



**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, DC 20036-3457

**SECRETARY OF LABOR,  
Complainant,**

**v.**

**MICHAEL F. RONCA & SONS, INC.,  
Respondent.**

**OSHRC DOCKET NO. 15-0291**

**ORDER DENYING RESPONDENT'S  
MOTION FOR SUMMARY JUDGMENT**

The Wilkes Barre, Pennsylvania Area Office of the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's worksite at 1214 Morea Road, Barnesville, Pennsylvania 18214, beginning on July 31, 2014. That date, July 31, 2014, Respondent's project manager and two employees working as temporary traffic control flaggers were present at the Morea roadway worksite to facilitate the delivery and unloading of a Caterpillar Excavator to be used in an upcoming construction project. That day, in the early afternoon, one of the flaggers was struck and fatally injured by a motorist driving on Morea Road. Due to the construction worksite fatality the OSHA inspection was initiated. See Respondent's Motion for Summary Judgment at pp. 2-3, Exs. 1-3.

On January 30, 2015, OSHA issued a one item serious citation to Respondent, alleging a violation of 29 C.F.R. § 1926.201(a)<sup>1</sup>, which states:

Flaggers. Signaling by flaggers and the use of flaggers, including warning garments worn by flaggers, shall conform to Part VI of the Manual on Uniform Traffic Control Devices (1988 Edition, Revision 3, or the Millennium Edition), incorporated by reference in § 1926.6.<sup>2</sup>

<sup>1</sup> Referenced herein as Standard 201(a).

<sup>2</sup> 29 C.F.R. 1926.6 "Incorporation by reference," in pertinent part, states:

(a) The standards of agencies of the U.S. Government . . . , which are incorporated by reference in this part, have the same force and effect as other standards in this part. *Only the mandatory provisions (i.e.,*

The citation described the alleged violation, at the Morea Road, Barnesville, PA, worksite, as follows:

Hand-signaling devices, paddles or flags, were not used to stop traffic approaching the work zone, on or about July 31, 2014.

Abatement Note: Abatement methods include, but are not limited to, following Part VI of the Manual on Uniform Traffic Control Devices (1988 Edition, Revision 3, or the Millennium Edition).

The citation proposed penalty was \$7,000. Respondent filed a timely notice of contest. This case was docketed with the Occupational Safety and Health Review Commission (Commission).

Thereafter, the Secretary of Labor filed a Complaint. Respondent filed an Answer, including several affirmative defenses. The parties engaged in initial discovery activities, including written discovery and key depositions. See July 24, 2015 Interim Scheduling Order and August 18, 2015 Second Interim Scheduling Order. At present, discovery is not complete and the agreed discovery period has not concluded.

Respondent filed a Motion for Summary Judgment. The Secretary filed an Opposition. I have carefully considered Respondent's Motion, the Secretary's Opposition, and the exhibits attached to each. For the reasons stated below, Respondent Motion is denied.<sup>3</sup>

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*provisions containing the word "shall" or other mandatory language) of standards incorporated by reference are adopted as standards under the Occupational Safety and Health Act.*

....

(u)(1) Manual on Uniform Traffic Control Devices (MUTCD), Part VI, Standards and Guides for Traffic Controls for Street and Highway Construction, Maintenance, Utility, and Incident Management Operation, 1988 Edition, Revision 3, September 3, 1993; IBR approved for §§ 1926.200(g), 1926.201(a), and 1926.202.

....

(2) Manual on Uniform Traffic Control Devices (MUTCD), Millennium Edition, Dec. 2000, IBR approved for §§ 1926.200(g), 1926.201(a), and 1926.202. (emphasis supplied).

See *The Ruhlin Co.*, No. 04-2049, 2006 WL 6936753, at \*7 (O.S.H.R.C. Nov. 20, 2006).

<sup>3</sup> During a conference call, on September 1, 2015, I advised counsel for the parties that Respondent's Summary Judgment Motion was denied and the reasons for that decision. I further advised that this written Order would follow.

### **Positions of the Parties.**

Respondent contends that the Secretary will be unable to carry his burden to prove that Section 201(a) applies to the cited condition, as the Secretary cited Respondent for failing to comply with an advisory portion of the Manual on Uniform Traffic Control Devices (MUTCD). Respondent argues that advisory provisions of the MUTCD are not incorporated into any OSHA standard pursuant to Commission precedent, citing *KS Energy Services, Inc.*, 22 BNA OSHC 1261 (No. 06-1416, 2008); *The Ruhlin Co.*, No. 04-2049, 2006 WL 6936753, at \*7 (O.S.H.R.C. Nov. 20, 2006), and *William B. Hopke Co.*, 10 BNA OSHC 1479 (No. 81-206, 1982)(ALJ).

Respondent contends that the Secretary did not cite Respondent for violating a Standard provision of the MUTCD, but rather for violating the Support provision of Section 6E.03 “Hand-Signaling Devices,” of Part 6 Temporary Traffic Control MUTCD 2000. Motion at pp. 4-5; Ex. 5. Respondent argues that there is no language in the MUTCD Section 6E.03 Support provision providing that the use of hand-signaling devices is mandatory.<sup>4</sup> Absent such mandatory language, Respondent contends that the Secretary cannot rely upon MUTCD Section 6E.03 to prove a violation of Section 201(a). Motion at pp. 5-6. Accordingly, “even if [Respondent’s July 31, 2014, temporary traffic control flaggers] were not using hand-signaling devices, Section 201(a) does not apply.”<sup>5</sup> Therefore, the alleged violation should be vacated. Motion at p. 6.

The Secretary opposes Respondent’s Motion. The Secretary asserts that the MUTCD does contain mandatory requirements that flaggers must use either paddles or flags to control traffic, as set forth in Sections 6E.03 and 6E.04, of Part 6 Temporary Traffic Control MUTCD 2000. Opposition at pp. 1-2, 11; Ex. A. The citation alleges that Respondent did not conform to Part 6 of the MUTCD, violating Section 201(a), at the worksite, as “[h]and-signaling devices, paddles or flags, were not used to stop traffic approaching the work zone, on or about July 31, 2014.” The Secretary contends that Respondent’s interpretation of the MUTCD as allowing flaggers to use paddles, or flags, or any other device, or even no device at all, must be rejected

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<sup>4</sup> Respondent cites the *OSHA Instruction, Inspection and Citation Guidance for Roadway and Highway Construction Work Zones*, CPL 02-01-054. Motion at p. 5.

<sup>5</sup> Respondent agrees that factual disputes do exist regarding whether, on July 31, 2014, the temporary traffic control flaggers, had been provided flags, and whether other individuals were present at the job brief. Motion at p. 2 n.2.

because it would lead to an absurd and highly dangerous result and it would undermine the significant protection that paddles and flags provide to flaggers performing dangerous traffic control work. Opposition at pp. 2, 4-5, 10-11.

The Secretary contends that Respondent failed to comply with mandatory “Standard” provisions in MUTCD Sections 6E.03 and 6E.04, sections within Part 6 of the MUTCD. Section 6E.03 “Hand-Signaling Devices” sets forth specific, mandatory, requirements regarding how the two hand-signaling device options – STOP/SLOW paddles and flags – must be designed. Section 6E.04 “Flagger Procedures” sets forth specific procedures and movements that flaggers must follow when using either of the two hand-signaling devices, paddles or flags. Opposition at p. 3, Ex. A. The Secretary contends that Respondent’s non-mandatory interpretation of MUTCD Section 6E.03 (and Section 6E.04) would mean that a traffic control flagger “may use, but is not required to use, paddles or flags, [and] therefore, that using one’s hands to control traffic is permissible.” Opposition at p. 4. The Secretary contends that MUTCD Sections 6E.03 and 6E.04 are mandatory “Standard” provisions that describe only two options for flaggers to use when controlling traffic, paddles and flags, because only these hand-held devices, designed and used as specified in these sections, “further the objective of making flagging work as safe as possible.” Opposition at p. 5.

The Secretary contends that consideration of other MUTCD sections reveals that Respondent’s interpretation of the MUTCD is incorrect, referencing MUTCD Section 6E.03 (“The Stop/Slow paddle should be the primary and preferred hand-signaling device because the Stop/Slow paddle gives road users more positive guidance than red flags”), Section 6C.11 (discussing manual signals that employees may use to communicate with one another, not to control traffic), and Section 6D.02 (describing the use of temporary traffic control devices). Opposition at pp. 2, 7-9.

Further, the Secretary contends that the requirements of MUTCD Sections 6E.03 and 6E.04 are based on the fundamental premise that flaggers must use either paddles or flags to control traffic, and that they may not use their hands to control traffic. This premise is so fundamental that it need not be expressly stated. Similar obvious premises, not expressly stated, are found in other sections of MUTCD Part 6, including Section 6E.02 (high-visibility

clothing) and Section 6G.03 (advance warning when the work area is within a traveled roadway). Opposition at pp. 9-10.

Therefore, the Secretary contends that Respondent's Summary Judgment Motion must be denied.

**Summary Judgment Standard.**

The requirements for granting a Summary Judgment Motion are well established. Federal Rule of Civil Procedure 56 applies to Summary Judgment Motions in Commission proceedings. See Fed.R.Civ.P. 56; Commission Rules 2, 61; 29 C.F.R. §§ 2200.2, 2200.61. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). When determining whether there is a genuine dispute as to any material fact, the fact finder must view the evidence in the light most favorable to the non-moving party. All reasonable inferences must be drawn and all ambiguities must be resolved in the non-moving party's favor. There must be no genuine dispute as to evidentiary facts and there must be no dispute as to the inferences to be drawn from the facts. See *Ford Motor Co. – Buffalo Stamping Plant*, 23 BNA OSHC 1593 (No. 10-1483, 2011). See also *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 255 (1986); *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 83, 85 (2d Cir. 2006); *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2159 (No. 87-214, 1989)(consolidated).

When reviewing Respondent's Summary Judgment Motion, it is the Judge's role to determine whether any factual disputes exist, not to decide the factual disputes. See *Ford Motor Co.*, 23 BNA OSHC at 1593-94, citing *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir. 1994). The Judge may not weight the evidence, make credibility determinations, resolve issues of material facts, or draw legitimate inferences from the facts. Disputed facts must be left for resolution at the trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 255 (1986).

In cases where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). See *Tufariello v. Long Island R.R.*, 458 F.3d at 85.

## **Manual on Uniform Traffic Control Devices (MUTCD), Part 6, Temporary Traffic Control.**

The cited Standard 29 C.F.R. § 1926.201(a) specifically incorporates by reference the mandatory provisions contained in MUTCD, Part 6, Temporary Traffic Control (1988 Edition Revision 3 or the Millennium Edition).<sup>6</sup> See 29 C.F.R. § 1926.6, set forth above in note 2. The MUTCD mandatory provisions are incorporated as standards. MUTCD non-mandatory provisions may be used as guidance in interpreting disputed terms in the MUTCD. See *KS Energy Services*, 22 BNA OSHC at 1264, 1265 n.8. See also *CPM Constructors*, 22 BNA OSHC 1544 (No. 08-1111, 2009)(ALJ).

[The Commission] find[s] nothing impermissible in [the Secretary's] reference to other provisions [in the MUTCD] as guidance in interpreting the disputed terms in the cited [MUTCD] provision, an approach that is consistent with Commission precedent. *Phoenix Roofing, Inc.* 17 BNA OSHC 1076, 1077 (No. 90-2148, 1995)(stating that when interpreting disputed terms, Commission looks to “the provisions of the whole law, and to its object and policy”), *aff'd* 79 F.3d 1146 (5<sup>th</sup> Cir. 1996)(unpublished); *Morrison-Knudsen Co. / Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1108 (No. 88-572, 1993)(explaining Commission construes “each part or section . . . in connection with every other part or section so as to produce a harmonious whole”).

*KS Energy Services*, 22 BNA OSHC at 1265 n.8 (parallel citations omitted).

When considering disputed provisions or terms in a standard, the Commission will read the language of the disputed provision in context to avoid defeating the purpose of the standard. The Commission has stated that standards must be construed to avoid absurd results. See *Otis Elevator Co.*, 24 BNA OSHC 1081, 1086-87 (No. 09-1278, 2013), citing *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993).

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<sup>6</sup> The OSHA construction industry safety standards, including Standard 201(a), were revised in 2002 to require that traffic control signs, signals, barricades or devices protecting workers conform to Part VI of either the 1988 Edition of the Federal Highway Administration (FHWA) MUTCD, with 1993 revisions (Revision 3) or the Millennium Edition of the FHWA MUTCD, instead of the American National Standards Institute (ANSI) D6.1-1971 Manual on Uniform Traffic Control Devices for Streets and Highways (1971 MUTCD). OSHA stated, in the publication of the Final Rule, that MUTCD Revision 3 and the Millennium Edition “better reflect current practices and techniques to best ensure highway construction worker safety and health.” 67 Fed. Reg. 57722-01 (Sept. 12, 2002)(to be codified at 29 C.F.R. Part 1926).

Accordingly, the 1982 case cited by Respondent regarding Section 6E-4 “Flagging Procedures,” derived from the outdated, inapplicable, 1971 MUTCD, is of limited assistance. See *William B. Hopke Co.*, 10 BNA OSHC 1479 (No. 81-206, 1982)(ALJ). See also *William B. Hopke Co.*, 12 BNA OSHC 2158 (No. 81-206, 1986)(EAJA).

The MUTCD Millennium Edition was reformatted to clarify employer requirements and the basis for the requirements. Each subsection in the MUTCD Millennium Edition is organized into categories entitled standard, guidance, options, and support. See 67 Fed. Reg. 57722-01 (Sept. 12, 2002) (Section IV. Discussion of Changes, Format and Style).

In its Motion, Respondent's narrow focus is on the Support provision of Section 6E.03 "Hand-Signaling Devices," of Part 6 Temporary Traffic Control MUTCD 2000. Motion at pp. 4-5; Ex. 5. The Support provision of Section 6E.03 "Hand-Signaling Devices" states:

Hand-signaling devices, such as STOP/SLOW paddles, lights, and red flags, are used to control road users through temporary traffic control zones.

In contrast, in its Opposition, the Secretary broadly considers the many sections in Part 6 Temporary Traffic Control MUTCD 2000, in context, in relationship to one another, and in light of the stated policy of the standard to ensure the safety and health of highway construction workers. Opposition at pp. 2-5, 7-11; Ex. A. Among other MUTCD sections, as discussed above, the Secretary cites the Standard provisions in Sections 6E.03 and 6E.04. The Standard provisions of Section 6E.03 "Hand-Signaling Devices" state:

Standard:

The STOP/SLOW paddle shall have an octagonal shape on a rigid handle. STOP/SLOW paddles shall be at least 450 mm (18 in) wide with letters at least 150 mm (6 in) high and should be fabricated from light semi-rigid material. The background of the STOP face shall be red with white letters and border. The background of the SLOW face shall be orange with black letters and border. When used at night, the STOP/SLOW paddle shall be retro reflectorized.

Standard:

Flags, when used, shall be a minimum of 600 mm (24 in) square, made of a good grade of red material, and securely fastened to a staff that is approximately 900 mm (36 in) in length.

Standard:

When used at nighttime, flags shall be retro reflectorized red.

The Standard provisions of Section 6E.04 "Flagger Procedures," in part, state:

Standard:

The following methods of signaling with paddles shall be used:

- A. To stop road users, the flagger shall face road users and aim the STOP paddle face toward road users in a stationary position with the arm extended horizontally away

from the body. The free arm shall be held with the palm of the hand above shoulder level toward approaching traffic.

....

**Standard:**

The following methods of signaling with a flag shall be used:

- A. To stop road users, the flagger shall face road users and extend the flag staff horizontally across the road users lane in a stationary position so that the full area of the flag is visibly hanging below the staff. The free arm shall be held with the palm of the hand above the shoulder level toward approaching traffic.

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**Discussion.**

In its Summary Judgment Motion, Respondent contends that the Secretary will be unable to establish the existence of an element essential to the Secretary’s case – that the cited Standard 202(a) applies to the facts at the Morea Road worksite on July 31, 2014.<sup>7</sup> Respondent contends that the Secretary cited Respondent for failing to comply with an advisory provision of the MUTCD, not a mandatory provision.

In Opposition, the Secretary states that Respondent was cited for violating Standard 201(a) as the signaling by flaggers did not conform to Part 6 of the MUTCD as hand-signaling devices, paddles or flags, were not used to stop traffic approaching the work zone. See Citation 1, item 1. The Secretary argues, *in detail*, that Respondent failed to comply with mandatory “Standard” provisions in MUTCD Part 6, in Section 6E.03 “Hand-Signaling Devices”<sup>8</sup> and Section

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<sup>7</sup> To establish a violation of the cited OSHA standard, the Secretary must establish by the preponderance of the evidence that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

<sup>8</sup> The legislative history is supportive of the Secretary’s contention that the use of hand-signaling devices, paddles and flags, is a mandatory provision of MUTCD Part 6, Section 6E.03.

**IV. Discussion of Changes.**

**Format and Style.**

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Pursuant to the requirements of 29 CFR 1926.31, only the mandatory language of standards that are incorporated through reference are adopted as OSHA standards. Therefore, the summary of changes below will focus primarily on the revisions that impose new requirements, or modify already existing requirements.

**Section 6E (Hand Signaling or Flagger Control)**

....



6E.04 “Flagger Procedures.” The Secretary argues that the mandatory “Standard” provisions in Sections 6E.03 and 6E.04 describe only two options for flaggers to use when controlling traffic, STOP/SLOW paddles and flags. The Secretary contends that Respondent’s “non-mandatory” interpretation of MUTCD Part 6 means that a traffic control flagger need not use a paddle or flag when signaling traffic. In other words, a traffic control flagger is permitted to use any device or no device at all. The Secretary contends that consideration of Sections 6E.03 and 6E.04, read in their entirety, and consideration of other sections in MUTCD Part 6 disclose Respondent’s “non-mandatory” interpretation of MUTCD Part 6 to be incorrect. The Secretary argues that Respondent’s “non-mandatory” interpretation of MUTCD Part 6, concerning hand-signaling devices, would lead to absurd and highly dangerous results.

When evaluating Respondent’s Summary Judgment Motion and determining whether there is a genuine dispute as to any material fact, the evidence must be viewed in the light most favorable to the Secretary, the non-moving party. All reasonable inferences must be drawn and all ambiguities must be resolved in favor of the Secretary.

The above summary reveals that in this case genuine issues of material fact are present, regarding the applicability of Standard 201(a) to the cited condition, including whether Respondent has been cited for failing to comply with a mandatory or advisory provision of the MUTCD. In Opposition, the Secretary has advanced several *persuasive* arguments to support the Secretary’s position that Standard 201(a) is applicable to the cited condition, as Respondent violated mandatory “Standard” provisions within Part 6 of the MUTCD that require work zone traffic flaggers to use hand-signaling devices, paddles or flags. The Secretary’s arguments regarding the applicability of Standard 201(a) to the cited condition are well supported by reference to the many sections of Part 6 of the MUTCD, read in context.

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Revision 3 and the Millennium Edition depart significantly from the 1971 ANSI standard by requiring that “Stop/Slow” paddles, not flags, be the primary hand-signaling device. The paddles must have an octagonal shape on a rigid handle, and be at least 18 inches wide with letters at least six inches high. The 1971 ANSI standard recommended a 24-inch width. Revision 3 and the Millennium Edition require that paddles be retro-reflectorized when used at night. Flags would still be allowed in emergency situations or in low-speed and/or low-volume locations.

67 Fed. Reg. 57722-01 (Sept. 12, 2002).

See Fed.R.Civ.P. 56(c). The presence of this genuine dispute regarding material facts precludes a finding that Respondent is entitled to a judgment as a matter of law.

Furthermore, assuming that Standard 201(a) is found applicable, Respondent agrees that other genuine, material, factual disputes are present for resolution at a hearing, including whether Respondent's employees working as temporary traffic control flaggers, on July 31, 2014, had been provided flags.

**Conclusion.**

Evaluating Respondent's Summary Judgment Motion and reviewing the record evidence in the light most favorable to the Secretary, drawing all reasonable inferences in the Secretary's favor, I find that genuine disputes as to material facts are present. Therefore, Respondent is not entitled to judgment as a matter of law.

Respondent's Motion for summary judgment is denied.

SO ORDERED.

Dated: October 13, 2015  
Washington, D.C.

*/s/ Carol A. Baumerich*

Honorable Carol A. Baumerich  
Judge, OSHRC