

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

Secretary of Labor,

Complainant,

v.

The Lane Construction Corporation,

Respondent.

OSHRC Docket No. **09-0348**

**Appearances:**

Charna Hollingsworth-Malone, Esq., and Kristina Harrell, Esq., U. S. Department of Labor,  
Office of the Solicitor, Atlanta, Georgia, For Complainant

Joseph P. Mawhinney, Esq., Clark, Campbell & Mawhinney, Esq., P.A., Lakeland, Florida  
For Respondent

Before: Administrative Law Judge Nancy J. Spies

**DECISION AND ORDER**

The Lane Construction Corporation (Lane) is a road paving contractor. On the evening of September 22, 2008, a crew working for Lane was setting up road signs along U. S. Highway 98 near Lakeland, Florida. One of the crew members, Felipe Felix-Espinaldo, was struck and killed by a vehicle as he crossed the highway carrying a road sign. The next morning, Occupational Safety and Health Administration (OSHA) compliance officers Lawrence Anderson and Lizbeth Troché arrived at the accident site to conduct an inspection. On February 19, 2009, the Secretary issued a citation alleging Lane committed a serious violation of § 1926.21(b)(2), for failing to instruct each employee in the recognition and avoidance of unsafe conditions.

Lane denies it violated the standard. It asserted, but did not argue, that if a violation occurred, it resulted from the misconduct of the employee in failing to follow road safety instructions.

The undersigned held a hearing in this matter on August 6, 2009. The parties have filed post-hearing briefs, and the case is ready for decision. For the reasons discussed below, the undersigned affirms the item, and assesses a penalty of \$5,000.00.

## **Facts**

Lane is headquartered in Cheshire, Connecticut, and maintains an office in Mulberry, Florida. On September 22, 2008, Lane was conducting a nighttime milling and paving operation on a rural stretch of Highway 98. The highway was not illuminated by street lights. The road was wet from an earlier rainfall (Tr. 47, 246). Lane assigned a crew to close one lane of the road, allowing for a single lane of traffic to pass through (Tr. 25).

Foreman Jeff Dasher supervised the crew's closing of the road. The other crew members were laborers Rogelio Hernandez and Curtis Cargile, and the decedent, cement finisher Felipe Felix-Espinaldo (Tr. 42).

At some point in the evening, after the crew had placed several signs, foreman Dasher was sitting in his truck speaking on his cell phone with his supervisor. Cargile was standing beside a Maintenance of Traffic (MOT) sign he had placed on the northbound side of the road. Hernandez was standing in the flatbed of the truck, from which he had handed an MOT sign to Felix-Espinaldo. Felix-Espinaldo carried the sign across the southbound lane and entered the northbound lane. As he did so, a northbound vehicle struck and killed him (Exh. C-8; Tr. 30-31).

The MOT sign was metal, weighing 20 to 30 pounds. It measured 64 inches by 64 inches, with attached legs that brought the total height of the sign to 78 inches (6 feet, 6 inches). According to the medical examiner's report, Felix-Espinaldo was 5 feet, 4 inches tall (Exh. C-4, C-5; Tr. 37).

### **Citation No. 1**

The Secretary has the burden of proving the violation by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

### **Item 1: Alleged Serious Violation of § 1926.21(b)(2)**

Section 1926.21(b)(2) provides:

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

The citation alleges, “Employees were not trained in the proper method of carrying road signs across active roadways to prevent visual obstruction of on-coming vehicles, on or about 9/22/08.”

#### *Applicability*

The Secretary argues § 1926.21(b)(2) applies to the cited conditions because Lane was engaged in road construction, an inherently dangerous activity requiring proper safety instructions. Lane argues § 1926.21(b)(2) does not apply to the cited conditions. No standard exists regulating the proper way to carry road signs. Lane argues the Secretary wrongly cited § 1926.21(b)(2) in lieu of a standard specific to the alleged violative activity; *i.e.*, improperly carrying signs across an active roadway. Lane then posits it was unnecessary to provide a specific instruction because “anyone of normal sensibility should know that they should look for traffic in all directions before stepping into an active roadway and that is not something that an adult in the working world should have to be told” (Lane’s brief, p. 7).

Lane’s arguments are rejected. Lane’s crew was engaged in a construction activity to which § 1926.21(b)(2) applies. The Secretary may properly cite § 1926.21(b)(2) for an employer’s failure to provide a safety instruction, even in the absence of a specific standard addressing the underlying condition. Section 1926.21(b)(2) requires an employer to “instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware.” *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992). The obviousness of the danger of crossing an active roadway without clear visibility does not negate the need to provide its employees adequate safety guidance on the known hazard.

Weighing heavily in these conclusions is the Commission’s holding that a reasonably prudent employer should be aware crossing a highway, even unencumbered by a road sign, poses the type of hazard which triggers an obligation to instruct employees to recognize and avoid the

hazard. In *W. G. Fairfield Co.*, 19 BNA OSHC 1233 (No. 99-0344, 2000), *aff'd*, *W. G. Fairfield v. OSHRC*, 285 F.3d 499 (6<sup>th</sup> Cir. 2002), an employee was attempting to cross six lanes of traffic on Interstate 71, when he was struck and killed by a vehicle. Chairman Rogers joined with Commissioner Weisberg in finding § 1926.21(b)(2) applies to highway construction activities that expose employees to the hazard of being struck by vehicles (*Id.* at 1236):

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. Of these practices, crossing an active highway on foot is clearly the most dangerous.

In affirming, the Sixth Circuit addressed whether instructions were necessary when an employer assigns work generally accepted as hazardous. The court observed that the employees' routine performance of the activity "suggests that the dangers inherent in crossing an active roadway were not so obvious that employees would not have benefitted from systematic instruction" (*supra*, 285 F.3d at 508).

The danger is exacerbated when employees carry a large MOT sign that could hinder visibility. In *W.G. Fairfield*, the Commission found § 1926.21(b)(2) required the employer "to address the practice [of crossing an active highway] in its safety program and employee training[.]," *supra*, 19 BNA OSHC at 1237.

Following Commission precedent, the undersigned finds § 1926.21(b)(2) applies to the instruction of employees on how to safely carry an MOT sign when crossing an active highway.

#### *Noncompliance with Terms of the Standard*

Lane argues that, if § 1926.21(b)(2) is found to apply, Lane's training was adequate under the standard. "An employer's instructions are adequate under § 1926.21(b)(2) if they are specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *Model Continental Construction Co.*, 19 BNA OSHC 1760 (No. 00-1629, 2001). Lane's position that it provided adequate instruction to the employees conflicts with its position that no instruction was needed.

Lane's written safety program provides only general safety training to its employees. In one of its weekly toolbox meetings, Lane instructed its employees to "beware of your surroundings" (Exh. C-9). In *W.G. Fairfield*, the company asserted it provided adequate instructions when it told its employees "to 'pay close attention to the traffic around you,' to 'stay alert at all times,' and to 'make sure that you always know where you are and where the traffic is so that you don't accidentally end up in an active lane.'" *Supra*, 19 BNA OSHC at 1235. The Commission stated, "In our view, this testimony suggests, at best, an inadequate and superficial treatment of a serious hazard." *Id.* at 1237. Likewise, in the instant case, Lane's safety training does not instruct employees on how to carry signs across a roadway and does not indicate that visual obstruction is a hazard to be avoided.

Foreman Dasher gave self-contradictory testimony regarding Lane's safety instructions. Initially, Dasher stated Lane had no set policy on how to carry signs, and that "it's totally up to the individual that's doing it" (Tr. 158). Dasher testified it was "okay" for each employee to have his own style for carrying the signs, and, "There's no proper way to carry a sign" (Tr. 158). Dasher then claimed if he saw an employee carrying a sign so that it obstructed his view, he would tell the employee not to do so. When asked if he had ever given this instruction, Dasher replied he had instructed "[j]ust about everybody that's ever worked for me, because the first thing they do is carry a sign improperly" (Tr. 159).

In Dasher's telling, this alleged instruction came only after Dasher observed an employee carry a sign improperly; Dasher does not claim to instruct employees prior to the observation. Dasher testified that, because Lane has no policy on carrying signs, he relied on his own experience in teaching employees how to carry the signs (Tr. 160).

Dasher also stated he did not instruct his crew on the safe manner in which to carry a sign because he told them not to carry signs the night of the accident, and that only he would be placing the signs (Tr. 190). This statement is contradicted by the signed statements given by Cargile (Exh. C-11) and Hernandez (Exh. C-18). They each state they placed signs that evening, and Hernandez states he and Felix-Espinaldo debated about who would place the sign Felix-Espinaldo was carrying when he was struck by the vehicle.

The undersigned finds Dasher's testimony regarding his instruction to employees on how to safely carry signs to be unreliable. As Lane concedes, it does not have a written policy on safely carrying road signs across active roadways. Safe sign carrying is not addressed in its weekly toolbox meetings. Any instructions Dasher gave to employees on this issue was sporadic and given only after improper handling was observed.<sup>1</sup> Lane had no program for systematically training its employees in the safe carrying of road signs, even though placing road signs along active roadways is a routine activity for its crew members.

Employees are required to carry large signs across roadways open to traffic. Sometimes they are required to perform this task at night, as in the instant case. The signs are over 6 feet tall with their attached legs. It is reasonable to assume some employees would choose to carry the signs in the most comfortable manner, at the expense of highway visibility. Without proper instruction, employees are more likely to engage in this hazardous practice.

The Secretary has established Lane violated the terms of § 1926.21(b)(2).

#### *Employee Exposure*

Felix-Espinaldo was struck and killed by a vehicle as he carried an MOT sign across the highway. Employee exposure is evident.

#### *Knowledge*

As the employer, Lane had actual knowledge of its training program. The company was aware that it did not instruct its employees to maintain visibility of the road in both directions when crossing the road on foot while carrying an MOT sign. Lane had actual knowledge that its safety program lacked such instructions.

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On September 26, 2008, shortly after the accident, and 4 months later on January 27, 2009, OSHA took oral and/or written statements from the four crew members. The undersigned is aware that for the first time during the January interviews foreman Dasher and Rogelio Hernandez stated that the very night of the accident Dasher gave specific directions to carry the signs to permit visibility. Not only did this contradict the earlier information the men gave to OSHA, it contradicts Lane's own admissions, made after investigating the incident. Also contradicting an earlier oral statement to OSHA, during the January interview Hernandez advised the sign did not obstruct the view of the 64-inch Felix-Espinaldo as he crossed the road on September 22nd carrying the 78-inch sign. Having placed the conflicting evidence in context with the other evidence of record, the statements are not credited. Further, the focus of the case is the violative conduct (failing to instruct), not what caused the accident.

Having proven each of the elements of her *prima facie* case, the Secretary has established Lane committed a violation of § 1926.21(b)(2).

### **Classification**

The Secretary classified the violation as serious. Under § 17(a) of the Act, a serious violation exists if there is a “substantial probability that death or serious physical harm could result” from the condition. Here, Felix-Espinaldo was killed while carrying an MOT sign across the highway. The violation is properly classified as serious.

### **Employee Misconduct Defense**

In its answer, Lane asserted this affirmative defense: “The accident and alleged violation were due to employee error or failure to follow instructions,” or the employee misconduct defense. Lane has apparently abandoned this defense, failing to mention it in its brief. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *E.g., Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff’d without published opinion*, 106 F. 3d 401 (6th Cir. 1997).

The first element of the defense requires the employer to have a specific workrule designed to prevent the violative conduct. As discussed previously, Lane did not have that workrule. Lane states in its brief, “[T]here are no standards as to how to carry a sign and Lane has no specific policy as to this, either” (Lane’s brief, p.11). Felix-Espinaldo could not fail to follow instructions when no instructions were given. The employee misconduct defense fails.

### **Penalty Determination**

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer’s business, history of previous violations, the employer’s good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Lane employs between 1,300 and 1,500 employees nationwide. The Secretary had cited Lane for OSHA violations within the years prior to the instant inspection (Tr. 75). Lane demonstrated good faith during this proceeding. It cooperated with the lengthy OSHA investigation.

