal landscape, the Court turns to the merits of Williams Brothers' preemption argument. Its argument relies on 29 U.S.C. § 453(b)(1), which states: "Nothing in [the Act] shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

In *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002), the Supreme Court interpreted 29 U.S.C. § 653(b)(1) and held "Congress' use of the word 'exercise' makes clear that … mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction." *Id.* at 241. The Court further held "another federal agency's minimal exercise of some authority over certain conditions … does not result in complete pre-emption of OSHA jurisdiction, because the statute also makes clear that OSHA is only pre-empted if the working conditions at issue are the particular ones 'with respect to which' another federal agency has regulated, and if such regulations 'affec[t] occupational safety or health.'" *Id.* Thus, to determine whether another federal agency has "displaced[d] OSHA's jurisdiction, this Court must "examine the contours of the [agency's] exercise of its statutory authority, not merely the existence of such authority." *Id.* at 242.

Federal Agency Action

In this instance, the Court finds Williams' Brothers argument fails to meet an antecedent threshold to qualify for preemption under 29 U.S.C. § 653(b)(1). Specifically, a standard or regulation can displace OSHA's jurisdiction only when "*[an]other Federal agenc[y]*" has exercised its authority over occupational safety and health.[11] 29 U.S.C. § 653(b)(1) (emphasis

[11] The Court recognizes 29 U.S.C. § 653(b)(1) contemplates some limited state agency regulation is also capable of displacing OSHA's jurisdiction. The provision referenced in the middle clause of the preemption provision, "section 2021 of Title 42," relates to the Atomic Energy Commission's "[c]ooperation with States" regarding the regulation

added); *see also Mallard Bay Drilling*, 534 U.S. at 240-41 (emphasizing the involvement of other federal agencies under the preemption provision). Here, Williams Brothers' preemption argument is premised on the TxMUTCD and the TxDOT Standard Sheets, guidance documents published by a *state* transportation agency, TxDOT, and incorporated into Texas's Transportation Code. Tex. Transp. Code Ann. §§ 6.2(5)(J); 27.31(4)(E); 27.51(4)(J); 544.001. The Court can find no instance, and Williams Brothers has cited none,[12] of a court finding a *state* standard or regulation has displaced OSHA's authority under 29 U.S.C. § 653(b)(1).

Nor does the Court find the FHWA's "approval" of the TxMUTCD as being in "substantial conformance" with the Federal Manual somehow converts the TxMUTCD (or the Standard Sheets issued as supplements thereto) into federal agency action. *Cf. PBR, Inc. v. Sec'y of Labor*, 643 F.2d 890, 896-97 (1st Cir. 1981) (safety rules issued by a contractor of the Department of Transportation were "similar to internal safety regulations and c[ould] not be viewed as official agency rules which must be promulgated according to APA procedures" and thus could not displace OSHA's authority under 29 U.S.C. § 653(b)(1)); *cf. also Ringsred v. City of Duluth,* 828 F.2d 1305, 1308 (8th Cir.1987) (Secretary of Interior's approval of contract between an Indian Tribe and a municipality concerning construction of parking ramp not "major federal action" under National Environmental Policy Act because it was not required and only "incidental" to the

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and disposal of nuclear waste. *See generally* 42 U.S.C. § 2021. This subject matter is not implicated by the events in this case.

[12] Williams Brothers does cite one case, *Pa. Elec. Co. v. Fed. Mine Safety & Health Review Comm'n*, 969 F.2d 1501 (3d Cir. 1992), in which the Third Circuit set forth a "two-step inquiry" for determining whether a standard or regulation has preempted OSHA's authority under 29 U.S.C. § 653(b)(1). *Pa. Elec. Co.*, 969 F.2d at 1504. There, the court appears to have held state agency regulation is capable of preempting OSHA's authority under 29 U.S.C. § 653(b)(1), formulating its two-step inquiry as follows: "whether: (1) a regulation was promulgated by <u>a state or</u> federal agency other than OSHA; and (2) whether the regulation promulgated covers the specific "working conditions" at issue." *Id.* (emphasis added).

The Court rejects the Third Circuit's two-step inquiry to the extent it includes state agency regulations. The case the Third Circuit cited in *Pa. Elec. Co.* in formulating its two-step inquiry, *Columbia Gas of Pa., Inc. v. Marshall,* 636 F.2d 913 (3d Cir.1980), only discussed whether a "coordinate federal agency" has exercised its authority so as to displace OSHA's. *Columbia Gas*, 636 F.2d at 915. The *Columbia Gas* case makes no mention of state agency regulations. Indeed, the *Pa. Elec. Co.* court itself was dealing with federal regulations from the Mine Safety and Health Administration, and thus its inclusion of state agency regulation was not necessary to the resolution of the case before it. It is possible the *Pa. Elec. Co.* court included state agencies in its two-step inquiry based on the very limited type of state agency regulations actually contemplated by 29 U.S.C. § 653(b)(1). *See* note 11, *supra.* In any event, even if the Third Circuit intended to include all state agency regulations in its two-step inquiry, this Third Circuit caselaw is not binding for purposes of this Fifth Circuit case. *See* 29 U.S.C. §§ 660(a) & (b) (describing where Commission final orders may be appealed including the Circuit where the violation occurred or where the employer has its principal place of business); *Kerns Bros. Tree Serv.*, No. 96-1719, 2000 WL 294514, at *4 (O.S.H.R.C., March 16, 2000) ("Where it is highly probable a case will be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case, even though it may differ from the Commission's precedent.").

project); *Save the Bay, Inc. v. U.S. Corps of Eng'rs.,* 610 F.2d 322, 327 (5th Cir.1980) (Corps of Engineers' issuance of a pipeline permit did not turn construction of private manufacturing plant into a "major federal action" for purposes of the National Environmental Policy Act because it was only "incidental federal involvement.").

Standard or Regulation

Even if the TxMUTCD or the Standard Sheets could be considered federal action by way of the FHWA's approval of the TxMUTCD, the Court still does not find they qualify for preemption under 29 U.S.C. § 653(b)(1). The provision requires an agency to have "authority to prescribe or enforce *standards or regulations* affecting occupational safety or health…." 29 U.S.C. § 653(b)(1) (emphasis added). And, as interpreted by the Supreme Court in *Mallard Bay Drilling*, the agency must actually exercise its authority in the form of a "standard or regulation." *Mallard Bay Drilling*, 534 U.S. at 241-42.

Here, there is no question TxDOT has acted to develop and publish the Texas Manual and its Traffic Division's Standard Sheets. However, the Court does not find these documents meet the definition of a "standard or regulation" sufficient to displace OSHA's authority under 29 U.S.C. § 653(b)(1). The Act defines "occupational safety and health standard" as "a standard which *requires* conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (emphasis added). Although the Act does not similarly define "regulation," courts, including the Fifth Circuit, have recognized the mandatory nature of a "regulation" in deciding where to draw the line between a "standard" and a "regulation" under the Act. *See, e.g.*, *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1468-69 (D.C. Cir. 1995); *Louisiana Chem. Ass'n v. Bingham*, 657 F.2d 777, 783 (5th Cir. 1981); *see also* 29 U.S.C. § 657(c)(1)-(3) (various provisions referring to "regulations" as "*requiring*" employers to perform certain acts or maintain certain records (emphasis added)). Black's Law Dictionary similarly defines a regulation in terms of its mandatory nature, defining "regulation" as "[c]ontrol over something by rule or restriction," and more pointedly, defining "agency regulation" as "[a]n official rule or order, *having legal force*, usu. issued by an administrative agency." *Regulation*, Black's Law Dictionary (11th ed. 2019) (definitions (1) and (3) (emphasis added)). In step with these definitions, the Commission has held "[t]o make out an exemption under … 29 U.S.C. § 653(b)(1), an employer must establish that another federal agency has the statutory authority to

regulate the cited working conditions and that it has exercised that authority by issuing regulations that have the force and effect of law." *Am. Airlines, Inc.*, 17 BNA OSHC 1552, 1553-54 (No. 93-181, 1996) (emphasis added).

As laid out in detail above, neither the TxMUTCD nor the Standard Sheets are mandatory in nature,[13] especially in the sense of "requiring" compliance with their terms or "having legal force" as would be required of a "standard or regulation" under the Act. *See* 29 U.S.C. § 652(8); *Regulation*, Black's Law Dictionary (definition (3)); *see also Workplace Health & Safety Council*, 56 F.3d at 1468-69; *Louisiana Chem. Ass'n*, 657 F.2d at 783. Accordingly, even if the FHWA's approval of the Texas Manual somehow imbues it with federal agency action (the Court emphasizes its conclusion that the FHWA's approval does not), the Texas Manual and the Standard Sheets cannot displace OSHA's authority under the Act because they do not have the "force and effect of law" as required of "standard or regulations" under 29 U.S.C. § 653(b)(1). *Am. Airlines, Inc.*, 17 BNA OSHC at 1554; *cf. PBR, Inc.*, 643 F.2d at 896-97 (safety rules issued by a contractor of the Department of Transportation were "similar to internal safety regulations and c[ould] not be viewed as official agency rules which must be promulgated according to APA procedures" and thus could not displace OSHA's authority under 29 U.S.C. § 653(b)(1)); *cf. also United Energy Servs., Inc. v. Mine Safety & Health Admin.*, 35 F.3d 971, 977 (4th Cir. 1994) ("Because MSHA has prescribed regulations addressing the area on mine property in which United Energy's employees work, MSHA has preempted OSHA's jurisdiction." (emphasis added)).

Summary

In sum, the Court finds as follows with regard to Williams Brothers' preemption argument:

1. Only the action of another federal agency can displace OSHA's authority under 29 U.S.C. § 653(b)(1). Williams Brothers relies on the TxMUTCD and TxDOT Standard Sheets as the basis for its preemption argument here. Because both of these are the result of state agency action, they are incapable of displacing OSHA's authority under the Act.

2. If the TxMUTCD and Standard Sheets could somehow be viewed as federal agency action because of the FHWA's approval of the TxMUTCD as being in substantial conformance with the

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[13] The TxMUTCD by its own terms is not mandatory, and Texas courts have repeatedly held as much. *See* TxMUTCD, at I-2; *King*, 808 S.W.2d at 466; *Perches*, 339 S.W.3d at 252; *Van Gelder*, 304 S.W.3d at 454; *Andrews*, 155 S.W.3d at 359; *Bellnoa*, 894 S.W.2d at 824; *Dunn*, 848 S.W.2d at 307-08; *Villarreal*, 810 S.W.2d at 420-21. As the Court found above, the Standard Sheets, which are issued by TxDOT as supplements to the TxMUTCD, are likewise not mandatory.

Federal Manual, Williams Brothers' preemption argument nonetheless would fail. OSHA's authority is displaced under 29 U.S.C. § 653(b)(1) only when another federal agency has prescribed a "standard or regulation" on the subject of occupational safety and health. Texas courts have repeatedly held the TxMUTCD is discretionary and creates no legal rights or obligations. The Court finds the Standard Sheets, which are issued as supplements to the Texas Manual, are similarly discretionary. The Texas Manual and Standard Sheets therefore fail to meet either the definition of "standard" or "regulation," both of which are mandatory in nature. Accordingly, neither can displace OSHA's authority under the Act.

THE CITATION

The Secretary's Burden of Proof

> To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. The Secretary must also show that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition.

Roadsafe Traffic Sys., Inc., No. 18-0758, 2021 WL 5994023, at *2 (O.S.H.R.C., Dec. 10, 2021) (internal citations omitted).

Applicable Law

The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer may also appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) & (b). Here, the violation occurred in Houston, Texas in the Fifth Circuit, where Williams Brothers' principal place of business is also located. "Where it is highly probable a case will be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case, even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, No. 96-1719, 2000 WL 294514, at *4 (O.S.H.R.C., March 16, 2000). The parties have not identified, and the Court has not found, any other Fifth Circuit precedent differing from the Commission's on any material issue raised in this case.

Citation 1, Item 1: Alleged Serious Violation of the General Duty Clause

The Alleged Violation Description

Citation 1, Item 1 alleges the following:

> OSH Act of 1970 Section (5)(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to struck by hazards:
>
> a) On or about October 30, 2021, employees were exposed to struck-by hazards from traffic when performing work activities on the northbound main lanes of Interstate 69 at Loop Interstate 610 Ramp.

As feasible means of abatement of the struck-by hazards alleged, the Citation sets forth the following:

> Among other methods, feasible and acceptable means of abatement include the following in accordance with the Traffic Control Plan – Freeway Lane Closures [TCP (6-1)-12] and the Traffic Control Plan – Work Area near Ramp [TCP (6-2)-12] developed by Texas Department of Transportation:
>
> a. Position two shadow vehicles with a Truck Mounted Attenuator (TMA) and high intensity rotating, flashing, oscillating, or strobing lights 30 feet to 100 feet in advance of the area of crew exposure.
>
> b. Develop a system to ensure a shadow vehicle cannot be moved out of the work zone area.
>
> c. When the work zone is moving, operate the shadow vehicle so that the shadow vehicle is positioned 30 feet to 100 feet in advance of the area in which the crew is working.

General Duty Clause

The General Duty Clause provides: "Each employer … shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees …." 29 U.S.C. § 654(a)(1).

(1) Existence of a Hazard

When the Secretary proceeds under the General Duty Clause she must define the hazard "in a way that apprises the employer of its obligations and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). "To prove that a condition presents a hazard under the general duty clause, the Secretary is required to show that ... employees [were exposed] to a significant risk of harm." *Roadsafe Traffic Sys., Inc.*, 2021 WL 5994023, at *2. "The existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances." *Id.*

Here, the Citation frames the alleged hazard as "struck-by hazards from traffic when

performing work activities on the northbound main lanes of Interstate 69 at Loop Interstate 610 Ramp." Citation 6. The Court finds the Secretary has proven the existence of this hazard, not only from a commonsense understanding of how traffic could be hazardous to employees working on an active highway, but also by the fact two vehicles did in fact enter the highway closure on I-69 North, with one ultimately striking and injuring a Williams Brothers employee. (Exhs. C-2, at DOL000029; C-7, at 3 & 4; Tr. 56-57, 145, 274, 277, 305, 366-67, 386-88); *see also W. G. Fairfield Co.*, 19 BNA OSHC 1233, 1236 (No. 99-0344, 2000) ("Simply put, unless such a highway has been completely closed to active traffic, employees engaged in highway construction work are in danger of being hit by a moving vehicle whether they are working adjacent to the highway, flagging motorists on the highway, or crossing the highway."), *aff'd* 285 F.3d 499 (6th Cir. 2002); *Litton Systems, Inc., Ingalls Shipbuilding Div.*, 10 BNA OSHC 1179, 1182 (No. 76-900, 1981) ("The hazard in this case is a large vehicle moving with obstructed vision through areas commonly used by employees. The danger presented by this type of machinery is a matter of common knowledge. … Recognition of the hazard can be inferred from the obvious nature of the hazard."). Thus, the struck-by hazard alleged in the Citation demonstrably "can occur under other than a freakish or utterly implausible concurrence of circumstances." *Roadsafe Traffic Sys., Inc.*, 2021 WL 5994023, at *2.

Williams Brothers resists this conclusion and argues it is only required to address hazards over which it can "reasonably be expected to exercise control." Resp't's Br. 17, citing *Morrison-Knudsen Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1121-22 (No. 88-572, 1993). It goes on to argue it "had multiple traffic control devices in place at the time of the incident, including advanced warning signs, barrels, arrows boards, and a [Crash Cushion Attenuator], plus, TMAs and off-duty police cars with red and blue flashing lights." Resp't's Br. 17. Williams Brothers goes on to argue it "cannot reasonably be expected to have the ability to exercise control over an erratic driver whose identity is unknown, and who ignored numerous traffic control devices and entered into the work zone, possibly constituting criminal conduct." *Id.* at 18.

The specificity with which Williams Brothers has framed the hazard is not the hazard as it is alleged in the Citation, i.e., "struck-by hazards from traffic when performing work activities," and relies on the underlying facts which led to the accident in this case. The Commission has held this is not the proper way to analyze whether a hazard exists for purposes of a General Duty Clause violation. *See Henkels & McCoy, Inc.*, No. 18-1864, 2022 WL 3012701, at *2 (O.S.H.R.C., July

21, 2022) ("[W]e analyze each element of the alleged violation with respect to the conditions set forth in the citation, not in terms of the incident or the design defect."); *Litton Systems, Inc., Ingalls Shipbuilding Div.*, 10 BNA OSHC at 1182 ("[I]t is the hazard, not a specific incident that resulted in injury, which is relevant in determining the existence of the recognized hazard."); *cf. S. Hens, Inc. v. Occupational Safety & Health Review Comm'n*, 930 F.3d 667, 679 (5th Cir. 2019) (finding it is "[t]he departure from OSHA standards, not the worker's injury, is the violation."). The Court finds the remainder of Williams' Brothers argument "conflates the hazard element of the alleged general duty clause violation with the abatement element." *Roadsafe Traffic Sys., Inc.*, 2021 WL 5994023, at *2. "The steps … it took to address the cited hazard are relevant to whether the Secretary established a feasible means of abatement, but they do not bear on whether the cited conditions constituted a hazard." *Id.* "Indeed, by pointing to the steps it allegedly took to mitigate the … hazard, [Williams Brothers] is in effect acknowledging its existence." *Id.*

The Secretary has proven the existence of the hazard alleged in the Citation.

(2) Hazard Recognition

The Secretary can establish hazard recognition either "by proof that a hazard is recognized as such by the employer or by general understanding in the employer's industry." *Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, at *7 (O.S.H.R.C., March 4, 2019). The Secretary argues she has established both types of recognition here. Sec'y's Br. 16-17. The Court addresses each in turn.

<u>Williams Brothers' Recognition</u>

With regard to an employer's recognition of a hazard, work rules and safety precautions taken by the employer are evidence the employer recognized the hazard. *See Integra Health Mgmt., Inc.*, 2019 WL 1142920, at *8 ("Work rules addressing a hazard have been found to establish recognition of that hazard."); *Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1061 (No. 89-2804, 1993) ("Commission precedent establishes that precautions taken by an employer can be used to establish recognition in conjunction with other evidence."). "While an employer's safety precautions alone do not establish that the employer believed that those precautions were necessary for compliance with the Act … precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence." *Beverly Enters, Inc.*, 19 BNA OSHC 1161, 1186 (No. 91-3144, 2000) (consolidated).

Williams Brothers took multiple precautions in recognition of the struck-by hazards posed to workers when working in a temporary highway construction zone. This included the placement of crash trucks, signs, barrels, barricades and off-duty police officers, as well as reflective vests for its employees. (Exhs. R-1; R-18, at DOL000057, 60 & 61; R-21; Tr. 80-82, 95-98, 117-18, 127, 206, 215-17, 338-39, 369-90, 405). Williams Brothers also trained its employees in recognizing and addressing these struck-by hazards, providing its own training during orientation and encouraging its traffic control crews to receive outside training from the TEEX on the use of traffic control devices in temporary work zones. (Exhs. R-5, R-6, R-13, at iii to v; Tr. 230, 295-96, 335-36, 351-52). Indeed, Williams Brothers' own Safety Manual recognizes "[t]he most common hazard to Williams Brothers' employees is the danger presented from working in the proximity of the traveling public" including in "[w]ork areas adjacent to the roadway" and "[w]ork areas behind temporary closures." (Exh. R-23, at WBC-HWy-59-000420). Likewise, Williams Brothers' supervisors and safety personnel who testified at the hearing recognized the struck-by hazards posed when working in a highway construction zone and discussed the precautions Williams Brothers had taken to address them. (Tr. 204-06, 243-45, 334-36, 345-46, 350-55). Finally, the Court notes Williams Brothers has not contested or even addressed this element of the Secretary's case in its brief.

The Court finds the Secretary has established Williams Brothers' recognition of the hazard.

<u>Industry Recognition</u>

The Secretary has also established industry recognition of the hazard. Chapter 6 of the TxMUTCD on temporary traffic control, which is developed and published by the state transportation agency TxDOT, states:

> Of equal importance to the public traveling through the [temporary traffic control] zone is the safety of workers performing the many varied tasks within the work space. [Temporary traffic control] zones present constantly changing conditions that are unexpected by the road user. This creates an even higher degree of vulnerability for the workers and incident management responders on or near the roadway.

TxMUTCD, at § 6A.01(06); *see also id.* at § 6D.03 (section entitled "Worker Safety Considerations"; Tr. 484-85 (brief description of how the TxMUTCD is developed)). The Federal Manual, which is developed and published by the FHWA, echoes the Texas Manual on the hazards posed to workers in temporary highway work zones. *See* MUTCD, at §§ 6A.01(06) & 6D.03 (containing similar language to the corresponding provisions of the TxMUTCD). Additionally,

TxDOT also issues its Standard Sheets, which according to TxDOT Area Engineer Hamoon Bahrami, are meant to enhance the safety measures set forth in the TxMUTCD because of the hazards posed to employees working in temporary highway work zones. (Exhs. C-5, C-6, R-15, R-16; Tr. 447-48, 469-70). The Participant Manual from the TEEX, an institution which provides training on traffic control, presents further evidence of industry recognition of the hazard, noting the number of deaths to highway workers from traffic-related accidents and the need for "a work zone that addresses safety for both workers and road users." (Exh. R-13, at 0-3; Tr. 230-31, 298-99, 352). Finally, the Court again notes Williams Brothers has made no contrary arguments on this element of the Secretary's case.

Taken together, the Court finds the evidence presented supports a finding of industry recognition of the hazard. *See Kelly Springfield Tire Co., Inc. v. Sec'y of Labor*, 729 F.2d 317, 321-22 (5th Cir. 1984) ("[W]here a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question.").

(3) Likelihood of Causing Death or Serious Physical Harm

To determine whether a hazard is "causing or likely to cause death or serious physical harm" the Commission does not look to the likelihood of an accident or injury occurring, but whether, if an accident occurs, the results are likely to cause death or serious harm. *Beverly Enters., Inc.*, 19 BNA OSHC at 1188; *Waldon Health Care Ctr.*, 16 BNA OSHC at 1060; *R.L. Sanders Roofing Co.,* 7 BNA OSHC 1566, 1569 (No. 76–2690, 1979), *rev'd on other grounds,* 620 F.2d 97 (5th Cir. 1980).

The possibility of death or serious physical harm resulting from an employee being struck by a motor vehicle is "supplied by [a] common sense understanding of physical law." *Ill. Power Co. v. Occupational Safety & Health Review Comm'n*, 632 F.2d 25, 28 (7th Cir. 1980); *see also Litton Sys., Inc., Ingalls Shipbuilding Div.*, 10 BNA OSHC at 1182 ("Given the massive size of the vehicle, the likely result of such an incident would be death or serious injury to the person struck by the carrier."). Additional evidence in this record supports this commonsense conclusion. In the instant case, the accident from the second vehicle striking the Williams Brothers employee resulted in serious physical harm to the employee in the form of a broken hip and head injuries. (Exh. C-2, at DOL000029; Tr. 57, 148-49, 286); *see also Waldon Health Care Ctr.*, 16 BNA OSHC at 1060 n.6 (broken bones constitute serious physical harm even if a worker recovers with no permanent side effects). While not dispositive, the existence of actual injuries to employees from the cited

hazard is evidence the hazard presented a risk of death or serious physical harm. *See, e.g.*, *Beverly Enters., Inc.*, 19 BNA OSHC at 1188-90 (citing actual back injuries suffered by the employer's workers as evidence the hazard posed a risk of serious harm).

Williams Brothers has not contested this element of the Secretary's case. The Court finds the Secretary has established the hazard is likely to cause death or serious physical harm.

(4) Feasible Mean of Abatement

To establish a General Duty Clause violation, the Secretary must set forth feasible means of abatement for the hazard alleged. *Roadsafe Traffic Sys., Inc.*, 2021 WL 5994023, at *2. Here, the Citation proposed three alternative means of abatement:

> Among other methods, feasible and acceptable means of abatement include the following in accordance with the Traffic Control Plan – Freeway Lane Closures [TCP (6-1)-12] and the Traffic Control Plan – Work Area near Ramp [TCP (6-2)-12] developed by Texas Department of Transportation:
>
> a. Position two shadow vehicles with a Truck Mounted Attenuator (TMA) and high intensity rotating, flashing, oscillating, or strobing lights 30 feet to 100 feet in advance of the area of crew exposure.
>
> b. Develop a system to ensure a shadow vehicle cannot be moved out of the work zone area.
>
> c. When the work zone is moving, operate the shadow vehicle so that the shadow vehicle is positioned 30 feet to 100 feet in advance of the area in which the crew is working.

In her brief, the Secretary focuses on the use of crash trucks (referred to as "shadow vehicles" in the Citation, *see* note 2, *supra*) at the worksite but has not devoted any of her argument to abatement method (b) concerning a "system" regarding the movement of these trucks out of the work area. Sec'y's Br. 18-20. The Court finds any reliance on this method of abatement has been abandoned. *See Peacock Eng'g Inc.*, 26 BNA OSHC 1588, 1593 (No. 11-2780, 2017) (failing to consider abatement measures which were set forth in the citation but not addressed at the hearing); *cf. Ala. Power Co.*, 13 BNA OSHC 1240, 1246 (No. 84-357, 1987) (excluding abatement measure because it "would be unfair for us to find [a] violation for failing to institute [a] . . . method that was not raised [or] litigated below.").

As to the remaining two abatement methods proposed in the Citation, Williams Brothers challenges whether the work zone was a "moving" work zone to which abatement method (c) would even apply. Resp't's Br. 21. The Secretary relies on testimony from the CSHO to support her contention it was a moving work zone. (Tr. 187). Williams Brothers, meanwhile, relies on

testimony from Cortes. (Tr. 407-09). On the limited amount of evidence available, the Court agrees with Williams Brothers and finds the work zone was not a "moving" work zone to which abatement method (c) would apply. The CSHO's testimony on which the Secretary relies was made in the context of discussing abatement method (a), which does not relate to moving work zones at all. (Tr. 187). As Cortes more cogently explained: "Everything behind the barrels. Everything inside of the lane closures, where the signs were, everything is considered a work zone." (Tr. 408). Thus, while various crews were moving within the "work zone" on I-69 North and the connecting lanes to I-610, the work zone remained the area within the enclosure for the entirety of the night. (Tr. 408-09). The Court thus focuses on abatement method (a).[14]

To demonstrate a "feasible" means of abatement, the Secretary "must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enters., Inc.*, 19 BNA OSHC at 1191. The Secretary must also show the proposed abatement measures are economically feasible. *Waldon Health Care Ctr.*, 16 BNA OSHC at 1063. "Where an employer has undertaken measures to address a hazard alleged under the general duty clause, the Secretary must show that such measures were inadequate." *A.H. Sturgill Roofing, Inc.*, No. 13-0224, 2019 WL 1099857, at *8 (O.S.H.R.C., Feb. 28, 2019). "In addition, the Secretary must show that knowledgeable persons familiar with the industry would regard additional measures as necessary and appropriate in the particular circumstances existing at the employer's worksite." *Inland Steel Co.*, 12 BNA OSHC 1968, 1970-71 (No. 79-3286, 1986).

Here, Williams Brothers undertook multiple measures to address the struck-by hazards posed by active traffic at the worksite. These measures included: multiple types of warning signs (*E.g.*, Exh. R-21, at 00:11, 00:22, 00:33, 00:37, 00:53; Tr. 370-75); flashing arrow boards (*E.g.*,

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[14] The Court further notes neither of the Standard Sheets referenced in the Citation specifically relates to "[w]hen [a] work zone is moving," and in the "Typical Usage" box on each Sheet, the box labeled "Mobile" is not checked. (Exhs. C-5, C-6, R-15, R-16). Nothing in the hearing testimony other than the portions cited by the parties even addresses the subject of a "moving" work zone, and so it is unclear to the Court how this abatement method was ever meant to relate to the worksite on I-69 North. The Court notes, however, the commonality between abatement methods (a) and (c) is the placement of crash trucks within 30 to 100 feet of the location of a working crew. The only material differences are the number of suggested crash trucks and whether the work zone is "moving." Because abatement method (a) is the only one actually covered by the Standard Sheets referenced in the Citation, and because the Court does not find the work zone was a "moving" work zone in the sense suggested by the Citation, the Court will cabin its analysis to abatement method (a). However, the Court's analysis would not differ in any significant regard if it reached the specific feasibility of abatement method (c), given the similarities between them and the deficiencies the Court has recognized in the Secretary's evidence on this element of her case.

Exh. R-21, at 00:57; Tr. 375); barricades (Tr. 98; *see also* Exh. C-17); orange barrels used for tapered lane closures (*E.g.*, Exh. R-21, at 01:18 to 01:30; Tr. 376); reflective vests (*E.g.*, Exhs. R-18, at DOL000057, 60 & 61; R-21, at 04:59; Tr. 390); the periodic positioning of off-duty cops in vehicles with flashing red and blue lights, including two police officers in the vicinity of the gore point of I-610 North and South where the injured Williams Brothers employee was working (Exhs. C-2, at DOL000026; C-8A, R-21, at 01:57, 02:57, 04:00, 04:45; Tr. 85-86, 96-99, 208, 214-15, 377-78, 380-82, 384-85); and the use of at least one crash truck. (Exh. C-2, at DOL000028; C-8, at 8; R-17, R-21, at 05:20 to 05:22; Tr. 217-18, 254, 319-20, 387). In addition, Williams Brothers required at least some training for all its employees in recognizing the struck-by hazards associated with construction work on an active roadway. (Exhs. R-6, R-8, R-23, at WBC-Hwy-59-000410; Tr. 335-36, 351-53). At least two of its supervisors, Cisneros and Gomez, as well as Gomez's traffic control "helper" were trained offsite in traffic control at the TEEX course. (Exhs. R-4, R-5, R-7, R-9; Tr. 229-30, 295-98). In her post-trial brief, the Secretary has not pointed to any inadequacy, either perceived or established by the record, in the methods Williams Brothers *did* employ to protect its employees from struck-by hazards, as is her burden in establishing the abatement element of a General Duty Clause violation. *A.H. Sturgill Roofing, Inc.*, 2019 WL 1099857, at *8.

Moreover, the Secretary has failed to demonstrate her proposed abatement method would be "regard[ed] … as necessary and appropriate" by "knowledgeable persons familiar with the industry." *Inland Steel Co.*, 12 BNA OSHC 1970-71. As Williams Brothers points out, the Secretary offered no expert witness in this case to substantiate her proposed abatement method as necessary and appropriate. Resp't's Br. 21. While this omission by itself is perhaps not fatal to her case, very little evidence in the record otherwise supports the positioning of two crash trucks at the gore point of I-610 where the Williams Brothers employee was injured, as proposed by abatement method (a).

The most prominent evidence the Secretary did offer of abatement method (a) being considered a necessary and appropriate additional safety measure was the TxDOT Standard Sheets. (Exhs. C-5, C-6, R-15, R-16). However, as the Court concluded earlier in addressing Williams Brothers' preemption argument, despite containing some mandatory language, these Sheets do not represent mandatory requirements, merely guidance, and so the Court does not regard them as requiring any particular method of traffic control. Moreover, it is not clear how these Standard

Sheets are even developed. *See* note 10, *supra.* The Standard Sheets' weight in establishing additional "necessary" traffic control methods by "knowledgeable persons familiar with the industry" is therefore questionable. *Cf. Quick Transp. Of Ark., LLC*, No. No. 14-0844, 2019 WL 1466256, at *4 (O.S.H.R.C., Mar. 27, 2019) (guidance document from employer's industry insufficient to establish explosion hazard alleged in the Citation); *Am. Bridge/Lashcon, J.V.*, 16 BNA OSHC 1867, 1870 (No. 91-633, 1994) (noting where industry standards' definition of a term "has not been made part of the OSHA standards … through the exercise of rulemaking"), *aff'd*, 70 F.3d 131 (D.C. Cir. 1995); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949, 1954 (No. 79-2553) (noting many industry standards are not "intended to be used as mandatory, inflexible legal requirements" and describing the committee process by which these standards are often developed), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988).

The Secretary nonetheless argues "the correct positioning of shadow vehicles with TMAs would have materially reduced the hazard" if they had been placed behind the injured Williams Brothers employee at the gore point of I-610 North and South. Sec'y's Br. 20. The Court does not read the relevant Standard Sheet, TCP (6-1)-12,[15] to even prescribe what the Secretary is proposing. In both figures on this Standard Sheet, following the tapered closing of a lane of traffic, one or two crash trucks are placed in between the active lanes of traffic to the left (separated by "channelizing devices," likely meaning cones or barrels) and a "work zone" to the right. (Exh. C-5, R-15). This scenario is significantly different from the work zone in which the injured Williams Brothers employee was working the night of the accident. At the point where I-69 North and I-610 split from each other, three lanes of traffic had been closed off, channeling all public traffic onto I-69 North. (Exh. R-21, at 05:00 to 05:20). Starting at the gore point of I-69 North and the I-610 connector lanes, there is a permanent concrete barrier separating the two roadways. (Exhs. C-8, at 8; R-21, at 05:22 to 05:40; Tr. 387). The combination of these two circumstances means, on the night of the accident, the stretch of the I-610 connector lanes leading up to the gore point of I-610

[15] The other Standard Sheet submitted at the hearing, TCP (6-2)-12 relates to temporary traffic controls near ramps. (Exhs. C-6, R-16). Although I-69 North was closed starting near the exit ramp of Chimney Rock Road, no employees were struck on or near this ramp. (Exh. R-21, at 01:18; Tr. 376). The Secretary's brief focuses mainly on the gore point of I-610 North and South, where the Williams Brothers employee was struck, and only briefly mentions the gore point of I-69 North and the I-610 connector lanes where the first PTC crew was re-striping. Sec'y's Br. 20-21. The Secretary makes no argument suggesting the proper placement of a crash truck near the Chimney Rock Road ramp, approximately two miles from the employees who were eventually struck by the vehicle, would have somehow abated the hazard to which those employees were exposed. The Court therefore focuses on the Standard Sheet which best matches the location where the Secretary has ultimately directed the Court's attention.

North and South had no active lanes of traffic. (Exh. R-21 05:22 to 05:40). The Court does not read Standard Sheet TCP (6-1)-12 to require, or even "typically" require, the placement of crash trucks in such a scenario, where a permanent physical barrier already separates the "work zone" from all active lanes of traffic.

To the extent the remainder of the closure on I-69 North is implicated in the Secretary's proposed means of abatement, the record establishes Williams Brothers' substantial compliance with the terms of Standard Sheet TCP (6-1)-12. As noted above, the Secretary has advanced no argument to suggest Williams Brothers' other means of traffic control, including the signs or "channelizing devices" present on the Standard Sheet, were somehow inadequate or deficient. Although the crash truck was moved approximately 400 feet away from the PTC crew re-striping near the gore point of I-69 North and I-610, further than the 30 to 100 feet prescribed by the Sheet, this was done because the truck was impeding the crew's re-striping of the road. (Tr. 385, 400-03). The Standard Sheet specifically allows for crash trucks to be moved if they are "adversely affecting work performance." (Exhs. C-5, R-15). The Court also notes the new location for the crash truck was on the "hill" above South Rice Avenue, and Cisneros opined it was actually more visible to a vehicle traveling on the highway. (Tr. 145, 254, 274, 276-77, 400).

The Court does not find the Secretary has established the element of a feasible means of abatement because she has failed to demonstrate the methods employed by Williams Brothers were inadequate. The Secretary has further failed to demonstrate knowledgeable persons familiar with Williams Brothers' industry would regard the additional measure of positioning two crash trucks within 30 or 100 feet of its employee working on an inactive roadway to be necessary or appropriate.[16]

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[16] Williams Brothers has advanced an affirmative defense of "greater hazard" as to placing additional crash trucks within 30 to 100 feet of working crews. Resp't's Br. 29-30. Where an employer asserts this defense in response to a proposed abatement method for a violation of the General Duty Clause, the Commission has held "it is not the employer's burden to establish an affirmative defense of greater hazard." *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1875 n.19 (No. 92-2596, 1996). Rather, "[t]he Secretary has the initial burden of proving "that an abatement method exists that would provide protection against the cited hazard. The burden then shifts to the employer to produce evidence showing or tending to show that use of the method or methods established by the Secretary will cause consequences so adverse as to render their use infeasible." *CSA Equip. Co.*, 2019 WL 1375918, at *9. On this issue, Williams Brothers argues, in relevant part, "[i]f, as the Secretary proposed, the TMAs needed to always be within 30' to 100' from crew exposure, this would require a driver having to move the TMAs throughout the night to follow the crews working within the closure, making sure not to hit any of the workers on foot." Resp't's Br. 29. Williams Brothers argues this exposes workers to "an even greater risk of a struck-by hazard." *Id.* 29.

Because the Court has found the Secretary failed to establish the abatement element of the violation for reasons other than feasibility, the Court need not address the issue of whether the moving of crash trucks creates a greater hazard in great detail. However, the Court notes only one of Williams Brothers' witnesses, Cortes, even offered

(5) Employer Knowledge

To prove the knowledge element of a violation, the Secretary must demonstrate the employer's actual or constructive knowledge of the violative condition. *Jacobs Field Servs., N.A.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015). A supervisor's knowledge of a violative condition is imputable to a corporate employer. *TNT Crane & Rigging, Inc. v. Occupational Safety & Health Review Comm'n*, 74 F.4th 347, 359 (5th Cir. 2023); *Angel Bros. Enters., Ltd. v. Walsh*, 18 F.4th 827, 832 (5th Cir. 2021); *see also Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

In the context of a General Duty Clause violation, the relevant inquiry is whether the employer had knowledge of the hazard as alleged in the Citation, not whether it had knowledge of the specific facts underlying the alleged violation. For example, in *Peacock Eng'g, Inc.*, 26 BNA OSHC 1588 (No. 11-2780, 2017), the employer was "using an excavator to hoist and transport a [burial] crypt, suspended by wire rope slings, from a staging area to its plot, when an employee's left thumb was amputated by a sling as he guided the crypt, by hand, into place." *Id.* at 1589. The Citation alleged "exposure of Peacock employees to amputation, struck by and crushed by hazards, while guiding a suspended load by hand." *Id.* The ALJ found there was no knowledge, attributing the cause of the employee's injury to a "latent defect in the crypt that could not have been foreseen." *Id.* at 1592. The Commission reversed, finding the ALJ's "narrow focus on amputation from a crypt defect was error. The citation is clearly broader than that, as it also alleges struck-by and crushed-by hazards resulting from guiding a suspended load by hand." *Id.* Thus, the Commission found the knowledge element hinged on "whether Peacock was aware of the cited

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testimony on this subject, and his testimony was self-interested and failed to offer specific reasons as to why moving the crash trucks would pose a greater hazard to employees than the struck-by hazard posed from active, public traffic. *See State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159 (No. 90-1620) (consol.) (In support of its greater hazard defense, "State has presented only the unsubstantiated opinion of its owner, who is hardly a disinterested witness. We are unwilling to accept such conclusory statements without being given any factual basis for them, and State has offered no facts on which this conclusion is based."); *Trinity Industries, Inc.*, 15 BNA OSHC 1985, 1986 (No. 89-2316, 1992) (consol.) (employer failed to establish greater hazard defense where the only testimony on hazard of compliance being greater was the opinion of a supervisor who failed to explain "how the materials would be brought up or why he believed such an arrangement would be more dangerous than the status quo."). Moreover, Cortes' assertions are undermined by the record, which establishes the lone crash truck on I-69 North was moved multiple times during the events in this case without incident. (Exhs. C-2, at DOL000028; R-17; Tr. 217-18, 254, 319-20, 305-06, 385, 387, 400-03). Indeed, Cisneros moved the crash truck *closer* to the first PTC crew after the accident specifically because he "want[ed] to make them feel better. (Tr. 305-06; *see also* Tr. 385, 401). The Court also notes Williams Brothers had a policy of leaving the keys in the crash trucks, anticipating them to be moved around the worksite if necessary. (Tr. 217, 275, 308-09). The Court does not find Williams Brothers has established the movement of crash trucks by employees posed a greater hazard to workers than the hazards posed by active traffic.

conditions its employees faced when guiding a suspended crypt." *Id.*

Similarly, in *Cranesville Block Co., Inc./Clark Div.*, 23 BNA OSHC 1977 (No. 08-0316, 2012), the employer's business involved mixing concrete. *Id.* at 1978. After the employer's truck drivers had delivered a load of concrete, the drivers would park their trucks near a pond where the trucks could be rinsed. *Id.* at 1984. The employer would place "three-foot by five-foot concrete blocks, known as 'stop blocks' on the ground near the edge of the pond," and, as a matter of practice, the drivers relied on these stop blocks "to determine whether they had reached the edge of the pond." *Id.* at 1985. During the CSHO's inspection, he found several defective or missing stop blocks. *Id.* On this basis, OSHA issued a Citation under the General Duty Clause for the employer's "failure to provide adequate stop blocks in two of the bays to prevent trucks from rolling into the pond, exposing employees to the hazard of drowning." *Id.* In addressing the knowledge element of the violation, the Commission focused on the hazard as alleged in the Citation, i.e., the missing stop blocks which exposed employees to a drowning hazard. *Id.* at 1986. The Commission ultimately found the Secretary had failed to show the missing stop blocks were in "plain view" for purposes of establishing the employer's knowledge. *Id.*

Here, the Court finds Gomez, a "Head Traffic Controller" who oversaw the work of at least one helper the night of the accident, and Cisneros, the "Dirt Supervisor" who oversaw all of the work being done on the I-610 Project the night of the accident, were supervisors for the purpose imputing knowledge to Williams Brothers. (Exh. R-18, at DOL000059; Tr. 206-07, 209-10, 221, 241-42, 246-47, 269-71); *see also Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-630, 1992) ("An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer."). Williams Brothers has not disputed the supervisory status of either employee.

The Court also finds both supervisors had actual knowledge of the hazardous condition alleged in the Citation, i.e., the "expos[ure] to struck-by hazards from traffic when performing work activities on the northbound main lanes of Interstate 69 at Loop Interstate 610 Ramp." *See* Citation. In his interviews with Gomez and Cisneros, both employees acknowledged the existence of this hazard. (Exh. C-2, at DOL000031 & 32; Tr. 193). At the hearing, both employees demonstrated actual knowledge of this hazard and the need for traffic control measures to protect employees from it. (Exhs. C-16, R-10; Tr. 205-06, 209-10, 224, 245, 280-82, 287-88, 305-06). The Court finds the actual knowledge of Gomez and Cisneros is imputable to Williams Brothers.

TNT Crane & Rigging, Inc., 74 F.4th at 359; *Angel Bros. Enters., Ltd.*, 18 F.4th at 832 (5th Cir. 2021); *see also Dover Elevator Co.*, 16 BNA OSHC at 1286.[17]

Characterization of the Violation

The Secretary characterized the alleged General Duty Clause violation as serious. A violation is properly characterized as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). The Secretary need not show there was a substantial probability an accident would occur, only that if an accident did occur, death or serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010).

The Commission's test for determining whether a violation is likely to cause death or serious harm for purposes of a violation of the General Duty Clause is nearly identical to its test for determining whether a violation is serious for purposes of section 17(k) of the Act. *Compare Waldon Health Care Ctr.*, 16 BNA OSHC at 1060, *with Mosser Constr., Inc.*, 23 BNA OSHC at 1046. Thus, finding a violation is "likely to cause death or serious harm [under the general duty clause] is equivalent to a finding under section 17(k) that the violation gives rise to a substantial probability of death or serious harm." *Gearhart-Owen Indus., Inc.*, 10 BNA OSHC 2193, 2199 (No. 4263, 1982). Accordingly, for the reasons stated above in finding a violation is likely to cause death or serious harm, the Court finds the Secretary properly characterized the violation as serious. *Id.*; c*f. also Acme Energy Servs.*, 23 BNA OSHC 2121, 2129 (No. 08-0088, 2012) (finding a general duty clause violation was serious based on the same factors considered in finding the general duty clause violation).

Respondent's Affirmative Defenses

Williams Brothers has raised multiple affirmative defenses, as follows: 1) unpreventable employee misconduct; 2) "vagueness" of the Citation; 3) infeasibility; and 4) greater hazard.[18]

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[17] The majority of Williams Brothers' argument on the knowledge element of the violation is devoted to whether or not it was "reasonably diligent" for purposes of its constructive knowledge. Resp't's Br. 24-26. Because the Court finds the Secretary has established the actual knowledge of two of Williams Brothers' supervisors, and because the Secretary need only demonstrate actual *or* constructive knowledge, the Court need not address Williams Brothers' arguments in this regard.

[18] As the Court noted above, in the context of a General Duty Clause violation, any evidence or arguments in support of a greater hazard defense should be considered as "rebuttal evidence" in deciding whether the Secretary has established a feasible means of abatement. *See CSA Equip. Co., LLC*, 2019 WL 1375918, at *9 n.15. Accordingly, the Court has considered Williams Brothers' argument in the context of the abatement element of the violation and finds no reason to retread those arguments here. *See* note 16, *supra.*

Resp't's Br. 26-30. Williams Brothers bears the burden of establishing each of its affirmative defenses by a preponderance of the evidence. *See Excel Modular Scaffold & Leasing Co. v. Occupational Safety & Health Review Comm'n*, 943 F.3d 748, 756 (5th Cir. 2019) (employers bear the burden of proof for affirmative defenses); *Marson Corp.*, 10 BNA OSHC 1660, 1662 (No. 78-3491, 1982).

Unpreventable Employee Misconduct

Williams Brothers first argues any violation was the result of unpreventable employee misconduct. Resp't's Br. 26-27. To establish this affirmative defense, Williams Brothers "must show that it 1) has established work rules designed to prevent the violation, 2) has adequately communicated these rules to its employees, 3) has taken steps to discover violations, and 4) has effectively enforced the rules when violations have been discovered." *S. Hens, Inc. v. Occupational Safety & Health Review Comm'n*, 930 F.3d 667, 678 (5th Cir. 2019); *see also George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1933 n.15 (No. 94-3121, 1999).

Work Rules & Communication

The Court is persuaded on the first two elements of Williams Brothers' defense. Regarding work rules, the evidence recounted above for the abatement element of the violation establishes Williams Brothers' use of numerous traffic control devices on its highway construction sites. The Court finds these requirements constitute a work rule designed to protect employees from the struck-by hazards alleged in the Citation. *Cf. TNT Crane & Rigging, Inc.*, No. 16-1587, 2022 WL 2102910, at *5 (O.S.H.R.C., June 2, 2022) (work rules must be designed to prevent the violation at issue); *Regina Constr. Co.*, 15 BNA OSHC 1044, 1050 (No. 87-1309, 1991) (where employer asserts work rules as a means of abatement for a General Duty Clause violation, the employer "must first show that the rule was adequate to prevent the violation ….").

Williams Brothers has also established its employees were trained on these policies and practices, including several of the employees involved in the events of this case. Cortes trains all new and rehired employees in traffic control, including a "work zone class and orientation" and training video created by TxDOT entitled "Work Zone Fundamental Training." (Tr. 335-36, 350-51). All employees receive a copy of Williams Brothers' "Safety Program Manual," with an emphasis on the Manual's discussion of hazards associated with the "Traveling Public" while working in highway construction zones. (Exhs. R-6, R-8, R-23, at WBC-Hwy-59-000420; Tr. 353-55). Additionally, Williams Brothers encourages off-site training from the TEEX, which covers

the subject of traffic control for highway construction sites. (Exh. R-13; Tr. 230-31, 298-99, 352). Gomez and his helper both received orientation training and the TEEX training. (Exhs. R-6 to R-9; Tr. 207-08, 213, 229-30). Cisneros received the TEEX training twice. (Exhs. R-4 & R-5; Tr. 296-98). Cisneros and Gomez both testified at the hearing, including on the subject of traffic control and the use of traffic control devices, and the Court found both witnesses to be knowledgeable on these subjects.

The Court therefore finds Williams Brothers has established the existence of work rules and adequate communication of those rules to its employees through employee training.

Monitoring & Discipline

However, Williams has failed to produce sufficient evidence to establish the other two elements of its unpreventable employee misconduct defense.

On the subject of monitoring and discovery of violations, Williams Brothers has introduced only vague and conclusory testimony from its supervisors regarding their monitoring efforts to detect violations of its rules on the use of traffic control devices. (Tr. 356-57, 426-27). No testimony or other evidence was introduced to show what methods these supervisors utilized to ensure their employees complied with Williams Brothers' traffic control rules. *See TNT Crane & Rigging, Inc.*, 2022 WL 2102910, at *7 (finding insufficient monitoring "absent sufficient evidence to evaluate the frequency of the company's audits"); *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097 (No. 98-1748, 2000) (worksite visits were inadequate monitoring where there was no evidence either the program or the worksite visits pertained to enforcing the cited provision), *aff'd*, 277 F. 3d 1374 (5th Cir. 2001). Moreover, as the Secretary points out, Gomez's supervisor, Cisneros, did not monitor or inspect Gomez's work at all on the night of the accident to ensure he properly implemented the traffic control plan for the north side of the highway. (Tr. 301-02). Instead, Cisneros spent the entirety of the evening leading up to the accident on the I-69 South side of the highway. (Tr. 255-56). The Court finds Williams Brothers' evidence fails to establish "a diligent effort to discover and discourage violations of safety rules by employees." *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999).

Regarding discipline for employees who violate Williams Brothers' traffic control policies, Williams Brothers did introduce a copy of its written discipline policy. (Exh. R-11). However, this policy was never discussed directly at the hearing. As evidence of Williams Brothers' actual compliance with this policy, two supervisors, Cisneros and Cortes, offered nonspecific and

conclusory testimony on the discipline of employees who fail to follow work rules. (Tr. 288-89 (Cisneros testifying employees are disciplined "when they do something wrong.")); Tr. 358 (Cortes stating "[t]here's disciplinary actions that get taken" when asked "What happens when a crew member doesn't follow your traffic controls [sic] rules?")); Tr. 432 (Cortes stating only "Yes" in response to a question about employee discipline with no further elucidation)). Williams Brothers also introduced the two disciplinary notices issued by Cisneros to himself and Gomez five months after the accident,[19] notices which both witnesses represented were issued for a single missing "Right Lane Closed Ahead" sign. (Exhs. C-9, R-2; Tr. 225-26, 289-94, 310-12).

The Court is not persuaded by Williams Brothers' evidence of discipline, finding the lack of documentary evidence to be particularly noticeable here. Williams Brothers has over 2,000 employees and its primary work involves highway construction, presumably requiring numerous road closures with traffic control devices. (Tr. 139, 337). Assuming Williams Brothers disciplines its employees for even a single missing traffic sign, as the two disciplinary notices it did introduce seem to suggest, it strains credulity to believe these two notices are the only documentary evidence it could introduce "[t]o prove that its disciplinary system is more than a 'paper program' …" *Propellex Corp.*, 18 BNA OSHC at 1683; *see id.* (to demonstrate the disciplinary element of the unpreventable employee misconduct defense, "an employer must present evidence of having actually administered the discipline outlined in its policy and procedures."); *TNT Crane & Rigging, Inc.*, 2022 WL 2102910, at *8 ("As a large crane-industry employer with more than 250 employees and numerous offices, we find it highly unlikely that no TNT employee had ever previously violated these rules"), citing *Angel Bros. Enters, Ltd. v. Walsh*, 18 F.4th 827, 833 (5th Cir. 2021) ("the Commission did not have to accept the statistically implausible claim that although OSHA found violations during 80% of its five inspections, the company committed no safety violations the other 6,000 or so times it performed excavations"). Presumably, if Williams Brothers in fact regularly administers discipline to its employees for missing traffic control devices, it could have produced more than the two written notices it did. *Cf. Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1968, 2003) (an adverse inference is proper where "one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation

[19] The Court notes, as the Secretary does, the oddity of Cisneros, at the direction of his supervisor, disciplining Gomez nearly five months after the accident and then issuing himself a "self-write up." (Exh. R-2, at 2; Tr. 293); Sec'y's Br. 24. However, the Secretary has not cited any authority suggesting the unusual circumstances under which Cisneros issued the disciplinary notices bears on the strength of Williams Brothers' enforcement of its disciplinary policy.

and fails to do so."), *aff'd*, 391 F.3d 56 (1st Cir. 2004).

The Court finds Williams Brothers has failed to establish two elements of its affirmative defense of unpreventable employee misconduct.

Vagueness of the Citation

Williams Brothers also asserts the Citation is "unenforceable" because it does not provide "**fair and reasonable warning of the proscribed conduct**." Resp't's Br. 27 (emphasis in original). Williams Brothers focuses on the feasible means of abatement proposed in the Citation and argues abatement methods (b) and (c) were not applicable to the worksite at issue here. *Id.* at 28. Regarding abatement method (a), it points to what it perceives to be several discrepancies between the TxDOT Standard Sheets referenced in the abatement portion of the Citation and the actual requirements of those Standard Sheets. *Id.* at 28. It goes on to argue these perceived discrepancies mean it "is left to wonder which standard applies – the plain language of the [Standard Sheets] finding the use of TMAs to not always be required, or OSHA's 'transformed' rule that requires TMAs to be used at all times." *Id.*

The only legal support Williams Brothers has cited in its briefing of this affirmative defense is *Krause Milling Co., A Corp.*, No. 78-2307, 1979 WL 28982 (O.S.H.R.A.L.J., Feb. 6. 1979), an unreviewed ALJ decision of no precedential value. *See Hartwell Excavating Co.*, 4 BNA OSHC 1263, 1264 (No. 3841, 1976). On this basis alone, the Court finds Williams Brothers has waived any reliance on this affirmative defense. *See, e.g., NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998) ("Issues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived.").

Were the Court to reach the merits of this defense, it would not be under the lens of the "void for vagueness" doctrine invoked by Williams Brothers here. That doctrine relates to whether *standards* promulgated by OSHA sufficiently apprise employers of their requirements under the Act. *See, e.g., Corbesco Inc. v. Dole*, 926 F.2d 422, 425-29 (5th Cir. 1991) (discussing whether a particular standard gave sufficient notice of its requirements); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205 (No. 87-2059, 1993) ("Absolute precision of language, however, is not required, and a standard is not impermissibly vague simply because it is broad in nature." (emphasis added)). Indeed, the sole case Williams Brothers has cited in support of its "vagueness" defense involved whether a particular standard was impermissibly vague. *See Krause Milling Co.*, 1979 WL 28982, at *1-2.

Rather, the contents of a Citation are governed by 29 U.S.C. § 658(a), which states: "Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated." For the sufficiency of the allegations in a Citation, the Commission looks to: whether an employer had "fair notice" of the allegations being lodged against it (or in this case, the proposed methods to abate the alleged hazard); whether it availed itself of procedural tools, including discovery, to clear up any ambiguities in the Citation; and whether, even after trial, the employer has pointed to any prejudice in the preparation or presentation of its defense. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008); *Conagra Flour Milling Co.*, 15 BNA OSHC 1817, 1822-23 (No. 88-2572, 1992); *La.-Pac. Corp.*, 5 BNA OSHC 1994, 1998-99 (No. 10639, 1977).

Williams Brothers has pointed to no such prejudice here. Although it may quibble with the applicability and precise meaning of the language in the Standard Sheets, it was not prejudiced by the Secretary including multiple abatement methods or only including some language from the Standard Sheets in the Citation. Williams Brothers' conduct at trial, including direct and cross-examination of the CSHO and other witnesses about the applicability and meaning of the Standard Sheets, demonstrated it was sufficiently on notice of the abatement methods being proposed by the Secretary. (Tr. 164-68, 171-82, 245, 309-10, 328-30, 330-33, 339-41, 393-95, 396-400, 411-12, 446-49, 452-62, 468-70). Williams Brothers was free to introduce contrary evidence or argue against the feasibility of the Secretary's proposed abatement, a subject to which it has devoted nearly six full pages of its post-trial brief. Resp't's Br. 18-23; *see also La.-Pac. Corp.*, 5 BNA OSHC at 1999 (rejecting a challenge to the sufficiency of the Citation where the employer "attempted to refute complainant's evidence concerning the feasibility of recommended engineering controls" and where it was "clear that respondent was not prejudiced in preparing a response to the citation."). The Court also notes Williams Brothers' Safety Coordinator, Cortes, testified he understood the meaning of the abatement methods set forth in the Citation. (Tr. 411).

Thus, even if Williams Brothers had properly briefed its affirmative defense of "vagueness" of the Citation, the Court would reject the defense because it has failed to demonstrate prejudice from any of the perceived deficiencies to which it has pointed.

<u>Infeasibility</u>

Finally, Williams Brothers raises the affirmative defense of infeasibility. Resp't's Br. 28-

29. "To prove infeasibility, [an employer] must show by a preponderance of the evidence that (1) literal compliance with the terms of the cited standard was infeasible under the existing circumstances and (2) an alternative protective measure was used or there was no feasible alternative measures." *Otis Elevator Co.*, BNA OSHC 1081, 1087 (No. 09-1278, 2013) (emphasis omitted), *aff'd* 762 F. 3d 116 (D.C. Cir. 2014).

Here, Williams Brothers argues compliance was infeasible because "OSHA's proposed abatement conflicts with TxDOT rules." Resp't's Br. 29. Because Williams Brothers "is contractually required to comply with TxDOT rules" and could have its contract terminated for noncompliance, "compliance with the Citation is infeasible, as it would require [Williams Brothers] to violate its contractual obligations to TxDOT." *Id.*

Even assuming Williams Brothers is correct in asserting the Citation's proposed abatement conflicts with TxDOT rules, its contractual obligations to TxDOT do not relieve it of its obligations under the Act nor render it infeasible to protect its employees from traffic hazards. *Cf. Brock v. City Oil Well Serv. Co.*, 795 F.2d 507, 512 (5th Cir. 1986) ("[A]n employer may not contract out of its statutory responsibilities under [the Act]."), quoting *Cent. Of Ga. R.R. Co. v. Occupational Safety & Health Review Comm'n*, (5th Cir. 1978); *Tri-State Steel Constr. Inc.*, 15 BNA OSHC 1903, 1916 n.23 (N0. 89-2611, 1992) ("The fact that others had the contractual responsibility for developing and implementing the traffic control plan did not mean that National and Tri–State were powerless to protect their own employees or that they were absolved of all responsibility under the Act to provide those employees with safe and healthful workplaces and working conditions."), *aff'd*, 26 F.3d 173 (D.C. Cir. 1994).

Nonetheless, Williams Brothers need not adopt the exact abatement measures proposed in the Citation to satisfy its obligations under the General Duty Clause so long as its abatement measures provide the same level of protection as the ones the Secretary has proposed. *See A.H. Sturgill Roofing, Inc.*, No. 13-0224, 2019 WL 1099857, at *8 (O.S.H.R.C., Feb. 28, 2019) ("Where an employer has undertaken measures to address a hazard alleged under the general duty clause, the Secretary must show that such measures were inadequate."); *see also* (Tr. 186). Thus, any perceived conflict between the Act's requirements and Williams Brothers' contractual duties to TxDOT does not render compliance infeasible. *See, e.g.*, *A. J. McNulty & Co., Inc.*, 19 BNA OSHC 1121, 1130-31 (No. 94-1758, 2000) (rejecting infeasibility defense where alternative method of abatement was available).

The Court finds Williams Brothers has failed to establish the defense of infeasibility.

PENALTY

Because the Secretary has failed to establish all elements of a General Duty Clause violation, the Court vacates the Citation and does not assess a penalty. However, the Court notes Williams Brothers has advanced no argument in favor of reducing the Citation's proposed penalty of $14,502, nor has it challenged any part of the CSHO's methodology in calculating this penalty. (Tr. 156-62).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a) and Commission Rule 90(a), 29 C.F.R. § 2200.90(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED,** Citation 1, Item 1, alleging a serious violation of the General Duty Clause, OSH Act Section 5(a)(1), is **VACATED**, and no penalty is assessed.

SO ORDERED.

/s/______________________________
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: **March 13, 2024**
Atlanta, GA